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Getting What You Bargained for: Avoiding Legal Uncertainty in Survival Clauses for a Seller's Representations and Warranties in M&A Purchase Agreements

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Getting What You Bargained for: Avoiding Legal Uncertainty in Survival Clauses for a Seller’s Representations and Warranties in M&A Purchase Agreements

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INTRODUCTION:¹

After entrepreneurs invest hard work, time, and ingenuity in their business, they may decide to sell the business to someone else. Before that sale, they likely know much more about the company than any prospective buyer. Consider, for example, the knowledge of the business’s conformity with tax law, the liability under contracts with suppliers, environmental regulatory risks, the financial statements’ GAAP² compliance, and the owner’s authority to sell the company. One of the many transaction costs of the sale is the time and effort that the buyer will spend learning about the business. The buyer and seller can allocate this cost between themselves with the use of representations and warranties (“reps and warranties”) and with contractual remedies for breaches of these reps and warranties. Through reps and warranties, the seller can disclose information that she knows about the business and answer the buyer’s specific questions. Reps and warranties are more efficient than requiring the buyer to conduct an exhaustive investigation of every aspect of the business because they allow a seller to use her knowledge about the company.

Normally, when the seller uses reps and warranties, she will promise to indemnify the buyer for any damages arising out of false reps and warranties. In a properly drafted agreement, the buyer only has a right to indemnity if the seller’s reps and warranties were untrue when they were made.³ A key topic of negotiation becomes how long the buyer will have to discover that one of the seller’s reps or warranties was false when made. In most private company agreements, this discovery period is referred to as the “survival” period. For example, a typical private Merger and Acquisitions (“M&A”) agreement might state:

The Seller’s representations and warranties shall survive closing until eighteen (18) months after the closing date (the “Survival Period”). The Seller hereby indemnifies and holds Purchaser harmless from any losses, damages, costs, and expenses related to any breach of any of Seller’s representations or warranties in this agreement. [This indemnification provision] shall be the Purchaser’s sole remedy for any breach of the representations and warranties.

¹ The author would like to thank Professor Bob Reder at Vanderbilt for his helpful suggestions when writing this note. The author would also like to thank Jim McLaughlin at Maynard Cooper & Gale for his help in bringing topics discussed by this note to the author’s attention.
² Generally accepted accounting principles (“GAAP”).
³ Reps and warranties may be “made” either at signing or at closing depending on whether an agreement “brings down” reps and warranties to closing.
contained in this Agreement. Seller hereby disclaims any and all representations and warranties other than those expressly made under this Agreement. The Seller’s indemnification obligations shall terminate at the expiration of the Survival Period, except that any representation or warranty that would otherwise terminate in accordance with this paragraph will continue to survive if written notice of breach thereof is made in accordance with [the procedural notice provisions in the agreement].

To explain the mechanics of the provision above, first, a seller makes specific reps and warranties about the business. Next, the seller agrees to indemnify the buyer for any damages caused by an inaccuracy of the seller’s reps and warranties. Further, the buyer agrees that he has no other legal recourse for an inaccurate rep or warranty other than his right to indemnification from the seller. In addition, the seller will want to get “off the hook” after some period of time. Therefore, both (i) the right to indemnity, and (ii) the reps and warranties, are said to “survive” closing—but only for a specific period. In the example above, that survival period is eighteen months. Lastly, the parties usually specify a notice procedure where the buyer agrees to notify the seller if he believes that he may have a claim to indemnification. This gives the seller a chance to fix the breached rep or warranty before a lawsuit is filed.

A provision like the one above is very common. In M&A transactions, a seller will almost always make some reps and warranties to the buyer regarding the seller’s business. The seller is almost always in a better position to know about and to quantify risks, so buyers usually require the seller to stand behind at least some baseline facts about the business before he pays the seller. In practice, the fulsomeness of the seller’s reps and warranties depends on the bargaining power of the two parties. If the seller has great bargaining power, they can make the transaction more like an “as is” or “quitclaim” deal. If the seller has little bargaining power, they will have to indemnify the buyer for many risks associated with operating the business.

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4 This example is adapted from publicly available agreements like the Indemnification Agreement found at: The Chef’s Warehouse, Inc., Current Report (Form 8-K) (Apr. 6, 2015) https://www.sec.gov/Archives/edgar/data/1517175/000138713115001249/ex2-2.htm.
5 See, e.g., 2011 Private Target Mergers & Acquisitions Deal Points Study, 30 ABA PUBLISHING (2011) available at http://www.iflr.com/pdfs/events/AsiaMA/2012_Day1_13.15.pdf (noting that only 3% of private M&A deals were silent as to the post-closing survival of representations and warranties).
6 An “as is” or “quitclaim” deal is a phrase modeled off of terms that originally arose in real estate wherein the seller made no representations about his or her claim to ownership over what was being sold. For further explanation, consider: Deed, BLACK’S LAW DICTIONARY (10th ed. 2014).
7 Impliedly, a “bad fact” must have existed when the rep and/or warranty about the bad fact was made.
In summary, reps, warranties, indemnification rights, and survival periods help the parties to pre-negotiate the seller’s post-closing liability for hard-to-quantify risks.\(^8\) Because indemnification is the buyer’s only remedy post-closing, when the right to indemnification cuts off, the seller knows that the proceeds she received in the sale are no longer at risk.\(^9\)

This “basket” of provisions (including reps, warranties, indemnification, and survival periods) might intersect with some state’s statutory provisions called “controlling statutes.” Controlling statutes prohibit a contractual shortening of the otherwise-applicable statute of limitations.\(^10\) This note argues that statutes prohibiting sophisticated business people from bargaining for a survival period should be repealed. In *Order of United Commercial Travelers of America v. Wolfe*, the Supreme Court held that parties can contractually shorten an otherwise applicable statute of limitations.\(^11\) However, the Supreme Court left open the states’ ability to enact “controlling” statutes which explicitly ban

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\(^8\) As a preliminary note, there is a fundamental—but confusing—difference between a contractual indemnification right in a M&A context and the common law, third party, theories of indemnity. The common law theory of indemnification accrues (i.e., the limitations period begins to run) when the “party seeking indemnification (indemnitee) has made payment to the third party” and the payer has a subsequent legal right to seek compensation from a person who was not a party to the first suit (the indemnitor). See Certainteed Corp. v. Celotex Corp., 2005 WL 217032 at *7 (Del. Ch. Jan. 24, 2005). Conversely, the contractual indemnification in the M&A setting accrues at closing when the buyer (indemnitee) receives something different from what the seller (indemnitor) represented the buyer would receive. *Id.* The difference is important because a plaintiff in the M&A setting cannot argue that his claim did not accrue until some third party (perhaps the EPA in an environmental regulatory action) made a final determination of liability. Rather, the seller breached and the period of limitation began at closing even if the plaintiff was unaware of the defect. The only exception would be if there were some external “tolling” rule that paused the statute of limitation such as: fraudulent concealment, inherently unknowable injuries, and equitable tolling. See, e.g., *id.* (discussing the “inherently undiscoverable” doctrine where, even after a reasonable investigation, a party could not have discovered that a representation was false). The tolling doctrines are very difficult for a plaintiff to plead and would not be applicable to most M&A transactions. See Marshall T. Simpson Tr. v. Invicta Networks, 2017 U.S. Dist. LEXIS 172247, at *20 (D. Del. Oct. 18, 2017) (pointing out that to plead the “inherently unknowable” injury requires that the plaintiff show that it would have been “practically impossible” to discover a misrepresentation and even if a tolling rule applies, it will not toll the statute of limitations after the plaintiff is put on inquiry notice). The “tolling” exceptions are largely outside of the purview of this note. For further helpful discussion of the distinction, see generally Melissa DiVincenzo, *Repose vs. Freedom – Delaware’s Prohibition on Extending the Statute of Limitations by Contract: What Practitioners Should Know*, 12 Del. L. Rev. 29, 36 (2010).

\(^9\) See 2011 Private Target Mergers & Acquisitions Deal Points Study, 30 ABA Publishing (2011) *available at* http://www.iflr.com/pdfs/events/AsiaMA2012_Day1_13.13.pdf (noting that 3\% were silent as to the survival period, 1\% had survival periods of less than 6 months, 25\% had survival periods of 12 months, 14\% had survival periods of 12–18 months, 34\% had survival periods of 18 months, 2\% had survival periods of 18–24 months, 12\% had survival periods of 25 months, and 4\% had survival periods of greater than 24 months).


\(^11\) See *id.* (“[I]t is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.”)
contracts that shorten the applicable statute of limitations on public policy grounds.  
This note argues that, while states may enact controlling statutes, they should not because such statutes (i) inefficiently limit the tools that parties have to allocate risk and (ii) create a lack of national uniformity.  
This note will show that there are nine states with laws that could invalidate important provisions in 94 percent of M&A agreements. These laws should be repealed. Secondarily, this note will seek to explain and clarify the complicated web of rules related to this topic. Part of this explanation will involve an argument that the contractual survival period is logically distinct from common law suits over breached reps and warranties. This distinction makes it inappropriate to argue that the statute of limitations can step in to extend the time period that a buyer has to sue a seller beyond the survival period.

Imagine that the previously mentioned entrepreneur (Sally, for the sake of this example) has grown a small chain of gas stations in Alabama, and Sally now wants to retire to her family farm. Sally identifies an interested buyer, Bob. Bob is an aggressive bidder, but he is concerned about a potential Environmental Protection Agency (“EPA”) violation from gasoline runoff at one of the gas station properties. Sally does not think that the gasoline leak is a serious problem, but to assuage Bob’s fears, she makes a specific representation that, as of the deal closing, there are no EPA violations on the gas stations’ property sufficient to have a material adverse effect on the company. Bob likes this idea because it acts as an insurance policy from Sally against the hard-to-quantify risk that the property is currently violating EPA regulations.

Sally, eager to sign a deal, decides to grant Bob a right of indemnification, and she gives Bob a choice. Bob can accept a two-year right of indemnification at his current bid price ($1,000,000), or he can get a three-year indemnification right by raising his bid to $1,100,000. This means that in the event that Bob can prove, within the survival period, that Sally’s EPA representation was false when it was made, then Sally has to compensate Bob for any damages he incurred in relying upon her representation. In other words, Sally might be paying the EPA to fix the problem. The period that Bob has to discover that a representation was false (when made) is the “survival” period.

