IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,846

MAZZONI FARMS, INC., a Florida corporation,

Plaintiff/Appellant,

v.

E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation, and CRAWFORD & COMPANY, a Georgia corporation,

Defendants/Appellees.

JACK MARTIN GREENHOUSES, INC., a Florida corporation, and PLANTAS LA PALOMA, INC., a dissolved Puerto Rica corporation though its Trustee Jack Martin,

Plaintiffs/Appellants,

v.

E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendants/Appellees.

On Certified Questions from the United States Court of Appeals for the Eleventh Circuit

11th Cir. Nos. 97-5931 & 97-5932

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CERTIFICATE OF TYPE SIZE AND STYLE

In compliance with Fla. R. App. P. 9.210(a)(2), this brief has been typed in twelve (12) point Courier, a font that is not proportionally spaced.

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STATEMENT OF THE CASE AND OF THE FACTS

I. INTRODUCTION

The Plaintiffs settled fraud and property damage claims in 1994, giving DuPont unambiguous general releases of all claims in consideration for DuPont's payment of substantial sums to Plaintiffs. Without offering to return the settlement money, Plaintiffs now seek to avoid the terms of the general releases and sue again on fraud claims based on alleged pre-release conduct.

The federal district court dismissed Plaintiffs' complaints with prejudice, finding that the claims for damages were barred by the unambiguous terms of their affirmed release contracts. On appeal, the Eleventh Circuit certified the following questions to this Court:

> Does a choice-of-law provision in a settlement agreement control the disposition of a claim that the agreement was fraudulently procured, even if there is no allegation that the choice-of-law provision itself was fraudulently procured?
>
> If Florida law applies, does the release in these settlement agreements bar plaintiffs' fraudulent inducement claims?

Mazzoni Farms, Inc. v. E.I. du Pont de Nemours and Co., 166 F.3d 1162, 1165 (11th Cir. 1999). As demonstrated below, the answer to both of these questions is "yes." Florida regularly enforces

choice-of-law clauses, and there is no Florida public policy justifying a disregard of this well-established conflict-of-laws rule here. Even if Florida law applies, Florida precludes parties from suing on released claims without rescission of the release. None of the cases cited by Plaintiffs allow suit on claims unambiguously covered by an affirmed release.

II. STATEMENT OF THE FACTS

A. Mazzoni Farms' Initial Benlate Claim

Plaintiffs Mazzoni Farms, Inc. ("Mazzoni") and Jack Martin Greenhouses, Inc. ("Jack Martin") are commercial plant nurseries. (Mazzoni Farms, R1-8-1, ¶ 2; Jack Martin R2-33-1-2, ¶¶ 2-3.) Defendant E.I. du Pont de Nemours and Company ("DuPont") is a Delaware corporation that manufactures and sells fungicides utilized by commercial plant nurseries, and Defendant Crawford & Company ("Crawford") was an alleged agent of DuPont that investigated claims related to Benlate® 50 DF ("Benlate"), a DuPont fungicide. (Mazzoni R1-8-1-2; Jack Martin R2-33-2.)

In the early 1990's, Mazzoni claimed that Benlate had caused property damage to various of its plants. (Mazzoni R1-8-9, ¶¶ 47-48.) No lawsuit was filed. On May 6, 1992, in exchange for $3,837,126.00, Mazzoni executed a general release of claims relating to the use of Benlate, reserving only claims for damage

to gladiolus plants. (R1-8-10, ¶ 51 & Ex. B.)

B. Both Plaintiffs Sue DuPont, Alleging Fraudulent Concealment of Alleged Benlate Defects

On March 20, 1992, Jack Martin commenced a lawsuit against DuPont and Asgrow Florida Company ("Asgrow"), a distributor of DuPont products. (Jack Martin R2-33-6-7, ¶ 30, R1-9, Exs. 1-2.) On September 17, 1992, Mazzoni also commenced a lawsuit against DuPont and Asgrow, based in part upon a claim for gladiolus damage. (Mazzoni R1-8-6-7, ¶ 30, R1-13, Ex. 2,¶ 6.) These 1992 lawsuits alleged not only that the Plaintiffs had suffered property damage arising from the use of Benlate, but also that DuPont and its agents had fraudulently concealed alleged defects in Benlate:

> DuPont recommenced distribution and sale of Benlate [after a recall] in 1989, representing that the problems with Benlate had been solved. In stark contrast to defendant's representations, defendant DuPont knew that Benlate had phytotoxic propensities and that Benlate was extremely toxic to plants.
>
> * * *
>
> During the time they distributed and/or sold Benlate, defendants omitted any statement or notice to purchasers of Benlate that the Benlate was defective, stunted plant growth and killed plants. Defendants also failed to disclose that Benlate destroyed or otherwise harmed plants or other vegetation. Furthermore, defendant's agents and

> representatives specifically represented that Benlate was a superior product and that Benlate was free from any defects.

(Mazzoni R1-13, Ex. 2 ¶¶ 18, 20; see also Jack Martin R1-9 Ex. 2 ¶¶ 19-21.) Accordingly, in 1992 and thereafter, each Plaintiff asserted not only products liability causes of action, but also claims for "Actual Fraud." (Mazzoni R1-13, Ex. 2 ¶¶ 66-73; Jack Martin R1-9, Ex. 2 ¶¶ 51-58, 88-95.)

