

Delaware Chancery Court Provides Further Insights into the Validity of Anti-Reliance Clauses

On November 30, 2016, the Delaware Court of Chancery issued another opinion in a growing body of decisions defining the parameters of extra-contractual fraud claims in M&A transactions. In *IAC Search LLC v. Conversant LLC*, C.A. No. 11774-CB (Del. Ch. Nov. 30, 2016), Chancellor Andre Bouchard dismissed IAC Search's (the buyer) fraud claim against Conversant LLC (f/k/a ValueClick, Inc.), but allowed the buyer's other six claims for breach of the purchase agreement to proceed. The fraud claim would have allowed the buyer to recover non-contractual damages without any limit, such as the indemnification cap, set forth in the purchase agreement.

The fraud claim arose following IAC's purchase of six subsidiaries, one of which was Investopedia, from ValueClick for \$90 million. IAC asserted that ValueClick provided false performance metrics regarding Investopedia's ad revenue to IAC during the due diligence process, thereby resulting in ValueClick fraudulently inducing IAC to overpay for Investopedia. To decide the fraud claim, Chancellor Bouchard first examined the purchase agreement between IAC and ValueClick, and then reviewed recent Delaware precedent.

Applicable Purchase Agreement Provisions

IAC's fraud claim was not based on a representation or warranty contained in the purchase agreement, but rather on information provided during the diligence process. Therefore, ValueClick argued that IAC's claim should be dismissed, based on three provisions in the purchase agreement.

First, ValueClick, as the "seller," disclaimed making any extra-contractual representations in Section 3.31 of the purchase agreement:

Neither the Seller nor any of its Affiliates or Representatives is making any representation or warranty of any kind or nature whatsoever, oral or written, express or implied (including but not limited to, any relating to financial condition, results of operations, assets or liabilities of the Transferred Group), except as expressly set forth in

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this Article III, as modified by the Disclosure Schedules, and the Seller hereby disclaims any such other representations and warranties.

Second, IAC, as the “buyer,” acknowledged that ValueClick was not making any representations concerning information provided by ValueClick during the diligence process unless such information had been included in an express representation and warranty in the purchase agreement (such clause referred to as a “Buyer’s Acknowledgement Clause”):

The Buyer is a sophisticated purchaser and has made its own independent investigation, review and analysis regarding the Transferred Group and the transactions contemplated hereby, which investigation, review and analysis were conducted by the Buyer together with expert advisors, including legal counsel, that it has engaged for such purpose. The **Buyer acknowledges** that **neither the Seller nor any of its Affiliates** or Representatives **is making**, directly or indirectly, **any representation or warranty with respect to any data rooms, management presentations, due diligence discussions, estimates, projections or forecasts** involving the Transferred Group, including, without limitation, as contained in the Confidential Information Packet dated August 2013 and any other projections provided to Buyer, **unless any such information is expressly included in a representation or warranty contained in Article III.** (*emphasis added*)

Third, the purchase agreement contained a standard integration clause defining and limiting the universe of writings that make up the parties’ agreement.

Legal Background

Following his review of the applicable provisions in the purchase agreement, Chancellor Bouchard reviewed the “considerable body of case law in this Court” on the subject of a seller’s disclaimer of extra-contractual representations to shield itself from fraud claims.

The Chancellor started with then-Vice Chancellor Strine’s opinion in *Abry Partners V, L.P. v. F&W Acquisition, LLC*, 891 A.2d 1032 (Del. Ch. 2006), which, the Chancellor noted, attempted to balance the law’s “natural abhorrence of fraud” with the tradition of “freedom of contract.” In *Abry*, the purchase agreement contained two relevant clauses. The first was a Buyer’s Acknowledgement Clause:

Acquiror acknowledges and agrees that **neither the Company nor the Selling Stockholder has made any representation or warranty**, express or implied, as to the Company or any Company Subsidiary or **as to the accuracy or completeness of any information regarding the Company or any Company Subsidiary** furnished or made available to Acquiror and its representatives **except as expressly set forth in this Agreement.** (*emphasis added*)

The second relevant clause, *i.e.*, a “release clause”, provided that the seller would not be liable to the buyer for misstatements made during due diligence:

... neither the Company nor the Selling Stockholder shall have or be subject to **any liability** to Acquiror or any other person resulting from the distribution to Acquiror, or **Acquiror's use of or reliance on**, any such information or **any information, documents or material made available to Acquiror in any "data rooms," "virtual data rooms," management presentations** or in any other form in expectation of, or in connection with the transactions contemplated hereby. (*emphasis added*)

Vice Chancellor Strine had found that the first clause, i.e., the Buyer's Acknowledgement Clause, was sufficiently clear to define what information the buyer relied upon in entering into the purchase agreement. As such, *Abry* stands for the proposition that extra-contractual fraud may be disclaimed by clear language by the buyer that it did not rely upon statements outside the contract's four corners in deciding to sign the contract.

