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FREEDOM TO MISLEAD: THE FICTITIOUS FREEDOM TO CONTRACT AROUND FRAUD UNDER DELAWARE LAW

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In the past 15 years, Delaware courts seem to have created a rule that allowed sophisticated parties to contract around fraud by using an unambiguous disclaimer and integration clause. Supposedly, an extra-contractual fraud claim would be dismissed had there been an unambiguous disclaimer. However, a survey of Delaware cases tells a different story. They have not held that even sophisticated parties who have relied on fraudulent misrepresentations are bound by contract with a clear disclaimer and integration clause. In the cases in which the courts have supposedly done so, either the party seeking to uphold the contract did not make any fraudulent misrepresentations on the other party did not rely on them or the case could easily have been decided on other grounds.

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INTRODUCTION

Contracting parties have been protected against fraud throughout the world, in both civil law as well as common law systems. In common law jurisdictions, they have traditionally been protected against fraud in extra-contractual representations even if their contract contains a disclaimer and integration clause, which state that the contract is the complete and final agreement between the parties who have not relied on any representations outside the contract.

Supposedly, Delaware is an exception. The traditional rule was challenged in a series of cases beginning in 2001 with *Great Lakes Chem. Corp. v. Pharmacia Corp.*[1] There, the court concluded that disclaimers in an agreement for purchase of a business barred the buyer's fraud claims, where the contract was entered into between sophisticated parties after extensive due diligence and negotiations.[2] Finally, in a landmark case in 2006, *ABRY Partners V, L.P. v. F&W Acquisition LLC,*[3] then-Vice Chancellor Strine said that an integration and disclaimer clause would be effective, even against a claim of fraud, provided it contains "language that . . . can be said to add up to a

1. 788 A.2d 544 (2001).
2. *Id.* at 555.
3. 891 A.2d 1032 (Del. Ch. 2006).

clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract."[4] He claimed to be following prior law:

> When addressing contracts that were the product of give-and-take between commercial parties who had the ability to walk away freely, this court's jurisprudence has taken a different approach. We have honored clauses in which contracted parties have disclaimed reliance on extra-contractual representations, which prohibits the promising party from reneging on its promise by premising a fraudulent inducement claim on statements of fact it had previously said were neither made to it nor had an effect on it.[5]

In a 2008 article, corporate attorney Steven Haas applauded this decision because it "sets the outer limit on the ability to contract around fraud."[6] The effect of the decision, according to Haas, is that "while a party can totally immunize itself for intentional misrepresentations made outside of a contract, a party cannot limit its liability for intentional misrepresentations found within the contract itself."[7] He claimed that Delaware courts consistently allow sophisticated parties to use integration clauses and disclaimers to contract around fraud.[8] According to Haas, "there are only minimal checks on what amounts to a contractual freedom to sanction lying outside the contract: the parties must be sophisticated and, the extra-contractual disclaimer must be unambiguous."[9] When these conditions are met, Delaware courts have allowed "a total exculpation of liability" when the disclaiming party "acted in a morally culpable manner to induce the other party to contract."[10]

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4. *Id.* at 1059.
5. *Id.* at 1056.
6. Steven M. Haas, *Contracting Around Fraud Under Delaware Law*, 10 DEL. L. REV. 49, 72 (2008), cited in RAA Mgmt. v. Savage Sports Holdings, Inc., 45 A.3d 107 (2012), and Prairie Capital III, L.P. v. Double E Holding Corp., 132 A.3d 35 (Del. Ch. 2015).
7. *Id.*
8. *Id.* at 49–50.
9. *Id.* at 50.
10. *Id.*

The Delaware courts are among the most sophisticated in the United States in business matters. So many businesses are incorporated there that Delaware law governs some of the most important transactions among American companies. It is a matter of national—not local—concern whether Delaware law allows the parties to contract around claims of fraud.

Both Strine and Hass believe that such a rule is justified by principles of freedom of contract and efficiency. They have made some novel arguments in support of that position. The first Part of this Article will show why those arguments are unsound. The second Part of this Article will show that, despite the language of their opinions, Delaware courts have not allowed parties to contract around fraud. They have not held that even sophisticated parties who have relied on fraudulent misrepresentations are bound by a contract with a clear disclaimer and integration clause. In the cases in which the courts have supposedly done so, either the party seeking to uphold the contract did not make any fraudulent misrepresentations, the other party did not rely on them, or the case could have been decided just as easily on other grounds.

I.
Fraud and Freedom of Contract

Freedom of contract is broadly protected in American law, especially under Delaware law.[11] As Melvin Eisenberg has shown, that principle is worthy of protection to the extent that both parties acted voluntarily, were fully informed, and the

11. *See, e.g.*, Aspen Advisors LLC v. United Artists Theatre Co., 843 A.2d 697, 712 (Del. Ch. 2004) (ruling that enforcing the "plain terms" of a contract furthers Delaware law's goal of promoting reliable and efficient corporate and commercial laws); Gildor v. Optical Solutions, Inc., 2006 WL 4782348, at *7 n.17 (Del. Ch. Jun. 5, 2006) ("It is imperative that contracting parties know that a court will enforce a contract's clear terms and will not judicially alter their bargain, so courts do not trump the freedom of contract lightly."); Douzinas v. Am. Bureau of Shipping, Inc., 888 A.2d 1146, 1152 (Del. Ch. 2006) ("[T]his court's duty is to respect the contract freely entered into by all the members . . . ."); *see also* Marino v. Grupo Mundial Tenedora, S.A., 810 F. Supp. 2d 601, 607 (S.D.N.Y. 2011) ("The policy of the Delaware Act is to give maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.") (citation omitted).

bargaining process was fair.[12] For good reason, then, traditionally, a party is not bound when his assent a contract was induced by fraud. He did not act voluntarily when he was tricked into assenting, nor was his assent fairly procured. Moreover, he lacked the information necessary if contract is to exchange resources in a way that benefits them both and is therefore efficient. Yet, Strine has argued that when sophisticated parties have included a clear integration and disclaimer clause, it is the victim of fraud who is unfairly trying to escape an agreement voluntarily made.[13] Haas has argued that to hold him bound, despite the other party's fraud, is an efficient allocation of the burdens of acquiring information.[14]

Strine argued that to bar the victim's fraud claim is actually to punish that party for "lying" rather than to let the fraudulent party get away with lies:

> To fail to enforce non-reliance clauses is not to promote a public policy against lying. Rather, it is to excuse a lie made by one contracting party in writing—the lie that it was relying only on contractual representations and that no other representations had been made—to enable it to prove that another party lied orally or in a writing outside the contract's four corners. For the plaintiff in such a situation to prove its fraudulent inducement claim, it proves itself not only a liar, but a liar in the most inexcusable of commercial circumstances: in a freely negotiated written contract. Put colloquially, this is necessarily a 'Double Liar' scenario. To allow the buyer to prevail on its claim is to sanction its own fraudulent conduct.[15]

Strine reasoned that:

