

## **RECENT DEVELOPMENTS IN DELAWARE COMMERCIAL LAW: IMPORTANT DECISIONS AND LEGISLATION FOR CONTRACT DRAFTING**

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Over the past few years, there have been numerous developments in Delaware commercial law as a result of court decisions and legislation. This article addresses a few of these developments that are particularly relevant to drafting and interpreting certain provisions in merger agreements, stock purchase agreements, asset purchase agreements and other transaction documents. This article is not intended to address all such recent developments, but instead discusses a subset of cases and legislation specifically involving the following topics: (i) availability of remedies for breach of an agreement to negotiate in good faith; (ii) enforceability of indemnification and release provisions in a merger agreement; (iii) legislation passed in Delaware in 2014 authorizing a statute of limitations of up to twenty years for breach of contract claims; and (iv) interpretation of contractual provisions that bar claims for misrepresentations based on statements or omissions made outside the express terms of a written agreement.

### **I. AGREEING TO NEGOTIATE IN GOOD FAITH: AN ANALYSIS OF THE *PHARMATHENE, INC. V. SIGA TECHNOLOGIES, INC.* DECISIONS**

A term sheet or similar document outlining the material terms of a transaction may include a provision that the parties agree to negotiate in good faith. Prior to the Delaware Supreme Court's (the "Court") decision in *SIGA Technologies, Inc. v. PharmAthene, Inc.*,<sup>1</sup> it was unsettled as a matter of Delaware law whether expectation damages were recoverable for breach of such a provision.<sup>2</sup> The Court in *SIGA Technologies* answered that question in the affirmative, through resolving an initial appeal by remand back to the Chancery Court and then, following a second appeal, affirming the Chancery Court's subsequent decision. The series of decisions in *SIGA Technologies* provides helpful guidance to practitioners who advise clients on whether to include agreements to negotiate in good faith in deal documents. The discussion below provides a summary of the *SIGA Technologies* decisions followed by an analysis of their implications for practitioners.

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1. *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330 (Del. 2013).
2. *See id.* at 350.

## A. SUMMARIZING THE *SIGA TECHNOLOGIES* DECISIONS

### I. Factual Background<sup>3</sup>

#### a. The License Agreement Term Sheet

The dispute in this case arose from a proposed collaboration between two biodefense companies, plaintiff, PharmAthene, Inc. (“PharmAthene”), and defendant, SIGA Technologies, Inc. (“SIGA”), to develop a drug to prevent and treat smallpox. SIGA acquired the technology for the smallpox drug, ST-246, at a time when commercial prospects were largely unknown. However, SIGA encountered financial difficulties and, therefore, was independently unable to develop ST-246. Also, SIGA lacked the administrative know-how to take ST-246 to market. SIGA approached PharmAthene, and the parties discussed collaborating to develop ST-246 and introduce it into the stream of commerce. PharmAthene initially attempted to engage SIGA in merger discussions; SIGA resisted because the parties had unsuccessfully attempted to consummate a merger years earlier due to the reservations of PharmAthene’s board members. Therefore, SIGA wanted to put in place a framework for a license agreement with PharmAthene before engaging in further merger discussions.

As the parties realized that the market potential for ST-246 could be in excess of \$1 billion, they began negotiating the terms of a license agreement in earnest. SIGA and PharmAthene negotiated through several versions of a license agreement term sheet (the “LATS”). Toward the end of negotiations of the LATS, SIGA requested two changes, which PharmAthene incorporated into the version that it presented to its board. The meeting minutes, however, did not indicate that PharmAthene’s board approved the LATS and the LATS remained unsigned. However, a representative of PharmAthene informed SIGA’s representative that the PharmAthene board had indeed approved the LATS as revised to reflect SIGA’s two requested changes. PharmAthene believed that the parties “had ‘a deal’ ... [and] ‘could now talk about a merger.’”<sup>4</sup>

A clean copy of the revised LATS was prepared, which included the parties’ collaborative objective and various terms relating to patents, licenses, royalties and fees. The LATS was not signed and included a footer on each page that stated “Non Binding Terms.” The LATS contemplated that: (i) SIGA would grant PharmAthene a “worldwide exclusive license ... to use, develop, make, have made, sell, export and import” ST-246 products;<sup>5</sup> (ii) the license would cover ST-246-related products worldwide and know-how related to ST-246; (iii) research and development committees would include both PharmAthene and SIGA representatives; and (iv) PharmAthene would fund the research and development based on a specified budget. The LATS also contained economic terms. Specifically, it provided that PharmAthene would pay SIGA: (i) a license fee in three portions (upfront, deferred and triggered); (ii) specified amounts upon achievement of development milestones; and (iii) certain royalty payments. Additionally, once net margins on sales to the United States government hit a certain mark, SIGA was entitled to fifty percent (50%) of those profits.

#### b. The Merger Discussions

After completing negotiations of the LATS, the PharmAthene board re-evaluated its position and communicated to SIGA that it wished to consider a merger. Still in perilous financial condition, however, SIGA asked PharmAthene

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3. The facts in Section I.A.1. are based on the findings in the Chancery Court’s opinion in *PharmAthene, Inc. v. SIGA Technologies, Inc.*, C.A. No. 2627-VCP, 2011 WL 4390726 (Del. Ch. Sept. 22, 2011).

4. *PharmAthene, Inc.*, 2011 WL 4390726, at \*5.

5. *Id.*

for bridge financing to enable SIGA to continue to develop ST-246 while negotiating the terms of the merger. The parties' discussions ultimately led them to pursue a merger with a definitive license agreement as a fallback should merger negotiations prove unsuccessful, and an agreement that PharmAthene would provide SIGA with the requested bridge financing. SIGA did not want to pay lawyers to draft a formal license agreement while merger talks were ongoing and suggested that PharmAthene, instead, attach the LATS to the merger agreement with the understanding that the parties would, at a minimum, enter into a license agreement in accordance with the terms of the LATS if the merger was never consummated. This proposal was acceptable to PharmAthene, and the final term sheet for the merger both referred to the LATS and included the LATS as an attached exhibit. The merger term sheet provided that "SIGA and PharmAthene will negotiate the terms of a definitive License Agreement in accordance with the terms set forth in the Term Sheet ... attached on Schedule 1 hereto."<sup>6</sup> The parties also signed a letter of intent, to which they also attached the merger term sheet and the LATS.

### **c. The Loan Agreement**

SIGA and PharmAthene then entered into a binding bridge loan agreement (the "Loan Agreement") whereby PharmAthene loaned SIGA \$3 million for expenses relating to development of ST-246 and overhead costs. The Loan Agreement provided that if the merger was terminated (by termination of the merger term sheet or the merger agreement, or if the merger agreement was not executed), "SIGA and PharmAthene will negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the License Agreement Term Sheet attached as Exhibit C ...."<sup>7</sup>

### **d. The Failed Merger**

SIGA and PharmAthene then signed a merger agreement (the "Merger Agreement"), also a binding agreement, which provided that "if the merger were terminated, the parties would negotiate a definitive license agreement in accordance with the terms of the LATS."<sup>8</sup> The Merger Agreement further provided that the parties would use "best efforts to take such actions as may be necessary or reasonably requested by the other parties hereto to carry out and consummate the transactions contemplated by this Agreement."<sup>9</sup> Internal SIGA emails suggested that SIGA would likely have a long-term relationship with PharmAthene based on the parties' talks. PharmAthene began to provide development assistance in its areas of expertise to SIGA and assisted SIGA in getting ST-246 to several important milestones, including a clinical trial paid for with proceeds from the PharmAthene loan. The National Institutes of Health then awarded \$16.5 million (the "NIH Award") to SIGA for ST-246's development.

However, approvals required from the Securities and Exchange Commission (the "SEC") relating to the merger lagged. Therefore, PharmAthene requested that SIGA extend the termination date set forth in the Merger Agreement.

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6. *Id.* at \*6.

7. *Id.* at \*7.

8. *Id.* at \*8.

9. *Id.*

Given ST-246's recent successes, however, SIGA cooled to the idea of a merger with PharmAthene, and SIGA's board terminated the merger. SIGA subsequently announced ST-246 successes, including the NIH Award and ST-246's one hundred percent (100%) success rate in preventing smallpox in primates. SIGA stock began trading over three times the price it had been trading when SIGA and PharmAthene began their discussions.

### e. The Failed License Agreement

After the Merger Agreement's termination, PharmAthene sent to SIGA a proposed license agreement that incorporated the LATS terms (the "Proposed License Agreement"). SIGA insisted on meeting with PharmAthene before revising the Proposed License Agreement. At the meeting, SIGA emphasized the title of the LATS — a "Siga/PharmAthene partnership" — and its desire to revise some economic terms in light of the clinical successes of ST-246 since the negotiation of the LATS. PharmAthene expressed its position that the parties were bound by the terms of the LATS, but was willing to listen to SIGA's proposal.

SIGA then forwarded a limited liability company agreement (the "LLC Agreement") to PharmAthene. PharmAthene viewed that document as "completely ignor[ing] the LATS,"<sup>10</sup> given the fact that both economic and noneconomic terms of the deal were revised to significantly favor SIGA. PharmAthene asserted this position to SIGA, but nonetheless expressed a willingness to consider some changes to the LATS. SIGA responded that the LATS was not binding because of the "Non Binding Terms" footer. SIGA demanded that PharmAthene "negotiate 'without preconditions' regarding the binding nature of the LATS, [or] the parties had 'nothing more to talk about.'"<sup>11</sup>

PharmAthene responded by filing suit, asserting claims for breach of contract, promissory estoppel and unjust enrichment. Specifically, PharmAthene sought: (a) specific performance of a license agreement that conformed to the terms of the LATS; (b) a declaration ordering SIGA to execute a license agreement that conformed to the terms of the LATS and prohibiting SIGA from entering into a joint venture with anyone else to develop ST-246; (c) damages for (i) breach of contract, (ii) SIGA's failure to execute a license agreement and (iii) SIGA's breach of its obligation to negotiate in good faith and to use best efforts to complete the LATS-envisioned transactions; and (d) damages on grounds of promissory estoppel and unjust enrichment.

