

Delaware Supreme Court Rules on Contractual Limitation on Liability Provision

Delaware Law Update

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Parties to commercial transactions governed by Delaware law and their counsel should take note of the recent en banc opinion issued by the Delaware Supreme Court in *Express Scripts, Inc. v. Bracket Holdings Corp.* (<https://courts.delaware.gov/Opinions/Download.aspx?id=317280>)

Background

Under a securities purchase agreement (the “SPA”) with United BioSource LLC, a subsidiary of Express Scripts, Inc. (collectively, “UBC”), Bracket Holding Corp. (“Bracket”) purchased three businesses from UBC for \$187 million. After closing, Bracket claimed that revenue and working capital had been overstated and took legal action.

Generally, the SPA provided that Bracket’s sole remedy for breaches of non-fundamental representations and warranties was to recover under a representation and warranty insurance policy (the “R&W Policy”). The SPA also included a carve-out, however, which provided that claims of “deliberate” fraud were not subject to the R&W Policy. Bracket obtained a \$13 million arbitration award under the R&W Policy and then sued UBC in the Superior Court of the State of Delaware for fraud. A jury awarded Bracket \$82 million, but the Delaware Supreme Court reversed that award because it determined that the SPA’s requirement that Bracket resort to the R&W Policy absent “deliberate” fraud meant that Bracket could not prevail without establishing “intentional” fraud. Because the trial court had “instructed the jury that the defendants could be liable for fraud if they acted recklessly,” the Delaware Supreme Court ordered a new trial.

Takeaways

The decision in *Express Scripts* demonstrates that parties to Delaware contracts should expect the language of their agreements to be enforced. Hypothetically, if Bracket had intended to bargain for a deal that would have allowed it to recover damages separate from the R&W Policy without having to establish intentional fraud, it should have insisted on clear language in the SPA to that effect (e.g., “except in the case of any type of fraud, including fraud based on recklessness, the sole and exclusive remedy with respect to any breach of any representation or warranty—other than the fundamental representations—in this agreement shall be satisfied solely from the R&W Policy”). With that type of language, the \$82 million jury award might have been upheld. But that is not what happened, and because the parties

had agreed that the R&W Policy would be the only recourse available to Bracket without “deliberate” fraud, Bracket could not prevail by showing recklessness, even if, hypothetically, that was what it had intended during negotiations.

Another issue bears mentioning. The *Express Scripts* decision discusses *ABRY Partners V, L.P. v. F & W Acquisition LLC*, where the Delaware Court of Chancery determined that contractual limitations on liability can be enforced unless they attempt to “insulate” a party from the “conscious participation in the communication of lies.” 891 A.2d 1032, 1064 (Del. Ch. 2006). The Delaware Supreme Court has not expressly adopted *ABRY Partners*, but the discussion in *Express Scripts* is significant, as it suggests that the Delaware Supreme Court is in line with and approves of the reasoning and holding in *ABRY Partners*. Contracting parties and their counsel, therefore, should expect contractual limitations on liability governed by Delaware law to be enforced unless they purport to shield a party from liability for intentional fraud.