> A party cannot promise, in a clear integration clause of a negotiated agreement, that it will not rely on promises and representations outside of the agreement and then shirk its own bargain in favor of a 'it

12. Melvin A. Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1415–16 (2009).

13. ABRY Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032 (Del. Ch. 2006).

14. Haas, *supra* note 6, at 55.

15. *ABRY Partners V*, 891 A.2d at 1058.

did rely on those other representations' fraudulent inducement claim.[16]

It is wrong to think that the victim of fraud who signs a contract with a disclaimer clause is "lying," in the normal sense of the word. He is unlikely to take the language of the disclaimer clause literally: that is, to believe that the written contract actually contains all of the representations on which he relied. Contracting parties invariably rely on information and representations beyond the four corners of the written contract when they contract. Even when they do not realize the extent of their reliance on the extra-contractual representations, such representations often become a predicate that had induced the contract. Sophisticated parties often lay out a detailed list of representations and warranties that they think they have relied on, but often the list is not, or cannot possibly be, exhaustive. Consequently, one who signs a contract with the magic language that says one does not rely on the extra-contractual promises is unlikely to think it really means that he did not. He signs a contract with a disclaimer clause, without realizing what he has given up, only because the lawyers put them there.

The mere fact that there is a disclaimer and integration clause only reduces the likelihood of extra-contractual reliance but does not bar such reliance as a matter of law. Whether there was reliance and whether the reliance was justifiable is a triable matter of fact. In any event, the victim of fraudulent misrepresentations neither assented voluntarily nor was his assent fairly procured. It would be odd to say that the party who made the fraudulent misrepresentations was himself the victim of fraud because his victim signed and later repudiated a disclaimer clause. A party who made these representations and then claimed he did not assent voluntarily would be saying that had he only known he could not commit fraud and get away with it, he would never have assented. If he claimed that his assent was procured unfairly, he would be saying that he was duped into thinking he could get away with fraud.

Haas argued that not enforcing the disclaimer would be inefficient because it would increase transactions costs.[17] The logic is that freedom of contract allows parties to freely allo-

16. *Id.* at 1057.
17. Haas, *supra* note 6, at 60.

cate the risk of the accuracy of information.[18] It is impossible for the seller to monitor all of the communications from its employees and agents.[19] Not allowing the freedom to contract around fraud would impose unlimited liability for every communication that is inaccurate.[20] Therefore, the seller would have an incentive to limit the flow of information.[21] As a result, more due diligence would be needed to gather information and transaction costs would be increased.[22]

Further, it would be costly for the seller to even attempt to monitor all communications from its employees and agents, but it may also be costly for the buyer to check their accuracy. Many representations play a greater or lesser role in the decision to contract. For parties to assume that everything that they have been told could be false and to check the authenticity of every word the other party has said would be impossibly costly. In any event, we are dealing with fraudulent misrepresentations. If the seller has to bear the cost of the harm done when his employees or agents lie, he has an incentive to monitor their behavior to see that they do not. He will do so efficiently: by spending the amount on monitoring that is reasonable given the harm that their lies may cause. He has no such incentive when he is protected by a disclaimer clause. Indeed, he profits when they lie, and so he has every incentive to overlook their misconduct, if not to encourage it. Indeed, sparing sophisticated parties from liabilities arising out of their fraud would encourage them to use integration clauses to contract out misrepresentations and get away with fraud.

II.
The Law in Delaware

A. *Overview*

To establish a fraud claim under Delaware law:

> [T]he plaintiff must plead facts supporting an inference that: (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

> representation was false or made the representation with a reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance.[23]

A survey of Delaware cases shows that in many cases in which the plaintiff's claim was dismissed, the plaintiff had failed to establish that they had, in fact, relied on the defendant's fraudulent misrepresentations. When the court actually barred an extra-contractual fraud claim, it acted as a fact-finder to reach a determination that the party did not actually rely on the misrepresentation in light of the circumstances.[24] Courts assessed the facts and determined that the plaintiff did not actually fall for the lies based on a finding of fact that either (i) sophistication and experience prevented them from relying on the lies,[25] (ii) the ambiguity of the alleged oral promise could not have induced reliance,[26] (iii) the alleged misrepresentation was deemed too important to be left out of the written contract had it indeed been relied on,[27] or (iv) the opinion and prediction of the past results were not certain enough to form future promises.[28]

It has mattered that the party raising a claim of fraud was sophisticated, that the contract was fully negotiated, and that it contained an unambiguous disclaimer and integration clause. It has mattered, though, because these circumstances helped to convince the courts that the party claiming fraud did not in fact rely on a misrepresentation or that his reliance was not reasonable. In other words, the courts were convinced that either there was no lie or the lie was not relied on by the sophis-

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23. ABRY Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032, 1050 (Del. Ch. 2006).

24. *See, e.g.*, Prairie Capital III, L.P. v. Double E Holding Corp., 132 A.3d 35 (Del. Ch. 2015); Black Horse Capital, LP v. Xstelos Holdings, Inc., No. 8642-VCP, 2014 WL 5025926 (Del. Ch. Sep. 30, 2014); H-M Wexford LLC v. Encorp, Inc., 832 A.2d 129 (Del. Ch. 2003); Progressive Int'l Corp. v. E.I. Du Pont de Nemours & Co., No. C.A. 19209, 2002 WL 1558382 (Del. Ch. Jul. 9, 2002); Great Lakes Chem. Corp. v. Pharmacia Corp., 788 A.2d 544 (Del. Ch. 2001).

25. *Great Lakes*, 788 A.2d at 555.

26. *Black Horse Capital*, 2014 WL 5025926, at *22.

27. *H-M Wexford*, 832 A.2d at 142.

28. *Great Lakes*, 788 A.2d at 554.

ticated party. If, among sophisticated parties, an unambiguous disclaimer and integration clause was sufficient to bar a claim of fraud, whether fraud actually occurred would not matter. Neither would it matter whether there was reasonable reliance on the part of the victim. Yet, if the language of the integration clause itself is not a boilerplate and expressly disclaimed reliance on extra-contractual representations between sophisticated parties, the courts will find that the party must have not relied on the representation.[29]

Conversely, courts have allowed claims for fraud by finding that the language of a disclaimer was insufficient. The courts do not have a clear rule about what kind of disclaimer would be sufficient to bar such a claim. The case law is so contradictory that the courts have been able to support just about any outcome by changing the standard for what constitutes an unambiguous disclaimer clause. They have done so by changing the standard for what constitutes clear anti-reliance language for purposes of overcoming a disclaimer which would seem to be unambiguous. In the earlier cases that dealt with contracting around fraud, the mere presence of a disclaimer in an agreement was said to be enough. Then, courts decided that boilerplate clauses do not bar fraud claims. In the 2006 case *ABRY*, the leading case on the effectiveness of such disclaimers, then-Vice Chancellar Strine stressed the importance of including a completely unambiguous disclaimer.[30] As required by the *ABRY* court, such a disclaimer must contain language that the party has contractually promised not to rely upon statements outside of the contract's four corners when entering into the contract.[31] After *ABRY*, in *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*[32] and *Black Horse Captial, LP v.*

29. *E.g.*, Monsanto Co. v. E.I. Dupont de Nemours & Co., No. 4:09CV00686 ERW, 2010 WL 3039210. *Cf. In re* Medical Wind Down Holdings III, Inc., 332 B.R. 98 (2005) (finding that the integration clause in parties' agreement did not bar fraud in the inducement and negligent misrepresentation claims); Kronenberg v. Katz, 872 A.2d 568, 592–94 (Del. Ch. 2004) (permitting extra-contractual fraud claims when the integration clause was boilerplate).

