# Delaware Court Reiterates Need for Unambiguous Non-Reliance Provisions in M&A Agreements

Purchase agreements in private merger and acquisition transactions typically contain provisions to circumscribe the promises (embodied in the parties' respective representations and warranties) that each party has relied on in entering into the transaction. If appropriately drafted, these non-reliance provisions can preclude fraud claims related to extra-contractual statements, which are statements of a party not specifically contained in the purchase agreement. However, courts historically have interpreted non-reliance provisions carefully to exclude extra-contractual fraud claims only where the intent to do so is explicit.

Recently the Delaware Court of Chancery, in *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*[1], continued to develop the principles stemming from a recent line of cases[2] and distinguished several conflicting outcomes on the effect of non-reliance provisions.

In *FdG Logistics*, the court found that a non-reliance provision drafted in a merger agreement could not prevent the buyer from asserting claims of fraud based on alleged extra-contractual misrepresentations where the provision did not contain an affirmative disclaimer of reliance by the *buyer*. This means that instead of the often-seen language whereby the seller expresses it has made no representation or warranty except as set forth in the agreement and all other representations and warranties are disclaimed, the buyer must affirmatively state it is disclaiming reliance on statements not contained in the agreement. While this distinction may appear technical, the court finds it important given the strong public policy against fraud. Even though the court reaffirmed that Delaware law does not require specific "magic words" to disclaim reliance, the non-reliance provision must be an affirmative expression from the perspective of the aggrieved party rather than from the perspective of the party accused of fraud, in order to give effect to the disclaimer.

The court also reiterated its existing position that generic "merger clauses," which state that the agreement constitutes the entire agreement between the parties and supersedes any prior understandings, agreements or representations by or between the parties would not be sufficient, on their own, to preclude potential claims for reliance on extra-contractual fraudulent statements.

*Fdg Logistics* is another reminder of the importance of careful and clear drafting by counsel, and non-reliance provisions are no exception to that rule.

For more information on the topic discussed, contact **David R. Lallouz** at **lallouz@thsh.com**.

**A special thanks to Andrew Yacyshyn for his contributions to this article.**

[1] 131 A.3d 842 (Del. Ch. 2016).

[2] See, in particular, *Abry Partners V, L.P. v. F & W Acquisition,* 891 A.2d 1032 (Del. Ch. 2006), and *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35 (Del. Ch. 2015).

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