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Boilerplate fabric lessons

By Neill May

Corporate lawyers take it for granted that most commercial agreements start with definitions. As efficient as that tool may be, we don't use it in conversation. For example, for the purposes of this discussion, "I" or "me" are references to the party with the accurate and engaging insights, and "you" or "the person listening with eyes closed" refer to the party expected to vigorously agree without interrupting.

Most agreements, of course, also typically feature relatively standard provisions at the end, commonly described as "boilerplate." To continue the analogy, my notional conversational partner might insist that for the purposes of our conversation "time is of the essence." In the earlier stages of my career, I considered heavy markups of boilerplate provisions to be a signal that opposing counsel had too much free time or too little insight into the core operative provisions. For these purposes, I will refer to myself as the party that was "flat wrong." Recent Ontario and Delaware court decisions concerning "entire agreement" and "non-reliance" provisions demonstrate that those clauses are often critically important.

Most purchase agreements have an "integration" or "entire agreement" provision, which states that the written agreement represents the "entire agreement" between the parties. That provision often includes or is accompanied by a "non-reliance clause," where the parties explicitly agree to the seller having made no representations other than those included in the agreement. As the Ontario Court of Appeal recently stated in *Soboczynski v. Beauchamp*, "an entire agreement clause is generally intended to lift and distill the parties' bargain from the muck of negotiations," crystallizing and encapsulating the parties' intended bargain.

Imagine I'm buying your custom tailoring business (this is a clue that the example is fictional — actually I care deeply about my wardrobe, just not enough to buy or wear passable clothing). All I'm asking from you is a promise that the things you've told me about your business are true and that, if not, you will compensate me. Now imagine a year has passed after closing and I discover that, although you'd specifically confirmed to me that the suits were entirely cashmere, in fact 10 per cent of the material is standard alpaca hair from your neighbour's exotic animal farm and petting zoo. I've been sued, the word is out such that my custom suits are selling at a severe discount, and lately I seem to have developed some kind of rash. But though our agreement includes a representation as to the quality of the suits and materials, it does not include the completely cashmere commitment.

In *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, the buyer of a business made fraud claims against the seller relating to alleged misrepresentations made to the buyer before it entered into the purchase agreement, but which were not included in the agreement. The Delaware court found that a buyer must explicitly disclaim reliance on representations made outside of the agreement for the non-reliance clause to be effective.

In other words, a standard, boilerplate non-reliance clause, in which the seller simply states it is not making any representations beyond those in the agreement, will not be enough. The anti-reliance clause doesn't need "magic" language, but it has to at least be drafted as an affirmative statement by the buyer. In other words, a disclaimer by the selling party that it's not making additional representations is not effective to protect the seller; only a positive expression by the buyer would suffice.

FdG builds on a line of prior cases in which the Delaware court, careful to balance the countervailing public policies of enforcing contractual bargains and preventing fraud, either allowed or prevented claims based on representations beyond those contained in a purchase agreement depending on how the non-reliance provision was drafted. In Canada, non-reliance provisions haven't been considered in this context. However, in *Soboczynski*, the court examined an integration clause and found it is enforceable, but operates only retrospectively, not prospectively. In other words, the integration clause you and I agreed to wouldn't prevent me from relying on your post-signing statement that "it's all cashmere."

These cases (bearing in mind that the *FdG* line of cases are not made in Canada) draw fairly fine lines. In the example given, though I belatedly cotton to the fact that you may have pulled the wool over my eyes by keeping the alpaca under your hat, I may be able to make a claim if the non-reliance clause is not robustly drafted or the cashmere representation was made after signing the agreement. In those circumstances, my pursuit of a claim, it would appear, would not unduly tear the fabric of our agreement.

Which takes me back to lessons learned about boilerplate. In the early stages of my career, then a young, painfully arrogant lawyer (as distinct from the old, painfully arrogant lawyer I've become), spotting a heavy markup of an agreement's boilerplate and sensing inexperience on the part of opposing counsel, I condescendingly asked what year he had been called to the bar. His extraordinarily effective response will always stay with me: "When were you born?" **CL**

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