30. *See generally* ABRY Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032 (Del. Ch. 2006).

31. *Id.* at 1057.

32. TrueBlue, Inc. v. Leeds Equity Partners IV, LP, No. CVN14C12112WCCCCLD, 2015 WL 5968726, at *8–9 (Del. Super. Ct. Sept. 25, 2015).

Xstelos Holdings, Inc.,[33] courts came to different conclusions about whether the reliance was disclaimed, although the language of the disclaimer clauses was virtually the same. One found justifiable reliance; the other did not, by taking into account other facts. In one of the two most recent cases, *Prairie Captial III, L.P. v. Double E Holding Corp.*, the court determined that there are no magic words or formula needed to effectively disclaim reliance.[34] The court then again came up with a new rule in *FdG Logistics LLC v. A&R Logistics Holdings, Inc.,* that the language must affirmatively state what the parties are relying on in entering the contract and that they are not relying on any representations made outside the contract.[35]

B. *The Misunderstood Delaware Case Law*

1. *The Pre-*ABRY *Case Law*

Traditionally, as held in *Norton v. Poplos*,[36] Delaware law prohibited the use of disclaimers to bar fraud claims. The rationale was to prevent sophisticated parties from exploiting unsophisticated parties through the use of boilerplate disclaimers that would bar fraud claims.[37] The court ruled that such boilerplate disclaimers did not bar fraud claims even when the representations were extra-contractual.[38]

a. *Great Lakes Chem. Corp. v. Pharmacia Corp.*[39]

The paradigm shifted in 2001, when the court barred claims of fraud for extra-contractual representations in *Great Lakes Chem. Corp. v. Pharmacia Corp.* The court held that the buyer's claim for fraud was barred by disclaimers in the agreement for the purchase of a business where the contract was entered into by sophisticated parties after extensive due diligence and negotiations.[40] The court argued that because the

33. Black Horse Capital, LP v. Xstelos Holdings, Inc., No. 8642-VCP, 2014 WL 5025926, at *24 (Del. Ch. Sep. 30, 2014).

34. Prairie Capital III, L.P. v. Double E Holding Corp., 132 A.3d 35, 50–51 (Del. Ch. 2015).

35. FdG Logistics LLC v. A&R Logistics Holdings, Inc., 131 A.3d 842, 860 (Del. Ch. 2016).

36. Norton v. Poplos, 443 A.2d 1, 6–7 (Del.1982).

37. *Id.*

38. *Id.*

39. Great Lakes Chem. Corp. v. Pharmacia Corp., 788 A.2d 544 (2001).

40. *Id.* at 555.

parties were sophisticated, they did not require the same level of protection as that given to unsophisticated parties as in *Norton*:

> [T]wo highly sophisticated parties, assisted by industry consultants and experienced legal counsel, entered into carefully negotiated disclaimer language after months of extensive due diligence. The parties explicitly allocated their risks and obligations in the Purchase Agreement. In these quite different circumstances, a party to such a contract who later claims fraud is not in the same position—and does not have the same need for protection—as unsophisticated parties who enter into residential real estate contracts having boilerplate disclaimers that were not negotiated.[41]

Nevertheless, a careful reading of the case tells a different story. The integration clause did not bar the fraud claim; rather, the lack of actionable fraud did.

The dispute centered around the sale of NSC, a business unit of Pharmacia. Great Lakes accused Pharmacia of misrepresentation and omission of material information, which resulted in the buyer overpaying for the business by 50 million dollars.[42] It was alleged that Pharmacia intentionally hid the real reasons for the drop in NSC's sales, came up with future projections they knew to be too high, and assured the buyer that sales would later increase.[43] Great Lakes later discovered the true reason for the drop in NSC's sales:

> [D]uring the negotiations, significant changes had occurred that affected NSC's business. Those changes resulted from price-cutting in the aspartame market, the failure of many smaller aspartame manufacturers, and the entry of new sellers of L-Phe into the pharmaceutical market. Those developments increased the number of NSC's competitors and affected NSC's customer base—changes that turned out to be permanent. Price competition in the aspartame market also reduced the price of L-Phe in the pharmaceutical market, which in turn drove

41. *Id.*
42. *Id.* at 551.
43. *Id.* at 547.

> smaller producers of aspartame, (including NSC's sole sweetener customer, Enzymologa), out of the artificial sweetener market altogether.[44]

The several disclaimers stated that (i) the seller did not assure the realization of the estimates, predictions, or forecasts, nor warrant the completeness and accuracy of the information provided, and that (ii) the buyer was taking full responsibility for making its own evaluation.[45] The disclaimers neither disclaimed responsibility for extra-contractual representations nor contained language in which the buyer promised not to rely on statements outside the contracts. Such language was later required by the *ABRY*, *Prairie*, and *FdG* courts.

Nonetheless, even if Pharmacia did in fact lie to induce Great Lakes to contract, the court did not think it mattered because it believed that reliance was not justified. Great Lakes had the resources available to ascertain the facts themselves without relying on the misrepresentation. Great Lakes retained industrial experts and top flight legal advisors who were capable of understanding and communicating to them how price-cutting in the aspartame market might be significant for NSC's future sale prospects.[46] The court further concluded that the representations were predictions and expressions of opinions about the future that did not give rise to actionable fraud.[47]

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44. *Id.* at 546.

45. *Id.* at 552–53. The several disclaimers at issue in the case stated as follows:

> The Buyer acknowledges that there are uncertainties inherent in attempting to make such estimates, projections and other forecasts and plans, that the Buyer is familiar with such uncertainties, that the Buyer is taking full responsibility for making its own evaluation of the adequacy and accuracy of all estimates, projections and other forecasts . . . . Buyer has received no representation or warranty from either Seller with respect to such estimates, projections and other forecasts and plans . . . . [N]one of [the sellers] make any express or implied representation or warranty as to the accuracy or completeness of the information contained herein or made available in connection with any further investigation of the Company . . . . [A]ll projections of financial or operating results are based on estimates made by NSC and there can be no assurance that such results will be realize.

46. *Id.* at 554–55.

47. *Id.* at 554.

