

July 15, 2011

**Seitz Ross Delaware Corporate Law Update:  
Court of Chancery Issues Guidance on Limitations Period for Rep and Warranty Claims**

Earlier this week, Chancellor Leo E. Strine, Jr. in *GRT, Inc. v. Marathon GTF Technology, Ltd., C.A. No. 5571-CS (Del. Ch. July 11, 2011)* (Slip Opinion attached), held that a provision that a contractual representation would survive for one year after closing shortened the statute of limitations for claims of breach of the representation to one year.

*GRT* involved a suit for breach of a representation in a joint venture agreement. The agreement provided that the representation would “survive for twelve (12) months after the Closing Date, and will thereafter terminate, together with . . . the remedies provided pursuant to [a provision setting forth the ‘sole and exclusive remedies’ for breach].” Slip Op. 15-16.

The Court granted defendants’ motion to dismiss the claim as time barred, rejecting plaintiff’s contention that this “Survival Clause limits only the time in which a breach of the [representation] can occur, not when a suit can be brought to remedy a breach.” *Id.* at 18. Drawing on M&A treatises, the Court provided guidance for determining the “life span” of a representation or warranty:

- “[W]here the contract expressly provides that the representations and warranties terminate upon closing . . . they can provide no basis for a post-closing suit seeking a remedy for an alleged misrepresentation” (*id.* at 29);
- “[A] discrete survival period . . . limit[s] the time period during which a claim for breach of a representation or warranty may be filed” (*id.* at 33); and
- Because a survival clause “never acts to lengthen the statute of limitations” under Delaware law, even “where the contract provides that the representations and warranties will survive indefinitely or otherwise does not bound their survival . . . the ordinarily applicable statute of limitations governs the time period in which actions for breach can be brought” (*id.* at 36-37).

The Court also noted that contracting parties who remain silent on the issue “do so at some risk, and the better and more certain practice is to have the contract expressly state whether or not the representations and warranties survive the closing.” *Id.* at 32.

Given the prevalence of representations and warranties in commercial agreements, the Court’s opinion is important reading for transactional lawyers and attorneys who litigate complex commercial disputes.