Litigating and Drafting Contractual Disclaimers Of Reliance in a Post-Financial Crisis World

BY BRIAN S. FRASER, PAUL B. HASKEL AND TAMALA E. NEWBOLD

In the massive market in unregulated (or at least less-regulated) private financial transactions between and among sophisticated institutions, such as transactions in bank debt, bankruptcy claims and structured products, in which disputes are resolved by reference to old-fashioned common-law rules, how do the courts balance the rights of sophisticated parties to transact without fear of a lawsuit from a counterparty with buyer’s remorse against a public policy that refuses to reward intentional fraud? That battle, especially in the years since the financial crisis, has played itself out in the use and enforceability of contractual disclaimers of reliance ("CDRs"), otherwise known as "Big Boy" provisions.

Courts in New York and elsewhere will, as a general rule, enforce contractual disclaimers of reliance in which each party specifically disclaims reliance on the other’s disclosures or omissions, when the parties to the contract are sophisticated and the CDR is specific as to the information that is not to be relied upon.1 The rule in New York has been expressed this way:

"Where the parties to an agreement have expressly allocated risks, the judiciary shall not intrude into their contractual relationship; a party cannot complain of having been misled if the substance of the disclaimer provisions tracks the substance of the alleged misrepresentations, notwithstanding semantical discrepancies... It is not the role of the courts to relieve sophisticated parties from detailed, bargained-for contractual provisions that allocate risks between them, and to provide extra-contractual rights or obligations for one side or the other."


The financial crisis spawned a significant number of cases involving Big Boy provisions, many arising from transactions in mortgage-backed securities and other complex structured products. In some, but by no means all, of those cases, courts have denied motions to dismiss fraud claims despite a sophisticated plaintiff’s agreement to a Big Boy provision. Below, we describe the recent trend in the law on Big Boys and provide some guidance derived from the cases for drafting enforceable CDRs.

I. Litigating Contractual Disclaimers of Reliance

While contractual disclaimers of reliance generally are enforceable between sophisticated parties, especially in New York, the “peculiar knowledge” exception has been applied in some recent cases to prevent dismissal of fraud complaints at an early stage of the litigation. Without early enforcement of the bargained-for disclaimer, the value of a CDR diminishes given the expense of litigation.

A. General Rule Regarding Enforceability Of Contractual Disclaimers

To succeed under New York law on common law fraud, the plaintiff must plead and prove:

1. A material false representation, or material omission with a duty to disclose;\(^2\)
2. an intent to defraud;
3. reasonable reliance on the misrepresentation or omission; and
4. economic loss arising as a result of reliance.

Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 178 (2011). A well drafted, specific and detailed CDR that has been negotiated at arms-length between sophisticated parties can destroy subsequent fraud claims in one of two ways: absolving the defendant of any duty to disclose or preventing the plaintiff from demonstrating its reasonable reliance.

1. Modifying or Negating the Duty to Disclose

A sophisticated party that has contractually waived the duty to disclose material information cannot then claim fraudulent concealment based on the counterparty’s failure to make such disclosure. Under this rule, there can be no concealment—and thus no fraud—if the plaintiff “knew what it didn’t know” when he entered the transaction. Harborview Master Fund, LP v. Lightpath Technol., Inc., 601 F. Supp. 2d 537, 546 (S.D.N.Y. 2009). Recent decisions continue to apply this general rule, which remains the lynchpin of the enforceability of Big Boy provisions.

For instance, in Pharos Capital Partners, L.P. v. Deloitte & Touch, L.L.P., plaintiff’s counsel initially objected to a provision in a draft Letter Agreement that limited defendant’s disclosure obligations. However, in

\(^2\) See Fraser & Newbold, Who’s a Big Boy II: Superior Knowledge and the Duty to Disclose (2009), available at http://www.rkollp.com/assets/pdf/publication_86.pdf. A duty to disclose can arise between parties to an arm’s length business transaction in one of three situations: (1) where a party’s partial or ambiguous disclosures render representations misleading without full disclosure; (2) where the parties have a fiduciary or confidential relationship; or (3) where one party’s superior knowledge of material facts renders a transaction without disclosure “inherently unfair.” See Jana L. v. West 129th St. Realty, 22 A.D.3d 274, 802 N.Y.S.3d 132, 134 (1st Dep’t 2009).