If the court's conclusion was that there was no valid claim for fraud because of the absence of justifiable reliance, the fraud claim would have been dismissed even without a disclaimer and integration clause.

b. *Progressive Int'l Corp. v. E.I. Du Pont de Nemours & Co.*[48]

The position taken by the court in *Great Lakes* was reinforced in 2002 by then-Vice Chancellor Strine in *Progressive*. There, the contract in dispute was a license agreement that transferred the exclusive right to use Du Pont's Silver Stone kitchenware brand to Progressive. The fraud claim was based on Du Pont's alleged misrepresentation of the value, commercial viability, and profit margin of its Silver Stone brand, as well as its misrepresentation about its commitment to expand the brand. Progressive argued that they entered into the contract based on Du Pont's representations and promises. It turned out that Progressive overestimated the value of the brand and underestimated its production cost.[49] Moreover, Du Pont adopted a different marketing strategy and expanded the Teflon brand rather than Silver Stone.[50] The license agreement contained neither the representations nor the commitment, but did contain an integration clause.[51] The integration clause was deemed sufficient to bar the claim for fraud.

Nevertheless, the language of the integration clause was not explicit enough to have met the standard later set by

48. No. C.A. 19209, 2002 WL 1558382 (Del. Ch. Jul. 9, 2002).
49. *Id.* at *6.
50. *Id.*
51. *Id.* The integration clause said:

> *Integration.* This LICENSE and any attached schedules and exhibits, constitutes the entire agreement between the Parties pertaining to the subject matter contained herein and supercedes all prior and contemporaneous agreements, representations, and understandings of the Parties. Each of the Parties acknowledges that no other party, nor any agent or attorney of any other party, has made any promise, representation, or warranty whatsoever, express or implied, and not contained herein, concerning the subject matter hereof to induce the Party to execute or authorize the execution of this LICENSE, and acknowledges that the Party has not executed or authorized the execution of this instrument in reliance upon any such promise, representation, or warranty not contained herein . . . .

Strine in *ABRY*.[52] It merely stated that the written contract and ancillary documents constituted the entire agreement, and that the parties had not made promises, representations, or warranties outside the written contract.[53] When the very same language was used in the integration clauses in *TrueBlue*[54] and *Anvil Holding Corp. v. Iron Acquisition Co.*,[55] however, the courts held them insufficient to constitute an explicit anti-reliance provision,"[56] as they were merely stating that the parties were "not making any other express or implied representation or warranty . . . ."[57] Such a provision was said to lack "the specific anti-reliance language required as evidence that the parties intended for the clause to bar fraud claims."[58] In contrast, in

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52. Strine required integration clauses to contain "language that . . . can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract." ABRY Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032, 1059 (Del. Ch. 2006).

53. *Id.*

54. The provision states:

> The Purchaser acknowledges that neither the Company, nor any of its Subsidiaries nor any seller nor any other Person . . . makes, or has made, any representation or warranty with respect to . . . information or documents made available to the Purchaser or its counsel, accountants or advisors with respect to the Company, its Subsidiaries or any of their respective businesses, assets, liabilities or operations . . . . The Purchaser acknowledges and agrees that the representations and warranties set forth in this Agreement (as qualified by the Schedules) supersede, replace and nullify in every respect the data set forth in any other document, material or statement, whether written or oral, made available to the Purchaser.

TrueBlue, Inc. v. Leeds Equity Partners IV, LP, C.A. No. N14C-12-112 WCC CCLD, 2015 WL 5968726, at *8 (Del. Super. Ct. Sept. 25, 2015).

55. C.A. Nos. 7975-VCP, N12C-11-053-DFP [CCLD], 2013 WL 2249655 (Del. Ch. May 17, 2013). The language of the contract in *Anvil* stated "neither the Company nor any Seller 'makes any other express or implied representation or warranty with respect to the Company . . . or any Seller or the transactions contemplated by this Agreement'" and "[t]his Agreement . . . constitutes the entire Agreement among the Parties (and the Sellers' Representatives) with respect to the subject matter of this Agreement and supersede[s] all other prior agreements and understandings, both written and oral, between the Parties with respect to the subject matter of this Agreement." *Id.*, at *8-9.

56. *TrueBlue*, 2015 WL 5968726, at *9.

57. *Anvil*, 2013 WL 2249655, at *8.

58. TEK Stainless Piping Products, Inc. v. Smith, 2013 WL 5755468, at *4 (Del. Super. Ct. Oct. 14, 2013).

Progressive, the court concluded that the integration clause barred the fraud claim, and that sophisticated parties are bound by the unambiguous language of the contracts they sign.[59]

Nevertheless, the court granted the motion to dismiss because it determined that any reliance would be unreasonable. The court repeatedly emphasized that Progressive had been in the industry since 1973 and had dealt with DuPont before.[60] Thus, it had sufficient experience to make an independent judgment on the commercial appeal of the brand and its profitability regardless of what DuPont represented to them.[61] In addition, if they had relied on the representations to contract, such representations should have been scheduled as conditions and warranties in the contract.[62]

Therefore, the court was convinced that Progressive had not been defrauded. The fraud claim was treated as an attempt to shirk a bargain that seemed bad in hindsight. Yet the court presented its decision to dismiss the claim of fraud as resting on the *disclaimer*, reasoning that:

> [In] the unambiguous integration clause . . . Progressive explicitly disclaimed any reliance on representations that are not memorialized within the four corners of the Agreement . . . .The License Agreement was not a contract of adhesion . . . . Progressive had the freedom to walk away and not deal with DuPont, or to bargain for better terms, including the elimination of the integration clause . . . [Therefore,] Progressive contractually agreed that it was not entering the License Agreement on the basis of extra-contractual representations by DuPont[ ]. . . . To enable Progressive to proceed with its rescission claims would allow Progressive to escape the plain language of the commercial contract it voluntarily chose to sign, and to renege on a contract promise it made to DuPont.[63]

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59. Progressive Int'l Corp. v. E.I. Du Pont de Nemours & Co., 2002 WL 1558382, at *1 (Del. Ch. Jul. 9, 2002).

60. *Id.* at *2.

61. *Id.* at *8.

62. *Id.* at *9.

63. *Id.* at *1.

Progressive argued that for the disclaimer to be binding, it should have included a list of every representation and issue that the parties were not relying upon as a basis for contracting with each other.[64] Otherwise, Progressive could not know what representation or subjects it was not relying upon in executing the Agreement.[65] The court did not think that it would be commercially viable to require the listing of all material issues that are not the part of the foundation of their relationship.[66] But whatever the contract should or should not have listed ultimately would not have mattered. Progressive could not prove that it had been defrauded.

c. *H-M Wexford LLC v. Encorp, Inc.*[67]

The pattern continued in *H-M Wexford* where the plaintiff, Wexford, accused the defendant, Encorp, of fraud related to a misleading unaudited financial statement made in a private-placement memorandum that was not integrated in a stock-purchase agreement.[68] The court granted the motion to dismiss the fraud claim based on the extra-contractual representation due to the anti-reliance language in the integration clause.[69] The court agreed with the defendant that the Purchase Agreement's integration clause had the effect of "exclud[ing] from the Purchase Agreement any representation or warranty not expressly set forth or referred to therein. The [private-placement memorandum] is not expressly referred to anywhere in the Purchase Agreement."[70]

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64. *Id.* at *10.
65. *Id.*
66. *Id.*
67. 832 A.2d 129 (Del. Ch. 2003).
68. *Id.* at 146.
69. *Id.* at 141. The integration clause reads:

> This Agreement, including documents, Schedules, instruments and agreements referred to herein, and the agreements and documents executed contemporaneously herewith embody the entire agreement and understanding of the parties hereto in respect to the subject matter hereof. There are no restrictions, promises, representations, warranties, covenants, or undertakings, other than those expressly set forth or referred to herein or therein. This Agreement supersedes all prior agreements and understandings between the parties with respect to such subject matter.