SIGA denied liability, and particularly, that the parties reached a binding license agreement. In that regard, SIGA argued that the parties lacked intent to be bound and did not include the necessary, definitive terms of a license agreement in the LATS. SIGA further asserted that the agreement regarding the LATS was an unenforceable agreement to agree. SIGA also counterclaimed that PharmAthene breached the duty to negotiate a license agreement in good faith in accordance with the LATS, resulting in SIGA incurring expenses relating to the preparation of the LLC Agreement that PharmAthene refused to consider.

## 2. The Chancery Court's Initial Decision

The first issue the court addressed was whether the LATS constituted a binding contract. The court found that the LATS, standing alone, was not an enforceable contract because it was unclear whether the parties' intended to be

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10. *Id.* at \*10.

11. *Id.*

bound. The LATS was also attached to the letter of intent, the Loan Agreement and the Merger Agreement (each of which included a provision that the parties would negotiate a license agreement in good faith in accordance with the LATS if the merger did not close). However, due to the “murky” factual record surrounding the LATS’s “Non Binding Terms” footer and the terms of the Loan Agreement and Merger Agreement (which stated that the parties would negotiate a license agreement), the court was unconvinced that the parties “intended to be bound to a specific license agreement when they agreed to attach the LATS” to such transaction documents.<sup>12</sup> Further, the court was persuaded that the LATS did not include all essential terms of a license agreement and, for that reason, the court could not order specific performance of a license agreement based upon the LATS.

The court then addressed whether SIGA breached its obligation to “negotiate in good faith” a license agreement that contained “substantially the same economic terms” as the LATS, as expressly provided in both the Loan Agreement and the Merger Agreement.<sup>13</sup> The court found that SIGA did, in fact, breach that obligation. The court recited the “number of promising events” that occurred between the time the parties signed the Merger Agreement and its termination, which showed ST-246’s potential for large-scale success. The court also noted that after termination of the Merger Agreement, PharmAthene prepared the Proposed License Agreement, which incorporated the LATS’s terms, and that SIGA responded by proffering the LLC Agreement in which “virtually every term ... was more favorable to SIGA than the corresponding provision in the LATS”.<sup>14</sup> In its analysis, the court noted the following:

In considering the duty to negotiate in good faith, this Court has held that an attempt to condition future agreement on a previously “contested and compromised” point is “an unambiguous act of bad faith” where the other party performed in reliance on that compromise. PharmAthene has made such a showing in this case. Specifically, the evidence proves that SIGA and PharmAthene contested and compromised the primary economic terms of a license to ST-246 in the LATS, that PharmAthene acted in reliance on that compromise, and that SIGA disregarded those terms and attempted to negotiate a definitive license agreement that contained economic and other terms drastically different and significantly more favorable to SIGA than those in the LATS. Accordingly, I find that SIGA acted in bad faith in relation to its duty to negotiate the terms of a licensing agreement in accordance with the terms of the LATS.<sup>15</sup>

When the Merger Agreement was terminated, the provisions in the Loan Agreement and Merger Agreement relating to the LATS were triggered, requiring SIGA to negotiate in good faith a license agreement that contained economic terms similar to the LATS. The court found that SIGA’s proposed economic terms in the LLC Agreement were sufficiently different from the LATS evidencing that SIGA was acting in bad faith.<sup>16</sup> Further, SIGA attempted to renegotiate the terms of its deal after PharmAthene upheld its end of the bargain and undertook an economic risk by providing

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12. *Id.* at \*16.

13. *Id.* at \*19.

14. *Id.* at \*21.

15. *Id.* at \*22.

16. “The terms proposed under the Draft LLC Agreement, however, were not similar to the LATS, nor were they intended to be.” *Id.* at \*24.

SIGA a loan pursuant to the terms of the Loan Agreement. Upon consideration of all of these factors, the court found that “SIGA breached its duty to negotiate a license agreement in good faith in accordance with the terms of the LATS.”<sup>17</sup>

After finding that PharmAthene provided sufficient evidence to support the elements of promissory estoppel, but that PharmAthene’s unjust enrichment claim was subsumed within its other claims, the court turned to the question of remedies.

The court noted that remedies for breach of contract and promissory estoppel could overlap within its consideration of the appropriate remedy for SIGA’s breach of its obligation to negotiate in good faith. PharmAthene requested specific performance or expectation damages. The court stated that while specific performance likely was a permissible remedy for breach of an agreement to negotiate in good faith, it is practically difficult to enforce such an order in situations (like here) where the relationship between the parties has deteriorated. Therefore, the court determined that ordering SIGA to negotiate a license agreement in accordance with the terms of the LATS was not an appropriate remedy.<sup>18</sup>

The court then addressed the propriety of expectation damages — the standard remedy for breach of contract under Delaware law — which must be proven with reasonable certainty. The court analyzed whether damages in this case were speculative or merely lacked mathematical precision.<sup>19</sup> The court looked to “whether the contingencies remaining after the parties had agreed to agree were such that the value of the lost opportunity was fairly measurable.”<sup>20</sup> Applying the facts, the court stated that it could not award PharmAthene estimated lost profits on a license agreement with SIGA when such an agreement was never consummated and, had it been, may have resulted in no profits.<sup>21</sup> The present value of future profits PharmAthene would have received absent SIGA’s breach was “speculative and too uncertain, contingent and conjectural.”<sup>22</sup> However, the court left open the possibility that, in an appropriate case, expectation damages could provide the claimant the net present value of what the parties had (or demonstrably would have) agreed to exchange when the breach occurred.<sup>23</sup>

Having rejected specific performance and expectation damages as appropriate remedies, the court relied upon its broad discretion under the equities to fashion an appropriate remedy and analyzed an equitable payment stream. In its analysis, the court found that, but for SIGA’s bad faith, the parties likely would have entered into a license agreement that generally conformed to the LATS (albeit with somewhat varied terms), which PharmAthene indicated it was willing to consider.<sup>24</sup> The court found that the appropriate remedy would be to award PharmAthene a future stream of payments for a defined period of time after sales of ST-246 commenced, taking into account certain expenses, on economic terms

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17. *Id.* at \*26.

18. *See id.* at \*31.

19. *See id.*

20. *Id.* at \*33.

21. *See id.*

22. *Id.* at \*37.

23. *See id.* at \*33.

24. *See id.* at \*38.

that the court found aligned with the parties' negotiations.<sup>25</sup> The court also awarded PharmAthene attorneys' fees and a portion of PharmAthene's expert witness fees.<sup>26</sup>

SIGA, unsatisfied with this outcome, appealed.<sup>27</sup>

### 3. The Delaware Supreme Court's Decision On Appeal

On appeal, the Court affirmed the Chancery Court's determination that SIGA breach its contractual obligation to negotiate a license agreement in good faith and, in doing so, reaffirmed its precedent that an obligation to negotiate in good faith is enforceable.<sup>28</sup> Further, the Court decided an unsettled question of Delaware law, holding that, in the context of a preliminary agreement that includes material terms but leaves other terms open for further good faith negotiation, "[w] here a trial judge makes a factual finding, supported by the record, that the parties would have reached an agreement but for the defendant's bad faith negotiation, we hold that a trial judge may award expectation damages."<sup>29</sup> The court reversed the Chancery Court's finding that SIGA was liable under the grounds of promissory estoppel, noting that PharmAthene and SIGA's promise to negotiate in good faith was fully enforceable and, therefore, a promissory estoppel claim could not be supported.<sup>30</sup> The Court also reversed the Chancery Court's award of equitable damages and directed the Chancery Court to revisit its damages award in light of the Court's opinion.

Notably, within its consideration of the proper remedy for PharmAthene, the Court analyzed case law from other jurisdictions which recognize the existence of "Type I" and "Type II" binding preliminary agreements and the types of remedies available for their breach.<sup>31</sup> A "Type I" agreement exists when the parties have agreed on all points that require negotiation but have not yet memorialized their agreement in a formal contract; a "Type II" agreement exists when parties "agree on certain major terms, but leave other terms open for negotiation."<sup>32</sup> The Court also noted that its decision in *Titan Investment Fund II, LP v. Freedom Mortgage Corporation*<sup>33</sup> left open the question of whether expectation

25. "I find that a payment stream consistent with the above terms would compensate PharmAthene for its expectancy interest with sufficient certainty to meet the requirements for relief from a breach of contract and promissory estoppel and to prevent injustice in the circumstances of this case." *Id.* at \*42.

26. *See id.* at \*43-45.

27. SIGA's appeal went forward after the Court of Chancery denied SIGA's motion for reargument based on the courts "unprecedented remedy" of an equitable payment stream/lien. *See PharmAthene, Inc. v. SIGA Tech's, Inc.*, C.A. No. 2627-VCP, 2011 WL 6392906 (Del. Ch. Dec. 16, 2011).

28. *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 333-334, 343-344 (Del. 2013).

29. *Id.* at 334.

30. "Promissory estoppel does not apply, however, where a fully integrated, enforceable contract governs the promise at issue." *Id.* at 348.

31. *Id.* at 349.

32. *Id.* (quoting *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 548 (2d Cir.1998)).