Bob is satisfied, and he takes the two-year indemnification right because he thinks that if there is a problem, surely, he will be able to discover it in two years. The deal closes, and two years pass. During the third year, Bob is appalled when he gets notice from the EPA that one of the gas stations has been leaking fuel into a river for the past ten years. Bob decides to consult his attorney. Bob remembers that he only got an

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12 Id.
13 See infra part III.B. (discussing the importance of repealing both borrowing statutes and controlling statutes).
indemnification right for two years because he was not willing to pay the extra $100,000, so Bob fears that his attorney will say that he is out of luck.

Fortunately for Bob, his attorney just got back from his CLE credit where he saw a presentation about states, including Alabama, which statutorily prohibit contractual shortening of the applicable statute of limitations. The presentation warned practitioners that there are at least nine states (Alabama, Florida, Louisiana, Mississippi, Missouri, Montana, Oklahoma, South Carolina, and South Dakota) that have “controlling statutes” prohibiting “contractual shortening” of the statute of limitations. Thus, Bob’s lawyer advises Bob to sue Sally three-years after closing even though Bob did not pay the extra $100,000. The attorney advises Bob to argue that Alabama’s six-year statute of limitations for actions upon a contract is the actual time period that Bob had to discover that Sally’s representation was false. Bob’s lawyer advises him to make this argument notwithstanding the fact that Bob and Sally specifically bargained over the survival period.

Buyer-Bob’s argument is the exact argument that was made in *Pinnacle Great Plains Operating Co. v. Wynn Dewsnup Revocable Trust* (“*Dewsnup*”) which involved the sale of 5,487 acres of land in Idaho (the “Property”) for $15,300,000 by means of a Real Estate Purchase Agreement (“PSA”). *Dewsnup* turned, in large part, on Idaho’s controlling statute, Idaho Code § 29-110, which states that “[e]very stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals, or which limits the time within which he may thus enforce his rights, is void as against the public policy of Idaho.” (the “Idaho Controlling Statute”).

In *Dewsnup*, the buyer discovered, post-closing, that sodium levels on the Property were too high for irrigation use—a fact which

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15 Id.

16 See ALA. CODE § 6-2-34 (1940) (setting a six-year period).


18 IDAHO CODE § 29-110.
“preclude[ed] normal agricultural activities on the property.” The utility of the property for agricultural purposes was expressly addressed in the PSA because the seller represented that the Property “has access to water resources necessary in the operation of agricultural activities” (the “Water Rep”).

The PSA also provided that the Water Rep “shall survive the Closing . . . of this Agreement for a period of one (1) year.” The buyer discovered the elevated sodium levels and notified the seller that the Water Rep was breached before the one-year survival period ended, but the buyer did not file suit within the one-year period. When the buyer filed suit, the seller argued that (i) notice of the breached Water Rep was insufficient and that the seller must file suit before the survival period ended and (ii) the Idaho Controlling Statute barred any contractual limitations period shorter than five years. Specifically, according to the buyer, Idaho’s statute of limitations for breach of contract was five years, and thus, the PSA’s survival period of one year was void because it violated the Idaho Controlling Statute since the PSA purported to “limit[ ] the time within which [the buyer] may thus enforce his rights.”

The court began its analysis by noting that “Idaho has expressed a fundamental policy by requiring strict adherence to its statutory limitations period.” The court held, for reasons discussed in Section II.C. of this note, that the PSA did not require the buyer to file suit within one year. However, before reaching this holding, the court wrote in dicta that “a one-year limitation on [the buyer’s] lawsuit is tantamount to [a void agreement] under Idaho law.” Therefore, it appears that, at least under Idaho law, (and potentially the law of any other state with a similar controlling statute) parties cannot set survival periods of less than the otherwise applicable statute of limitations.

This note will examine the variables that affect the way that courts may limit parties’ contractual freedom to shorten or lengthen statutes of limitation. It will describe the legal levers that determine the applicable survival period and suggest ways that parties can reduce legal uncertainty around the “basket” of provisions including reps, warranties, survival, and indemnification periods. One key detail examined by this note is

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19 Dewsnup, 996 F. Supp. 2d at 1029.
20 Id. at 1030.
21 Id. at 1031.
22 Id. at 1033.
23 Dewsnup.
25 Dewsnup, 996 F. Supp. at 1034.
26 Id. at 1036.
27 For another example, consider similar laws in Tennessee. See TENN. CODE ANN. § 47-2-725 (1985) (providing that the parties may reduce the period of limitation for action on a contract in sale from four years to “not less than one year: it may not be extended”); Curtis v. Murphy Elevator Co., 407 F. Supp. 940 (E.D. Tenn. 1976) (holding that attempts to disclaim or limit warranties of merchantability to less than one year would be invalid).
“borrowing statutes” that could operate to import another state’s controlling statute. Additionally, this note will discuss ways in which the contractual right to indemnification for breached reps and warranties is a substantive right that is inextricably tied up with the duration of the right in such a way that statutes of limitation should not be implicated. Specifically, this note will argue that a contractual indemnification and the concomitant survival period is distinct from the common law right to sue for misrepresentation. This distinction makes it illogical for courts to invalidate bargained-for survival periods on the grounds that they violate the statute of limitations.

I. BACKGROUND

In the modern private M&A context, every transaction involving the sale of a company is governed by some form of a Purchase and Sale Agreement. One of the perennial, and highly negotiated, sections of this agreement is the reps and warranties section where the seller described what she is selling. The scope and detail of the seller’s representations in the agreement will vary based upon the seller’s relative bargaining position, with a more powerful seller able to make very few representations about her business and thus shift due diligence costs to the buyer. Therefore, when a high-powered seller (who makes few reps and warranties) sells a company, it is more of a “caveat emptor” transaction. The seller wants to limit reps and warranties because each rep or warranty about the company is an opportunity for the buyer to push risks back to the seller if a latent defect is discovered post-closing.

With this buyer-seller tradeoff in mind, the reps and warranties section has four main business purposes: (i) for the seller to consolidate and disclose known information relevant to the buyer’s decision to purchase the company, (ii) to allocate risk between the parties pertaining to negative facts that may not be known to either party at the time of sale, (iii) to provide the buyer with a “walk right,” or the ability to not purchase the company if the buyer discovers, before closing, that the seller

28 To explain this tradeoff, usually only sellers who have a strong bargaining position can ask a buyer to take an asset “as is.”
29 Here, “caveat emptor” meaning buyer beware, signifies the strongest kind of seller. These sellers can sell a metaphorical black box. The buyer will get whatever is in the black box, but the seller has not promised that the black box will contain anything or perform in any specific way.
30 See 21st National M&A Institute, Annual Nat’l Inst. On Negotiating Bus. Acquisitions: Model Stock Purchase Agreement with Commentary Second Edition 20, AMERICAN BAR ASS’N (2017), available at https://www.americanbar.org/content/dam/aba/events/cle/2016/11/ce1611nba/ce1611nbacon.authcheckdam.pdf (noting that the “[s]cope of representations in an acquisition agreement will vary based upon factors such as the nature of the target’s business, the relative bargaining power of the parties, the business context, and the size of the transaction.”).
31 See id. at 30 (providing examples of whether the company’s products infringe on any third-party patents or whether pending litigation will materially affect the company).
32 This “walk right” is only effectively operative if the specific rep and warranty is a closing condition.
breached a rep or warranty, and (iv)—in tandem with the indemnification and survival provisions—to allow the seller to define her post-closing risk by defining the buyer’s *only* legal remedies if any of the reps and warranties turn out to have been breached (i.e., been false) as of the closing.33 While all goals are relevant to this note, the second and the fourth goals (to allocate risks pertaining to unknown facts and to allow the seller to define her post-closing risk) are the most important.

For U.S. transactions in 2015, 82% of Purchase and Sale Agreements provided that the buyer’s right to indemnification for breached reps and warranties would survive for at least 18 months after closing.34 Depending on the parties’ relative bargaining power, the survival period could terminate immediately post-closing or extend past five years in some contracts—especially in dealing with so-called “fundamental” reps and warranties.35 The graph below shows a more detailed look at the survival periods for non-fundamental reps and warranties for deals that closed in 2012.

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33 Id.
Some reps and warranties are “fundamental” and have a longer survival periods of three to five years—depending on negotiation. Some common examples of “fundamental” reps and warranties include: the seller’s organization and standing, the proper payment of brokers and finders fees, title to assets or securities, tax liability, and GAAP compliance of financial statements.

The chart below shows the percentage of deals that “carved out” specific reps and warranties (to become “fundamental” reps and warranties). Frequently, these reps and warranties are subject to a longer survival period because they are more important to the buyer.

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38 See id.

These two graphs are important because, as this note will show, controlling statutes threaten to invalidate a large percentage of survival clauses. Controlling statutes prohibiting contractual shortening of the statute of limitations are currently enacted in Alabama, Florida, Louisiana, Mississippi, Missouri, Montana, Oklahoma, South Carolina, Idaho and South Dakota. Based on the data above and cases like Dewsnup, these statutes could invalidate at least 94% of all non-fundamental survival clauses in M&A agreements. It is unclear how aware practitioners in the M&A space are of the interaction between survival periods and controlling statutes.

40 See 2012 ABA Study, supra note 36, at 87.
41 See ALA. CODE § 6-2-34 (1940) (six years); FLA. STAT. § 95.11 (2018) (five years); LA. CIV. CODE § 3499 (1984) (ten years); MISS. CODE § 15-1-49 (1990) (three years); MO. REV. STAT. § 516.120(1) (1939) (five years); MONT. CODE ANN. § 27-2-201(1) (2001) (eight years); OKLA. STAT. tit. 12 § 95 (five years); S.C. CODE ANN. § 15-3-530(1) (2001) (three years); IDAHO CODE § 29-110 (2012); S.D. CODIFIED LAWS § 15-2-6 (1949) (six years).
42 See supra Introduction.
43 See Pinnacle Great Plains Operating Co. v. Wynn Dewsnup Revocable Trust, 996 F. Supp. 2d 1026, 1029 (D. Idaho 2014). To understand this point, note that the vast majority of survival periods in M&A agreements are shorter than two years. See 2012 ABA Study, supra note 36, at 87. Therefore, any of these agreements (if they are governed by the law of a state with a controlling statute) purport to limit the limitations period because the statute of limitation in most of these states is greater than two years. Id.
To further complicate the issue, this note will show that it is the state where a Purchase Agreement arises that will determine the source of law for procedural matters. Therefore, parties cannot simply contract around a controlling statute by providing that the agreement will be governed by the law of another state. Part of this note’s intention is to increase awareness of the general operation of the statute of limitations rules and to give practitioners some tips on how to avoid unexpected consequences.

