FdG Logistics LLC v. A&R Logistics Holdings, Inc., C.A. No. 9706-CB (Del. Ch. Feb. 23, 2016)

Delaware Law Update

03.09.2016

Anti-reliance disclaimer by buyer in M&A transaction: Delaware law enforces clauses which identify the specific information on which a party has relied and foreclose reliance on other information

Upon the consummation of an M&A transaction, a buyer usually has a period of time in which to claim a seller breached certain representations and warranties made in the purchase agreement. The claims a buyer can make against the selling party depend on what the purchase agreement says but also depend on how much information the buyer relies on in deciding whether to purchase a company. For the most part, the selling party seeks to limit to the four corners of the parties' agreement the representations about the business being sold in hopes of precluding a buying party from relying on anything outside the agreement.

A recent decision from the Delaware Court of Chancery addresses the types of provisions in an agreement that could bar such claims for misrepresentation based on extra-contractual statements or omissions.

In *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, C.A. No. 9706-CB (Del. Ch. Feb. 23, 2016), the buyer asserted common law fraud claims against the sellers in a lawsuit which arose from a private equity firm's purchase of a trucking company. The buyer claimed it discovered several illegal and improper activities, including falsified documents and records, environmental law breaches, facilities in need of repair, and the hiring of undocumented workers.

The sellers argued that those fraud claims must fail because they were being asserted based on information that was made available to the buyer before it entered into the merger agreement. However, the Court held that the merger agreement did not contain an ***affirmative*** disclaimer of reliance by the buyer sufficient to preclude it from asserting a claim for fraud based on representations outside the four corners of the merger agreement.

In this transaction, the sellers' indemnification obligations were not triggered until the losses exceeded $1 million and were subject to a cap of $20.3 million; however, those limitations did not apply in cases of "fraud or intentional breach." Thus, it was important for the buyer to assert fraud claims to avoid the $20.3 million cap. The buyer thus asserted a claim for common law fraud against the sellers, based in part on alleged misrepresentations and

omissions concerning certain documents provided to the buyer before it entered into the merger agreement. However, the sellers argued that the buyer could not establish as a matter of law that it justifiably relied on any representations in any of the premerger materials because of the effect of certain sections of the merger agreement. Chancellor Bouchard wrote that the merger agreement did not explicitly bar such claims and thus did not insulate the sellers from them.

"The integration clause contained in [the agreement] 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," the opinion states. "Because the language of [the relevant sections] of the merger agreement does not contain this type of unambiguous anti-reliance disclaimer by buyer, those provisions are not sufficient to preclude its common law fraud claim relating to the premerger materials."

The Court pointed to then-Vice Chancellor Strine's decision in *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006), where he carefully considered the need to strike an appropriate balance between holding sophisticated parties to the terms of their contracts and simultaneously protecting against the abuses of fraud.

The Court had the opportunity to address this issue in *Anvil Hldg. Corp. v. Iron Acquisition Co., Inc.*, 2013 WL 2249655 (Del. Ch. May 17, 2013). Anvil was a case in which the buyer asserted fraud claims based on extra-contractual statements. The purchase agreement stated that neither the target company nor the seller made any "other express or implied representation or warranty with respect to the Company" and that the agreement "constitute[d] the entire Agreement among the Parties." In refusing to dismiss the fraud claims, the Court reasoned that the provisions in question were not expressed from the point of view of the buyer and thus did not "reflect a clear promise by the Buyer that it was not relying on statements made to it outside of the Agreement to make its decision to enter the Agreement."

In another case, *Prairie Capital III, L.P. v. Double E Hldg. Corp*, 2015 WL 7461807 (Del. Ch. Nov. 24, 2015), the Court reached the opposite conclusion in dismissing fraud claims that a buyer of a company asserted based on extra-contractual representations. In that case, "the Court found that the provisions at issue reflected an affirmative expression by the aggrieved buyer that it had relied only on the representations and warranties in the purchase agreement[.]"

In this case, similar to *Anvil* but unlike *Prairie Capital*, the critical language missing from the merger agreement was the affirmative expression by the buyer specifically representing that it was not relying on any representations made outside the merger agreement.

The key takeaway from this case as it relates to limiting claims by aggrieved buyers in M&A transactions is that the disclaimer must be made from the perspective of the party that is making the claim in order to preclude fraud claims for extra-contractual statements.