the final, executed version of the Letter Agreement, the plaintiff represented and acknowledged that (a) defend-ant was not a fiduciary of plaintiff and (b) defendant may have acquired or may acquire information “which we agree need not be provided to us.” 905 F. Supp. 814, 820-21 (S.D. Ohio 2012) (applying Ohio and New York law). The court held that the Letter Agreement’s “unmistakable language” defeated any argument plaintiff made about defendant’s duty to disclose and “render[ed] unreasonable any expectation [plaintiff] may have had about informational parity.” Id. at 825. Likewise, the recent Southern District of New York decision in Harboview Master Fundv. Lightpath Technolo-gies held that plaintiff could not recover under federal law for “omissions to which it contractually agreed,” where the parties’ purchase agreement provided that defendant had no duty to disclose MNPI. 601 F. Supp. 2d at 547-48.

2. Negating Reasonable Reliance

Most recent cases that involve CDRs allege a mix of fraudulent misrepresentations and fraudulent concealment. Of those cases, many allege concealment of defendant’s own bad acts or illicit motivations. While these cases also implicate the duty to disclose, the “reasonable reliance” element of the fraud claim figures much more prominently. As such, here we examine the so-called “disclaimer bar” rule, which defeats a fraud claim by preventing a plaintiff from establishing reasonable reliance, and we also discuss an exception which can protract litigation over CDRs.

The disclaimer bar rule provides that where a

“plaintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded[,] [plaintiff’s] specific disclaimer destroys the allegations in plaintiff’s complaint that the agreement was executed in reliance upon these contrary . . . representations”.

Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 320-21 (1959); see Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc., 115 A.D.3d 128, 139, 980 N.Y.S.2d 21, 30 (1st Dep’t 2014) (referring to the Danann Realty rule as the “disclaimer bar” rule). Any contrary result would “in effect condone [plaintiff’s] own fraud in deliberately misrepresenting [its] true intention” when it agreed to the CDR in its transaction documents. HSH Nordbank, AG v. UBS AG, 95 A.D.3d 185, 201 (1st Dep’t 2012) (citing Danann Realty, 5 N.Y.2d at 323).

A number of recent cases have applied the disclaimer bar rule to dismiss fraud claims early in the proceedings on a pre-answer motion to dismiss. For example, in ACA Fin. Guar. Corp. v. Goldman Sachs & Co., the First Department held that plaintiff, “a highly sophisticated commercial entity,” could not base fraud claims on defendant’s alleged misrepresentations regarding a nonparty hedge fund’s position in a CDO transaction because plaintiff’s alleged reliance on such misrepresentations “would have been contrary to its acknowled-
edgment . . . that, in entering into the transaction, it was not relying . . . upon any advice, counsel or representations . . . of [defendant]” other than the representations expressly set forth in the parties’ written agreement. 106 A.D.3d 494, 497 (1st Dep’t 2013).3 Similarly, in MBIA Ins. Corp. v. Merrill Lynch, the First Department barred a fraud claim where specific disclaimers provided that plaintiff “would not rely on [defendant’s] advice,” had the “capacity to evaluate transactions” and “understood and accepted” the risks of the transaction. 81 A.D.3d 419 (1st Dep’t 2011). Absent a plaintiff’s credible allegation that the undisclosed information was “peculiarly” in the defendant’s possession, early dismissal is generally the result.