33. 53 A.3d 984 (Del. 2012).

damages could be awarded when a trial judge finds that the parties would have reached an agreement but for the defendant's breach.<sup>34</sup> The Court's discussion of remedies culminated in its finding: "where the parties have a Type II preliminary agreement to negotiate in good faith, and the trial judge makes a factual finding, supported by the record, that the parties would have reached an agreement but for the defendant's bad faith negotiations, the plaintiff is entitled to recover contract expectation damages."<sup>35</sup>

The Chancery Court made such a factual finding in this case; however, when forming its remedy, the Chancery Court recognized that *Titan Investment* did not provide guidance regarding whether expectation damages are available in such a factual setting.<sup>36</sup> Due to the previous lack of clarity in the law, and because the Court could not ascertain to what extent the Chancery Court's damages award was based on the now-reversed finding of promissory estoppel rather than liability based on breach of contract, the Court reversed the Chancery Court's award and remanded the matter for reconsideration of damages in light of the Court's opinion.<sup>37</sup>

#### 4. The Chancery Court's Decision On Remand

On remand, PharmAthene and SIGA's contentions centered on the issue of potential remedies. PharmAthene contended that all potential remedies, even those previously analyzed and discarded by the Chancery Court, were available.<sup>38</sup> SIGA contended that, based on the Court's decision, only contractual remedies were available and PharmAthene failed to prove expectation damages with reasonable certainty.<sup>39</sup>

The crux of the dispute regarding expectation damages was the applicable legal standard for awarding such damages; specifically, "what does it mean to be able to prove damages with reasonable certainty?"<sup>40</sup> The court stated that if the fact of damages is proven, less certainty can exist regarding the proof of the amount of damages and the circumstances surrounding the breach can affect the level of proof required.<sup>41</sup> The court disagreed with SIGA, found that PharmAthene adequately proved its entitlement to expectation damages and awarded damages to PharmAthene in a lump sum representing lost profits.<sup>42</sup>

In reconsidering the testimony (including expert testimony) presented at trial, the court found that PharmAthene established by a preponderance of the evidence several key metrics which informed the Court's

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34. *SIGA Techs., Inc.*, 67 A.3d 300, 350.

35. *Id.* at 350-351.

36. *See id.* at 350.

37. *See id.* at 351-352.

38. *PharmAthene, Inc. v. SIGA Techs., Inc.*, C.A No. 2627-VCP, 2014 WL 3974167, at \*1 (Del. Ch. Aug. 8, 2014).

39. *See id.*

40. *Id.* at \*8.

41. *See id.* (citing *Cura Fin. Servs. N.V. v. Elec. Payment Exch., Inc.*, 2001 WL 1334188, at \*20 (Del. Ch. Oct. 22, 2001)).

42. *See id.*



determination of the amount of lump sum expectation damages to which PharmAthene was entitled.<sup>43</sup> The court awarded over \$113 million in damages to PharmAthene.<sup>44</sup>

SIGA, once again, appealed.

## 5. The Delaware Supreme Court's Decision On Appeal

In considering SIGA's second appeal, the majority of the Court affirmed the Chancery Court's decision that PharmAthene met its burden to prove expectation damages with reasonable certainty and the amount of its award of monetary damages.<sup>45</sup> Justice Valihura filed an opinion concurring in part and dissenting in part.<sup>46</sup>

SIGA's appeal focused on two issues: (1) whether the law of the case doctrine precluded the Chancery Court from reevaluating whether expectation damages were an appropriate remedy; and (2) if not, whether the Chancery Court should have found on remand, as it had in the first instance, that expectation damages were too speculative to issue an award.<sup>47</sup> In its decision resolving SIGA's earlier appeal, the Court: (i) "expressly instructed [the Court of Chancery] to reconsider expectation damages;"<sup>48</sup> (ii) decided a previously-undecided question of law regarding whether expectation damages were available for breach of a Type II agreement; and (iii) overturned the Chancery Court's award of damages based on a theory of promissory estoppel and directed the Chancery Court to analyze the appropriate damages available under a breach of contract theory.<sup>49</sup> Therefore, the Court resolved the issues raised in SIGA's second appeal by finding that the law of the case doctrine did not preclude the Chancery Court from reevaluating the availability of expectation damages.<sup>50</sup>

The Court also found that the Chancery Court did not abuse its discretion in determining that PharmAthene met its burden of proving expectation damages and awarding a lump-sum payment.<sup>51</sup> The Court affirmed that the Chancery Court applied the correct legal standard, that "expectation damages must be proven with reasonable certainty."<sup>52</sup> However, under Delaware law, where the fact of damages (*i.e.*, that there would have been profits from the contract) has

43. These included (i) that the parties reasonably expected ST-246 to be commercialized in the near future, (ii) that sales would begin by 2010 at the latest, (iii) the price at which ST-246 and quantity of ST-246 that would be sold to the U.S. government, (iv) that quantity of sales to other parties. *See id.* at \*10-18.

44. *See PharmAthene, Inc. v. SIGA Techs., Inc.*, C.A. No. 2627-VCP, 2015 WL 98901 (Del. Ch. Jan. 7, 2015).

45. *See Siga Techs., Inc. v. PharmAthene, Inc.*, No. 20, 2015, 2015 WL 9467037, at \*1 (Del. Dec. 23, 2015), as corrected (Dec. 28, 2015).

46. *See id.* at \*23.

47. *See id.* at \*1.

48. *Id.* at \*15.

49. *See id.*

50. *See id.*

51. *See id.* at \*15-16.

52. *Id.* at \*16.

been proven, less certainty is required regarding the amount of damages.<sup>53</sup> The Chancery Court found that PharmAthene “firmly established the fact of damages,”<sup>54</sup> with PharmAthene losing out on a very attractive economic and reputational opportunity to develop, market and sell ST-246.<sup>55</sup> The Court also found that the Chancery Court applied the “wrongdoer rule,” where doubts regarding the extent of damages are generally resolved against the breaching party, in “a limited and proper way” where SIGA’s breach resulted in the lack of more particular information regarding damages.<sup>56</sup> Further, the Court found that the Chancery Court’s reliance on post-breach evidence, when it used the LATS economic terms to decide what expectation damages were available, was also limited and proper and that the Chancery Court’s factual findings were not clearly erroneous.<sup>57</sup> Therefore, the Court affirmed the Chancery Court’s decision that SIGA was liable to PharmAthene for expectation damages of over \$113 million.<sup>58</sup>

Justice Valihura concurred with the majority’s conclusion that the trial court’s earlier decision, finding that expectation damages were too speculative to award, was not the law of the case because the Court directed the trial court to reconsider a damages award.<sup>59</sup> However, Justice Valihura emphasized that “this Court also stated clearly . . . that expectation damages must be proven with reasonable certainty. No recovery can be had for damages that are ‘uncertain, contingent, conjectural, or speculative.’”<sup>60</sup> In her dissent, Justice Valihura disagreed with several of the majority’s findings, including its stated standard of proof for awarding expectation damages.<sup>61</sup> Justice Valihura analyzed the body of New York case law on preliminary “Type I” and “Type II” agreements and stressed how those courts “disfavor[ed] awarding expectation damages in cases of a breach of a Type II preliminary agreement,”<sup>62</sup> and, instead, favored awarding reliance damages, which she considered to be appropriate in this case.<sup>63</sup>

## B. The Implications Of The *PharmAthene* Decisions

Although *PharmAthene* involved an award of expectation damages for a breach of an agreement to negotiate in good faith, the *PharmAthene* decisions suggest that whether expectation damages should be awarded for such a breach

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53. *See id.*

54. *Id.* at \*17

55. *See id.*

56. *See id.* at \*18

57. *See id.* at \*18-22

58. *See id.* at \*23

59. *See id.*

60. *Id.* (quoting *SIGA Techs., Inc.*, 67 A.3d 330, 351 n.99)

61. *See id.* at \*24.

62. *Id.* at \*26.

63. *See id.* at \*23, \*27.

depends on the facts and circumstances of a particular case. As discussed above, the particular facts and circumstances in *PharmAthene* included a provision requiring good faith negotiation in ancillary, binding agreements coupled with highly negotiated terms (including economic terms) relating to an anticipated additional agreement. Also, the found bad faith conduct by SIGA resulted in SIGA's realization of significant economic benefits.

In other contexts, such as a non-binding letter of intent, it is unclear whether *PharmAthene* would have any application. In that regard, Delaware courts applying Delaware law have generally held that a letter of intent will be nonbinding if it expressly states that it is nonbinding.<sup>64</sup> However, the landscape of Delaware law relating to agreements to negotiate in good faith has now changed as a result of the *PharmAthene* decisions. Importantly, *PharmAthene* established that expectation damages may be available for a breach of an agreement to negotiate in good faith and affirmed that, while the fact of damages in such a case must be proven with reasonable certainty, the amount of damages can be proven with less certainty.<sup>65</sup> However, we note that, as a matter of Delaware law, contractual clauses that preclude various types of damages, such as consequential damages, are typically enforceable, and no such limitation was involved in *PharmAthene*.<sup>66</sup>

Among other lessons from the *PharmAthene* decisions that may be relevant to practitioners, we specifically highlight that it seems that a court applying Delaware law in determining remedies for breach of an agreement to negotiate in good faith may look to at least two factors: (1) the factual record of the parties' negotiations; and (2) the facts and circumstances that may exist at the time of future negotiations.