One of the most important state laws related to this topic is in Delaware, because of its centrality to M&A deals. In 2014, Delaware amended its statute of limitations to expressly allow parties to set contractual statutes of limitations for agreements involving at least $100,000, as long as the time period set by the agreement is less than or equal to twenty years. This would seem to eliminate any doubt that a survival period of zero to twenty years is valid. Unfortunately, other states have not been so quick to explicitly accommodate bargained-for risk allocation choices and may, in fact, statutorily prohibit contractual shortening of the “applicable” statute of limitation. This means that, for example, a court applying the South Carolina Statute of Limitations for action upon a contract (three years) could arguably invalidate the vast majority of contractual survival clauses (usually less than two years).

To further illustrate why survival clauses are at risk, note that South Carolina prohibits contractual shortening of the limitations period. However, most agreements provide that the right to indemnity for breached reps and warranties survives for only eighteen months.

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44 See infra Part II.B.
45 See DEL. CODE ANN. tit. 10 § 8106 (West 2014); Bear Stearns Mortg. Funding Trust 2006-SL1 v. EMC Mortg. LLC, 2015 Del. Ch. LEXIS 9, at *37 (Ch. Jan. 12, 2015) (stating that Section 8106 was “intended to allow parties to contract around Delaware’s otherwise applicable statute of limitations for certain actions based on a written contract, agreement or undertaking”).
46 As examples, South Carolina, Alabama, Florida, and Missouri all have “controlling statutes” which prohibit contractual shortening of the statute of limitations. S.C. CODE ANN. § 15-3-140 (2012) (“No . . . agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action, but the action may be brought notwithstanding such clause . . . .”); ALA. CODE § 6-2-15 (2017) (“[A]ny agreement . . . whereby the time for the commencement of any action is limited to a time less than that prescribed by law for the commencement of such action is void”); Fla. Stat. Ann. § 95.03 (2013) (“Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void.”); MO. REV. STAT. § 431030 (2015) (“All parts of any contract . . . which either directly or indirectly limit or tend to limit the time in which any suit or action may be instituted, shall be null and void.”).
48 See 2012 ABA Study, supra note 36 (showing that the vast majority of M&A deals had a survival period of at least 18 months); S.C. CODE ANN. §15-3-530 (2012) (setting the statute of limitations for an action upon a contract at three years); S.C. CODE ANN. §15-3-140 (2012) (prohibiting contractual shortening of the statute of limitations).
Therefore, because eighteen months is shorter than three years, most survival periods ostensibly “bar[] [a party] from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations.”

While the parties to a Purchase and Sale agreement will remain free to simply select Delaware law to substantively govern their agreement, it may be the forum selection clause which actually determines the applicable statute of limitations because the statute of limitations is a procedural law for purposes of the Erie doctrine, at least in Delaware. This note will explain the risk that if the parties are either (a) litigating in a forum that prohibits a contractual modification of the statute of limitations or (b) litigating in Delaware, but the case “arose” in a forum that prohibits contractual modification, the parties’ attempt to contractually modify the statute of limitations with the use of a survival clause could be void.

To explain this risk, it is important to understand the Delaware Statute of Limitations with an eye towards (i) the operation of Delaware procedural law and (ii) the operation of key contractual clauses related to the survival period.

II. ANALYSIS

A. Operation of the Delaware Statute

The Delaware statute of limitations, as amended in 2014, sets a three-year statute of limitations, but if the agreement involves at least $100,000, then it may be brought as “specified” in the written contract with a maximum limit of twenty years. This statute has been described by courts as setting a “contractarian” statute of limitations, but there are still some unclear, or at least confusing, areas of the law. Specifically, what will determine the source of law for the limitations period, what language must the parties use to specify the limitation period; when does the limitation period begin to run; what must a plaintiff do to satisfy the limitation period; what effect does a notice requirement have on the limitations period; what effect do choice of law provisions have; and can the statute of limitations be lengthened contractually? These questions are important to explain ways to reduce risk in this area of law, and these

50 See Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933) (explaining that the internal affairs doctrine is only relevant to disputes between owners and officers of a corporation which would not control disputes between a former and current owner).
51 See infra note 55 (discussing Delaware cases that show that the statute of limitations is a procedural law and not a substantive law that would be governed by a choice of law provision).
52 DEL. CODE ANN. tit. 10 § 8106 (West 2014); see also GRT, Inc. v. Marathon GTF Tech., Ltd., 2011 WL 2682898, at *6 (Del. Ch. July 11, 2011) (noting that “parties to a contract are entitled to shorten the period of time in which a claim for breach may be brought, i.e., the statute of limitations, so long as the agreed upon time period is a reasonable one.”)
topics will be addressed before moving to contractual, legislative, and judicial suggestions.

**B. Determining the Applicable Limitations Period**

The traditional rule, adopted by Delaware, treats the statute of limitations as a procedural law.\(^{54}\) Thus, it is the forum selection clause and not the choice of law provision that will determine whether the Delaware contractual statute of limitations will apply.\(^{55}\) This procedural and substantive distinction can be overlooked which could have expensive consequences if an agreement’s forum selection clause chose a jurisdiction that did not respect bargained-for limitation periods.\(^{56}\) One might think that selecting Delaware in the forum selection clause would guarantee that a court would apply the Delaware “contractarian” statute of limitations.\(^{57}\) Unfortunately, even if both the forum selection clause and the choice of law provision select Delaware law, the purchase agreement might still be limited by another jurisdiction’s “controlling statute,” at least if the agreement arose outside of Delaware.

This additional wrinkle comes from Delaware’s “borrowing statute” which requires that, if a cause of action “arises” outside of

\(^{54}\) See infra note 55.

\(^{55}\) See, e.g., Res Cap Liquidating Trust Mortg. Purchase Litig. v. HSBC Mortg. Corp. (USA), 524 B.R. 563 (Bankr. S.D.N.Y. 2015) (“Choice of law provisions typically apply only to substantive issues, and statutes of limitations are considered procedural because they are deemed as pertaining to the remedy rather than the right.”).

\(^{56}\) See, e.g., Simon Romano & Andrew S. Cunningham, Survival Clauses and Limitations Law in Delaware and Ontario: A Quick Comparison LEXOLOGY (May 14, 2014) https://www.lexology.com/library/detail.aspx?g=780f0942-e0a6-4fa2-96a7-3e7c3308af61. Online legal blogs occasionally suggest using a “choice of law” provision selecting a jurisdiction for its statute of limitations without analyzing whether the forum selected would honor that statute or disregard it as procedural. Id.

\(^{57}\) As an example, Bridge Products v. Quantum Chemical, parties specified that Delaware’s substantive law would govern their agreement, but the forum court, sitting in Illinois, applied the Illinois procedural law to determine the appropriate statute of limitations. 1990 U.S. Dist. LEXIS 2202, at *10 (N.D. Ill. Feb. 22, 1990) (applying a forum state’s procedural law instead of Delaware’s statute of limitation notwithstanding that the agreement specified “[t]his Agreement shall be executed, construed and performed in accordance with Delaware Law.”) In turn, Illinois procedural law used a “most significant relationship” test pursuant to its borrowing statute to determine that Illinois procedural law would “borrow” the Virginia statute of limitations for the instant case because the cause of action arose in Virginia based off of the agreement’s place of performance of promises and the subject matter of the agreement. Id.
Delaware, courts must use the shorter of: (i) the statute of limitations in the jurisdiction where the cause of action arose or (ii) the Delaware statute of limitations.\textsuperscript{58} Thus, even if a party is litigating in Delaware, the Delaware procedural law may be forced to adopt or borrow another state’s procedural law if the claim arose in a state other than Delaware.\textsuperscript{59}

The flow chart below shows the potential interaction of forum selection and the “borrowing” statute, at least under the plain language of the borrowing statute.\textsuperscript{60} Borrowing statutes give rise to two distinct implications. First, the forum court’s procedural law will apply. This means that the forum court’s stance towards shortening or lengthening the statute of limitations is the relevant source of law, potentially including any “controlling” statute that limits parties’ ability to shorten the statute. Second, the borrowing statute may require that a different forum’s statute of limitation govern.

To further complicate the matter, Delaware courts have not always constructed the borrowing statute according to its ordinary meaning. Some

\textsuperscript{58} DEL. CODE ANN. tit. 10 § 8121 (West 1953).
\textsuperscript{59} Id.
\textsuperscript{60} It is unclear whether the borrowing statute would compare the statute of limitations as contractually shortened under § 8106 or the default three-year period under § 8106. For the purposes of this flow chart, it is assumed that the contractual period is the relevant period for comparison with the foreign jurisdiction’s period.
Delaware courts have applied a purposivist reading\(^{61}\) to the borrowing statute. These purposivist readings refuse to “borrow” another jurisdiction’s statute of limitations unless there is evidence that a plaintiff chose to sue in Delaware in order to take advantage of Delaware’s longer statute of limitations.\(^{62}\) However, this purposivist construction of a statute may not be relevant where the parties have used a forum selection clause because, presumably, it is not possible to forum shop by selecting a contractually mandated forum. The plaintiff is simply not seeking a litigation advantage by suing in Delaware where a contract mandates that he sue in Delaware. The plaintiff has no choice. To the extent that a court uses a purposivist construction of the borrowing statute, another jurisdiction’s statute of limitations will not be imported and the Delaware “contractarian” rule will apply.\(^{63}\)

However, it appears that the majority rule in Delaware is to apply the borrowing statute according to its plain meaning without examining the purposes behind the statute.\(^{64}\) If courts use this literal construction, then the Delaware borrowing statute could very well “borrow” another state’s shorter statute of limitation.