B. The ‘Peculiar Knowledge’ Exception

In some recent cases, plaintiffs who were bound by CDRs found a powerful antidote: the “peculiar knowledge” exception. The “peculiar knowledge” exception holds that “even where the parties have executed a specific disclaimer of reliance on a seller’s representations, a purchaser may not be precluded from claiming reliance on any . . . misrepresentations if the facts allegedly misrepresented are peculiarly within the seller’s knowledge . . . .” Tahini Inv., Ltd. v. Bobrowsky, 99 A.D.2d 489, 470 N.Y.S.2d 431, 433 (2d Dep’t 1984); Basis Yield Alpha v. Goldman Sachs, 118 A.D.3d at 139 (citing Dannann Realty, 5 N.Y.2d at 323). “Peculiar knowledge” bears on the reasonableness of a plaintiff’s reliance on the alleged fraudulent or incomplete information that it received from defendant.

Sophisticated Investors Beware

New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations made in connection with business transactions by conducting an independent appraisal of the details and inherent risks of the transaction, or by negotiating and obtaining prophylactic contractual representations or warranties. VisionChina Media Inc. v. Shareholder Repr. Servs., LLC, 109 A.D.3d 49, 57-58 (1st Dep’t 2013). Plaintiff’s reliance, however, is deemed reasonable if the alleged misrepresentations or omissions are “peculiarly within the defendant’s knowledge.” DDJ Mgmt., LLC v. Rhone Group, L.L.C., 15 N.Y.3d 147, 154 (2010). In those circumstances, plaintiff may rely “without prosecuting an investigation, as he has no independent means of ascertaining the truth.”

Unicredit Italiano SPA v. JPMorgan Chase Bank, 288 F. Supp. 2d 485, 499 (S.D.N.Y. 2003). Once adequately pleaded, the peculiar knowledge exception renders a plaintiff’s reliance presumptively reasonable for purposes of surviving a motion to dismiss, thereby preventing early dismissal. P.T. Bank Central Asia v. ABN AMRO Bank N.V., 301 A.D.3d 373, 378 (1st Dep’t 2003) (denying motion to dismiss because “it is inappropriate to determine [issues regarding defendant’s alleged peculiar knowledge] as a matter of law based solely on the allegations in plaintiff’s complaint”).

A plaintiff can show reasonable reliance based on defendant’s peculiar knowledge where

(a) the facts allegedly misrepresented were within the exclusive knowledge of the defendant and plaintiff had no independent means of ascertaining the truth, OR

(b) the facts theoretically might have been discovered, but only through extraordinary effort or great difficulty. Unicredit, 288 F. Supp. 2d at 500.

The second of these has been applied in some recent cases that may suggest a loosening of the requirement that the information be in the “exclusive” control of the defendant.

a. Exclusive “Peculiar Knowledge”

Several recent cases have addressed the peculiar knowledge exception in a manner that is consistent with a line of peculiar knowledge cases in which the defendant allegedly failed to disclose material information, known and knowable only to defendant, that renders false the plaintiff’s basic assumptions about the transaction.4 In a number of these cases it is alleged that the defendant fraudulently concealed or intentionally misrepresented material information about the defendant’s own fraudulent conduct that plaintiff could not have discovered through independent appraisal. Courts assume that information about the defendant’s own “bad acts” is not available to the plaintiff: “[B]y its nature, this information is of the type of information that was in defendant’s possession, not at plaintiff’s fingertips, and which, one can envision, defendants would have desired to keep close to the chest.”

b. “Only Found Through Great Difficulty” Peculiar Knowledge

In a few recent cases the courts appear to have relaxed the level of exclusivity necessary to invoke the peculiar knowledge exception. The traditional formulation of the exception was articulated by the New York Court of Appeals as follows:

OR

3 On May 1, 2014, nearly one year after issuing its decision, the First Department granted plaintiff’s leave to appeal to the New York Court of Appeals. ACA Fin. Guar. v. Goldman, Index No. 650027/11 (1st Dep’t May 1, 2014).