## 1. Factual Record Of Negotiations

Delaware courts (including the Court of Chancery in *PharmAthene*) have held that an "attempt to condition future agreement on a previously 'contested and compromised' point is 'an unambiguous act of bad faith' where the other party performed in reliance on that compromise."<sup>67</sup> In *PharmAthene*, the parties "contested and compromised" the primary economic terms relating to the license of ST-246 by negotiating the LATS.<sup>68</sup> PharmAthene acted in reliance on the agreement to negotiate in good faith by providing operational and other assistance to SIGA in the early stages of ST-246's development.<sup>69</sup> SIGA then refused to enter into an agreement on the terms of the LATS and, instead, proposed a deal with significantly different economic terms which, under Delaware law, was held to be *de facto* bad faith.<sup>70</sup>

64. See *Global Asset Capital, LLC v. Rubicon US REIT, Inc.*, No. 5071-VCL, Tr. at 89 (Del. Ch. Nov. 16, 2009).

65. See *SIGA Techs., Inc.*, 67 A.3d at 351-51; *Siga Techs., Inc.*, 2015 WL 9467037, at \*16.

66. *eCommerce Indus., Inc. v. MWA Intelligence, Inc.*, C.A. No. CV 7471-VCP, 2013 WL 5621678, at \*45 (Del. Ch. Sept. 30, 2013); see *Eisenmann Corp. v. Gen. Motors Corp.*, 2000 WL 140781, at \*22 (Del. Super. Jan. 28, 2000) (enforcing a limitation of liability provision stating that "neither party shall be liable to the other for consequential damages whatsoever and/or lost profit"); *Yellow Book USA v. Sullivan*, 2003 WL 1848650, at \*7 (Del. Com. Pl. Feb. 20, 2003) (upholding a limitation of liability clause). Delaware courts recognize that Delaware's strong presumption in favor of freedom of contract suggests that "parties to a contract should be entitled to draft agreements so as to avoid certain of the duties and liabilities that are normally part of a contractual relationship." *eCommerce Indus., Inc.*, 2013 WL 5621678, at \*45.

67. *PharmAthene, Inc.*, 2011 WL 4390726, at \*22.

68. See *id.*

69. See *id.* at \*8, 22.

70. See *id.* at \*22.

The lesson from *PharmAthene* is clear — one cannot benefit from the present certainty of an agreement to negotiate in good faith based on previously compromised terms and then abandon those terms if the future presents a better opportunity. Therefore, practitioners should consider the factual record in negotiating and compromising on terms of a potential transaction with an understanding that a future proposal to change such terms could be evidence of bad faith negotiations.

## 2. Facts And Circumstances That May Exist At The Time Of Future Negotiations

In *PharmAthene*, SIGA abandoned its obligation to negotiate in good faith a license agreement that conformed to the terms of the LATS, at least in part, because the facts and circumstances surrounding the development of ST-246 changed.<sup>71</sup> During the course of SIGA and PharmAthene's negotiations, market conditions surrounding the development and sale of ST-246 became more favorable and it became clear that ST-246 likely would be a viable and much-sought-after drug.<sup>72</sup> The record suggests that these facts and circumstances were a major factor in SIGA's decision to all but abandon the terms of the LATS and propose an agreement that "contained economic and other terms drastically different and significantly more favorable to SIGA than those in the LATS."<sup>73</sup> These facts underscore the importance of considering during negotiations whether to include a binding agreement to negotiate in good faith and whether to leave certain terms open for future discussion.

## II. STRUCTURING RELEASE AND INDEMNIFICATION PROVISIONS IN PRIVATE COMPANY MERGERS: LESSONS FROM *CIGNA HEALTH & LIFE INSURANCE COMPANY V. AUDAX HEALTH SOLUTIONS, INC.*

### A. Summary Of The Case

*Cigna Health and Life Insurance Company v. Audax Health Solutions, Inc.* involved a private company merger wherein Optum Services, Inc. ("Optum"), an affiliate of UnitedHealth, acquired Audax Health Solutions, Inc. ("Audax") by merger via Audax Holdings, Inc. ("Holdings" and, together with Optum, "United").<sup>74</sup> While almost 70% of the Audax stockholders entitled to vote approved the merger by written consent (in the form of support agreements), Cigna Health and Life Insurance Co. ("Cigna"), one such stockholder, was not among them.<sup>75</sup>

The support agreements: (i) released any stockholder claims against United (the "Release Obligation"); (ii) bound stockholders to the terms of the merger agreement, which included indemnifying United, up to the *pro rata* amount of the merger consideration they received, for Audax's breach of certain representations and warranties (the "Indemnification Obligation"); and (iii) appointed a stockholder representative (the "Representative Obligation" and, collectively with the

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71. *See id.* at \*10.

72. *See id.* at \*8-9.

73. *Id.* at \*22.

74. *See Cigna Health & Life Ins. Co. v. Audax Health Sols., Inc.*, 107 A.3d 1082, 1084 (Del. Ch. 2014).

75. *See id.* at 1085.

Release Obligation and the Indemnification Obligation, the “Obligations”).<sup>76</sup> Cigna, as a non-consenting stockholder, did not sign a support agreement.<sup>77</sup> The merger agreement required stockholders to both surrender their shares and execute a letter of transmittal in order to receive merger consideration.<sup>78</sup> The letter of transmittal required the stockholder to agree to the Obligations.<sup>79</sup> Cigna refused to execute a letter of transmittal and, therefore, the defendants refused to pay Cigna its merger consideration.<sup>80</sup>

Cigna alleged that it should not be required to sign the letter of transmittal to obtain the merger consideration and that the Indemnification Obligation was invalid under Delaware law.<sup>81</sup> The Court of Chancery first noted that, because the Release Obligation was not mentioned in the merger agreement, it was not supported by consideration and could not be a condition to receiving the merger consideration.<sup>82</sup> With respect to the Indemnification Obligation, the court issued a narrow ruling that addressed certain indemnity obligation provisions in the merger agreement that purported to survive for an indefinite length and covered the full merger price.<sup>83</sup> The effect of such provisions, the court indicated, could render “the value of the merger consideration unknowable,” which the court viewed as contrary to section 251 of the Delaware General Corporation Law.<sup>84</sup>

The court stated, however, that its opinion did not address: (i) merger agreements in which a percentage of the consideration is placed in escrow to cover future indemnification claims; (ii) the general validity of post-closing price adjustments requiring direct repayment from the stockholders; or (iii) “whether such a price adjustment that covers all of the merger consideration may be permissible if time-limited, or whether an indefinite adjustment period as to some portion of the merger consideration would be valid.”<sup>85</sup> This decision is relevant to practitioners when considering how to structure and draft release and indemnification provisions in the context of private company mergers.

## **B. Structuring Release And Indemnification Provisions In A Private Company Merger After *Cigna***

We note that *Cigna* does not eliminate the enforceability of all release, indemnification and escrow provisions in merger agreements and related documents.<sup>86</sup> However, it does provide guidance on how practitioners should incorporate

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76. *See id.* at 1085-1086.

77. *See id.* at 1085.

78. *See id.* at 1085-86.

79. *See id.* at 1086.

80. *See id.*

81. *See id.* at 1085-1086.

82. *See id.* at 1091.

83. *See id.* at 1092-95. (“I note that Cigna’s primary challenge to the Indemnification Obligation relates to the fact that certain aspects of it are not limited in terms of (1) the amount of money that might be subject to a clawback and (2) time. This Opinion focuses only on those aspects of the Indemnification Obligation.” *Id.* at 1093).

84. *Id.* at 1099.

85. *Id.*

86. “This is a limited holding. This Opinion does not concern escrow agreements, nor does it rule on the general validity

those concepts to ensure that such provisions would be enforceable. In that regard, based on the Court of Chancery's findings in *Cigna*, it appears that there are at least four approaches that could be considered when structuring release, indemnification and escrow provisions in a private company merger: (1) the contractual approach; (2) the statutory approach; (3) a hybrid of the statutory and contractual approaches; and (4) the use of pre-existing drag-along rights, as applicable.

### 1. The Contractual Approach

In the contractual approach to releases and indemnities, the target stockholders would enter into a pre-closing joinder or support agreement with the acquiror that would contain provisions relating to release and indemnification as a condition to closing. In *Cigna*, some stockholders did enter into such support agreements, but *Cigna* did not. *Cigna* also refused to consent to the merger and sign a letter of transmittal, which included an agreement to the Obligations.<sup>87</sup> Both of these facts supported the court's finding that the Obligations were not supported by consideration where the stockholder was required to agree to the Obligations to receive merger consideration. A Delaware court would likely view a joinder or support agreement as a true contract, to which each stockholder is a consenting party, that is supported by pre-closing consideration (the elements lacking in *Cigna*) and, thus, that the provisions therein are binding and enforceable on the shareholders party to the agreement.<sup>88</sup>

### 2. The Statutory Approach

The statutory approach,<sup>89</sup> which makes use of a post-closing price adjustment compliant with section 251 of the Delaware General Corporation Law, may be used whether cash or securities are provided as consideration to target stockholders. If the consideration is paid in cash, practitioners implementing the statutory approach would either include a provision in the merger agreement or another agreement, which is binding on the target stockholders (such as a support agreement), allowing the acquiror to hold back a portion of the consideration in escrow or include a clawback provision for a formulaic purchase price adjustment to reimburse the acquiror for breaches of representations and warranties. If target

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continued from page 161

of post-closing price adjustments requiring direct repayment from the stockholders. This Opinion does not address whether such a price adjustment that covers all of the merger consideration may be permissible if time-limited, or whether an indefinite adjustment period as to some portion of the merger consideration would be valid. I hold only that the combination of these factors present in this case—indefinite length and the contingent nature of the entirety of the consideration—renders the value of the merger consideration unknowable and, therefore, violates Section 251.” *Id.*

87. *See id.* at 1085-86.

88. “While individual stockholders may contract—such as in the form of a Support Agreement—to accept the risk of having to reimburse the buyer over an indefinite period of time for breaches of the Merger Agreement’s representations and warranties, such a post-closing price adjustment cannot be foisted on non-consenting stockholders.” *Id.* at 1095.