Thus, it remains theoretically possible for parties to sue in Delaware court, but have the dispute “arise” in another state which statutorily limits the parties’ ability to contractually shorten the statute of

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\(^{61}\) Here, “purposivist” is intended to mean that a court will look to the legislature’s purpose (to discourage forum shopping) and conclude that where a contract specifically requires parties to litigate in a given forum, a plaintiff is not engaging in manipulative behavior by seeking a forum with favorable law because, at the time of filing a lawsuit, the plaintiff has no choice of forum. He will be bound to sue in the forum mandated by the agreement.

\(^{62}\) See Bear Stearns Mortg. 2006-SL1 v. EMC Mortg. LLC, 2015 Del. Ch. LEXIS 9, at *23 (Ch. Jan. 12, 2015) (“The borrowing statute only applies when a party seeks to take advantage of a longer Delaware statute of limitations to bring a claim that would be time-barred under the law of the jurisdiction governing the claim.”); cf. Lambda Optical Sols., LLC v. Alcatel-Lucent USA Inc., 2015 U.S. Dist. LEXIS 107495, at *15–*16 (D. Del. Aug. 6, 2015) (applying Delaware law) (“The Delaware borrowing statute’s terms should apply in all circumstances unless there is clear evidence that applying the statute would reward a party who intentionally engaged in forum shopping by filing suit in Delaware”). Ultimately, these cases are focused on a judicial construction of the statute’s purpose (to prevent forum shopping). This concern should not be raised by a forum selection clause, so the statute should be applied according to its plain meaning.

\(^{63}\) See, e.g., Bear Stearns Mortg., 2015 Del. Ch. LEXIS at *23. As the Bear Stearns case insinuates, the purposivist rule may be an example of bad facts making bad law. Id. The purposivist reading originated in Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. where a plaintiff brought suit in Delaware to preclude the defendant’s expected counterclaim which would not have been barred in Saudi Arabia where the claim arose. 866 A.2d 1 (Del. 2005). Thus, the plaintiff sought a form where its claims could be pursued while simultaneously using the shorter statute of limitations in Delaware as a shield against the defendant’s large counterclaims. Id. In this case, the literal meaning of the borrowing statute would require the application of the shorter Delaware statute of limitations which would bar the plaintiff’s claims. The case is a rare example of a plaintiff who was seeking the shorter statute of limitations.

\(^{64}\) Lambda Optical, 2015 U.S. Dist. LEXIS 107495, at *15–*16.
limitations (such as South Carolina, Alabama, Florida, and Missouri). In such a case, a Delaware court might also “borrow” or adopt that other state’s limitation on the parties’ ability to contractually shorten the limitations period notwithstanding Delaware’s normally permissive statute of limitations. In that event Delaware would be, in a sense, adopting the other jurisdiction’s statute for purposes of the dispute at issue. This point will become important later in the note when discussing whether the borrowing statute would mandate a temporary enactment of another jurisdiction’s controlling statute as an “accoutrement.” This topic will be discussed along with the importance of repealing—or modifying—borrowing statutes.

C. Contractually “Specifying” the Limitations Period

Another potential area for confusion arises because, while some jurisdictions require “clear and explicit” language to shorten the statute of limitations, Delaware does not require any specific language other than simply providing that reps and warranties will “terminate” after a specified period. However, in some “clear statement” jurisdictions, in order to shorten the statute of limitations, one must both (i) provide a clear statement that the reps and warranties will only “survive” up to a specific date, and (ii) provide that any action, lawsuit, or demand must be filed


66 Federated Capital Corp. v. Libby, 384 P.3D 221, 226 (Ut. 2016) (“[W]hen a court relies on [a forum jurisdiction’s] borrowing statute, it does not merely apply a statute of limitations from another jurisdiction, but borrows or adopts that statute, making that statute [a statute of the forum jurisdiction] for purposes of a particular dispute.”).

67 See id.

68 See infra section III.B.1 (discussing the importance of repealing borrowing statutes).

69 See GRT, Inc., v. Marathon GTF Tech., Ltd., 2011 WL 2682898, at *11 (Del. Ch. July 11, 2011) (treating the “survival” period as equivalent to a “contractarian” statute of limitations stating “there is no special rule requiring that in order to contractually shorten the statute of limitations, parties must utilize ’clear and explicit’ language”); Sterling Network Exchange, LLC v. Digital Phoenix Van Buren, LLC., 2008 WL 2582920 (Del. Super. Mar. 28, 2008) (holding that language limiting the survival of representations and warranties to six months after closing created a contractual statute of limitations period of six months); ENI Holdings v. KBR Grp. Holdings, 2013 Del. Ch. LEXIS 288, at *7 (Del. Ch. Nov. 27, 2013) (holding that a survival clause limited actions to the survival period only, even though it did not specify that the remedies (indemnification rights), in addition to representations, would expire on the termination date); cf. Western Filter Corp v. Argan, Inc., 540 F.3d 947, 953 (9th Cir. 2008) (providing that, in order to shorten the statute of limitations by statute, the parties must use “clear and explicit” language which will be “strictly construed” against the party seeking to invoke the provision and holding that a limitation on “survival” was only relevant for when breach on reps and warranties may occur, but not when an action must be filed); Hurlbut v. Christiano, 63 A.D.2d 1117, 1117–18 (N.Y. App. Div. 1978) (refusing to “infer” that the statute of limitations had been shortened from a survival clause that limited the survival of contractual representations and warranties); Arcade Co. LTD. v. Arcade, LLC, 105 F. App’x 808, 810 (6th Cir 2004) (concluding that a “survival clause such as the one at issuer here, which contains no express reference to ‘actions,’ ‘demands,’ or even to the breach of the contract, does not clearly manifest an intent to establish a contractual limitations period”).
before a specific period.\textsuperscript{70} In other words, the contract must both state that the survival period is \(X\) years, and that after \(X\) years, no party can sue.

Clear statement jurisdictions will distinguish between (i) the period within which a breach must be discovered and, (ii) a clause that explicitly cuts off a right to sue for the underlying representation.\textsuperscript{71} These jurisdictions impose this type of clear statement rule pursuant to the public policy of not favoring contract clauses that “limit the right to sue to a period shorter than that granted by statute.”\textsuperscript{72} Delaware, to the contrary, will construe a limitation on an indemnification right as a contractual statute of limitations.

For example, Delaware courts have held that the following language unambiguously shortened the applicable statute of limitations: “the representations and warranties of the Seller . . . shall survive until the second anniversary of the closing date.”\textsuperscript{73} Contrast this language with jurisdictions that require “clear statements” to shorten a limitations period. Consider California and Idaho: courts in both of these jurisdictions have

\textsuperscript{70} I include this language as a bit of a drafting guide for practitioners. See, e.g., Giant Eagle, Inc. v. Excentus Corp., 2014 U.S. Dist. LEXIS 196191, at *33-34 (N.D. Tex. Aug. 2, 2014) (noting that “a number of courts have split on this issue” and holding that a survival clause stating “all representations, warranties, covenants, and obligations of the parties shall survive the closing for a period of 18 months thereafter” did not shorten the statute of limitation to 18 months because it did not “contain words like ‘action,’ ‘lawsuit,’ or ‘demand’” or otherwise “reference[e] potential claims or lawsuits”).

\textsuperscript{71} See, e.g., Inhalation Plastics, Inc., v. Medex Cardio-Pulmonary, Inc., 2013 U.S. Dist. LEXIS 34943, at *70 (S.D. Ohio Mar 13, 2013) (stating “representations and warranties . . . shall survive until one (1) year after the expiration of the applicable statutes of limitations”). Id. The court held that this language “was a limitations period, but it is a limitation on the survival of indemnification obligations, not on [the plaintiff-purchaser’s] ability to sue [the seller] for breach of the [agreement].” Id. (applying Ohio procedural law).

\textsuperscript{72} See American Nat. Ass’n v. Conestoga-Wright Corp., 2014 U.S. Dist. LEXIS 196191, at *34 (N.D. Tex. Aug. 2, 2014) (noting “a number of courts have split on this issue” and holding that a survival clause stating “all representations, warranties, covenants, and obligations of the parties shall survive the closing for a period of 18 months thereafter” did not shorten the statute of limitation to 18 months because it did not “contain words like ‘action,’ ‘lawsuit,’ or ‘demand’” or otherwise “reference[e] potential claims or lawsuits”).

\textsuperscript{73} See, e.g., Giant Eagle, Inc. v. Excentus Corp., 2014 U.S. Dist. LEXIS 196191, at *33-34 (N.D. Tex. Aug. 2, 2014) (noting that “a number of courts have split on this issue” and holding that a survival clause stating “all representations, warranties, covenants, and obligations of the parties shall survive the closing for a period of 18 months thereafter” did not shorten the statute of limitation to 18 months because it did not “contain words like ‘action,’ ‘lawsuit,’ or ‘demand’” or otherwise “reference[e] potential claims or lawsuits”).
held that agreements stating that representations “shall survive . . . for a period of one year” do not cut off the time within which a party could file suit. Instead, that language only “specif[ies] when a breach of the representations and warranties may occur.”

D. The Start of the Limitations Period

Generally speaking, reps and warranties in a purchase agreement are either true or false when they are made, and the plaintiff can commence legal action immediately. Thus, claims by a plaintiff seeking indemnification for a breached representation accrue at closing, and the statute of limitations begins running at that same date whether or not the purchaser had actual knowledge of the breach.

