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Earn-Outs and Other Forms of Contingent Consideration: Recent Delaware Decisions and Drafting Takeaways

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In our July 2024 Advisory regarding *Trifecta Multimedia Holdings Inc. v. WCG Clinical Services LLC*, we noted the importance, in the earn-out context, of distinguishing between extra-contractual statements that may be treated as actionable representations and those that may be dismissed as mere "puffery," and we highlighted the significance of clear anti-reliance language in acquisition agreements. Two more recent Delaware decisions — the Court of Chancery's post-trial opinion in *Camaisa v. Pharmaceutical Research Associates, Inc.*[1] and the Delaware Supreme Court's decision in *Fortis Advisors LLC v. Johnson & Johnson*[2] — bear on those same subjects and, in the case of Fortis, make Delaware's position on anti-reliance language particularly clear. The decisions also implicate several other recurring questions in contingent consideration[3] disputes, including efforts-based covenants and the limits of the implied covenant of good faith and fair dealing. We summarize the background of these cases and our principal takeaways below.

Camaisa

Camaisa arose out of the acquisition by Pharmaceutical Research Associates, Inc. ("PRA"), a clinical research organization ("CRO") of Parallel 6, Inc. ("P6"), a cloud-based technology company, via merger, where the maximum transaction consideration consisted 80% of cash up-front and 20% of a revenue-based earn-out that ultimately was not achieved. Following the earn-out failure, the representative of the former stockholders of P6 and former CEO of P6, Allan Camaisa ("Camaisa"), filed suit on behalf of the former stockholders against PRA alleging fraud and breach claims.

Fraud

P6's fraud claim was based on an alleged representation made by a PRA senior executive during a pre-signing conference call ("the Call") that P6 would be permitted to continue to operate its business autonomously during the earn-out

[1] *Camaisa v. Pharmaceutical Research Associates, Inc.*, C.A. No. 2019-0561-NAC, 2025 WL 3049891 (Del. Ch. Oct. 28, 2025).

[2] *Johnson & Johnson v. Fortis Advisors LLC*, No. 490, 2024, 2026 WL 89452 (Del. Jan. 12, 2026).

[3] Contingent consideration in a transaction can take various forms, including earn-outs, milestones payments, contingent value rights and other variations. While the cases covered in this article specifically involved contingent consideration framed as earn-outs and milestones, the analysis and takeaways included herein would apply generally to most if not all forms of contingent consideration.

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period and continue selling to PRA's other CRO competitors. P6 attributed the failure to achieve the earn-out on the opposite actually occurring — following the transaction closing, P6 was required to operate with PRA on an integrated basis and could not sell to other CRO competitors.

Notably, the transaction agreement contained a standard integration clause providing that the agreement superseded all other understandings among the parties with respect to the subject matter, but did not contain an anti-reliance clause from P6 disclaiming reliance on extra-contractual statements made by the buyer, PRA. It also included a fraud override clause which preserved the ability of either party to make fraud claims notwithstanding any other provisions in the agreement. The court noted that the inclusion of an anti-reliance clause could have resolved the fraud claim at the pleading stage in favor of PRA.

The elements of a fraud claim in Delaware are as follows: (1) a false representation, (2) the maker of such representation's knowledge of or belief in its falsity or reckless indifference to its truth, (3) an intention to induce action based on the representation, (4) reasonable reliance by the recipient on the representation, and (5) damages. The court found that P6's fraud claim failed under both the first and fourth prongs.

With respect to the first prong, the court found that the plaintiff had failed to prove the existence of an actionable false statement made on the Call by a preponderance of the evidence. The court emphasized that there was no contemporaneous record that would conclusively establish exactly what was said, and how. In the absence of such record, the court looked extensively at the surrounding circumstantial evidence including, among other things, the statements made internally within PRA in relation to P6's prospective operations, as well as the actual behavior of the respective parties on relevant operational matters. Of particular note, the court factored in the unequivocally negative statements Camaisa made during negotiations regarding the desirability and value of an earn-out as a seller,[4] effectively indicating that in light of Camaisa's hostility to earn-outs, the court would have expected him to (at minimum) document any promise made that would make accepting an earn-out less "stupid." The court also observed that the alleged representation was inconsistent with the covenant in the transaction agreement that allowed PRA broad discretion over the post-closing operation of the P6 business,[5] and noted that the legal doctrine under Delaware caselaw[6] that a party cannot prove justifiable reliance where the contract contradicts an allegedly inducing misrepresentation provided evidence that P6 did not justifiably rely on the alleged representation in this instance.

The court went on to determine that even if plaintiff had successfully proven the existence of an actionable false statement, the fraud claim would necessarily fail because P6 could not have justifiably relied on it.