89. The “statutory approach” is so named because practitioners would be using a method—the post-closing price adjustment—that Delaware courts have stated is permissible if the price adjustment complies with the requirements under Section 251 of the Delaware General Corporation Law. *See id.* at 1093 (stating that “[p]ost-closing price adjustments are permissible if they satisfy the requirements of DGCL § 251”); *see also id.* at 1095 (stating that “individual stockholders may contract ... to accept the risk of having to reimburse the buyer over an indefinite period of time for breaches of the Merger Agreement’s representations and warranties” so long as such an adjustment is not “foisted on non-consenting stockholders”).

stockholders receive securities as consideration, the acquiror could embed a purchase price adjustment in the security itself by deducting indemnification losses from the security's liquidation preference. In *Cigna*, certain of the representations and warranties survived closing of the merger by eighteen months, others survived for thirty-six months and still others survived indefinitely.<sup>90</sup> Notably, while *Cigna* cautions against indefinite survival of representations and warranties, it did not state that a definite survival period of thirty-six months was unreasonable or unenforceable.<sup>91</sup>

### a. The Hybrid Approach

Alternatively, a practitioner could employ a hybrid of the statutory and contractual approaches to indemnification and escrow provisions. In so doing, a certain percentage of the merger consideration will be held back in escrow for a specified number of years to satisfy indemnification claims, but such consideration will be released early to any stockholder that contractually agrees to a clawback.

## 3. The Use Of Pre-Existing Drag-Along Rights

Finally, if applicable, an acquiror could exercise an existing drag-along right (a "drag") to compel minority stockholders to vote for a merger approved by the majority and, therefore, be bound by the terms of the merger. The Court of Chancery's decision in *Halpin v. Riverstone National, Inc.* provides insight on how to successfully implement the exercise of a drag in such a situation.<sup>92</sup>

In *Halpin*, the minority common stockholders sought to exercise appraisal rights in connection with an acquisition of the company that took the form of a merger.<sup>93</sup> The minority stockholders were party to a stockholders agreement that required them to vote for a change-in-control transaction, which was approved by a majority of stockholders.<sup>94</sup> However, to trigger the drag, the company was required to give the minority stockholders notice before the vote.<sup>95</sup> The company failed to provide such notice and comply with the terms of the drag.<sup>96</sup> Further, it is worth noting that the stockholders agreement did not give the majority stockholders a proxy to vote the minority stockholders shares. The court, while not reaching the question of whether common stockholders can contractually waive appraisal rights,<sup>97</sup> ultimately held that

90. *See id.* at 1086.

91. "The longest specified time period regarding any portion of the Indemnification Obligation appears to be 36 months. This Opinion is without prejudice to any argument either Cigna or Defendants might make in future proceedings as to aspects of the Indemnification Obligation that are limited to 36 months or less." *Id.* at 1099 n.65.

92. *Halpin v. Riverstone Nat'l, Inc.*, C.A. No. 9796-VCG, 2015 WL 854724 (Del. Ch. Feb. 26, 2015).

93. *See id.* at \*1, 3.

94. *See id.* at \*1.

95. *See id.* at \*6.

96. *See id.* at \*9.

97. *See id.* at \*1.

because the company “failed to exercise its drag-along rights as provided by contract,”<sup>98</sup> the minority stockholders were not bound to vote for the merger and their appraisal rights were not lost.<sup>99</sup>

*Halpin* provides two takeaways for practitioners. First, if minority stockholders are bound by a drag-along provision, practitioners must ensure that the company carefully complies with the provisions of the drag to eliminate the potential for a court to find the drag unenforceable. Second, when drafting drag-along provisions, it may be advisable to include a proxy from the minority stockholders. The failure of the company in *Halpin* to comply with the drag’s provisions and to obtain a proxy from the minority stockholders resulted in a minority that was unbound by the terms of the majority-approved, consummated merger and free to exercise its appraisal rights.<sup>100</sup>

In conclusion, *Cigna* does not absolutely bar including a stockholder release of claims, indemnification or the use of escrow accounts in private company mergers; it is, by its own terms, “a limited holding.”<sup>101</sup> Rather, *Cigna* cautions practitioners to ensure that any agreements with stockholders relating to release and indemnification are supported by consideration and that an indemnification obligation is not unlimited in both duration and amount.<sup>102</sup> As outlined above, practitioners have alternative approaches to structuring release and indemnification provisions in private company mergers that would achieve the parties’ objectives and comply with the guidance from *Cigna*.

### III. LENGTHENING THE STATUTE OF LIMITATIONS PERIOD: THE ADOPTION AND APPLICATION OF 10 DEL.C. § 8106

#### A. The Enactment Of House Bill No. 363

Until recently, the statute of limitations of general applicability for breach of contract claims under Delaware law was three years,<sup>103</sup> breach of a contract for the sale of goods under Article 2 of the Delaware Uniform Commercial Code was four years,<sup>104</sup> and a cause of action arising from a promissory note was six years.<sup>105</sup> If contracting parties wished to avail themselves of a statute of limitations of 20 years, they were required to use a sealed contract. However, as of August 1, 2014, parties to a contract involving at least \$100,000 could select a limitations period of up to 20 years without resorting to a contract under seal. House Bill No. 363, which was codified into law at 10 DEL. C. § 8106(c) (“Section 8106(c)”), authorizes contracting parties to contract beyond the otherwise-applicable statutory limitations periods without resorting to the use of a sealed contract.<sup>106</sup> Section 8106(c) provides as follows:

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98. *Id.* at \*10.

99. *See id.* at \*9-10.

100. *See id.* at \*10.

101. *See supra* note 87.

102. *See supra* note 87.

103. 10 DEL. C. § 8106(a).

104. 6 DEL. C. § 2-725.

105. 10 DEL. C. § 8109.

106. Gen. Assemb. 147-363, at 1 (Del. 2014).



Notwithstanding anything to the contrary in this chapter (other than subsection (b) of this section) or in § 2-725 of Title 6 [of the Delaware Code], an action based on a written contract, agreement or undertaking involving at least \$100,000 may be brought within a period specified in such written contract, agreement or undertaking provided it is brought prior to the expiration of 20 years from the accruing of the cause of such action.<sup>107</sup>

The synopsis to this legislation provides examples of a “period specified” to include, without limitation: “(i) a specific period of time, (ii) a period of time defined by reference to the occurrence of some other event or action, another document or agreement or another statutory period and (iii) an indefinite period of time.”<sup>108</sup> This legislation has already been interpreted and upheld by the Court of Chancery in *Bear Stearns Mortgage Funding Trust 2006-SL1 v. EMC Mortgage LLC*, as discussed *infra*.

## B. Benefits Of Section 8106(C)

Prior to the adoption of Section 8106(c), parties negotiating a contract could only select a 20-year limitations period by entering into a contract under seal and complying with somewhat archaic procedural requirements.<sup>109</sup> Although parties may, generally, shorten a statute of limitations by contract, provisions purporting to extend a statute of limitations have been interpreted as impermissible.<sup>110</sup> In *GRT, Inc. v. Marathon GTF Technology, LTD*, the Court of Chancery noted a “freely made contractual decision among private parties to shorten, rather than lengthen, the permitted time to file a lawsuit does not violate the unambiguous negative command of 10 DEL. C. § 8106, but a decision to lengthen it does and allows access to the state’s courts for suits the legislature has declared moribund.”<sup>111</sup>

In the context of private entity acquisition agreements that include sections or provisions requiring the seller of an entity to indemnify the buyer post-closing for losses that may arise from a breach of the seller’s representations and warranties, parties may attempt to allocate risk through a combination of survival clauses, notice provisions and contractual indemnification obligations.<sup>112</sup> Such indemnification obligations could, by their terms, extend beyond closing. In the case of indemnification for breach of certain “fundamental” representations,<sup>113</sup> parties may provide in their agreement that the

107. 10 DEL. C. § 8106(c).

108. Gen. Assemb. 147-363, at 1 (Del. 2014).

109. See *id.*; see also Louis G. Hering & R. Jason Russell, *A New Del. Statute of Limitations Will Be Useful For M&A*, LAW360 (Aug. 5, 2014, 10:46 AM), <http://www.law360.com/articles/563992/a-new-del-statute-of-limitations-will-be-useful-for-m-a> (providing background information on the enactment of Section 8106(c)).

110. See *GRT, Inc. v. Marathon FTF Technology, LTD*, 2011 WL 2682898, at \*15 (Del. Ch. July 11, 2011) (addressing *in dicta* that a contractual provision providing for indefinite survival of representations and warranties contained in a securities purchase agreement may be impermissible under Delaware law).

111. *Id.* at \*15 n.80.

112. See Louis G. Hering & Melissa DiVincenzo, *Considerations for Contractual Provisions Extending Statutes of Limitations*, 69 BUS. LAW. 1007 (2014).