Note that accrual is another area where clarity is important. Courts usually hold that claims for indemnification based on breached reps and warranties accrue at closing. However, closing-accrual may not occur for a stand-alone indemnification right that is specifically related to other kinds of claims (i.e., indemnification rights not tied to reps and warranties). In other words, the agreement could grant the buyer a stand-alone right to be indemnified for any future environmental costs associated with the intentional bad acts of the seller. Presumably, this type of claim would accrue when the cost was incurred and not at closing because it is a more traditional indemnification right. This type of right, in effect, would

74 Western Filter Corp., 540 F.3d 947; Pinnacle Great Plans Operating Co. v. Wynn Dewsnup Revocable Trust, 996 F. Supp. 2d. 1026, 1036 (D. Idaho 2014).
75 Id. (citing Western Filter, 540 F.3d at 954). Note that both of these cases appear to fundamentally misunderstand when a rep or warranty in a purchase agreement is breached (i.e., at closing). Id.
76 See Certainteed Corp. v. Celotex Corp., 2005 WL 217032 (Del. Ch. Jan. 24, 2005); GRT, Inc., v. Marathon GTF Tech., Ltd., 2011 WL 2682898, at *6 (Del. Ch. July 11, 2011) (“The [contractual limitations period] typically begins to run when the contract is breached, whether or not the plaintiff was aware of such breach. Because representations and warranties about facts pre-existing, or contemporaneous with, a contract’s closing are to be true and accurate when made, a breach occurs on the date of the contract’s closing and hence the cause of action accrues on that date.”). New York has a similar rule. See ResCap Liquidating Trust Mortg. Purchase Litig. v. HSBC Mortg. Corp., 524 B.R. 563, 591 (Bankr. S.D.N.Y. 2015) (noting that the accrual date for the breach of representations and warranties is at closing and that a plaintiff cannot plead around this rule by arguing that the defendant separately breached the agreement by failing to remedy any alleged breaches “[Defendant]’s alleged failure to comply with its cure or repurchase obligations does not give rise to a separate breach of contract at the time of refusal because New York law does not recognize pre-suit remedial provisions as constituting separate promises which can serve as the basis for independent causes of action”). Note that the tolling period may start at different times depending on whether the “Claim relates to a present or a prospective warranty, a representation, a covenant, or a third-party claim.” See DiVincenzo, supra note 8, at 36.
77 See infra note 79.
78 See infra note 79.
make the seller an insurer for the purchaser in a way that was unrelated to any reps or warranties.

E. Requiring Notice of a Suspected Breach of Reps and Warranties

Normally, as discussed, a plaintiff must actually file suit to satisfy the statute of limitations. There is one notable exception to this rule. The parties can use a notice provision to require the buyer to notify the seller in the event that one of the reps and warranties turns out to be defective. This notice can “toll” the statute of limitations. In other words, if the agreement is properly written, a buyer need not actually file a lawsuit within the survival period in order to satisfy the statute of limitations. Instead, he might simply give proper contractual notice to the seller of a suspected defect which will give more time to resolve the issue while still preserving the buyer’s ultimate recourse of filing suit.

A key issue in these cases becomes (i) what is the trigger for the toll and (ii) what is the duration of the toll? Contracts should carefully define both.

For example, in Friedman Fleisher & Lowe v. AccentCare, the Delaware Court of Chancery held that a buyer’s suit was foreclosed when a buyer filed suit after of the survival period because—even though the buyer gave notice of his claim to the seller before the survival period had run—the agreement did not explicitly provide that such notice would extend the survival period. In short, the court adopted a rule that unless a notice provision explicitly extends the time period for filing a suit, the survival period is not extended by notice.

The notice provision is reduced to a contract such that the statute of limitations does not prevent an extension of the buyer’s ability to file suit.

80 See Aircraft Service International v. TBI Overseas Holdings, 2014 WL 4101660, at *4 (Del. Super. Ct. Aug. 5, 2014) (involving language “[i]n addition, if written notice of a violation or breach of any specified representation [or] warranty . . . is given to the party charged with such violation or breach during the [survival period], such representation [or] warranty . . . shall continue to survive until such matter has been resolved by settlement, litigation (including all appeals related thereto) or otherwise.”).

81 Note that the language of the agreement is key. If the exact requirements of the notice provision are not followed, then the default rule, that the buyer must actually file suit within the limitations period, will be in effect. See HBMA Holdings v. LSF9 Stardust Holdings, 2017 Del. Ch. LEXIS 841, at *14 (Ch. Dec. 8, 2017) (holding that, because a plaintiff’s contractual notice did not specifically reference an indemnification section of the agreement, it was not proper notice pursuant to the contract language which required a notice that specifically referenced the indemnification section); Friedman Fleischer & Lowe, LLC v. AccentCare, Inc., 2016 Del. Ch. LEXIS 218 at *7 (Del. Ch. Nov. 29, 2016) (explaining the default rule: “[w]hen parties have shortened the statute of limitations by providing that representations and warranties survive through a specified date, the party claiming breach must file suit within the specified time period. Providing notice within the specified time period is not enough.”).

82 See Aircraft Service International, 2014 WL 4101660, at *4 (remanding case for more factual findings on these issues).

83 Friedman Fleisher & Lowe, LLC, 2016 Del. Ch. LEXIS 218 at *7.

84 Id.
**procedural** condition precedent to filing suit. Therefore, agreements should be clear about whether the notice is simply a procedural condition precedent to filing suit or both a condition precedent and a mechanism to toll the contractual indemnity period (within which suit must be filed).^{85}

**F. Choice of Law Provisions**

Traditionally, the *Erie* doctrine^{86} would require the application of a forum’s statute of limitations. However, some jurisdictions—excluding Delaware—have held that a choice of law provision (e.g., “this agreement should be governed by California law”) requires the application of California’s statute of limitations instead of the forum’s statute of limitations.^{87} This alternative view adheres to the idea that statutes of limitation are substantive—at least in the face of a contractual choice of law provision in the M&A context. This is a shift from the traditional rule that statutes of limitation are procedural and should be supplied by the forum.

Alternatively, as a third option, if a forum selection clause singles out a specific state’s statute of limitations to govern the agreement (e.g., “Delaware law, including its statute of limitation, shall govern this agreement”), it is likely that Delaware courts, with their tendency to honor bargained-for agreements, would give effect to that bargain.^{88} Some jurisdictions have adopted this position and allow parties to specifically

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^{85} If the agreement is unclear, the parties run the risk that a court may hold that the survival period remains the (contractual) statute of limitations period before which a suit must be filed and that the notice provision does not extend the time within which a suit may be filed. *See, e.g.*, ENI Holdings v. KBR Grp. Holdings, 2013 WL 6186326 (Del. Ch. Nov. 27, 2013).

^{86} References to the *Erie* doctrine refer to *Erie v. Tompkins*, 304 U.S. 64, 78 (1938), wherein the Supreme Court held that “[t]here is no federal general common law” and, in so holding, began a long line of cases that distinguished between substantive and procedural questions of law.

^{87} *Hambrecht & Quist Venture Partners v. Am. Med. Int’l., Inc.*, 38 Cal. App. 4th 1532, 1542 (1995). Explaining California’s position, the court wrote, “[w]e therefore decline plaintiffs’ invitation to read the choice-of-law provision as if it incorporated only the substantive law of Delaware, i.e., excluded Delaware procedural law. Although statutes of limitations may be viewed as procedural rather than substantive in some contexts, the choice-of-law clause in this case does not make a distinction along those lines. It simply incorporates the ‘laws’ of Delaware without using any adjectives or other qualifiers.” *Id.* Interestingly, while Florida is among the states that statutorily prohibit parties from contractually shortening statutes of limitations, its courts appear to treat the statute of limitations as a substantive issue and not a procedural issue. *See Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So. 2d 1166, 1168 (Fla. 1985) (holding that a choice of law provision in a contract that selected Michigan law to govern the agreement would allow parties to shorten the statute of limitations notwithstanding Florida’s statutory prohibition—the case did not discuss the issue that statutes of limitation are normally procedural).

^{88} Delaware statutorily allows parties to select law in a choice of law provision, but it is not clear that such a provision would override the traditional substantive / procedural distinction. *See Del. Code. Ann. tit 6, § 2708 (West 1993) (“The parties to any contract, agreement or other undertaking, contingent or otherwise, may agree in writing that the contract, agreement or other undertaking shall be governed by or construed under the laws of this State, without regard to principles of conflict of laws, or that the laws of this State shall govern, in whole or in part, any or all of their rights, remedies, liabilities, powers and duties if the parties.”). Note that, as a general principal, Delaware courts attempt to honor parties bargained-for allocation of risk. *See generally EMSI Acquisition, Inc. v. Contrarian Funds, LLC*, 2017 WL 1732369 (Del. Ch. May 3, 2017) (“[Buyer] cannot reach the [sellers] on an indemnification claim beyond the bargained-for limits.”).
select a forum’s statute of limitation if they do so explicitly. \(^89\) Note however that in these “specific selection” states, courts refuse to abandon the traditional rule that statutes of limitation are procedural and governed by the law of the forum absent explicit language in the agreement. \(^90\)

**G. Lengthening of the Statute of Limitations**

Delaware’s statute of limitations prohibits parties from contractually lengthening the statute of limitations past twenty years. \(^91\) This prohibition is based off of evidentiary policy decisions to “preven[t] allegedly-breaching parties from being unfairly made to address stale claims for which proof becomes progressively less trustworthy over time.” \(^92\) Thus, while Delaware is willing to adopt a contractarian stance towards shortening the statute of limitations, it is unwilling to afford parties similar latitude to lengthen the period—at least beyond twenty years.

Other jurisdictions have similar policy positions to the effect that contracts which lengthen the applicable statute of limitations are void as against public policy. \(^93\) However, as noted previously, it may be possible for the seller to grant the purchaser an independent indemnification right that is unrelated to any representation or warranty—such that the claim did not accrue until the buyer made a demand on the seller. \(^94\) This would, in effect, make the seller an insurer for the purchaser. \(^95\)

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\(^89\) See Western Video Collectors, L.P. v. Mercantile Bank of Kansas, 23 Kan. App. 2d 705, 706 (Kan. Ct. App. 1997) (“[U]nless the parties expressly agree to apply the statute of limitations of another state, general choice of law provisions in contracts incorporate only substantive law and do not displace the procedural law of the forum state.”); Deutsche Bank Natl. Trust Co. v. Barclays Bank PLC, 156 A.D.3d 401, 403 (2017) (“As to the New York choice of law clauses of the relevant agreements, because these provisions do not expressly incorporate the New York statute of limitations, they cannot be read to encompass that limitation period.”) (internal quotations omitted).

\(^90\) Id.

