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Exchange Act Does Not Prohibit Big Boy Letters

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Companies weighing the value of no-reliance clauses in agreements have good reason to include them, as federal courts continue to enforce disclaimers of reliance in contracts between sophisticated parties, including in so-called "Big Boy" letters.[1] A survey of the applicable law confirms that Section 29(a) of the Securities and Exchange Act ("Exchange Act"), which prohibits anticipatory waivers of compliance with applicable securities law, does not prohibit the use of Big Boy letters or other iterations of specific nonreliance provisions in agreements.

Where parties have entered into Big Boy letters or other agreements in which a party has disclaimed reliance, defendants in subsequent litigation counter any allegations of fraud by moving to dismiss based on plaintiff's inability to plead reasonable reliance in the face of such agreements. In lawsuits alleging violations of Section 10(b) of the Exchange Act or Rule 10b-5 promulgated thereunder, plaintiffs sometimes oppose a motion to dismiss by arguing that no-reliance clauses are barred by Section 29(a) of the Exchange Act. Section 29(a) provides as follows: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of [the Exchange Act] or of any rule or regulation thereunder ... shall be void." 15 U.S.C. § 78cc(a).

Pursuant to Section 29(a), courts typically invalidate clauses that expressly include an advance release that waives federal securities law claims. For instance, a federal district court in California held that a "mutual release from all claims and liabilities" in a purchase agreement was void under Section 29(a) to the extent that it purported to waive plaintiff's claims under the Exchange Act. Wallack v. Idexx Labs. Inc. (S.D. Cal. Apr. 11, 2013). Likewise, the Second Circuit refused to recognize a release clause in a stock purchase agreement in which plaintiff "waive[d] and discharge[d] any claims it may have" against defendant, insofar as that clause applied to plaintiff's Rule 10b-5 claim. Vacold LLC v. Cerami, 545 F.3d 114, 122 (2d Cir. 2008).

However, Section 29(a) will rarely bar enforcement of no-reliance clauses that do not include express waivers of liability. The United States Supreme Court laid the groundwork for this narrow interpretation of Section 29(a) in Shearson v. McMahon, holding that Section 29(a) "only prohibits waiver of the substantive obligations imposed by the Exchange Act," i.e., waivers that would "weaken [plaintiffs']

ability to recover under the [Exchange] Act." Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 228, 230 (1987).

The Second Circuit has since held that even though a no-reliance provision may weaken a plaintiff's ability to recover under Section 10(b), it does not constitute a waiver of a party's compliance with the Exchange Act — and thus will not be void under Section 29(a) — where sophisticated parties are negotiating at arm's length. Harsco Corp. v. Segui, 91 F.3d 337, 344 (2d Cir. 1996); see also Rissman v. Rissman, 213 F.3d 381, 384 (7th Cir. 2000) (written anti-reliance clause precludes claims of securities fraud by prior representation); Petro-Ventures Inc. v. Takessian, 967 F.2d 1337, 1342 (9th Cir. 1992) (release in settlement agreement does not violate Section 29(a) when negotiated by parties of equal bargaining power); Dresner v. Utility.com Inc., 371 F. Supp. 2d 476, 492 (S.D.N.Y. 2005) ("a limited waiver of reliance on certain representations" in an agreement between sophisticated parties is enforceable and precludes Section 10(b) claims as they relate to such representations).

Our research has not identified any case in which a court has found a Big Boy letter void under Section 29(a). Instead, following Shearson and Petro-Ventures, one federal court sitting in New York has held that an agreement that "clearly notified plaintiff that defendants were not disclosing certain information" akin to a Big Boy letter was not contrary to Section 29(a). See Harborview Master Fund LP v. Lightpath Techs. Inc., 601 F. Supp. 2d 537, 546-48 (S.D.N.Y. 2009) (claim barred in private placement transaction where plaintiff acknowledged it was not provided access to material nonpublic information, and disclaimed reliance on all representations not made in the agreement).[2]

Some courts assessing the impact of Section 29(a) on no-reliance clauses have held that the clause may not be enforced to bar a Section 10(b) claim as a matter of law (e.g., at the motion to dismiss stage), but the clause may be considered as factual evidence of nonreliance. See AES Corp. v. Dow Chem. Co., 325 F.3d 174, 180 (3d Cir. 2003) (finding no-reliance clause unenforceable as a matter of law, though still considering it as evidence of nonreliance); Rogen v. Ilikon Corp., 361 F.2d 260, 268 (1st Cir. 1966) (finding clause unenforceable under Section 29(a), but only insofar as it would "foreclose our finding nonreliance as a matter of law"). Importantly, the court in AES Corp. noted that declining to enforce such a clause does not render it useless to the defendant if the claim survives the pleadings, observing that a no-reliance clause "may establish an absence of reliance and, when unrebutted, may even provide a basis for summary judgment in the defendant's favor." AES Corp., 325 F.3d at 180.[3]

The usual requirements for enforcing a disclaimer of reliance apply, including that (a) the clause(s) apply to a specific and not a general or boilerplate statement and (b) the clauses are "the product of negotiations between 'sophisticated business entities' of roughly equal bargaining power." Valentini v. Citigroup Inc., 837 F. Supp. 2d 304, 317-18 (S.D.N.Y. 2011) (denying motion to dismiss and declining to enforce no-reliance clause, where language of clause was general and parties had disparate bargaining power).

As in Harsco and Harborview, therefore, properly drafted no-reliance clauses may be enforced so as to bar a plaintiff's Section 10(b) claim as a matter of law. And even if a court were to invalidate a Big Boy letter as violative of Section 29(a), such a ruling would likely not keep the court from considering it as evidence of nonreliance on a summary judgment motion.

In sum, most courts recognize that a contracting party's statements that it is not relying on its counterparty and is otherwise a "big boy," is not a statement by the party waiving its counterparty's obligations under the Exchange Act in violation of Section 29(a). Rather, carefully drafted agreements will generally be enforced to bar a claim of fraud at the motion to dismiss stage (as a matter of law)

where the alleged misrepresentation or omission falls within the specific scope of the facts disclaimed. Even where courts have not enforced the no-reliance clause at the motion to dismiss stage, such clauses provide powerful written evidence of the maker's lack of reasonable reliance.

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[1] For a discussion of a recent decision of the Sixth Circuit, see our colleagues' Alert: Sixth Circuit Affirms Dismissal of Claims Based on "Big Boy" Letter and Evidentiary Failures, Oct. 24, 2013 (available at http://www.bingham.com/Alerts/2013/10/Sixth-Circuit-Affirms-Dismissal-of-Claims-Based-On-Big-Boy-Letter).

[2] The court found that plaintiff had agreed that "it was relying solely on the information contained in the [purchase agreement] itself" by agreeing to a standard integration clause that stated the "[t]ransaction documents ... contain the entire understanding of the parties with respect to the subject matter hereof and supersede all prior agreements and understandings, oral and written, with respect to such matters." Id., 601 F. Supp. 2d at 541, 546.

[3] The court found that the clause could be used to establish the facts of non-reliance despite a vigorous dissent asserting that the use of the word "void" in Section 29(a) was meant to render such clauses of no effect.
