

## Anti-Reliance Disclaimers in Delaware—Why Skillful Drafting Matters

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*In FdG, the Delaware Court of Chancery held that a Buyer's fraud claim based on extra-contractual representations will not be barred unless the anti-reliance disclaimer is drafted as an unambiguous affirmative expression by the aggrieved party (in this case, the Buyer).*

In *FdG Logistics LLC v. A&R Logistics* (Del. Ch. Feb. 23, 2016), the Delaware Court of Chancery held that, to be effective, an anti-reliance disclaimer in a merger agreement must contain an unambiguous statement by the aggrieved party disclaiming reliance on extra-contractual statements. In arriving at its decision, Chancellor Bouchard affirmed then-Vice Chancellor Strine's decision in *Abry Partners V, L.P. v. F & W Acquisition LLC* (Del. Ch. Feb. 14, 2006), where the court sought to strike a balance between holding sophisticated parties to the terms of their agreement and protecting the public against fraud. Chancellor Bouchard stated that the court "will not bar a contracting party from asserting claims for fraud based on representations outside the four corners of the agreement unless that contracting party unambiguously disclaims reliance on such statements." Chancellor Bouchard further explained that the difference between a disclaimer from the point of view of a party accused of fraud and from the point of view of a counterparty who believes it has been defrauded may seem inconsequential, but the difference is critical because of Delaware's strong public policy against fraud.

### **FdG Decision**

*FdG* arose out of a transaction in 2012 where the sellers (the "Sellers") of a trucking company (the "Company") entered into negotiations with a private equity firm (the "Buyer") for the sale of the Company by way of merger. After the deal closed, the Sellers filed a complaint in the Delaware Court of Chancery to recover a tax refund under the merger agreement and the Buyer responded by asserting various counterclaims against the Sellers, including a claim that the Sellers fraudulently falsified records that were provided to the Buyer prior to entering the merger agreement.

In a motion to dismiss the Buyer's claim in regard to fraud based on extra-contractual representations, the Sellers relied on two provisions in the merger agreement: (1) a disclaimer by the Company stating that the Company did not make any representation or warranty outside of the agreement; and (2) a standard integration clause stating that the transaction documents constitute the entire agreement between the parties and superseded any prior agreements or representations made by or between the parties.

The Court of Chancery denied Buyer's motion to dismiss, reasoning that the disclaimer and integration clause lacked an affirmative expression by the Buyer as to the specific information it was relying on when it entered into the merger agreement, or that the Buyer was not "relying on any representations made outside of the merger agreement." In reaching this conclusion, Chancellor Bouchard specifically noted that the disclaimer "amounts to a disclaimer by the seller company of what it was and was not representing and warranting. Moreover, the integration clause... merely states in general terms that the merger agreement constitutes the entire agreement between the parties, and does not contain an unambiguous statement by Buyer disclaiming reliance on extra-contractual statements."

### **Anvil and Prairie Decisions**

Two recent decisions from the Delaware Court of Chancery demonstrate how the principles articulated in *Abry* have been applied. In *Anvil Holding Corporation v. Iron Acquisition Company* (Del. Ch. May 17, 2013), the court held that because the disclaimer of extra-contractual representations was insufficiently expressed from the viewpoint of the buyer, the buyer's claim of fraud with respect to extra-contractual representations was not barred. The court reasoned that the disclaimer did not "reflect a clear promise by the Buyer that it was not relying on the statements made to it outside of the agreement to make its decision to enter the agreement." Regarding the integration clause, the court noted that to bar a plaintiff's claim for fraud based on extra-contractual representations, an integration clause must be drafted so that the language demonstrates an unequivocal anti-reliance clause under which a plaintiff has contractually promised that it relied only on statements made within the four corners of the contract.

In *Prairie Capital v. Double E Holding Corp.* (Del. Ch. Nov. 24, 2015), the Court of Chancery held that because the disclaimer provision, coupled with the integration clause, clearly "reflected an affirmative expression by the aggrieved buyer that it had relied only on the representations and warranties in a stock purchase agreement," the buyer's claim of fraud with respect to extra-contractual representations was barred. Although the court barred the fraud claim, it clarified that: (1) when drafting disclaimer language, Delaware law does not require magic words to be effective; (2) anti-reliance provisions may be drafted affirmatively or negatively; and (3) a clear anti-reliance provision serves to preclude both fraud claims based on extra-contractual representations and those based on extra-contractual omissions.

### **Key Takeaways**

- To be effective, a non-reliance provision in Delaware must contain an unambiguous statement by the buyer disclaiming reliance on extra-contractual statements. Disclaimers solely by the seller, such as "Seller makes no other representations or warranties," do not work.
- Despite the Court's flexibility in *Prairie Capital*, a selling party should as a matter of prudence use a tested formulation, i.e., an acknowledgement by the buyer as to no extra-contractual representations by the seller, an affirmative disclaimer by the buyer as to extra-contractual statements *and* extra contractual omissions, and an integration clause.
- Sellers should carefully review all other fraud exceptions in the agreement, particularly any fraud carve-outs in the indemnification section, to ensure they do not override the anti-reliance provisions.
- Since effective anti-reliance disclaimers have been consistently enforced by Delaware courts, buyers entering into agreements with anti-reliance disclaimers should negotiate fulsome representations and warranties to be included in the agreements.

- Buyers entering into agreements with effective anti-reliance disclaimers should give full and deliberate consideration to the specific representations and warranties included in the agreements, since claims based upon fraud will be limited to intentional misrepresentations or omissions of the representations and warranties in the agreements.

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If you have any questions about the content of this alert please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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