70. *Id.*

Once again, this language would not have been deemed to contain the explicit anti-reliance language required in later cases.[71] The Fraud claim would have been allowed by courts in *Blackhorse*, *FdG*, and *Trueblue*. Again, this case shows that the surrounding facts matter in deciding whether a fraud claim will be dismissed.

If the court had been convinced that an integration clause alone, if unambiguous, will bar a fraud claim despite the presence of fraud, it could have stopped there. Instead, the court went on to show that there was no justifiable reliance on the financial statements. The court reasoned that the purchase agreement warranted the accuracy of the audited financial statement until September 2000. Had the parties intended to warrant the accuracy of the unaudited statements until November 2000, they could easily have done so.[72] Moreover, even though Wexford alleged that Encorp attempted to falsify the financial statement in the fourth quarter of 2000, the court concluded that Wexford should not have trusted the statement. The statement was merely a projection. Wexford was "an 'accredited investor' as defined by federal securities regulation. As such, it is presumed to have understood the ramifications of the integration clause in the purchase agreement and the disclaimer clause in the PPM."[73] The court's logic was apparently that even if Encorp lied, Wexford did not justifiably rely on that lie. "[I]f Wexford wanted to be able to rely upon the PPM or particular facts represented therein, it had an obligation to negotiate to have those matters included within the scope of the integration clause of the contract."[74] The court therefore concluded that there was no justifiable reliance on Wexford's part.[75] Justifiable reliance, however, is an essential element of a common law claim of fraud.[76] Again, we see the irony: since a claim of fraud was not established, the anti-reliance language in the integration clause should not have mattered.

71. *Id.* at 141.
72. *Id.* at 142.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*

2. *ABRY Partners V, L.P. v. F&W Acquisition LLC*[77]

As noted earlier, in this landmark case, then-Vice Chancellor Strine upheld a claim for fraud based on misrepresentations contained in a contract. He said that a "fraudulent inducement claim" could not be made for extra-contractual misrepresentations when the contract contained an effective disclaimer. He framed a rule as to what constitutes an effective disclaimer: there must be "language that . . . can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract."[78] The effect of the decision, according to Haas, is that "while a party can totally immunize itself for intentional misrepresentations made outside of a contract, a party cannot limit its liability for intentional misrepresentations found within the contract itself."[79]

Nevertheless, none of Strine's pronouncements on the effect of fraud in extra-contractual communications had anything to do with the case he was deciding. As he noted himself, the buyer did not base its claims for fraud on extra-contractual communications. "[T]he Buyer has premised its rescission claim solely on the falsity of representations and warranties contained within the Stock Purchase Agreement itself."[80]

The buyer, ABRY Partners, had contracted to buy the stock of a company, F&W Publications, from the seller, Providence Equity Partners. The buyer alleged that with the knowledge and connivance of Dominguez, a principal of the seller, F&W had misrepresented its condition in its financial statements. The financial statements were referenced by the Purchase Agreement. Another alleged misrepresentation concerned VISTA, which was F&W's book ordering system. The buyer alleged that F&W represented that VISTA was "fully functioning and processing orders."[81]. However, in fact, it was not functioning appropriately and orders had not been shipped for weeks, which had caused the loss of several key

77. 891 A.2d 1032 (Del. Ch. 2006).
78. *Id.* at 1059 (quoting Kronenberg v. Katz, 872 A.2d 568, 593 (2004)).
79. Haas, *supra* note 6, at 72.
80. *ABRY Partners V*, 891 A.2d at 1035.
81. *Id.* at 1039.

customers including Amazon.[82] These facts were not disclosed.[83] This misrepresentation was made by F&W, and the buyer did not allege that it was made with the seller's knowledge and connivance. Yet, the buyer claimed that the change constituted a material adverse effect under the stock purchase agreement. The seller had certified in the purchase agreement that no material adverse effect had occurred since closing.

As Strine noted, the buyer was not making a claim for fraud arising from extra-contractual misrepresentations:

> The present case is starker than the typical case. That reality is best illustrated by understanding the burden that the Buyer has voluntarily taken on, without raising a legal peep. The burden is that of demonstrating that its rescission claim is based on false representations of fact embodied within the four corners of the Stock Purchase Agreement itself.[84]

Strine's conjecture was that the buyer did not do so because it "[r]ecogniz[ed] that the case law of this court gives effect to non-reliance provisions that disclaim reliance on extra-contractual representations."[85] That is conjecture. The reason the buyer did not claim that it had relied on fraudulent extra-contractual representations might be that it could not establish that such representations were made, or, if so, whether it had relied on them. The financial statements were not extra-contractual. They were referenced in the contract. The extra-contractual misstatements about the condition of VISTA were not made by the seller. The buyer did not allege, and may not have been able to prove, that they were made with the seller's knowledge or approval. One could not assume, as the court noted, that the seller would know what F&W knew:

> The Seller did not manage the Company being sold directly. Most of the key representations of fact were made by the Company to the Buyer in the first instance, primarily through managers working directly for the Company who were not otherwise affiliated with the Seller. The Seller did not necessarily possess

82. *Id.*
83. *Id.* at 1040.
84. *Id.* at 1055–56.
85. *Id.* at 1035.

> the same information as the managers of the Company.[86]

Thus, Strine decided what the effect of extra-contractual fraud should be in a case in which extra-contractual fraud was not even alleged. Moreover, it is hard to see how he could reconcile what he said about such a case (which was not before him) with what he said in the case that was. Departing from his view about other cases, in this case he held that the integration and disclaimer clause would not protect the seller from a claim that, by including false information in the contract, the seller defrauded the buyer intentionally. As we have seen, his rationale for excluding a claim of extra-contractual fraud was that the victim himself lied by signing a contract with the disclaimer.[87]

> To fail to enforce non-reliance clauses is not to promote a public policy against lying. Rather, it is to excuse a lie made by one contracting party in writing—the lie that it was relying only on contractual representations and that no other representations had been made—to enable it to prove that another party lied orally or in a writing outside the contract's four corners. For the plaintiff in such a situation to prove its fraudulent inducement claim, it proves itself not only a liar, but a liar in the most inexcusable of commercial circumstances: in a freely negotiated written contract. Put colloquially, this is necessarily a 'Double Liar' scenario. To allow the buyer to prevail on its claim is to sanction its own fraudulent conduct.