\(^91\) Del. Code. Ann. tit. 10 § 8106(c) (West 2014) (“[A]n action based on a written contract, agreement or undertaking involving at least $100,000 may be brought within a period specified in such written contract, agreement or undertaking provided it is brought prior to the expiration of 20 years from the accruing of the cause of such action).


\(^93\) See Deutsche Bank Nat’l Tr. Co. v. Flagstar Capital Mkts. Corp., 143 A.D.3d 15, 16, (App. Div. 2016) (holding that, under New York law, a contract which stated that a right to indemnification for breached representations and warranties related to loans would “accrue . . . upon discovery” was void against public policy because it had the effect of extending the statute of limitations period). New York law will not allow a plaintiff to plead around this rule by arguing that the defendant committed a separate breach by failing to perform under the indemnification right. Id.

\(^94\) See Little & Babcock, supra note 79.

\(^95\) Also, some states allow for a longer limitation period for contracts that are signed “under seal” which could also be a good option for parties that want to keep the seller on the hook for a longer period of time. Id.; see, e.g., ALA. CODE § 6-2-33 (setting a ten-year statute of limitations for contracts signed under seal).
H. Summary of Current Law

In summary, there are jurisdictional differences when it comes to whether statutes of limitation are substantive or procedural, what levels of specificity are required to contractually set the limitations period, and whether states permit any contractual modification of the statute of limitations. While current law creates a bit of a maze for parties to get what they bargained for, there are ways to simplify this area of law.

III. Solution

In determining how a court will enforce a survival clause, there are three main variables: (1) the forum selection clause, (2) the choice of law provision, and (3) the way that the contract words its indemnification and survival clauses.

First, the forum selection clause will, at least under the traditional rule, determine the procedural law that governs the agreement. Second, the choice of law provision will select the substantive law to govern the agreement, and third, the contract itself is an important source of law. This note assumes that the “correct” legal outcome is for courts to require a plaintiff to bring suit within the survival period.

The main threats to the “correct” outcomes are, as previously mentioned, that (i) a forum state will use its borrowing statute to “borrow” another state’s statute of limitation which could include a controlling statute, and (ii) that a forum with a controlling statute will disregard a choice of law provision in a contract and substitute its own procedural law. Either of these two outcomes could throw off the parties bargained-for risk allocation.

A. Contractual Solutions

There are two main strategies that parties can adopt to reduce the aforementioned risks: (i) carefully worded choice of law provisions and (ii) liability limitations clauses. First, in jurisdictions that prohibit contractual shortening of the applicable statute of limitations, the parties

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97 Compare Western Filter v. Argan, Inc., 540 F.3d 947, 953 (9th Cir. 2008) (holding that parties must use “clear and explicit” language to shorten a statute of limitation) with GRT, Inc. v. Marathon GTF Tech. Ltd., 2011 WL 2682898 *11 (Del. Ch. July 11, 2011) (rejecting a rule that parties must explicitly prohibit the filing of a lawsuit after a specific period and holding that stating a claim would survive for a specific period is enough).

98 Compare Del. Code Ann tit. 10 § 8106(c) (West 2014) (allowing parties to contractually set a limitations period as long as the contract involves at least $100,000) with S.C. CODE ANN. § 15-2-140 (2012); ALA. CODE § 6-2-15 (2017); FLA. STAT. § 95.03 (2013); MO. REV. STAT. § 431030 (2015) (prohibiting contractual shortening).

99 See supra note 88.
may be able to contract around the default rule that statutes of limitation are procedural (i.e., supplied by the law of the forum) by emphasizing the centrality and substantive nature of the survival period. This approach was explained in Section II.F which details how some agreements may be able to turn procedural rules into substantive rules by emphasizing their centrality to agreements.100

In other words, the parties may be able to specify that the duration of the indemnification right is substantive for the purposes of their agreement. Whether the parties are able to achieve this procedural–substantive shift will turn on the forum’s law on the conflict of laws.101 While a complete fifty-state survey is beyond the purview of this note, a strong case can be made that—at least for shortening the statute of limitations—parties should be able to contract around the traditional rule that statutes of limitation are procedural.102

The traditional distinction between substantive and procedural rights is that a statute of limitation “does not wipe out the substantive right; it merely suspends the remedy.”103 In other words, while a party may have a substantive right to indemnification under an agreement, the courts of the forum jurisdiction will not provide a remedy for the breach of that right after a specific time period.

Contrarily, in an agreement that creates a right to indemnification, but only for a limited time period, it is most precise to say that the contract granted a substantive right with a temporal component.104 A buyer should not be able to legally vindicate a substantive right that the seller did not give. As has been shown in this note, the survival period is one of the most negotiated terms in an M&A agreement.105 A right to indemnification for defective reps and warranties that lasts six months could be worth millions less than a similar right that lasts five years.106 Thus, while the traditional

100 See Del. Code. Ann. tit. 6, § 2708 (West 1993) ("The parties to any contract, agreement or other undertaking, contingent or otherwise, may agree in writing that the contract, agreement or other undertaking shall be governed by or construed under the laws of this State, without regard to principles of conflict of laws, or that the laws of this State shall govern, in whole or in part, any or all of their rights, remedies, liabilities, powers and duties of the parties...").


102 Note that California has already taken this stance. See Hambrecht v. Am. Med. Int’l, 46 Cal. Rptr. 2d 33 (Ct. App. 1995). As an aside, however, it may be hard to predict how such language in an agreement would interact with borrowing statutes. See, e.g., S.C. CODE ANN. § 15-3-140 (2012); ALA. CODE § 6-2-15 (1975); FLA. STAT. ANN. §95.03 (2013); MO. REV. STAT. § 431030 (2015).


104 See supra note 8 and accompanying text (explaining the difference between a traditional right to indemnification and a M&A indemnification for reps and warranties).

105 See supra notes 35–36 and accompanying text (showing that almost all M&A agreements specifically list the survival period).

rule is that statutes of limitation pertain to the availability of a remedy, a limited survival period is—by its nature—substantive in the minds of the parties.

Further, courts sometimes refer to the statute of limitation as expressing the legislature’s policy judgment regarding the use of judicial resources and the litigation of stale claims for which evidence is scant.\(^\text{107}\) This rationale is inapplicable to a contractual shortening of the limitations period between sophisticated parties who specifically addressed the issue, and should in fact help to preserve judicial resources.

Other courts, as exhibited in the Dewsnup case, rely on an amorphous “fundamental policy [of] requiring strict adherence to . . . statutory limitations period[s].”\(^\text{108}\) It is unclear what the motivating principle behind this fundamental policy is. If legislatures are concerned about asymmetric bargaining power and draconian limitations periods, then they could follow the Delaware legislature which only grants flexibility to parties negotiating contracts valued at over $100,000.

The most important point to remember is that to the extent that “substantive” rights turn on the intent of the contracting parties, if courts were to substitute a different limitation period than the survival period in the contract, they would be giving a substantive right to the buyer that the seller did not grant. Under every meaning of the word, the length of the survival period is substantive to an M&A agreement. This would be even more true where the contract explicitly mentioned the statute of limitations in its choice of law provision because it shows that the parties’ intention was for courts to respect their bargained-for limitation. Thus, courts should adopt a rule—as California has—that an “agreement’s unqualified reference to the ‘laws’ of [a state in the choice of law provision] referred to all of that jurisdiction’s statutory laws, including its statutes of limitation.”\(^\text{109}\) This will, in turn, allow parties to select a forum with a “contractarian” statute of limitation.

However, this is only a partial solution, because there is still a risk that a “contractarian” state will also have a borrowing statute.\(^\text{110}\) For example, even if the parties select Delaware law, Delaware law might borrow from a state where the contract arose which could include a

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\(^\text{107}\) GRT, Inc. v. Marathon GTF Tech., Ltd., 2011 WL 2682898, at *12 (Del. Ch. Jul. 11, 2011) (quoting CORBIN ON CONTRACTS § 83.8, at 289–90 (1993) (“Because the purpose of a statute of limitations is ‘to prevent the bringing and enforcement of stale claims . . .,’ courts do not enforce parties’ agreements to lengthen the limitations period.”).


\(^\text{109}\) See Hughes Elecs. Corp. v. Citibank Delaware, 15 Cal. Rptr. 3d 244, 250 (Ct. App. 2004).

\(^\text{110}\) Delaware is such a state. See supra note 58 and accompanying text.
controlling statute. Thus, at least when parties’ agreements arise in a jurisdiction with a controlling statute, the parties may be limited in their ability to contract around that limitation.

For parties in these situations, they might consider a liability limitation provision. Such a provision would state that: “for lawsuits filed after [eighteen months] from the closing date, the buyer’s sole remedy for indemnification, and damages for such a breach shall be capped at [a very low number].” This would not prevent the parties from filing suit, but it would achieve the goal of shifting risk to the buyer after some time period.

B. Legislative Solutions

While Delaware has taken significant steps to increase the freedom of contract regarding limitations periods, Delaware and other states should take additional steps to statutorily enable contracts with a value of over $100,000 to contractually specify how they want their agreement to behave in court. Specifically, States should both (i) amend

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111 To explain this scenario, imagine that two South Carolina entities are in a South Carolina court litigating a contract with a choice of law provision that selects Delaware law. Imagine also that the seller is able to persuade the South Carolina state court to treat the choice of law provision as also selecting the Delaware statute of limitations. This would seem to solve the problem and put the agreement under DEL. CODE ANN. tit. 10 § 8106 (allowing the parties to set any limitation period less than 20 years for contracts worth more than $100,000 and avoiding South Carolina’s prohibition on shortening from section 15-3-140 of the South Carolina Code Annotated). However, Delaware also has its borrowing statute under section 8121 of the Delaware Code Annotated (requiring courts to apply the shorter of the Delaware statute of limitations or the statute of limitation from the jurisdiction where the claim arose). Thus, similarly to the court in Hughes Elecs. Corp., the South Carolina court could take the choice of law provision to include both the statute of limitation and the borrowing statute which would put the parties right back under S.C. CODE ANN. § 15-3-140 which prohibits shortening. See Hughes Elecs. Corp., 15 Cal Rptr. 3d 244. Note that it is unsettled whether the Delaware borrowing statute would also borrow another state’s prohibition on shortening. This is discussed in more detail later in this note.