113. Examples of such “fundamental” representations in a typical asset purchase or merger agreement include those relating to the existence of the parties, authorization of the transactions and title to the assets. See Hering & Russell, *supra* note 111.

indemnification rights extend indefinitely. In *GRT*, the Court of Chancery interpreted such survival clauses in a securities purchase agreement as a contractual statute of limitations.<sup>114</sup> In doing so, the court enforced the survival clause to the extent it was consistent with Delaware public policy, which prohibits contractually lengthening a statute of limitations.<sup>115</sup>

As previously discussed, survival provisions are often combined with notice requirements and indemnification covenants for breaches of representations or warranties arising during a specified period. Indemnification covenants, such as environmental hazards indemnifications, can relate to claims arising from third parties, as well as between the contracting parties themselves. Under Delaware law, however, the analysis of a claim for breach of representations or warranties resulting in diminution in value of transferred assets is analyzed differently than a claim for breach giving rise to a third-party indemnification claim.<sup>116</sup> Claims for breach of representation or warranty resulting in diminution of value, generally accrue at closing.<sup>117</sup> Accordingly, the statute of limitations for such breach will begin to run upon closing, absent any basis for tolling.<sup>118</sup> Third-party indemnification claims, however, may not accrue until post-closing payment is made to the third party.<sup>119</sup>

For example, a seller represents there is no environmental contamination of a parcel of real estate. In fact, however, there is such contamination, which has already affected neighboring properties owned by third parties. In such instance, that breach of representation could give rise to a claim for diminution of property value, as well as a claim for payments made to any third party for the environmental contamination.<sup>120</sup> The claim for loss of value damages would, generally, accrue at closing.<sup>121</sup> However, the environmental indemnification claim arising from a third-party payment would, generally, accrue upon payment to the third party subsequent to closing.<sup>122</sup> Prior to the enactment of Section 8106(c), a contract or agreement that obligated a seller to “indemnify” a buyer for losses arising from a breach of representation or warranty for a period lasting longer than three years may have constituted an impermissible attempt to extend the statute of limitations. However, other third-party indemnification claims within the same agreement may have been enforceable obligations if timely brought within the statute of limitations period following the post-closing date on which the claim accrued. Of course, contracting parties must consider which State’s statute of limitations would apply to a particular claim.

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114. See *GRT*, 2011 2L 26828989, at \*12. In this case, the survival clause had the effect of shortening the applicable statute of limitations.

115. See *id.* at \*15 n.80 (noting Delaware’s policy of prohibiting contractual lengthening of the applicable statute of limitations).

116. Hering & DiVincenzo, *supra* note 115, at 2.

117. *Id.*

118. See *CertainTeed v. Celotex Corp.*, 2005 WL 217032 (Del. Ch. Jan. 24, 2005).

119. Hering & DiVincenzo, *supra* note 115, at 2.

120. *Id.*

121. *Id.*

122. *Id.*

In Delaware, the statute of limitations is generally considered a procedural issue, rather than substantive law.<sup>123</sup> Accordingly, the statute of limitations of the forum would generally govern.<sup>124</sup> It follows that Delaware courts typically apply the relevant Delaware statute of limitations,<sup>125</sup> rather than the statute of limitations under a choice-of-law provision or under the applicable law governing the contract in the absence of a choice-of-law provision.<sup>126</sup> For causes of action arising in another jurisdiction, Delaware has a “borrowing statute,”<sup>127</sup> providing that a cause of action arising outside Delaware cannot be brought in a Delaware court after the expiration of the shorter of the Delaware statutory period or the statutory period of the state (or country) where the cause of action arose.<sup>128</sup>

In essence, the borrowing statute mandates that Delaware courts apply the shorter limitations period between the Delaware statute of limitations and that of the foreign jurisdiction where the cause of action arose.<sup>129</sup> The policy behind the borrowing statute is to “protect Delaware’s courts from having to adjudicate stale out-of-state claims.”<sup>130</sup> By mandating the application of the shorter limitations period, “the General Assembly sought to prevent forum shopping to take advantage of a longer limitations period.”<sup>131</sup> Nevertheless, assuming Delaware law applies, a court would then need to determine if Section 8106(c) applies to the limitations period set forth in the contract. As discussed in the next section, unless the contract is clear, the answer to this question may be subject to court interpretation.

## **C. The Application Of Section 8106(C): *Bear Stearns***

### **1. Factual Background**

Defendant, EMC Mortgage LLC (“EMC”), was involved in the creation and sale of residential-mortgage-backed securities.<sup>132</sup> In the securitization giving rise to the case, EMC sold 8,447 mortgage loans to the plaintiff, Bear Stearns Mortgage Funding Trust 2006-SL1 (the “Trust”).<sup>133</sup> The sale was governed by a Mortgage Loan Purchase Agreement

123. See *Bear Stearns Mortgage Funding Trust 2006-SL1 v. EMC Mortgage LLC*, C.A. No. 7701-VCL, 2015 WL 139731, at \*13 (Del. Ch. Jan. 12, 2015).

124. See *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1984); *David B. Lilly Co., Inc. v. Fisher*, 799 F. Supp. 1562, 1568 (D. Del. 1992), *aff’d*, 18 F.3d 1112 (3d Cir. 1994).

125. We note that the Court of Chancery applies the doctrine of laches, the equity analog to the statute of limitations. See *Dragon Gp., L.L.C.*, 991 A.2d 1 (Del. 2009).

126. *Hering & DiVincenzo*, *supra* note 115, at 2.

127. See 10 DEL. C. § 8121.

128. *Hering & DiVincenzo*, *supra* note 115, at 2.

129. *Id.*

130. *Juran v. Bron*, 2000 WL 1521478, at \*12 (Del. Ch. Oct. 6, 2000).

131. *Id.*

132. *Bear Stearns*, 2015 WL 139731, at \*1.

133. *Id.*

(the “Purchase Agreement”).<sup>134</sup> The Trust then created and issued certificates representing beneficial interests in the cash flows generated by the mortgage loans (the “Certificates”).<sup>135</sup> The Certificates were then sold to investors, who ultimately received distributions of cash stemming from principal and interest payments on the mortgage loans.<sup>136</sup> However, by the second year following the securitization, the mortgage loans experienced high rates of defaults and delinquencies and the Trust ultimately suffered approximately \$295 million in losses, which represented nearly 60 percent of the original principal loan balance.<sup>137</sup> At the direction of certain investors, U.S. Bank, the trustee of the Trust (the “Trustee”), asked EMC for various documents and records relating to the mortgage loans.<sup>138</sup> After investigating the mortgage loans, the Trustee notified EMC that some of the mortgage loans did not comply with the representations and warranties contained in the Purchase Agreement about the characteristics and quality of the mortgage loans.<sup>139</sup> The Trustee then asked EMC to comply with a remedial procedure in the Purchase Agreement that generally required that, in the event of a breach of such a representation, EMC would cure the breach, repurchase the non-conforming loan or replace the loan with a conforming loan if the breach occurred within the first two years after the securitization.<sup>140</sup> The remedial procedure was the sole and exclusive remedy for any breaches of such representations.<sup>141</sup>

In response to the Trustee’s inquiry, EMC agreed to repurchase some loans but declined to repurchase others.<sup>142</sup> Although the Trustee made its first requests four-and-a-half years after the securitization closed, EMC did not contest the Trustee’s breach claims for violating the applicable statute of limitations.<sup>143</sup> Rather, the Purchase Agreement provided the following accrual provision:

Any cause of action against [EMC] or relating to or arising out of a breach by [EMC] of any representations and warranties made in this Section 7 shall accrue as to any Mortgage Loan upon (i) discovery of such breach by [EMC] or notice thereof by the party discovering such breach and (ii) failure by [EMC] to cure such breach, purchase such Mortgage Loan or substitute a qualifying Replacement Mortgage Loan pursuant to the terms hereof.<sup>144</sup>

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134. *Id.*

135. *Id.*

136. *Id.* at \*2.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at \*3-\*4.

141. *Id.* at \*4.

142. *Id.*

143. *Id.*

144. *Id.*

After EMC declined to repurchase the bulk of the non-conforming loans, the Trustee filed its original complaint.<sup>145</sup> Although the original complaint was filed nearly six years after the closing of the securitization, EMC and its fellow defendants did not assert a timeliness defense.<sup>146</sup> The parties exchanged information and conferred regarding the status of the loans for the next two years, after which the Trustee filed the operative complaint.<sup>147</sup>

The operative complaint alleged, *inter alia*, claims for breaches of representations and warranties within the Purchase Agreement.<sup>148</sup> EMC and its fellow defendants then moved to dismiss the complaint as untimely.<sup>149</sup> The defendants argued that two intervening New York decisions applied, one of which held that any breach of representations about underlying mortgage loans occurred at closing,<sup>150</sup> and the other held that New York law does not permit an accrual provision to lengthen a statute of limitations.<sup>151</sup> The Court of Chancery dismissed the complaint.<sup>152</sup> The court's decision relied heavily on *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC*,<sup>153</sup> which also involved claims for breaches of representations about loans underlying residential-mortgage-backed-securities.<sup>154</sup> *Central Mortgage* held that Delaware's borrowing statute required the application of Delaware's shorter three-year limitations period, rather than the six-year period available under New York law.<sup>155</sup> The court also relied on *Central Mortgage's* holding that, absent tolling, the statute of limitations for any claim for breach of representations and warranties relating to underlying loans begins to run at the time the securitization closed.<sup>156</sup>

## 2. The Motion For Reargument

The Trustee filed a motion for reargument claiming, *inter alia*, that the recently enacted Section 8106(c) should have been applied.<sup>157</sup> The court agreed that reconsideration was warranted because Section 8106(c) became effective

145. *Id.* at \*5.

146. *Id.*

147. *Id.*

148. *Id.* at \*6.

149. *Id.*

150. *Id.* (citing *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 112 AD.3d 522 (N.Y. App. Div. 2013)).

151. *Id.* (citing *Lehman XS Trust, Series 2006-4N ex rel. U.S. Bank, Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 991 F.Supp.2d 472 (S.D.N.Y. 2014)).

152. *Id.* at \*7 ("In assessing the question of timeliness, both sides agreed that the doctrine of laches provided the appropriate framework. But because equity follows the law, "a party's failure to file within the analogous period of limitations will be given great weight in deciding whether the claims are barred by laches." (citing *Dragon Gp., L.L.C.*, 991 A.2d at 9 & n.17)).

153. C.A. No. 5140-CS, 2012 WL 3201139 (Del. Ch. Aug. 7, 2012).

154. *Bear Stearns*, 2015 WL 139731, at \*7.

155. *See Cent. Mortg.*, 2012 WL 3201139, at \*16.

