

Negotiating Fraud Carve-outs

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Varieties of Fraud

Will an honest client save the day?

- Most extra-contractual M&A fraud claims are by buyers against sellers, but sellers also bring fraud claims against buyers
- Fraud claims come in a variety of shapes and sizes
- Extra-contractual fraud claims are not limited to claims that the defendant deliberately spoke a falsehood
- Not all fraud claims require knowing communication of a lie
 - “fraud claims can be premised on reckless, not just intentional, misrepresentations; and even completely innocent misrepresentations can constitute a type of fraud (so-called ‘equitable fraud’)”
- Promissory fraud
 - oral communication of a promise to do something in the future that the promisor is alleged not to have ever intended to *actually* perform

Equitable Fraud is a Real Thing

Board of Managers of the Soundings Condominium v. Foerster, 2016 WL 698715 (N.Y.A.D. Feb. 23, 2016):

Fraud sufficient to support ... rescission requires only a misrepresentation that induces a party to enter into a contract resulting in some detriment, and “unlike a cause of action in damages on the same ground, proof of scienter and pecuniary loss is not needed” (*D’Angelo v. Bob Hastings Oldsmobile, Inc.*, 89 A.D.2d 785, 785 [4th Dept 1982], *affd* 59 N.Y.2d 773 [1983]). Even an innocent misrepresentation will support rescission (*see Seneca Wire & Mfg. Co. v. Leach & Co.*, 247 N.Y. 1, 8 [1928]).

See Glenn West, *Private Equity Sellers Must View “Fraud Carve-outs” with a Gimlet-Eye*, Weil Insights, Weil’s Global Private Equity Watch, March 16, 2016, <http://goo.gl/uO6lfQ>

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