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[4] For example, Camaisa characterized earn-outs as "plain stupid" in writing to a colleague, and testifying that at his first two sold companies, "I had no earnout. I knew better. No earnout." *Camaisa*, 2025 WL 3049891, at *3, *10.

[5] The court referenced Section 2.7(h) of the transaction agreement, which provides that: "(i) Parent and its Affiliates will be entitled to effect the integration of the Surviving Corporation and its business, assets and personnel with Parent and its Affiliates, (ii) Parent and its Affiliates shall have the right to direct the overall operations and strategy of the business of the Surviving Corporation and may make all management decisions with respect to the Surviving Corporation and its business (including all decisions with respect to the research, development, marketing and sale of its products and services …)." *Id*. at *5-6.

[6] *Id*. at *14 (citing *Paperless Solutions Group, Inc. v. MIB Group, Inc*., 2025 WL 1466603, at *4 (Del. Super. May 21, 2025) at *3 (citing *Chapter 7 Trustee Constantino Flores v. Strauss Water Ltd*., 2016 WL 5243950, at *6 (Del. Ch. Sept. 22, 2016)).

Noting that the analysis of whether there is an actionable representation and reliance is "bound up together," the court indicated that the inconsistency of the alleged representation with the provision providing broad discretion to PRA for post-closing operations strongly factored against finding reliance, as did Camaisa's starkly unfavorable views regarding the value of earn-outs and his sophistication and prior experience. Similarly, certain actions of the parties that were noted to have factored against finding a false representation were also noted to affect reliance. One factor bearing only on reliance was the court's evaluation of the evidence on *how* the statements were made, and that because Camaisa viewed the statements as having been made in the manner of a salesperson taken together with P6's description of the general tenor of the call, such statements could be viewed to be "non-actionable puffery" that could not support a fraud claim, citing to *Trifecta*.

Breach

P6 also alleged that PRA breached the earn-out anti-frustration covenant in the merger agreement, which provided that PRA would "not knowingly take (or knowingly cause any of its controlled Affiliates to take) any action for the *primary purpose* of preventing the achievement of the Contingent Consideration" [emphasis added]. The court noted that proving a breach of the primary purpose standard is a heavy burden, referencing that in a prior case with substantially identical language, the court had determined that a buyer could "take actions … knew would frustrate [an earnout], so long as the action has some other primary purpose."[7] In practice, this standard affords buyers significant operational flexibility, even where their actions foreseeably impair earn-out performance.

Evaluating several alleged violations by PRA under this high standard where PRA took actions during the earn-out period that would ordinarily be expected to adversely affect P6 sales, the court determined that PRA did not violate the covenant and had legitimate business purposes for all of them. For example, during the relevant earn-out period, PRA did scale back P6's inclusion in new proposals. However, the court found that such practices were driven by poor performance of P6's products and related customer complaints, and were not primarily motivated to avoid the earn-out. The other alleged covenant breach violations failed under similar analyses.

Auris

Auris arose out of Johnson & Johnson's ("J&J") 2019 acquisition of Auris Health, Inc. ("Auris"), a medical robotics company having two product platforms at various stages of development at the time of the transaction. The transaction consideration consisted of approximately 60% of cash up-front and 40% in contingent earn-outs tied to 10 milestone events: eight based on regulatory milestones and two based on net sales. The regulatory milestones were each expressly conditioned on obtaining "510(k) premarket notification" from the Food and Drug Administration ("FDA"), a specific and relatively streamlined regulatory pathway. Following the failure of all 10 earn-out milestones, Fortis Advisors LLC ("Fortis"), acting as the representative of Auris' former stockholders, filed suit against J&J alleging fraud, breach of contract, and breach of the implied covenant of good faith and fair dealing.

Fortis prevailed in certain of its breach and fraud claims in the Chancery Court decision,

[7] *Id*. at *16, citing *Fortis Advisors LLC v. Medtronic Minimed, Inc.*, 2024 WL 3580827, at *5 (Del. Ch. July 29, 2024).

which decision was appealed by J&J and largely affirmed by the Delaware Supreme Court.

Fraud

At the Chancery Court, Fortis asserted fraud claims based on a number of statements which the Chancery Court characterized as either true or non-actionable "puffery" statements of the type that commercial parties routinely make as part of deal-making courtship, including that: (1) Auris' and J&J's competing products were "complementary"; (2) "Auris had J&J's 'resources at [its] sails' to develop [Auris' products]"; (3) "J&J would spend "multiples" of what Auris alone could devote to its technology"; (4) "[Auris' product] was a 'priority'"; (5) "J&J would "retain [Auris'] leadership / team by creating a semi-autonomous model"; (6) "J&J would be 'deferential' to [the Auris CEO];" and (7) "unlike in prior mergers, it was going to 'do Silicon Valley well … this time.'"[8] These findings were not appealed by Fortis, and were referenced without further discussion in the Supreme Court decision.