112 See, e.g., ALA. CODE § 6-2-17 (1975). The Alabama borrowing statute, unlike the Delaware statute, does not require applying the shorter statute of limitations. DEL. CODE ANN. tit. 10 § 8121 (1947). Rather, the Alabama borrowing statute requires that a court apply the statute of limitations “in the same manner it would have been in the state or country where the act was done or the contract was made.” ALA. CODE § 6-2-17 (1975). States with borrowing statutes like Alabama are much more likely to borrow a statutory prohibition on shortening.

113 While the enforceability of such a liquidated damages clause is beyond the purview of this note, a brief review of Delaware case law indicates that such a limitation would be enforceable. See eCommerce Indus., Inc. v. MWA Intelligence, Inc., 2013 WL 5621678, at *45 (Del. Ch. Sept. 30, 2013) (“Under Delaware law, limitation on liability clauses that preclude various types of damages, such as consequential damages, are typically enforceable . . . freedom of contract would suggest that parties to a contract should be entitled to draft agreements so as to avoid certain of the duties and liabilities that are normally part of a contractual relationship.”); Abry Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d. 1032, 1064 (Del. Ch. 2006) (upholding a limitation of liability for an indemnification right unless the seller intentionally misrepresented facts).

114 The Delaware legislature could take a strong leadership role for other state legislatures, and it has a strong tradition of promoting the freedom of contract. In the amendments to the Statute of Limitations in § 8106, the House Judiciary Committee commented that it was attempting to “help make business law in Delaware more palatable” by allowing parties to specify a limitation period
their borrowing statutes to specify that nothing should limit parties’ ability to provide a limitations period that is less than 20 years, and (ii) amend their choice of law statutes, similar to Delaware Code Section 2708, to specifically allow parties to a contract involving more than $100,000 to agree that their undertaking shall be governed under the laws of their state, including their statute of limitation. Both of these changes, taken together, would increase parties’ ability to select “contractarian” law and reduce the risk that another state’s prohibition on contractual shortening would constrain the freedom of contract.

1. Borrowing Statutes and Accoutrements

The first group of amendments to borrowing statutes, such as Delaware Code Section 8121, would eliminate the threat that the forum state would “borrow” another state’s prohibition on contractual shortening or lengthening where a dispute arose in another jurisdiction. Current law is unclear as to whether a Delaware court would borrow another state’s statutory prohibition on contractual shortening or lengthening as an “accoutrement” to the statute of limitations. A federal district court, applying Delaware law from the Delaware supreme court, wrote that section 8121 required a Delaware court to apply “another jurisdiction’s statute of limitations . . . with all its accoutrements[;] including[.] . . . rules governing time when causes of action accrue.” Thus, it is unclear whether a defendant-seller who had selected Delaware law to govern her agreement, and who was in court in Delaware, would be able to win on a statute of limitations defense if the dispute underlying her lawsuit had arisen in South Carolina. This is true even though she signed an agreement that would otherwise have limited a buyer-plaintiff’s right to sue for indemnification.

For example, the logic of the Delaware statute for contractual shortening, under its plain meaning, would be as follows: If the agreement limited the buyer’s right to sue to one year after closing, and arose in South Carolina longer than the standard period without signing a contract under seal. See Del. H.B. 363, 147th Gen. Assemb. § 1 (2014).

115 DEL. CODE ANN. tit. 6, § 2780 (2012).

116 Delaware Code Section 8121 reads: “Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action.” DEL. CODE ANN. tit. 10, § 8121 (2012).

117 Id.


119 Id.

120 The problem is that it is unclear whether the South Carolina limitation on contractual shortening would be considered an “accoutrement” of the statute of limitations. See S.C. CODE ANN. § 15-3-140 (2012) (“No . . . agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action, but the action may be brought notwithstanding such clause”).
Carolina, then the court would apply the “shorter” of “the time limited by the law of [South Carolina]” or the time limited by Delaware Law.121 This would mean comparing the shorter contractual limitations period and the longer, three-year period of limitations under South Carolina law.122 Thus, under its plain meaning, the borrowing statute would select the contractual limitations period instead of the statutory period in South Carolina.123

However, cases that speak of the Delaware borrowing statute as borrowing “accoutrements” could create uncertainty in this area.124 A plaintiff could argue that the Delaware court should adopt another state’s policy determination on limiting limitations periods as a procedural “accoutrement” to the limitations period.125

Additionally, other states with borrowing statutes have rules that borrow another statute of limitation. In other words, by the terms of the borrowing statute, courts should not only borrow the limitations period but also apply the limitations period as the other jurisdiction would.126 For example, Alabama’s borrowing statute applies the other jurisdiction’s statute of limitations “in the same manner it would have been in the state or country where the . . . contract [was] made.”127 This type of borrowing statute would be much more likely to “borrow” a controlling statute.128

Alternatively, contractual lengthening of the limitations period is seriously jeopardized by the borrowing statute.129 When examining a survival period that lengthens the statute of limitations, a Delaware court would compare another jurisdiction’s statute of limitation with the twenty-year contractual limitations period in Delaware.130 The borrowing statute instructs the court to apply the “shorter” of the two statutes.131 This comparison could cut off a buyer’s right to indemnification sooner than

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124 Frombach v. Gilbert Assoc., 236 A.2d 363, 366 (Del. 1967) (“[T]he borrowed limitations statute is accepted with all its accoutrements.”).
125 Id. “Under Delaware borrowing statute, the borrowed limitations statute is accepted with all its accoutrements.” Id.
126 See, e.g., id.
128 See Frombach, 236 A.2d at 366.
129 See Del. H.B. 363, 147th Gen. Assemb. § 1 (2014) (Bill 363 “gives clear statutory authorization to the parties’ freedom to contract beyond the three or four year statutory period without resorting to the use of a sealed instrument, as long as the contract involves at least $100,000 and is in writing.”).
130 Note that, while a twenty-year survival period is long, fundamental representations are subject to longer survival periods with some even claiming to survive indefinitely. See Fortis Insight: Survival Periods for Representations and Warranties, FORTIS ADVISORS (June 22, 2016), https://www.fortisrep.com/news/2016/6/28/fortis-insight-survival-periods-for-representations-and-warranties.
131 Id.
the parties bargained for if another jurisdiction’s statutory or common law prohibition on lengthening.132

2. Controlling Statutes

States should repeal controlling statutes, at least for contracts with a value of over $100,000 because the traditional rationale for strict enforcement of the statutes of limitation is inapplicable to survival periods in M&A transactions. Further, regarding contractual lengthening, as has been previously stated, statutes of limitation embody the legislature’s policy judgment that after a certain period of time, the courts should not hear stale claims because they both waste the judiciary’s resources and are particularly susceptible to falsification to the detriment of defendants.133

First, regarding contractual lengthening, it is probably a good idea to prevent a buyer from suing a seller for a breached representation that is discovered two-hundred years post-closing. However, some states have relatively short statutes of limitation for claims based upon contract, but, with the addition of a simple “sealed” document, allow claims to be brought after a much longer period.134 It seems extremely formalistic to allow parties to bring a suit up to seventeen additional years later by simply calling a signature “sealed.”135 Further, it presents a rather easy-to-circumvent attempt to conserve judicial recourses.136 Therefore, at least to the extent that a state is willing to allow suit based off of a “sealed” document, it seems even-handed to allow parties to a high-dollar-value transaction to contractually specify the limitations period (at least up to what they could have achieved under seal).

Similarly, states with controlling statutes should feel no need to protect sophisticated parties who bargain for a shorter survival period (and who shift purchase prices in light of the bargain).137 This note is not dealing with a situation where the seller engages in either fraud or duress to extract a shorter limitations period, but with a situation where a seller agrees to accept a specific price and one of the reasons for such acceptance

132 Id.
133 See, e.g., supra note 93; See also John R. Sand & Gravel Co. v. United States, 522 U.S. 130 (2008) (“Most statutes of limitations seek . . . to protect defendants against stale or unduly delayed claims.”); DiVincenzo, supra note 8, at 30 (explaining that the Delaware statute of limitations is a statute of repose “intended to discourage stale disputes where the passage of time may have made determination of the facts more difficult”).
134 A sealed document basically just requires a notary to witness the signing. See, e.g., S.C. CODE ANN. §15-3-530 (2012) (setting a three-year period for standard contracts); S.C. CODE ANN. §15-3-520 (2012) (allowing an “action upon a sealed instrument” to be brought up to twenty years after accrual).
135 It is not difficult to “seal” a document. See Carolina Marine Handling, Inc. v. Lasch, 609 S.E.2d 548, 551 (S.C. Ct. App 2005) (“If it appears from a non-sealed instrument that the parties intended for the contract to be sealed, it will be deemed sealed.”).
136 Id.
137 The Delaware courts have said it best: “parties who contract for an abbreviated limitations period must be held to their bargain.” ENI Holdings v. KBR Grp. Holdings, 2013 WL 61836, at *15 (Del. Ch. 2013). Note also that Delaware was careful to limit the ability of a party to contractually shorten the limitations period to high-dollar-value transactions worth over $100,000. See DEL. CODE ANN. tit. 10 § 8106 (2012).
In the modern M&A context, broad provisions that prohibit parties from contractually limiting a buyer’s right to sue would only have the effect of giving such buyer a windfall.

A good example of a statute that still prevents contractual shortening as a default rule, yet carves out an exception for contractual shortening in sophisticated business transactions originates in Texas:

[A] person may not enter a[n] . . . agreement that purports to limit the time in which to bring suit on the . . . agreement to a period shorter than two years. A[n] . . . agreement that establishes a limitations period that is shorter than two years is void in this state. . . . This section does not apply to a[n] . . . agreement relating to the sale or purchase of a business entity if a party to the . . . agreement pays or receives or is obligated to pay or entitled to receive . . . value of not less than $500,000.

This language will cause an increased freedom of contract in the M&A context by allowing parties to use the survival period as a bargaining chip rather than being limited to the default state statute of limitations.

In summary, states should follow Delaware’s lead and repeal controlling statutes, and go a step further to resolve any ambiguity about shortening or lengthening (for contracts above a specified dollar amount).