4 Although the terms are similar, and some courts have used them interchangeably, see, e.g., MBIA Ins. Corp. v. Royal Bank of Canada, the “superior knowledge” doctrine and the “peculiar knowledge” exception apply to different elements of a fraudulent concealment claim. “Superior knowledge” triggers a defendant’s duty to disclose, see note 2, infra, while “peculiar knowledge” bears on the reasonableness of a plaintiff’s reliance. In practice, many of the situations that give rise to a defendant’s duty to disclose — either in the case of partial, incomplete disclosures or “superior knowledge” of material facts — also bear on the reasonableness of plaintiff’s reliance, as the law assumes that this information is “peculiarly” within defendant’s knowledge. Therefore, adequate pleading of one necessarily implies adequate pleading of the other. See, e.g., Nomura Sec. Int’l, Inc. v. E*Trade Sec., Inc., 280 F. Supp. 2d 184, 206 (S.D.N.Y. 2003) (if “[defendant] failed to disclose certain material facts to [plaintiff], [plaintiff] would have no way of knowing this, and it would be entirely reasonable for [plaintiff] to rely on the knowledge it did possess.”).

“[I]f the facts represented are not matters peculiarly within the party’s knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by those misrepresentations.”

This traditional formulation does not address the ease or difficulty of obtaining the information other than requiring the “exercise of ordinary intelligence.” One could argue that the Court of Appeals would require that any means available to discern the information be employed.

In some recent cases involving RMBS and other complex structured products, however, courts have appeared more willing to accept plaintiffs’ claimed inability to conduct their own due diligence without the necessity of proving it was impossible to do so.7 For example, in MBIA Ins. Corp. v. Royal Bank of Canada, the court initially ruled that the disclaimer and disclosures in the parties’ transaction documents were sufficiently specific with regard to the risks inherent in the collateral to “fatally undercut Plaintiff’s ability to allege justifiable reliance.” 28 Misc.3d 179, 2010 WL 3294302, at *32 (Westchester Sup. Aug. 19, 2010). The court noted that the analysis could not end there, however, because plaintiff had “raised the argument” that the peculiar knowledge exception applied by alleging that (1) “it was not the industry standard for a credit protection provider at a super-senior level to perform a complete loan-level, forensic revaluation of a complex CDO by assessing the [underlying] loans that made up the collateral of a CDO . . . in order to verify the representations of the arranger” and (2) plaintiff “often lacked first-hand access to such data . . . which made a firsthand review overly time consuming and expensive.” Id. Notwithstanding the existence of a detailed, negotiated CDR, the court found the allegations in plaintiff’s complaint sufficient to invoke the peculiar knowledge exception to the disclaimer bar rule for purposes of denying defendant’s motion to dismiss. Id. at *33.

Peculiar Knowledge Exception Handicap

The peculiar knowledge exception diminishes the utility of a CDR because, once adequately pleaded, the question of whether the defendant genuinely had peculiar knowledge is a question of fact that is inappropriate for determination on a motion to dismiss.8 Although defendant ultimately may prevail after expending considerable time and resources in protracted litigation to defend its counterparty’s fraud claim, the reality is that denial of a motion to dismiss grants many plaintiffs bargaining power at the settlement table they may not otherwise have enjoyed.9

II. Lessons Learned: Applying Recent Decisions To Drafting CDRs

As we saw above, whether a CDR results in early dismissal of a fraud claim is critical to the defense of the claim. If the CDR is not broad enough or clear enough, years of expensive litigation may ensue for the defendants.

In general, a CDR should

1. be the product of negotiation between sophisticated entities;
2. specifically describe the type and quality of information being withheld in terms that are tailored to the transaction at hand;
3. require parties to acknowledge that each party has voluntarily entered the transaction notwithstanding the nondisclosure of material nonpublic information;
4. require each party to perform its own due diligence and to disclaim reliance on the other; and
5. contain a merger clause that clearly sets forth the parameters of the entire agreement between the parties and the representations, if any, on which the parties may rely.10

The cases discussed herein, however, suggest that a few refinements and additions to this list might add additional protection that just might persuade a court to dismiss a fraud claim at an early stage. Note that although sellers are the defendants in most of the cases we have reviewed, the cases and our analysis apply equally to purchasers.