Nevertheless, Strine held in the case before him:

> [W]hen a seller intentionally misrepresents a fact embodied in a contract—that is, when a seller lies—public policy will not permit a contractual provision to limit the remedy of the buyer to a capped damage claim. Rather, the buyer is free to press a claim for rescission or for full compensatory damages . . . I dismiss the Buyer's claims except insofar as it can prove that the Seller intentionally misrepresented a fact within the Stock Purchase Agreement or knew that

86. *Id.* at 1062–63.
87. *Id.* at 1058.

> the Company had misrepresented such a fact. In either situation, the Seller would have been responsible for the injury suffered by the Buyer in reliance upon a lie.[88]

He gave two reasons why the disclaimer should not immunize the seller from an intentionally false misrepresentation. One is moral: "[T]here is a moral difference between a lie and an unintentional misrepresentation of fact . . . . [T]hus it is understandable that courts would find it distasteful to enforce contracts excusing liars for responsibility for the harm their lies caused."[89] The other is practical:

> There is also a practical difference between lies and unintentional misrepresentations. A seller can make a misrepresentation of fact because it was misinformed by someone else, was negligent, or even was reckless. All of those possibilities can be enhanced if the seller does little to investigate its own representations and compounded if the buyer does little independent due diligence of its own. The level of self-investigation expected from a seller, to me, seems to be a more legitimate subject for bargaining than whether the seller can insulate itself from liability for lies.[90]

Why, then, should a party be able to immunize itself against a claim of an intentionally false extra-contractual communication? It would seem that the only relevant difference between the two is that when a representation is contained in the contract, it is *certain* a party made the representation and thus more likely that his victim relied upon it. And so we come back to this Article's thesis: what should matter is whether one party lied and the other relied upon that lie to his detriment, which is a question of *fact*.

88. *Id.* at 1036.
89. *Id.* at 1062.
90. *Id.*

3. *The Post-*ABRY *Era*

a. *RAA Mgmt. v. Savage Sports Holdings, Inc.*[91]

In 2012, the Delaware Supreme Court barred a claim for fraud arising out of inaccurate and incomplete extra-contractual representations made during the due diligence process.[92] After the negotiations broke down, RAA sued to recover the cost incurred during the due diligence process and the negotiations.[93] RAA argued that it would not have considered purchasing the company had it known about three facts that Savage misrepresented, but which were disclosed in due diligence.[94] The court dismissed the claim because the nondisclosure agreement expressly disclaimed the accuracy or completeness of evaluation material or of any other information provided.[95]

This might be the only case so far where the court actually followed the rule it had laid out for itself since *Great Lakes,*[96] that an extra-contractual fraud claim is barred when the disclaimer is clear enough regardless of whether reliance could be found by looking at the facts. Nevertheless, the case can be explained under a different rationale.

RAA was not a case in which a disclaimer clause in a contract barred a claim for fraud. There *was* a disclaimer, but it was not contained in a contract. The liability here is not a contractual liability but a *pre*-contractual one. The alleged misrepresentations were made to induce the final sales agreement, not the nondisclosure agreement.

RAA, which had been interested in buying Savage Sports, sued for 1.2 million dollars that it had allegedly spent in due-diligence investigation and preliminary negotiations. It would never have incurred these costs, it claimed, except for three fraudulent misrepresentations made by Savage. The disclaimer said that "Savage was making no representations or warranties as to the accuracy or completeness of any information . . . be-

91. 45 A.3d 107 (Del. 2012).
92. *Id.* at 117.
93. *Id.* at 109.
94. *Id.* at 111.
95. *Id.* at 119.
96. Great Lakes Chem. Corp. v. Pharmacia Corp., 788 A.2d 544 (Del. Ch. 2001).

ing provided to RAA, and . . . Savage would have no liability to RAA resulting from RAA's reliance on such information."[97]

RAA sued for fraud. The court dismissed its claim, invoking the rule of *ABRY* that the claim was barred by a disclaimer it had signed before incurring these costs. Nevertheless, this was not a case in which the buyer entered into a contract to purchase assets from a seller who had defrauded him. The parties never ended up contracting for the sale of Savage. It was not a case in which the parties entered into a preliminary agreement to bargain in good faith or reallocate the costs of investigation and negotiation. Along with the disclaimer, RAA had signed an acknowledgement that the parties had no contract: "You [RAA] understand and agree that no contract or agreement providing for a transaction between you and the Company [Savage] shall be deemed to exist between you and the Company unless and until a definitive Sale Agreement has been executed and delivered."[98]

It was a case, then, in which one party who had spent money investigating and negotiating a deal—costs parties would normally bear themselves—wished to transfer these costs—which it would normally bear itself—to the other party, by raising a claim of fraud.

American courts traditionally recognize the freedom of negotiation but not *culpa in contrahendo*, the duty to negotiate in good faith under German law. As a result, it has been said that parties are relieved from any liability in the pre-contractual period.[99] If the court was of the same opinion, they could have dismissed the claim based on this reason alone regardless of the integration clause.

As E. Allen Farnsworth noted in his classic study, "courts have rarely applied the law of misrepresentation to failed negotiations."[100] These failed negotiations are different from a case in which a party was fraudulently induced to enter into a contract. One who has sold an asset through fraud has profited at the buyer's expense. One who has induced the other party to enter into negotiations that ultimately failed, normally

97. *RAA v. Savage*, 45 A.3d at 110.

98. *Id.* at 110–11.

99. E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreement: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 221 (1987).

100. *Id.* at 235.

has not. Farnsworth mentioned only two situations in which a claim of fraud has succeeded in failed negotiations: (i) when a party conceals the fact that he never intended to contract,[101] or (ii) was secretly negotiating with someone else.[102] In such cases, one party was trying to obtain some advantage at the expense of the other. Moreover, it would be dangerous to allow a party to shift the costs he incurred to the other party after negotiations have broken down by alleging that one or more of the many statements made to him was a misrepresentation on which he relied to start the negotiation.

The allegations of fraud in *RAA* illustrate just how dangerous it would be. Indeed, the allegations make it doubtful that RAA could have established the requisite elements of a fraud claim: intentional misrepresentation and justifiable reliance. The alleged misrepresentations concerned not existing problems, but events that might lead to problems in the future: an "ongoing investigation by the New York State Department of Environmental Conservation" into a site owned by a predecessor which, depending on the result, could lead to Superfund liability;[103] efforts by employees at the BowTech plant of a Savage subsidiary which, depending on the result, could lead to unionization;[104] and; a claim against BowTech that could lead to a lawsuit.[105] The misrepresentations RAA alleged were a denial that there was potential Superfund liability, a denial that there was a unionization effort at the BowTech plant, and nondisclosure of the possibility of litigation.[106] RAA would have needed to establish that these two denials amounted to fraudulent misrepresentations, rather than opinions as to whether there was a significant possibility of Superfund liability or unionization. Put simply, it would have needed to establish that the nondisclosure amounted to fraud. Moreover, it would have had to establish that it relied on these misrepresentations before due diligence even began, meaning it would have had to establish that the negotiation and due

101. *Id.* at 233–34 n.54 (citing RESTATEMENT (SECOND) OF TORTS §§ 525, 530 (AM. LAW INST. 1977)).