156. *See id.* at \*17.

157. *See id.* at \*8-\*15.

before the court's ruling to dismiss.<sup>158</sup> The court noted that although it was aware that the General Assembly had enacted Section 8106(c), it did not take into account the effective date.<sup>159</sup> Importantly, the court noted that Section 8106(c) was outcome-determinative as to the initial dismissal of the Trustee's complaint.<sup>160</sup>

Citing the General Assembly's synopsis to the legislation in bill form, the court reasoned that the legislative intent behind Section 8106(c) is to allow contracting parties to govern their contractual relationship outside of Delaware's otherwise applicable statute of limitations for certain causes of action.<sup>161</sup> The court further noted that by stating that a written agreement could refer to a "period specified," Section 8106(c) created "a flexible framework" for defining the time in which suit could be brought.<sup>162</sup> The court explained that "period specified" is not limited to a particular date or a period measured in traditional units of time (*e.g.*, months, days, years), but contemplates other measures of time, including "a period of time defined by reference to the occurrence of some other event or action, another document or agreement or another statutory period" or even "an indefinite period of time."<sup>163</sup> The court reasoned that even if a contract specified an indefinite period, however, a claim must still be brought "prior to the expiration of 20 years from the accruing of the cause of such action."<sup>164</sup>

The court then addressed EMC's argument that because the General Assembly enacted Section 8106(c) after the securitization closed, the new legislation should not apply retroactively to the Trustee's claims.<sup>165</sup> The court highlighted that a modification of a limitations period was a procedural matter affecting remedies as opposed to a change in substantive law.<sup>166</sup> On that basis, the court held that ordinary judicial presumptions against retroactivity were inapplicable to Section 8106(c) and the newly enacted legislation would apply to ongoing suits unless there was a showing of manifest injustice.<sup>167</sup> The court found no concerns of injustice that would limit the application of Section 8106(c).

Before applying Section 8106(c), the court noted preliminarily that the General Assembly has the power to modify statutes of limitations at any point in time, including the authority to revive stale claims.<sup>168</sup>

Statutes of limitation find their justification in necessity and convenience rather than in logic.... They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay.... Their shelter has never been regarded as ... a "fundamental

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158. *Id.* at \*9-\*12.

159. *Id.*

160. *See id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. 10 DEL. C. § 8106(c).

165. *Bear Stearns*, 2015 WL 139731, at \*13.

166. *Id.*

167. *Id.*

168. *Id.* (citing *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1259 (Del. 2011)).

right”.... [T]he history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.<sup>169</sup>

The court further stated that once the legislature alters a statute of limitation, that change governs not only future claims, but is also presumed to govern existing claims.<sup>170</sup> The court reasoned that because statutes of limitations are procedural limitations on remedies, statutory changes to the limitations period are given retrospective construction in the absence of injustice.<sup>171, 172</sup> However, the court ruled that in the present case, applying Section 8106(c) to the Trustee’s claims would not be unjust to the defendants.<sup>173</sup>

The court then applied Section 8106(c) to the Purchase Agreement.<sup>174</sup> The court noted that the Purchase Agreement contained provisions designed to modify the statute of limitations for purposes of claims for breaches of representations and warranties.<sup>175</sup> The court found that, under Section 8106(c), those provisions were valid and effective. The court then noted that contracting parties typically make representations in a transaction agreement so that the representations “can provide a basis to avoid closing to the extent that their truth is made a condition to closing.”<sup>176</sup> However, the court noted, that absent contract language providing to the contrary, under the same rationale that causes representations about real property to merge with a warranty deed, pre-closing representations about the acquired property interest become ineffective post-closing.<sup>177</sup> The court also noted that representations may survive closing by way of a survival clause in the transaction

169. *Id.* (quoting *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)) (alterations in original).

170. *See id.* (citing *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 529 (Del. Ch. 2005)); *see also* *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 354 (Del. 1993) (“[A] statutory amendment is remedial, and may apply retroactively, when it relates to practice, procedure or remedies and does not affect substantive or vested rights.”).

171. *Id.*; *see also* *Sokolove v. Marenberg*, 2013 WL 6920791, at \*5 (Del. Super. Dec. 5, 2013); *Waterhouse v. Hollingsworth*, 2013 WL 5803136, at \*3 (Del. Super. Oct. 10, 2013); *Brady*, 870 A.2d at 529. The court noted that the defendants’ authorities supporting the proposition that statutes do not operate retroactively were inapposite because they addressed substantive changes in law, not procedural or remedial matters.

172. *See* *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 487 (9th Cir. 1991) (explaining that a change to statute of limitations would operate retroactively absent legislative intent to the contrary or “manifest injustice”); *Brady*, 870 A.2d at 530–31 (considering whether retroactive revival of claims would be unjust).

173. *See id.* (“First, the Trustee filed its claims before the statute of limitations had expired in New York, so the claims were timely under the law of the jurisdiction governing the claims. Second, the defendants did not assert a timeliness defense until two years after the dispute arose, including after the parties had engaged in a lengthy meet-and-confer process that contemplated resolving loan disputes on their merits. During the meet-and-confer process, the defendants never argued that the Trustee’s claims were untimely. Third, the case was still pending when the General Assembly enacted Section 8106(c) and when the statute became effective, so the amendment addressed live claims. It did not have the effect of reviving extinguished claims. Finally, the relevant agreements contained an Accrual Provision that contemplated permitting claims to be asserted well after the securitization closed, and the defendants committed through the Binding Representation Provision that the Accrual Provision was effective. Under the circumstances, it is not manifestly unjust to apply Section 8106(c) to the Trust’s claims.”).

174. *Id.* at \*14-\*15.

175. *Id.*

176. *Id.* (citing *GRT*, 2011 WL 2682898, at \*13).

177. *Id.* (citing *GRT*, 2011 WL 2682898, at \*13 & n.70).

agreement.<sup>178</sup> The court explained that once a contractual agreement provides for representations to survive closing, the next issue presented is how long those representations could survive under Delaware law.<sup>179</sup> Prior to the effective date of Section 8106(c), the maximum survival period for a contractual representation or warranty was three years.<sup>180</sup> The court stated that this three-year survival period resulted from various Delaware decisions holding that parties could shorten, but not lengthen, a statute of limitations by contract.<sup>181</sup> Critically, the court noted that, pursuant to Section 8106(c), parties could now permissibly extend the statute of limitations up to a maximum of twenty years.<sup>182</sup>

Looking to the text of the Purchase Agreement, within its analysis the court found contractual support for the survival of representations and warranties by way of the following provision:<sup>183</sup>

All representations, warranties and agreements contained in this Agreement, or contained in certificates of officers of [EMC] submitted pursuant hereto, shall remain operative and in full force and effect and shall survive delivery of the Mortgage Loans to [to the Trustee]. Subsequent to the delivery of the Mortgage Loans ... each of [EMC's] representations and warranties contained herein with respect to the Mortgage Loans shall be deemed to relate to the Mortgage Loans actually delivered ... and included in the Final Mortgage Loan Schedule and any Replacement Mortgage Loan....<sup>184</sup>

Next, the court held that provisions in the Purchase Agreement, which provided for the accrual of causes of action related to the representations and warranties, effectively extended the statute of limitations up to the new Section 8106(c) maximum period of twenty years.<sup>185</sup> Specifically, the Purchase Agreement stated as follows:

[a]ny cause of action against [EMC] or relating to or arising out of a breach by [EMC] of any representations and warranties made in this Section 7 shall accrue as to any Mortgage Loan upon (i) discovery of such breach by [EMC] or notice thereof by the party discovering such breach and (ii) failure by [EMC] to cure such breach, purchase such Mortgage Loan or substitute a qualifying Replacement Mortgage Loan pursuant to the terms hereof.<sup>186</sup>

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178. *Id.* (citing *GRT*, 2011 WL 2682898, at \*14).

179. *Id.*

180. *Id.*; *see also id.* at n.17 (listing Delaware cases supporting the proposition).

181. *See, e.g.,* *Menefee, ex rel. Menefee v. State Farm Mut. Ins. Co.*, 1986 WL 630314, at \*1 (Del. Super. July 11, 1986) (“[A] contract provision for a longer period of limitation than provided by the applicable statute would be void as against public policy.”).

182. *Bear Stearns*, 2015 WL 139731, at \*14.

183. *Id.* at \*15.

184. *Id.* (quoting Section 17 of the Purchase Agreement).

185. *Id.*

186. *Id.* (quoting Section 7 of the Purchase Agreement).



Under this accrual provision, the court articulated that a cause of action would accrue only when both conditions were met, *i.e.*, after both discovery of the breach by EMC and EMC's failure to take remedial action.<sup>187</sup>

In considering the survival and accrual provisions together, the court found that the Purchase Agreement provided "a period of time defined by reference to the occurrence of some other event or action" that is a sufficient "period specified" for purposes of Section 8106(c).<sup>188</sup> The court noted that these provisions established a "period specified" in which EMC's representations remained operative following closing, and the three-year statute of limitations for the Trustee's cause of action for breach would not begin to run until after the conditions precedent were satisfied.<sup>189</sup> The court further found that, because these provisions did not specify an outside date for bringing claims, the 20-year statutory maximum provided in Section 8106(c) was applicable.<sup>190</sup>

For these reasons, the court held that any claim by the Trustee must be brought prior to the expiration of twenty years after the closing of the securitization and that the Trust brought its claims within that period of time.<sup>191</sup>

#### **D. Implications Of *Bear Stearns* And Section 8106(C)**

The adoption of Section 8106(c) furthers the general policy in Delaware to give maximum effect to the principles of freedom of contract and enforcement of agreements in accordance with their terms. In that regard, Section 8106(c) enables parties to select a statute of limitations of up to 20 years. Also, where an agreement provides that certain claims survive "indefinitely," such language would be interpreted to apply Section 8106(c)'s 20-year statute of limitations. Although *Bear Stearns* provides some guidance as to the meaning of a "period specified," and suggests that term would be interpreted broadly, and notwithstanding the examples of a "period specified" listed in the synopsis to House Bill No. 363, there are presumably existing and future agreements where it is (or will be) unclear whether a limitations period was "specified." From a drafting perspective, if parties wish to provide for a certain limitations period, it is important to expressly and clearly state such limitations period in the subject agreement so as to not leave the limitations period up to a matter of court interpretation. In addition, if parties desire to apply Section 8106(c) to their agreement, it may be advisable to expressly provide for jurisdiction in Delaware since, as discussed above, the applicable statute of limitations could be treated as a procedural matter for the forum jurisdiction, rather a substantive matter controlled by the governing law of the agreement.