C. Judicial/litigation Solutions under Current Law

Notwithstanding all of the previous discussion in this note, it may be possible to help parties get what they bargain for even if legislatures fail to act. It may be possible to distinguish between the contractual right to indemnification and the common law right to sue for breached reps and warranties. To explain this point, consider the following hypothetical.

Consider, again, the facts of Dewsnup: the case concerns a breach of a seller’s reps and warranties; a controlling state law statute procedurally governed the case; the defendant sought summary judgment based upon a contractual survival period that was shorter than the statute.

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138 Note that most American jurisdictions would have either “fraud” or “duress” exceptions for those situations and void or render a contract voidable. See, e.g., Cafer v. Ash, 2015 WL 4366541, at *6 (Kan. Ct. App. 2016) (“American courts have traditionally taken the view that competent parties may make contracts on their own terms, provided such contracts are neither illegal nor contrary to public policy.”). Under Delaware law, courts have held that a defendant-seller cannot “knowingly . . . prevent [the buyer] from learning facts or otherwise [make] misrepresentations intended to ‘put the plaintiff off the trail of inquiry.’” Krahmer v. Christie’s Inc., 911 A.2d 399, 407 (Del. Ch. 2006). Silence by the defendant-seller will be insufficient, rather the defendant must employ some “actual artifice.” Id.

of limitations, but the statutory limitations period had not yet expired.\textsuperscript{140} As this note has explained, the buyer may be able to argue that the contractual survival period is void based upon the controlling statute. However, the seller could make the argument explained below.

The argument concerning contractual survival periods not violating controlling statutes is that the contractual right to indemnity is a distinct substantive right that is inextricably tied to \textit{duration}. No specific case follows this line of argument, but courts have not explored the interaction between the statute of limitations and survival clauses in the first place, so creative argument exists in this area.

To understand this argument, the first key point is that, by default rule, reps and warranties do not survive closing.\textsuperscript{141} Therefore, one would not naturally say that survival periods cut off the remedy for a substantive right upon expiration. Instead, survival periods actually create the buyer’s substantive right to rely upon the seller’s reps and warranties.\textsuperscript{142} Delaware law is clear that a party can disclaim all reps and warranties.\textsuperscript{143} Such a disclaimer (frequently called a “non-reliance provision”) effectively leaves the buyer without the substantive legal right to rely upon the veracity—or the mere existence of—the defendant seller’s statements about the company.\textsuperscript{144} If a seller can totally eliminate a buyer’s post-closing right to sue for breached reps and warranties or even disclaim them altogether, she should be able to create a limited substantive right to rely upon her statements. The very nature of a \textit{procedural} rule (such as a statute of limitation) is that it “does not wipe out [or create] the substantive right; it merely suspends the remedy.”\textsuperscript{145} It seems illogical to have a default rule that reps and warranties do not survive closing, but they must survive up to the statute of limitations if the default rule is not used. This all or nothing approach seems like a pointless abrogation of the freedom of contract.

The substantive right to rely on a seller’s statements of fact was originally the creation of common law.\textsuperscript{146} The historical rule, \textit{caveat emptor}, put all risks on the buyer.\textsuperscript{147} However, courts decided that a seller could not haphazardly offer affirmative statements about the subject of the contract without some expectation that the seller would rely on those statements.\textsuperscript{148} Presumably, this common law right was limited by a statute

\begin{footnotesize}
\begin{enumerate}
\item Pinnacle Great Plains Operating Co. v. Wynn Dewsnup Revocable Trust, 996 F. Supp. 2d 1026, 1029, 1037 (D. Idaho 2014).
\item See Bear Stearns Mortg. Funding Trust 2006-SL1 v. EMC Mortg. LLC, 2015 Del. Ch. LEXIS 9, at *41 (Ch. Jan. 12, 2015).
\item See generally RAA Mgmt., LLC v. Savage Sports Holdings, Inc., 45 A.3d 107, 117–19 (Del. 2012) (upholding a non-reliance provision as \textit{not} against public policy); \textit{see also supra} note 65.
\item RAA Mgmt., LLC, 45 A.3d at 116–17.
\item See \textit{id.} at 115–20.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
of repose to prevent a buyer from sleeping on those rights.\footnote{149} Note specifically that the statute of repose arose to cut off a substantive right that the parties did not explicitly create.\footnote{150} Instead, the statute of repose was a judicial or legislative protection for sellers that was needed because courts created the open-ended common law right for a buyer to rely upon the seller’s representations.\footnote{151}

Contracts evolved, and parties began explicitly listing their reps and warranties while disclaiming all others. Respect for the freedom of contract allowed buyers to contractually waive any such substantive right to reliance where it was clear that parties intended to do so.\footnote{152} Further, instead of leaving it up to the common law substantive right to rely on the seller’s reps and warranties, the parties contractually erased that right and replaced it with indemnification as the buyer’s sole remedy.\footnote{153} Thus, if the seller can sell without granting any right to sue over breached reps and warranties, then she should be able to grant a limited right to sue and the contract, not the external statute of limitations, should determine the duration of such substantive right.

To summarize, where parties specifically address the buyer’s right to rely on the seller’s reps and warranties (including the duration of said right) within the four corners of the purchase agreement, that right to rely should be substantively linked to the survival period.\footnote{154} Contractual survival periods of indemnity rights should be thought of as representing a distinct type of substantive right-to-rely that is inextricably tied up in the duration of the right.\footnote{155}

Perhaps the best illustration of the substantive nature of the survival period is representation and warranty insurance. Modern insurance products offer the opportunity for a buyer and seller to purchase insurance, which will cover any breaches of a seller’s reps and warranties

\footnote{149} See DiVincenzo, supra note 8, at 2.
\footnote{150} Id.
\footnote{151} Id.
\footnote{153} Hovde Acquisition v. Thomas, 2002 WL 1271681, at *5 (Del. Ch. June 5, 2002).
\footnote{154} Id.
\footnote{155} For an example of a case that split the atom of the common law substantive right to rely on statements of fact and the new substantive right to indemnity for breaches of representations and warranties, see Hovde Acquisition, 2002 WL 1271681, at *7. In that case, the buyer’s sole remedy for breaches of representations and warranties had already expired, but the agreement also provided that the buyer “may avail itself of any and all rights or remedies available to it either at law or equity.” Id. at 5. The court “assume[d], without deciding” that the plaintiff could sue under a common law breach of contract theory instead of the contractual right to indemnity based off of the contract’s preservation of rights “either at law or equity.” Id. Thus, because the indemnity right was not the buyer’s sole remedy, the buyer preserved both the common law right and a limited contractual right (but the contractual right had already expired). Id. In that event, the statute of limitations provides the duration of the right, but arguably, under the contractual right to indemnity, the contract should provide the duration of the right. Id.
if the buyer discovers and proves them within the survival period.\textsuperscript{156} Thus, for the payment of a specific premium, the insurance company will grant a contractual right.\textsuperscript{157} This right is functionally equivalent to the seller’s grant of indemnification rights that survive for a specific period, yet it is unquestioned that it is the terms of the contract, not the statute of limitations, which “cut off” a buyer’s right to seek compensation from the insurance company.\textsuperscript{158}

Survival periods and insurance contracts function very similarly. In fact, survival periods are a sub-species of insurance product.\textsuperscript{159} Both parties to an insurance contract recognize an underlying risk and they place opposite “bets” related to the risk.\textsuperscript{160} In many cases, the risk relates to the occurrence or non-occurrence of an event.\textsuperscript{161}

One significant factor related to the value of each bet is the time period within which each party bets that the event will or will not occur.\textsuperscript{162} The price to ensure a building for all flood damages for ninety-nine years is significantly more than the price to ensure a building for one year. Each of the two bets (the ninety-nine year and the one year) are different risk-products. Similarly, when a seller sells a business and grants an eighteen-month survival period, she is selling a specific risk-product. This risk-product is a substantive right that should be irrelevant to the statute of limitations because the \textit{duration} of the right is also the \textit{substance} of the right.

In summary, because the source of law for the buyer’s right stems not from the common law, but from the contract’s language, which also specifically lists how long such a right will last, courts should not allow the statute of limitations to modify a substantive right-to-rely. Instead, courts should think of indemnification rights and specific survival periods as the contractual creation of a substantive right that is tied to a specific duration.

\section*{Conclusion}

When a buyer and a seller negotiate key provisions in an M&A agreement related to reps and warranties, controlling statutes may threaten the carefully-balanced allocation of risk between the buyer and seller. This risk must be analyzed in light of various states’ laws on whether the statute of limitations is a substantive or procedural law for purposes of the \textit{Erie} doctrine. Also, the language the parties use to specify the survival period,

\begin{thebibliography}{9}
\bibitem{Youngblood1} \textit{Id.} at 36.
\bibitem{Youngblood2} \textit{Id.} at 36–37.
\bibitem{Youngblood3} \textit{Id.} at 35–37.
\bibitem{Youngblood4} \textit{Id.}
\bibitem{Youngblood5} \textit{Id.}
\bibitem{Youngblood6} \textit{Id.}
\bibitem{Youngblood7} \textit{Id.} at 24.
\end{thebibliography}
whether a state has a borrowing statute, and whether a choice of law provision can select another state’s procedural law are all legal “levers” that can vary from jurisdiction to jurisdiction. Those drafting M&A agreements should closely analyze each of these levers.

Solutions to reduce this risk include creative drafting of liability limitations, choice of law provisions, legislative amendments to borrowing statutes, and the repeal of controlling statutes. Perhaps the most innovative way to reduce risk in this area of law is realizing the distinction between the common law right to sue for breaches of reps and warranties and the contractual right to indemnity in a modern M&A agreement.

In the common law scenario, courts would allow a buyer to sue a seller when the seller went out of her way to state facts on which the buyer relied during the course of the transaction. The courts thus created an open-ended substantive right for buyers to rely upon sellers’ reps and warranties without any internal limits. Instead, the buyer’s right had to be externally limited by statutes of limitation and repose.

Contrarily, the modern M&A right to indemnification is internally limited in such a way that it is inextricably tied to the duration of the survival period. If courts adopted this distinction between the contractual and common law right of reliance, much of the previously-mentioned complexity would fade because the right to indemnify would be a substantive right, for which the forum’s procedural laws would be irrelevant.

164 See DiVincenzo, supra note 8, at 2.