First, be explicit that you may have information that is not available to your counterparty. In Pharos, the Big Boy letter expressly provided that “any nonpublic information known by [defendants] ‘need not be provided’ to [plaintiff].” 905 Supp. 2d at 824-25, and the court ultimately found it persuasive. The language in Chase Manhattan Bank v. New Hampshire Ins. Co., 193 Misc. 2d 580, 749 N.Y.S.2d 632, 647 (N.Y. Sup. 2002), is equally instructive. There, plaintiff agreed to a disclaimer of whether plaintiff merely entered into a bad deal.”); MBIA v. RBC, 2010 WL 3294302, at *33 (“[w]hile the evidence might ultimately demonstrate that the Defendants did not have any special knowledge upon which they relied or which Plaintiffs could not have ascertained by exercising reasonable diligence, these are issues which are inappropriate to determine . . . as a matter of law based solely on the allegations of [the claim].”)


claim that specifically acknowledged the possible existence of misstatements or omissions, waived any obligation on defendant’s part to speak, and acknowledged that defendant had only provided plaintiff with very limited information. The Court held that the disclosures operated as a waiver that absolved defendant of any responsibility to make affirmative disclosures.\footnote{Interestingly, at least one other recent court has granted a motion to dismiss, finding that similar disclosures were adequate to address a defendant’s alleged undisclosed motive. The First Department in \emph{HSN Nordbank AG v. UBS AG} that in light of the parties’ “specific and detailed disclosures and disclaimers,” it was “unjustifiable and unreasonable as a matter of law for [plaintiff] to place any reliance on [defendant’s] alleged extracontractual representations . . . concerning [defendant’s] intended ‘trading strategy’ and ‘motive and economic interest’ in the deal.” 95 A.D.3d at 205-06.} Second, because a number of the cases that stem from the recent financial crisis allege peculiar knowledge based on claims involving a defendant’s unstated motive for entering a transaction rather than on nondisclosure of MNPI, consider including an acknowledgement that any stated motivations for entering the transaction are not exhaustive and may include other, unstated motives. For example, in \emph{Basis Yield Alpha v. Goldman}, the plaintiff alleged that in 2006, defendant, “at its highest levels,” made a decision that the value of its RMBS holdings would soon decline steeply, and that as a result, defendant devised a scheme to unload its “toxic” inventory and, by shorting the market, “profit from the decline in value of the very securities it was recommending that its clients purchase.” 115 A.D.3d at 136.

In its motion to dismiss, defendant relied heavily on the plaintiff’s disclaimers of reliance, including disclaimers:

1. requiring plaintiff to “disclaim reliance on “any advice, counsel or representation ‘whether oral or written of [the sellers], . . . other than in this offering circular’” and concomitantly advised the purchaser to “consider and assess for themselves the likely rate of default of the references obligations”;

2. disclosing that “[a]ccording to recent reports, the residential mortgage in the United States has experienced a variety of difficulties and change in economic conditions that may adversely affect the performance and Market of RMBS;” and

3. disclosing that an affiliate “will act as the sole Synthetic Security counterparty,” which would “create a conflict of interest,” and that it would be purchasing credit protection from the CDOs. \emph{Id.} at 137-38.

The court denied the motion to dismiss and found that the disclosures and disclaimers, including the disclosure of defendant’s intention to take a short position in the CDOs, fell short of the specificity required because, in the court’s view, there was a “vast gap” between disclosures about the speculative and risky nature of the investment and plaintiff’s allegations regarding the defendant’s motivation to unload CDOs based on its knowledge that the collateral had already deteriorated (i.e., the alleged plan to structure and unload toxic CDOs on its clients and then reap a profit by shorting and betting against its long term position). \emph{Id.} at 138. \emph{See also LBBW v. Wells Fargo,} 2014 WL 1303133, at *9 (“if [defendant] was motivated by a desire to offload deteriorating assets, as alleged, this intent would be within [defendant’s peculiar knowledge].”\footnote{The disclaimer stating that [defendant] had done no independent investigation \emph{would seem} beyond credulity to potential investors who knew that defendant, a major financial institution, had helped devise the note programs, helped draft the offering materials, and had purchased hundreds of millions of dollars of notes in its role as initial purchaser.” \emph{Id.} at 1004-05 (emphasis added).} Third, be sure the CDR accurately reflects the information that \emph{has} been provided to the counterparty. To avoid undermining statements in the CDR that seller is not making any representations on which the counterparty is entitled to rely, the seller should, to the extent possible, then actually refrain from providing any information or representations regarding the asset being sold. If limited information is disclosed, the CDR should express the limited nature of the disclosure. For instance, in denying defendant’s motion to dismiss the complaint, the district court in \emph{Pharos} found that the disclaimers in the offering materials and Participation Agreement did not preclude plaintiff from showing justifiable reliance on defendant’s alleged misrepresentations, because “the purported disclaimers were undermined or contradicted by other information allegedly available to potential investors.” \emph{In re National Century Financial Enterprises, Inc., Inv. Litig.,} 541 F. Supp. 2d 986, 1004 (S.D. Ohio 2007) (emphasis added). The court was particularly struck by the following discrepancies:

