

The Delaware Court of Chancery Finds That Fraud May Serve as an Alternate Source of Recovery for Aggrieved Purchasers

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Delaware Law Update

10.23.2020

Swift Acquisition Corp. v. Krauss, et al., Case No. 2019-0509-PAF (Del. Ch. Aug. 25, 2020)—The Delaware Court of Chancery may permit a purchaser to pursue claims for breach of contract and fraud against a seller and its directors arising out of the purchaser's acquisition of the seller. The court reached this conclusion in *Swift Acquisition Corp.* based on the purchaser's allegations that the seller made misrepresentations in the asset purchase agreement concerning its customer base, and the seller and its directors undertook acts to prevent the purchaser from discovering the misrepresentation. As a result of the court's decision to deny the motion to dismiss, the purchaser may pursue damages in excess of the limited remedy set forth in the asset purchase agreement.

In *Swift Acquisition Corp.*, the purchaser filed suit arising out of the seller's purported concealment of the latter's loss of a major customer prior to the execution of the asset purchase agreement. The seller, PLI Holdings, Inc., was in the business of designing, manufacturing, and distributing gift cards. In 2018, PLI entered into negotiations with Swift's advisors for the sale of its business, in which the seller provided the purchaser's representatives with a memorandum regarding the seller's clients and future sale projections. The document specifically referenced PLI's relationship with First Data Corp., which serviced large retail clients. Swift expressed interest in acquiring PLI, and the parties entered into sale negotiations. During the due diligence period, PLI learned that a larger retailer eliminated its relationship with First Data Corp. The seller's directors expressed concern that this news would dissuade Swift from purchasing PLI. When Swift sought to speak with PLI's customers, the seller's directors conditioned such conversations on the arrangement that Swift not discuss the status of its customers' business with sub-customers. Swift consented to this limitation, and it failed to learn of the larger retailer's decision until after the sale was consummated.

Swift filed suit against PLI and its directors to recover approximately \$47 million in damages based on the defendants' breach of certain representations in the asset purchase agreement and fraud. The defendants sought dismissal of the contract claim based on their interpretation of the relevant representations, and

argued that the anti-reliance provision in the asset purchase agreement barred the fraud claim. The court disagreed.

The Delaware Court of Chancery rejected defendants' interpretation of the asset purchase agreement, in which PLI represented that none of its customers or sub-customers intended to substantially reduce their demand for PLI's products. Defendants argued that the next sentence, which sets forth PLI's representation that none of its customers or sub-customers threatened to reduce their demand for its products as a result of the sale, should be read in conjunction with the prior representation to impose the sale-limitation language on the latter representation on the former. Defendants maintained that the two sentences must be read in conjunction with one another in order to prevent the latter sentence from being rendered meaningless. Since PLI could have breached the prior representation without violating the latter representation, or vice versa, the court found that each of the sentences constituted independent, actionable representations.

The court also rejected defendants' argument based on the anti-reliance provision in the asset purchase agreement. It found that the fraud claims took root in the agreement's express representations and warranties, in which the anti-reliance provision authorized Swift to rely on PLI's express promises. In response to defendants' argument that Swift impermissibly "bootstrapped" its fraud claim on the breach of contract claim, the court concluded that contractual representations may form the basis of a claim for fraud if the plaintiff alleges facts that the defendant knew its misrepresentations were false. Swift satisfied the court's inquiry, in which the purchaser alleged that defendants were aware of the larger retailer's decision to cease doing business with First Data Corp. and took steps to prevent disclosure of this decision during the due diligence period. Additionally, the court found that the anti-bootstrapping rule will not bar a plaintiff from pursuing a fraud claim if the fraud permits plaintiff to obtain a different recovery.

While *Swift Acquisition Corp.* does not constitute new law, it strengthens the ability of an aggrieved purchaser to pursue damages from a seller. Had PLI negotiated the terms of the asset purchase agreement with more precision, the defendant may have been able to defeat the breach of contract claims at this initial stage of the litigation. Swift's allegations of fraud, however, provide a separate and distinct avenue for recovery, in which the purchaser may be able to obtain damages in excess of the limited remedy under the asset purchase agreement.