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Delaware Court of Chancery Holds that a Buyer's Fraud Claim Based on Extra-Contractual Representations Will Not Be Barred Unless the Buyer Affirmatively Disclaims Reliance on Such Representations

In *FdG Logistics LLC* v. *A&R Logistics Holding, Inc.*, the Delaware Court of Chancery held that a seller's disclaimer in a merger agreement of extra-contractual representations and warranties was insufficient to bar a buyer's claim for fraud, which was based on extra-contractual representations allegedly made by the seller during merger negotiations, because the buyer *itself* did not make an affirmative statement in the merger agreement disclaiming reliance on such extra-contractual representations.

In 2012, securityholders (the "Sellers") of a trucking company (the "Company") negotiated the sale of the Company to a private equity firm (the "Buyer"). The merger agreement included a disclaimer, which stated that the Company was not making any representation or warranty outside of the merger agreement (the "Disclaimer Provision"), and an integration clause, which further stated that the transaction documents contained the entire agreement between the parties and superseded any other understandings, agreements or representations. After the merger closed, the Sellers filed a complaint in the Court of Chancery to recover a tax refund under the merger agreement. In response, the Buyer asserted counterclaims against the Sellers, including a counterclaim for fraud based on alleged misrepresentations and omissions in documents that the Company provided to the Buyer before it entered into the merger agreement (the "Pre-Merger Materials"). The Sellers moved to dismiss the fraud counterclaim because it related to alleged misrepresentations outside of the agreement, counter to the statements in the Disclaimer Provision.

The Delaware Court of Chancery denied the motion to dismiss, holding that the Disclaimer Provision was not an unambiguous disclaimer of reliance by the Buyer. In doing so, the Court provided an important reminder of how an enforceable anti-reliance clause must be constructed:

- *To be enforced, anti-reliance clauses must contain a clear statement by the counterparty (i.e., the aggrieved party that may seek to rely on extra-contractual statements) that it disclaims reliance.* – The Court explained that it "will not bar a contracting party from asserting claims for fraud based on representations made outside the four corners of [an] agreement unless *that contracting party* unambiguously disclaims reliance on such statements." The Court then ruled that the Disclaimer Provision did not contain an unambiguous disclaimer of reliance *by the Buyer* because it did not contain an "affirmative expression *by [the] Buyer* of (1) specifically what it

[wa]s relying on when it decided to enter the [m]erger [a]greement, or (2) that it [] was not relying on any representations made outside of the [m]erger [a]greement." Thus, it was only "a disclaimer *by the selling company* . . . of what it was and was not representing or warranting."[1]

- *Which party disclaims reliance is critical because of Delaware's public policy against fraud*: The Court 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" is "critical" because of Delaware's "strong public policy against fraud." The identity of the disclaiming party is central to the Court's analysis because the Court must "strike an appropriate balance between holding sophisticated parties to the terms of their contracts and simultaneously protecting against the abuses of fraud." The Court reiterated that because of this "venerable public policy" it will not insulate a party from liability for its counterparty's reliance on fraudulent statements made outside an agreement absent a clear statement by that counterparty disclaiming such reliance.

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[1] In reaching its conclusion, the Court distinguished the Disclaimer Provision and the integration clause of the merger agreement from the anti-reliance and integration clauses in *Prairie Capital III* v. *Double E Holding Corp*. where the Court found that those provisions "reflected an affirmative expression *by the aggrieved buyer* that it had relied only on the representations and warranties in a stock purchase agreement." For more, click here.

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Ariel J. Deckelbaum
Partner
New York Office
212-373-3546
Email

Ross A. Fieldston
Partner
New York Office
212-373-3075
Email

Justin G. Hamill
Partner
New York Office
212-373-3189
Email

Stephen P. Lamb
Partner
Wilmington Office
302-655-4411
Email

Jeffrey D. Marell
Partner
New York Office
212-373-3105
Email

Counsel Frances Mi and associate Brendan Sullivan contributed to this alert.

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