\begin{enumerate}
\item[a] “[T]he disclaimer stating that [defendant] had done no independent investigation \emph{would seem} beyond credulity to potential investors who knew that defendant, a major financial institution, had helped devise the note programs, helped draft the offering materials, and had purchased hundreds of millions of dollars of notes in its role as initial purchaser.” \emph{Id.} at 1004-05 (emphasis added).
\item[b] “Other disclaimers stated that [defendant] was not making any representations of accuracy and that potential investors should rely on their own examinations. But those disclaimers were contradicted by a statement on the second page of the offering materials telling potential investors, “‘You should rely only on the information contained in this document.’ The very documents that defendant put into the hands of investors told them to rely on the statements made in those documents.” \emph{Id.} at 1005 (emphasis added).
\item[c] The disclaimer in the offering materials “stating that no person, apart from those ‘specifically designated,’ was authorized to make representations other than those in the private placement memoranda — on its face did not apply to representations made in the offering materials” . . . . “In the absence of a specific designation otherwise, investors dealing with [defendant], who served as placement agent for the notes and whose name appeared prominently on the front page of the offering materials, certainly had reason to believe that [defendant] was authorized to make representations . . . . Further, the memorandum stated that defendant was the authorized agent of National Century and that all inquiries by investors were to be directed to [defendant].” \emph{Id.} at 1005, 1019. Given the weight the district court and the Sixth Circuit later afforded the parties’ Big Boy Letter in deciding to grant defendant’s motion for summary judgment, it is at least arguable that, had defendant’s actions not conflicted with the clear terms of the Big Boy, the district court may have granted a motion to dismiss and terminated the litigation at a much earlier stage.

Fourth, since a defendant can undermine a claim of peculiar knowledge on a motion to dismiss by arguing...
that the complaint does not allege adequate due diligence on the plaintiff's part, a CDR should—in addition to requiring a buyer to rely exclusively on the buyer's own due diligence—require the counterparty to represent and warrant that it agrees to conduct due diligence to whatever degree necessary for the counterparty to gain comfort to enter the transaction, even if the counterparty is required to conduct a higher level of due diligence than would normally be the case.

Arguing Plaintiff's Diligence

As discussed above, New York law imposes an affirmative duty on sophisticated investors to conduct due diligence to protect themselves from misrepresentations in the course of business transactions. *DDJ Mgmt.*, 15 N.Y.3d at 154. The presence of contractual disclaimers and disclosures “reinforces the conclusion that the sophisticated plaintiff's fraud claim should be dismissed” if the plaintiff fails to take protective measures. *HSN Nordbank v. UBS*, 95 A.D.3d at 199 (emphasis added). “[I]f the plaintiff [claiming peculiar knowledge] has the means of learning the facts and disclaims reliance on the defendant’s representations, there simply is no reason to relieve it of the consequences of both its failure to protect itself and its bargain to absolve the defendant of responsibility.” *Unicredito Italiano*, 288 F. Supp. 2d at 499. A CDR that requires the counterparty to perform whatever due diligence it determines necessary to enter a transaction may help a defendant defeat a claim of peculiar knowledge by arguing that the plaintiff's diligence was inadequate or countering plaintiff's likely response that the necessary level of diligence would have (1) exceeded market standards; or (2) been “overly time consuming or expensive.” See *MBIA v. RBC*, 2010 WL 3294302, at *40; *CIFG Assurance North America, Inc. v. Goldman, Sachs & Co.*, 966 N.Y.S.2d 369, 371 (N.Y. Sup. 2013) (finding that plaintiff was “not required, as a matter of law, to audit or sample underlying loan files”).