The second case Chancellor Bouchard reviewed was *Prairie Capital III, L.P. v. Double E Holding Corp.*, 2015 WL 7461807 (Del. Ch. 2015). In that case, the target company fraudulently inflated sales by creating fake bills of sale and shipping documentation to hit certain sales numbers that the buyer made clear were critical to whether the deal would go forward. In *Prairie Capital*, the relevant clause read as follows:

"Buyer has relied on ... the representations and warranties of the Double E Parties expressly and specifically set forth in this Agreement, including the Schedules ... Buyer understands, acknowledges, and **agrees that all other representations and warranties of any kind or nature express or implied ... are specifically disclaimed** by the Double E parties." (*emphasis added*)

This clause was phrased differently than the clause in *Abry*. Here, the clause was framed *affirmatively* as to what the buyer was relying upon, i.e., the buyer was relying *only* on the representations and warranties contained in the agreement. In *Abry*, however, the clause was phrased *negatively*, i.e., the seller was *not* making any representations and warranties except those in the agreement. However, according to Vice Chancellor Laster, the different phrasing did not matter because, if a party represents that it only relied on particular information, then that statement establishes the universe of information on which that party relied. He emphasized that Delaware law does not require "magic words" to disclaim reliance. In other words, specific language in an agreement may vary, but can still add up to a clear anti-reliance clause that bars fraud claims based on extra-contractual statements. As such, the seller's motion to dismiss in *Prairie Capital* was granted, to the extent the claims were based on extra-contractual representations.

Finally, Chancellor Bouchard reviewed his own decision in *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, C.A. No. 9706-CB (Del. Ch. Feb. 23, 2016). In *FdG Logistics*, the securityholder representative initiated an action against A&R Logistics to recover a pre-closing tax refund. In response, the buyer asserted several counterclaims, including for common law fraud based on extra-contractual statements made to the buyer before the merger agreement was entered into by the parties. *FdG Logistics* moved to dismiss, insofar as the alleged misrepresentations were outside the four corners of the Agreement, because of the following disclaimer clause:

“EXCEPT AS EXPRESSLY SET FORTH IN THIS ARTICLE 5, **THE COMPANY** MAKES NO REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, AT LAW OR IN EQUITY AND SUCH OTHER REPRESENTATIONS AND WARRANTIES ARE HEREBY EXPRESSLY DISCLAIMED...” (*emphasis added*)

However, unlike in *Prairie Capital*, where the Court found that the provision at issue reflected an affirmative expression *by the buyer* that it had relied only on the representations and warranties in the purchase agreement, Chancellor Bouchard found in *FdG Logistics* that an assertion from the *seller* of what it was and was not representing and warranting was *not* sufficient. In other words, a disclaimer of reliance must come from the point of view of the aggrieved party, *i.e.*, the buyer who is asserting the fraud claim. In *FdG Logistics*, the critical language missing was any *affirmative expression by buyer*: (1) of specifically what it was relying on when it decided to enter the agreement with the seller *or* (2) that it was not relying on any representations made outside of the purchase agreement.

Decision

Turning to the facts of the present case, Chancellor Bouchard noted that the Buyer’s Acknowledgement Clause came from the perspective of the buyer in substantially the same manner as the clause in *Abry*, and not from the seller, as in *FdG Logistics*. He found that the clause in *IAC Search LLC v. Conversant LLC* was sufficient, as IAC expressly acknowledged that ValueClick was making no representations about information provided during due diligence, *except* as provided in an express representation in the purchase agreement. Thus, the clause specifically identified the universe of information upon which IAC relied when it entered into the purchase agreement. Although the IAC-ValueClick purchase agreement did not contain the additional “release” clause found in *Abry* (thereby making this a closer call than *Abry* from the Court’s perspective), Chancellor Bouchard found that the combined effect of the Buyer’s Acknowledgement Clause and the integration clause resulted in a “clear anti-reliance clause to bar fraud claims based on extra-contractual statements made during diligence.” Thus, the fraud claim was dismissed.

Implications

The principles for drafting an effective anti-reliance clause in M&A transactions governed by Delaware law are now fairly clear. From a *seller’s* perspective, an anti-reliance provision:

- must be **an explicit and clear statement of anti-reliance** (while neither a standard integration clause nor a buyer investigation clause is sufficient by itself or together, those clauses should be included in the purchase agreement as well);
- must be **made by the buyer**;
- may be worded as an acknowledgement by the buyer of *either* seller’s disclaimer of any representations outside of the agreement *or* its reliance only on seller’s representations contained in the agreement; and

- does *not* have to include a “release clause,” such as the one in *Abry*, but can be included by sellers to reinforce the limiting effect of the anti-reliance clause.

From a *buyer’s* perspective, even though the ABA’s Private Target Deal Point Study for deals completed in 2014 shows that only 40% of those deals included an express anti-reliance clause, it may be difficult to keep anti-reliance language out of the purchase agreement. In that case, the buyer should seek to include additional representations in the purchase agreement specifically addressing critical information that underpins the value that the buyer is paying for the target. Such a representation should provide, at a minimum, that such information is complete and accurate.