102. *Id.* at 234 n.55 (citing the "rare case" of Markov v. ABC Transfer & Storage Co., 6 Wash. 2d 388, 457 P.2d 535 (1969)).

103. *RAA v. Savage*, 45 A.3d at 111.

104. *Id.*

105. *Id.*

106. *Id.*

diligence would not have taken place without such reliance and that the reliance was justifiable. It would be especially difficult to establish the case because: (i) Savage did not have the duty to disclose all pertinent information before a nondisclosure agreement was signed and the due diligence began, and (ii) the later-discovered events worthy of concern are the typical issues parties only find out through due diligence.

The court should have taken the opportunity to decide when, if ever, a party should be able to claim fraud in preliminary negotiations that never resulted in a contract. It could then, if necessary, have discussed the effect of a disclaimer in such a case, which may well be different from a case in which a contract had actually been made. Instead, the court took the easy way out and cited the rule in *ABRY*.[107]

b. *TransDigm, Inc. v. Alcoa Global Fasteners, Inc.*[108]

If Delaware law does allow a party to contract around fraud, the claim for fraudulent active concealment should have been dismissed in *TransDigm*. Instead, having determined that fraud was committed, the court allowed the fraud claim to proceed despite a clear disclaimer.[109] Alcoa claimed that TransDigm actively concealed material information that one key customer had expressed the intent to buy fifty percent less from TransDigm going forward and that the key customer was offered a five percent discount.[110]

The disclaimer clearly covered reliance on extra-contractual representations:

> Buyer has undertaken such investigation and has been provided with and has evaluated such documents and information as it has deemed necessary to enable it to make an informed decision with respect to the execution, delivery and performance of this [a]greement and the transactions contemplated hereby. Buyer agrees to accept the [s]hares *without reliance upon any express or implied representations or warranties of any nature, whether in writing, orally or otherwise,* made by or on behalf of or imputed to Trans-

107. *Id.* at 117.
108. 2013 WL 2326881 (Del. Ch. May 29, 2013).
109. *Id.* at *7.
110. *Id.* at *6.

> Digm or any of its [a]ffiliates, except as expressly set forth in this [a]greement.[111]

TransDigm based its defense on *RAA*, where the court allowed the defendant to disclaim reliance on the completeness and accuracy of the information.[112] Here, the court distinguished the case from *RAA* on the grounds that (i) the disclaimer did not cover omissions, and (ii) there was reasonable reliance on the assumption that TransDigm did not actively conceal information.[113]

Such reasoning is hardly convincing. Under the law of fraud, the omissions due to "active concealment" are actionable because active concealment counts as a lie, just as an affirmative misrepresentation would. Moreover, it would be bizarre if one who tells an outright lie were better protected against a fraud claim than one who actively conceals a material fact.

If *A*BRY and the previous cases were right that extra-contractual fraud can be excused by a clear and unambiguous disclaimer, this disclaimer should have effectively barred these extra-contractual fraud claims. Following the logic in the previous cases, had Alcoa truly wanted to rely on the assumption that no material facts had been omitted, they could have written the assumption into the contract. Otherwise, any representations or warranties were disclaimed effectively.[114]

c. *Black Horse Capital, LP v. Xstelos Holdings, Inc.*[115]

In this 2014 case, it was alleged that the plaintiffs had agreed to make a ten-million-dollar bridge loan in exchange for the defendant's transfer of a 60.5% interest in an asset referred to as "Serenity."[116] The Serenity agreement was an oral agreement not included in the written agreements. The integration clauses alone should have been sufficient to dismiss the fraud claim if a party was really allowed to contract around fraud.[117] According to the court, they were. The court said,

111. *Id.* at *7.
112. *RAA v. Savage*, 45 A.3d, at 110.
113. *TransDigm Inc.*, 2013 WL 2326881, at *9.
114. *Id.* at *7.
115. 2014 WL 5025926 (Del. Ch. Sept. 30, 2014).
116. *Id.* at *5.
117. *Id.* at *24.

following *ABRY*, "a party cannot promise, in a clear integration clause of a negotiated agreement, that it will not rely on promises and representations outside of the agreement and then shirk its own bargain in favor of a 'but we did rely on those other representations' fraudulent inducement claim."[118]

In *Black Horse*, however, the plaintiff was suing for a breach of contract supposedly committed by the defendants when it refused to transfer Serenity. It argued that even if this claim failed because the contract was found to be unenforceable, it could recover for fraud because the defendants misrepresented their "state of mind" as to entering into the contract.[119]

The court held that "it is not reasonably conceivable that the Serenity Agreement is an enforceable contract between the parties."[120] To do so, the defendants must have intended for the agreement to be binding. The court concluded, "it is not reasonably conceivable that plaintiffs could prove that the parties shared an intent to be bound by the Serenity Agreement."[121]

One reason was that its terms were so indefinite that the alleged agreement would be unenforceable for that reason alone. The term "Serenity" was not defined and the assets to be transferred under the Serenity Agreement were not identified.[122] Moreover, there was obvious ambiguity regarding what the alleged Serenity interest embodied.[123] It could have meant mere royalty rights or the additional residual proprietary interest, but no definitive answer was ascertainable.[124] The court found that "it is not reasonably conceivable that Plaintiffs could prove under Delaware law that the parties intended to be bound by the Serenity Agreement, in light of their execution only days or weeks later of these written agreements."[125]

The court then dismissed the plaintiff's claim for fraud on the ground that "it is not reasonably conceivable that Plaintiffs

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118. *Id.* (quoting ABRY Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032, 1057 (Del. Ch. 2006)).
119. *Id.* at *24.
120. *Id.* at *11.
121. *Id.*
122. *Id.* at *18.
123. *Id.*
124. *Id.*
125. *Id.*

could prove the existence of a critical element of the applicable tests—namely, justifiable or reasonable reliance."[126] The fraud claim was based on the defendant's alleged "state of mind" in entering into the contract. It is hard indeed to imagine how that claim could succeed, given the court's finding that "it is not reasonably conceivable that Plaintiffs could prove that the parties shared an intent to be bound by the Serenity Agreement."[127] Once again, the plaintiff's claim for fraud would have been dismissed regardless of the presence of the integration clause.

d. *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*[128]

This case was about a dispute regarding the parties' claim to a six-million-dollar earn-out payment.[129] The parole evidence rule precludes introducing evidence outside the final written agreement when interpreting the contract.[130] The court therefore barred the breach of contract claim, blaming the plaintiff for its careless drafting of the contract, which did not include a provision as important as the earn-out clause.[131] Therefore, the plaintiff only had the experts on whom it relied in drafting the agreement to blame.[132] Yet, immediately after applying the technicalities of the parole evidence rule to refuse to enforce the provision, the court used another technicality in the language of integration clause to allow the fraud claim.