The Chancery Court did, however, find J&J liable for common law fraud with respect to one of Fortis' fraud claims. During negotiations, a senior executive of J&J told Auris that there was such a "high certainty" of achieving a proposed $100 million regulatory milestone that J&J viewed it as an "effective up front" payment. However, the court found that J&J (and specifically, J&J's deal team) was aware at the time that a patient in its clinical study of a different device needed to achieve the milestone had recently died, prompting the FDA to open a for-cause investigation that could threaten substantial delay, none of which was disclosed to Auris until after closing. The Chancery Court described this fraud theory as "being markedly different than the other [fraud claims]" but did not provide a substantive explanation as to the basis for the distinction. The Supreme Court found no clear error in the Chancery Court's finding.

Similar to *Camaisa*, the merger agreement in *Auris* contained a standard integration clause but no anti-reliance clause in favor of the buyer, J&J. In its holding, the Supreme Court reinforced that an integration clause cannot serve to waive fraud liability and that only an unmistakable anti-reliance clause would suffice. As part of its holding, the court rejected J&J's argument that a (fairly typical) exclusive remedy provision in the indemnity could suffice where an integration clause could not, reasoning that allowing for such a clause to eliminate extra-contractual fraud liability would render the one-way non-reliance provision in favor of Auris superfluous.

Breach

The merger agreement required J&J to use "commercially reasonable efforts" to achieve the various regulatory milestones. As is typical in acquisition agreements containing the type of product development earn-out milestones included in *Fortis/Auris*, "commercially reasonable efforts" was specifically defined and required J&J to expend efforts and resources "consistent with [its] usual practice … with respect to priority medical device products of similar commercial potential at a similar stage in product lifecycle." The agreement also specified 10 factors that J&J could take into account in setting its level of efforts, which included safety and efficacy issues, development and commercialization risks, competitiveness, intellectual property positioning, the likelihood or difficulty of obtaining regulatory approvals, other regulatory issues, and expected profitability. Finally, the agreement prohibited J&J from taking any action with the intention of avoiding any earn-out payment or "based

[8] *Fortis Advisors LLC v. Johnson & Johnson*, C.A. No. 2020-0881-LWW, 2024 WL 4048060 (Del. Ch. Sept. 4, 2024).

on taking into account the cost of making any" earn-out payment ("the No Intentional Avoidance Provision").

The Chancery Court found, and the Supreme Court affirmed, that J&J breached this efforts obligation. On appeal, it was uncontested that both J&J and Auris understood that J&J's orthopedic surgical robot, Velys, was the only comparable "priority" device. Most importantly for the court's analysis, it determined that J&J's commercially reasonable efforts obligations *first* were required to be consistent with J&J's usual practice for "priority" devices, and *then only within that lens* could the 10 factors be considered. Any alternate reading, the court reasoned, would render the "priority" contractual language superfluous or internally inconsistent. In effect, the court treated the "priority" designation as a binding benchmark rather than a general reference point, significantly limiting the buyer's ability to justify deviations based on broader business considerations. Accordingly, a sufficiently adverse result on any of the 10 factors would not permit J&J to override the contractually agreed priority baseline specification. Several of J&J's post-closing actions with respect to one of Auris' products were determined to have breached the merger agreement efforts obligation under this standard, including: (1) J&J holding an internal technological competition between Auris' device and another surgical robot J&J was developing in a joint venture shortly after closing to determine which product would remain operative going forward, which was inherently problematic given the possibility of an Auris' device loss and also resulted in significant resource drain and time delay; (2) the combination of the Auris product with another J&J product to prop up the J&J product's issues; (3) changes in the regulatory approval strategy taken by J&J which negatively affected timing; and (4) changes to employee incentives that were disaligned with the achievement of the earn-out milestones.[9]

The Supreme Court also referenced the Chancery Court's finding that J&J knew that certain of its post-closing actions would likely cause an earn-out failure, and on at least one occasion selected a course of action noting a "good overall value case" factoring in that contingent payments would not need to be made. The court used a similar analysis to rebut the proposition that actions taken within the discretion provided to J&J through the "ten factors" would negate breaches of No Intentional Avoidance Provision, indicating that if actions taken on the basis of any of the "ten factors" could override such provision, then the provision was superfluous.