### **IV. INTERPRETATION OF INTEGRATION AND CHOICE-OF-LAW CLAUSES IN MERGER AGREEMENTS: *FDG LOGISTICS LLC V. A&R LOGISTICS HOLDINGS, INC.***

Parties to transaction documents, particularly merger agreements, may negotiate the scope of their reliance on the other party's representations. In *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*,<sup>192</sup> the Court of Chancery addressed

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187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. 131 A.3d 842 (Del. Ch. 2016).

the tension between two Delaware public policy considerations: (i) holding sophisticated parties to the terms of their transactions; and (ii) protecting against the abuses of fraud.<sup>193</sup> *FdG Logistics* provides an instructive overview of anti-reliance provisions in merger agreements. This Section IV provides a summary of the *FdG Logistics* decision followed by an analysis of its implications for practitioners.

## A. Summary Of *Fdg Logistics*

### 1. Factual Background

#### a. The Merger Agreement

The dispute in this case arose from a merger agreement entered into by the plaintiff, FdG Logistics LLC (“FdG Logistics”), and A & R Merger Corp. (“Buyer”).<sup>194</sup> FdG Logistics held a majority interest in A&R Logistics Holdings, Inc. (“Old A & R”), which was the parent company of a trucking operation based out of Louisville, Kentucky.<sup>195</sup> Buyer was a subsidiary of Mason Wells, a private equity firm based out of Milwaukee, Wisconsin.<sup>196</sup> In 2012, Buyer entered into negotiations with Old A & R’s senior management team to discuss a potential sale of the company.<sup>197</sup> Over the course of negotiations, Buyer received several documents from Old A & R’s management, including a confidential information memorandum, a PowerPoint presentation and various other materials in conducting due diligence (the “Pre-Merger Materials”).<sup>198</sup> In December 2012, Buyer entered into a merger agreement (the “Merger Agreement”) with Old A & R and two of Old A& R’s major shareholders, one of which was FdG Logistics.<sup>199</sup> Under Article 5 of the Merger Agreement, Old A & R made a series of representations and warranties regarding Old A & R and its subsidiaries.<sup>200</sup> One particular provision stated that Old A & R made no representations or warranties except as set forth in Article 5 (the “Disclaimer Provision”).<sup>201</sup> The Merger Agreement also included a standard integration clause, which stated that the Merger Agreement superseded any prior understandings, agreements or representations made by or between the parties (the “Integration Clause”).<sup>202</sup>

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193. *Id.* at 859.

194. *Id.* at 849.

195. *Id.* at 847.

196. *Id.*

197. *Id.* at 848.

198. *Id.* at 848, 857.

199. *Id.* at 849.

200. *Id.*

201. *Id.* at 849, 857-58.

202. *Id.* at 858.

## b. Fdg Logistics Sues And Buyer Counterclaims

Shortly after the merger closed, Buyer discovered numerous issues at Old A & R that Buyer alleged were fraudulently concealed during negotiations.<sup>203</sup> For example, Buyer alleged that Old A & R systematically falsified corporate records, violated environmental laws, concealed massive structural impairments in its facilities and hired aliens who were not authorized to work in the United States.<sup>204</sup> In May 2014, FdG Logistics filed a complaint alleging a single breach of contract claim for failing to remit a tax refund in accordance with the terms of the Merger Agreement.<sup>205</sup> Buyer counterclaimed, asserting, among other claims,<sup>206</sup> common law fraud stemming from the aforementioned issues.<sup>207</sup> FdG Logistics subsequently moved to dismiss Buyer's counterclaim.<sup>208</sup>

## 2. The Integration Clause Analysis

In deciding FdG Logistics' motion, the court analyzed whether Buyer properly asserted a claim for common law fraud based on the Pre-Merger Materials.<sup>209</sup> The court first noted the elements of a *prima facie* claim for common law fraud under Delaware law: (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the 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.<sup>210</sup> The basis of FdG Logistics' motion was that Buyer could not establish as a matter of law that it justifiably relied on representations contained in any of the Pre-Merger Materials because of the effects of the Disclaimer Provision and the Integration Clause.<sup>211</sup>

The court noted that under Delaware law, courts "enforce[ ] clauses which identify the specific information on which a party has relied and foreclose reliance on other information."<sup>212</sup> The court referred to its decision in *Abry Partners V, L.P. v. F & W Acquisition LLC*,<sup>213</sup> where then-Vice Chancellor Strine noted Delaware's dual policies of enforcing contracts

203. *Id.* at 850.

204. *Id.* at 850-51.

205. *Id.* at 851.

206. Buyer's other claims are out of the scope of this article.

207. *FdG Logistics*, 131 A.3d at 851.

208. *Id.* at 851.

209. *Id.* at 857.

210. *Id.* (quoting *DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 958 (Del. 2005)).

211. *Id.* at 857.

212. *Id.* at 858 (citing *RAA Mgmt., LLC v. Savage Sports Hldgs., Inc.*, 45 A.3d 107, 116-17 (Del. 2012)).

213. 891 F.2d 1032 (Del. Ch. 2006).

by their terms and protecting contracting parties from fraudulent representations.<sup>214</sup> In *Abry*, the court reasoned that a contracting party cannot promise in an integration clause that it will not rely on representations outside of the agreement, then later evade its contractual obligations by claiming fraudulent inducement in reliance on representations outside of the contract.<sup>215</sup> However, the court in *Abry* also noted Delaware's "venerable public policy to guard against fraud,"<sup>216</sup> and further reasoned that it will not insulate a party from liability stemming from its counterparty's reliance on fraudulent representations made outside the four corners of an agreement, unless the counterparty makes a clear statement disclaiming such reliance.<sup>217</sup> To qualify as such a clear statement, the Court in *Abry* explained, an integration clause must contain clear anti-reliance language by which the claimant (*i.e.*, the aggrieved buyer) has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract.<sup>218</sup> In applying the *Abry* rule to the facts *sub judice*, the *FdG* court noted that neither the Disclaimer Provision nor the Integration Clause contained an affirmative expression by Buyer of what it was relying on when it decided to enter into the Merger Agreement.<sup>219</sup> Similarly, there was no affirmative expression by Buyer that it was not relying on any representations made outside of the Merger Agreement.<sup>220</sup> Rather, the court held that the Disclaimer Provision was merely a disclaimer by Old A & R of what it was (and was not) representing and warranting.<sup>221</sup> In addition, the court found that the Integration Clause simply stated that the Merger Agreement constituted the entire agreement between the parties, without an unambiguous anti-reliance statement by the Buyer.<sup>222</sup>

The court reasoned that the difference between disclaimers from the perspective of the party accused of fraud, versus the counterparty who believes it was defrauded, is critical given Delaware's strong public policy against fraud.<sup>223</sup> Given this public policy concern, the court emphasized that it will not bar a contracting party from asserting claims for fraud based on extra-contractual representations unless "*that contracting party* unambiguously disclaims reliance on such statements."<sup>224</sup> Although there are no "magic words" under Delaware law to disclaim such reliance, the disclaimer must come from the aggrieved party, or all parties to a contract, to ensure preclusion of fraud claims under the principles articulated in *Abry*.<sup>225</sup>

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214. *FdG Logistics*, 131 A.3d at 858 (citing *Abry*, 891 F.2d at 1058).

215. *Id.* (citing *Abry*, 891 F.2d at 1057).

216. *Id.* at 859.

217. *See id.* (quoting *Abry*, 891 A.2d at 1058-59).

218. *Id.* (citing *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004) (Strine, V.C.)).

219. *Id.* at 860.

220. *Id.*

221. *Id.*

222. *Id.* (emphasis in original).

223. *Id.*

224. *Id.*

225. *Id.* (citing *Prairie Capital III, L.P. v. Double E Hldg. Corp.*, 2015 WL 7461807, at \*9 (Del. Ch. Nov. 14, 2015)).

### **b. The Implications Of *Fdg Logistics***

*FdG Logistics* demonstrates the importance of precision in drafting the scope of anti-reliance provisions and integration clauses when the parties desire to limit representations and warranties to those expressly set forth within the four corners of an agreement. To the extent such provisions are unclear, a court applying Delaware law may interpret such provisions in favor of the party that relied on the alleged misrepresentations or warranties outside of the agreement. Importantly, as discussed above, *FdG Logistics* instructs that an anti-reliance provision may not be effective as intended, unless it reads as a statement by the *buyer*. Relatedly, a statement by a seller that it has not made any representations or warranties other than those set forth in the applicable agreement may not preclude a fraud claim based on other documents provided to the buyer. Thus, based on the teachings of *FdG Logistics*, to support an argument that disclaimer and integration provisions limited the representations and warranties made by a seller to those within the four corners of an agreement, such provisions should include affirmative and express statements by the buyer that it only relied on the representations and warranties in the subject agreement and did not rely on any representations or warranties made outside of that agreement.