In accordance with *ABRY,*[133] the court found that the language in the integration clause (which provided that the final agreement would supersede all prior agreements and any representation or warranties outside the agreement) to be standard and "insufficient to create the kind of explicit and unam-

126. *Id.* at *21.
127. *Id.* at *12.
128. C.A. No. N14C-12-112 WCC CCLD, 2015 WL 5968726 (Del. Super. Ct. Sept. 25, 2015).
129. *Id.* at *1.
130. *Id.* at *4.
131. *Id.* at *3.
132. *Id.*
133. Arby Partners V, L.P., v. F & W Acquisition LLC, 891 A.2d 1032,1059 (Del. Ch. 2006) (following Kronenberg v. Katz, 872 A.2d 568, 593 (Del. Ch.2004), which held that "[b]ecause Delaware's public policy is intolerant of fraud, the intent to preclude reliance on extra-contractual statements must emerge clearly and unambiguously from the contract.").

biguous anti-reliance provisions that would preclude justifiable reliance on extra-contractual representations."[134] Despite the court's ruling, such language would have been sufficient to preclude the fraud claim in *Great Lakes* and *Progressive*.

In *Black Horse*, however, clear anti-reliance language was missing as well. In *Black Horse*, the court gave effect to the integration clause even though, as we have seen, the fraud claim would have been dismissed regardless. To distinguish the cases, the court in *TrueBlue* held that, even though the integration clauses were similar, the direct and complete contradiction between the Acquisition Agreement and the alleged oral agreement in *Black Horse* rendered the reliance unjustifiable.[135] In *TrueBlue*, the court found it plausible that TrueBlue would have relied on, and been induced to contract by, Leeds' fraudulent promise to pay the earn-out despite an *entire agreement* clause.[136] Consequently, the alleged lie, according to the *TrueBlue* court, does not contradict the language of the stock purchase agreement so "directly and completely" as to justify dismissal of the fraud claim.[137]

Supposedly, the court was interpreting the scope of the integration clause. Hidden behind the court's skillful word play is the simple issue of whether one party justifiably relied on a lie told by the other. Unlike most opinions, the court in *TrueBlue* did recognize that justifiable reliance, or the reasonableness of one's reliance on false information, is a question of fact.[138] Nevertheless, the court reframed the question as whether there are contractual provisions in which sophisticated parties disclaim reliance on extra-contractual representations.[139]

The case law indicates that neither the technical rules regarding the language in the disclaimers nor the idea of freedom to contract around fraud means much to the courts. Whether extra-contractual fraud claims are allowed comes down to whether there is a justifiable reliance, and the justifia-

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134. TrueBlue, Inc. v. Leeds Equity Partners IV, LP, C.A. No. N14C-12-112 WCC CCLD, 2015 WL 5968726, at *8 (Del. Super. Ct. Sept. 25, 2015).

135. *Id.* at *9.

136. *Id.*

137. *Id.*

138. *Id.* at *7 (quoting Vague v. Bank One Corp., 2004 WL 1202043, at *1 (Del. May 20, 2004)).

139. *Id.* at *8.

ble reliance is a question of fact that has been determined by the court early on in pre-trial motions. When the courts are convinced that fraud was actually committed, they will allow the claim despite the technicalities on which they claim their decisions are based.

e. *Prairie Capital III, L.P. v. Double E Holding Corp.*[140]

In this case, the seller of a company represented to the buyer that the company had met its sales target for March 2012.[141] However, the sales figures had been doctored by changing the company's accounting method to include in accounts receivable the amounts due for the sale of products that were not yet shipped.[142]

Applying *ABRY*, the court dismissed the buyer's claims for fraud contained in the extra-contractual representations on the grounds that the Stock Purchase Agreement contained a disclaimer and integration clause, but allowed the buyer's claims for fraudulent misrepresentations included in the agreement.[143] Again, the court's use of *ABRY* did not matter to the result. The extra-contractual misrepresentations were replicated by those in the agreement. Extra-contractually, the seller represented that it met its sales targets for March 2012, that it "recognize[d] revenues in its accounts receivable only upon the shipment of finished products, in conformance with GAAP" and that it presented financial statements "which included 'revenues' for the sale of products that were not yet sold or shipped to customers during the time-period at issue."[144] The representations included in the agreement were that the buyer had recognized as accounts receivable the sale of goods not yet shipped. Thereby, the buyer had "deviate[d] drastically and materially from its own ordinary course of business and internal accounting and other recordkeeping policies and procedures . . . include[d] in its accounts receivable revenues that were not collected or generated in the ordinary course of business" and had "falsif[ied] its own internal ac-

140. Prairie Capital III, L.P. v. Double E Holding Corp., 132 A.3d 35 (Del. Ch. 2015).
141. *Id.* at 46.
142. *Id.* at 47.
143. *Id.* at 60–61, 66.
144. *Id.* at 49–50.

counting and other records to make it appear as though the Company's inclusion of false 'revenues' in its accounts receivable did not constitute a drastic alteration of the Company's internal practices and procedures."[145] Again, the case would have been resolved the same way even in the absence of the disclaimer and integration clause.

f. *FdG Logistics LLC v. A&R Logistics Holding, Inc.*[146]

In this 2016 decision, the court allowed an extra-contractual fraud claim because the disclaimer language was not sufficient to disclaim reliance. The language clearly stated that the target company was not making any representations or warranties outside the written contract and there was an integration clause that excluded other understandings, representations, or agreements.[147] The court held, nevertheless, that the language was insufficient because it lacked any affirmative expression by the buyer "(1) of specifically what it was relying on when it decided to enter the [m]erger [a]greement or (2) that it is was not relying on any representations made outside of the [m]erger [a]greement."[148] The disclaimer by the seller only stated "what it was and was not representing and warranting."[149] Once again, a claim for fraud in extra-contractual representations prevailed despite *ABRY*. It did so although the same language would have been sufficient to disclaim reliance in pre-*ABRY* cases.

Conclusion

The law in Delaware is supposed to be settled. A party is entitled to lie provided he does so extra-contractually and then immunizes himself against a claim of fraud by using an integration and disclaimer clause. We have seen that, despite the language of their opinions, Delaware courts have not explicitly allowed parties to contract around extra-contractual fraud. In the cases in which the courts have supposedly done so, either the party seeking to uphold the contract did not make any

145. *Id.* at 56.
146. FdG Logistics LLC v. A&R Logistics Holdings, Inc., 131 A.3d 842 (Del. Ch. 2016).
147. *Id.* at 858.
148. *Id.* at 860.
149. *Id.*

fraudulent misrepresentations, the other party did not rely on them, or, for one reason or another, the rule that the court supposedly applied made no difference to the result.

As we have seen, that is as it should be. It is strange to think that one who signs a disclaimer clause drafted by lawyers stating that he has not heard the many statements which surely have been made to him, or did not rely on them when they were made, is held to be a liar. Further, it is strange to think that such a lie constitutes the sort of fraud that would exonerate the party who made the fraudulent misrepresentations, even if the clause led that party to believe that he could commit fraud and get away with it. Finally, it is strange to think that it is efficient for the victim to suffer from harm that the perpetrator can prevent. Fortunately, as is often said, the common law is made by what judges do and not by what they say.