Implied Covenant of Good Faith and Fair Dealing

After the merger closed, the FDA informed J&J that one of the relevant Auris' products would no longer be eligible for regulatory approval through the 510(k) clearance and would instead need to proceed through a different and somewhat more onerous regulatory route. This distinction was critical because the earn-out milestones were expressly conditioned on obtaining 510(k) clearance. The Chancery Court, invoking the implied covenant of good faith and fair dealing, held that J&J was required to use commercially reasonable efforts to pursue the alternate regulatory approval and to treat such pathway as the functional equivalent of the 510(k) clearance specified in the contract.

The Supreme Court reversed on this point. The court noted that the implied covenant of good

[9] The Chancery Court found that J&J satisfied the standard with respect to Auris' other product line.

faith and fair dealing is a limited gap-filler that is designed to enforce the parties' reasonable expectations in unforeseeable circumstances that they failed to address in their contract, and that it cannot be used to rewrite or renegotiate terms that have become undesirable for either party. The Supreme Court held that there was no gap to fill in this case — the merger agreement repeatedly and expressly conditioned each regulatory milestone specifically (and only) on 510(k) premarket notification. Especially in light of the sophistication of the parties and the regulated industry, the risk that the FDA might require a different pathway was foreseeable. Other provisions of the merger agreement acknowledged the possibility of FDA developments affecting the route, timing, and cost of approval, further confirming that this category of risk was considered by the parties. While declining to apply the implied covenant, the Supreme Court's reversal did not disturb J&J's obligations with respect to the remaining milestones — because an alternative regulatory path could serve as the predicate for future 510(k) submissions, J&J remained bound by its express efforts obligations to pursue 510(k) clearance for the other, later, milestones. Put another way, the Supreme Court determined that implicit in the later milestones was an obligation to obtain *any* regulatory approval that would allow them to be achieved, irrespective of what the initial milestone did or did not contemplate.

Key Takeaways

- These cases reinforce a critical takeaway from our *Trifecta* article that buyers should include explicit anti-reliance provisions in addition to standard integration clauses. The Delaware Supreme Court has eliminated any ambiguity as to whether any other clause in the agreement will suffice for the same purpose, and only a clear statement will do.
- There is little clear guidance as to what constitutes "puffery" versus an actionable representation, creating uncertainty for parties engaging in pre-signing discussions. While we have not seen a court frame the analysis in these terms, it essentially appears to be an "I know it when I see it" test. Given that it is impractical and unlikely for buyers and sellers to *entirely avoid* extra-contractual discussions in relation to their expectations for post-closing operations, beyond a general word of caution to buyers that their reassurances could become actionable representations under the "right" circumstances, the lack of predictability on this point reinforces our first takeaway. Having a clear and unequivocal anti-reliance clause should provide vital protection against later claims arising from such statements.
  - This also reinforces that, for sellers, statements made during negotiations that are central to their decision to proceed are best protected by being expressly incorporated into the purchase agreement.
- Buyers should be cautious in relying on broad statements of operational discretion providing an effective commercial override of the primary obligation to use their efforts to achieve a particular result. In *Fortis/Auris*, it is unclear to what extent the "priority" product designation was the main reason why the override was disallowed, or whether it would have also been disallowed under a general efforts standard for a regular (non-priority) product. The same reasoning used by the Supreme Court in

seeking to avoid superfluous provisions could have also been applied to a non-priority efforts level.

- Negotiators for buyers should be cautious about agreeing to a particular reference band of efforts (*e.g.*, such as "priority"), and understand that the contractual term could be interpreted under a standard of strict literalism. In evaluating particular efforts levels, the court in *Fortis/Auris* gave significant weight to the "priority" product designation and there was only one other example reference point to compare that standard against. An equally concerning scenario would be where the buyer agreed to treat the product as a "priority" or "highest priority" *without* any further definition, and a court could frame the analysis in any way that *it* would hypothetically view such a designation.[10] It would be risky to assume that a term included as a reference point in the agreement would be considered a form of industry "puffery" by a court.
- The "primary purpose" standard in anti-frustration covenants sets a high bar for sellers and affords buyers substantial flexibility, even where their actions foreseeably impair the earn-out. Given the impact of the provision, counsel to selling parties would be well served to specifically highlight this clause to their client, and ideally provide an example fact pattern or two, so they have a clear understanding of the clause's implications before agreeing to it.
- The implied covenant of good faith and fair dealing will not be used to reallocate risks that were foreseeable at the time of contracting, and will not be used to "paint over contractual provisions that one side later regrets."

[10] A court may be presented with industry-based information for the term, but in the absence of clear facts indicating that there was an industry standard for the term, the court would have enormous interpretive discretion on the point.

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