

**SUMMARY****FRAUD CARVE-OUTS: MARKET TRENDS***Fraud Carve-Outs: Market Trends*

- Market trends indicate that there's increasing awareness of the importance of defining fraud in acquisition agreements.
- According to the 2021 ABA M&A Committee's Private Target Deal Points Study, fraud was carved out of the Exclusive Remedy provision in 92% of deals in 2020 and the first quarter of 2021. Of these deals:
  - 32% leave fraud undefined;
  - 34% refer to "actual" or "intentional" fraud; and
  - 34% refer to different types of fraud, like common law fraud or intentional misrepresentation.
- The number of deals that leave fraud undefined has decreased over the years:
  - 74% in 2014;
  - 63% in 2016 to 2017;
  - 39% in 2018 to 2019; and
  - 32% in 2020 to 2021.
- Because the Study only looked at material transactions between public companies and private parties, a substantial number of transactions were excluded.
  - Anecdotal information is that the vast majority of private equity deals include defined fraud carve-outs that limit fraud to deliberate falsehoods, knowingly made in the written representations and warranties of the acquisition agreement.
    - This supports the trend shown in the Study away from the use of undefined fraud carve-outs.

The rest of the video includes interviews with ABA M&A Committee members Glenn West from Weil, Gotshal & Manges LLP and Tali Sealman from White & Case LLP.