The recent decision in *HSN Nordbank v. UBS* illustrates the usefulness of such a provision. The plaintiff claimed that defendant misrepresented the reliability of credit ratings that were used to define the reference pool underlying RMBS. *HSN Nordbank v. UBS*, 95 A.D.3d at 192-93. Plaintiff further claimed that information about the alleged misrepresentations was peculiarly within defendant's knowledge and that plaintiff had no way of learning the truth. *Id.* However, the plaintiff's complaint failed to identify any factual data or economic assumptions that defendant used in its internal analysis that was not readily accessible to other sophisticated investors through independent appraisal. *Id.* at 195-96. The First Department was critical of plaintiff's claims of justifiable reliance given plaintiff’s admitted failure to evaluate publicly available information. *Id.* The court, however, found plaintiff's due diligence deficiencies particularly glaring in light of representations in the “heavily negotiated” transaction documents that plaintiff was “not relying (for purposes of making any investment decision or otherwise) upon any advice, counsel or representations (whether written or oral) of [defendant] or any of its affiliates; and . . . has consulted with its own . . . [led to the conclusion that plaintiff was ‘so lax in protecting [itself] that [it] cannot fairly ask for the law’s protection.’” *Id.* at 196-97 (citing *Centro Empresarial Cempresa S.A. v. America Movil, S.A.*, 17 N.Y.3d 269, 279 (2011)). The court further explained that to permit plaintiff's fraud claims to proceed notwithstanding its representations in the CDR,

“would put in question whether any set of disclaimers and disclosures, no matter how detailed and specific, affords protection against a fraud claim—even a claim by a commercial entity of a high degree of sophistication, and with the resources to hire any outside help it needs—concerning matters subject to discovery through due diligence, and as to which the claimant agreed that it was not relying on the party sitting across the table.”

*Id.* at 207-8.

Fifth, consider adding a waiver and release of fraud and negligent misrepresentation claims arising under the transaction. Courts have cited such waivers to support a motion to dismiss. *See MBIA v. Merrill Lynch*, 81 A.D.3d at 420 (enforcing disclaimer of reliance where plaintiff expressly waived all affirmative rights (including fraud) asserted as defenses to payment). In addition, courts have held, and the New York Court of Appeals has affirmed, that “a party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release.” *Centro Empresarial*, 17 N.Y.3d at 276-77 (granting motion to dismiss fraud claims on findings that release of “all manner of actions,” in conjunction with the reference to “future” and “contingent” actions, “indicated an intent to release fraud claims unknown at the time of contract”).

Finally, ensure that the CDR disclaimers and reliance on any alleged pre-contractual representations, oral or written. *Accord MBIA Ins. Corp. v. Morgan Stanley*, 42 Misc. 3d 1213(A), 2011 WL 2118336, at *5 (Westchester Sup. May 26, 2011) (denying motion to dismiss where “[n]one of the transaction documents disclaim [plaintiff’s] reliance on [defendant’s] pre-contractual representations”).

Conclusion

Contractual disclaimers of reliance have been front and center of recent fraud cases, including cases arising from the financial crisis. While the basic boundaries of the law governing their enforceability have not changed, the large number of recent cases, arising in a wide variety of contexts and transactions, has resulted in a more nuanced and complex view of the legal landscape. The recent increase in cases in which plaintiffs have pled that the defendant had “peculiar knowledge” has also resulted in a more fact-intensive analysis, one that may foreclose a rapid dismissal in the early stages of the case.