C. Both Plaintiffs Execute Comprehensive General Releases

On May 26 and 27, 1994, respectively, Mazzoni and Jack Martin settled their claims, executing comprehensive general releases with no reservations in favor of DuPont and "all other firms, corporations, business entities, or persons associated with DuPont." (Mazzoni R1-8 ¶ 33 & Ex. A; Jack Martin R2-33 ¶ 33 & Ex. A.) The recitals to the agreements state that Plaintiffs had "alleged" various claims in the Underlying Actions, that DuPont had denied those allegations, and that Plaintiffs desired not only to terminate the Underlying Actions, but also to "release and dispose of all claims against Defendant and all claims incident thereto" and "to give assurance that Plaintiff will not hereafter prosecute such claims or cause them to be prosecuted." (Mazzoni R1-8 Ex. A-1; Jack Martin R2-33 Ex. A-1.)

In exchange for DuPont's payment of the settlement amount,

Mazzoni and Jack Martin each released DuPont from:

> [A]ny and all causes of action, claims, demands, actions, obligations, damages, or liability, whether known or unknown, that Plaintiff ever had, now has, or may hereafter have against Defendant, by reason of any fact or matter whatsoever, existing or occurring at any time up to and including the date this Release is signed (including, but not limited to, the claims asserted and sought to be asserted in the Action).

(Id. ¶ 1.) Each of the Plaintiffs further covenanted not to commence any action "based upon or in any way related to" the released claims, agreed to assign to DuPont "any and all causes of action, claims, demands, actions, obligations, damages, or liabilities which are the subject of this Release," and promised not to participate "in any action of any kind by any person against Defendant." (Id. ¶¶ 3, 7, 8.)

In paragraph nine of the settlement agreements, Plaintiffs expressly recognized that DuPont denied any "liability, guilt or wrongdoing." (Id. ¶ 9.) Plaintiffs also personally warranted that they fully understood the legal import of the settlement agreements and had sought and received the advice of counsel:

> Plaintiff represents and warrants that he has {they have} been fully advised by his attorney or attorneys concerning the execution of this Release, that he has {they have} fully read and fully understands the terms of this Release, and that he has {they have} freely and voluntarily executed this

Release.

(Id. ¶ 10.) The agreements also included an entire agreement clause providing that "[t]his document embodies the entire terms and conditions of the Release described herein." (Id. ¶ 14.)

The agreements contain the following choice-of-law clause:

> This Release shall be governed and construed in accordance with the laws of the State of Delaware without giving effect to the conflict of laws or choice of law provisions thereof.

(Id. ¶ 15.)

D. Plaintiffs' Current Lawsuits for Fraudulent Concealment of Alleged Benlate Defects

On December 31, 1996, Plaintiffs commenced their current lawsuits by filing separate complaints against DuPont in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County. (Mazzoni R1-1, Ex. A; Jack Martin R1-1, Ex. A.) Jack Martin filed an Amended Complaint on January 9, 1997. (Jack Martin R2-33.)

In the current lawsuits, as in their prior lawsuits, Plaintiffs allege that DuPont, starting in 1989, fraudulently concealed information relating to alleged defects in Benlate. (Compare Mazzoni R1-8, ¶¶ 12-13 and Jack Martin R2-33, ¶¶ 12-13 with Mazzoni R1-13, Ex. 2, ¶ 20 and Jack Martin R1-9, Ex. 2, ¶¶ 20-21.) Plaintiffs' current suits, however, include additional

allegations of fraudulent concealment said to have occurred during and in connection with their prior lawsuits, such as alleged misrepresentations and omissions by DuPont in discovery. (Mazzoni R1-8, ¶¶ 31-32; Jack Martin R2-33, ¶¶ 31-32.)

According to the Plaintiffs, these later instances of fraudulent conduct "were consistent with DuPont's prior representations to the growers and the public" that Benlate was not defective. (Id. ¶ 32.) Allegations that DuPont had made such representations formed the basis for Plaintiffs' previous claims for actual fraud in 1992. (Mazzoni R1-13, Ex. 2 ¶¶ 18, 20; see also Jack Martin R1-9 Ex. 2 ¶¶ 19-21.)

Plaintiffs acknowledge that the settlements effected the "full and complete settlement" of their unproven, unliquidated tort claims. (Id. ¶ 33.) Plaintiffs claim, however, that DuPont's misrepresentations and omissions during the 1992-1994 litigation induced them to accept "substantially less than the value of those claims." (Id. ¶ 34.)

III. COURSE OF THE PROCEEDINGS

On January 10, 1997, the two state court actions initiated in late 1996 were removed to the United States District Court for the Southern District of Florida. (Mazzoni R1-1; Jack Martin R1-1.) On February 21, 1997, Mazzoni filed an Amended Complaint

naming Crawford as an additional defendant. (Mazzoni R1-8.)

On February 24, 1997, DuPont and Crawford moved to dismiss both Amended Complaints, and filed separate motions for summary judgment. (Mazzoni R1-9, R1-12; Jack Martin R1-6, R1-8.) On July 14, 1997, each of the Plaintiffs moved for leave to file a Second Amended Complaint. (Mazzoni R2-32; Jack Martin R1-27.) Although the proposed Second Amended Complaints included additional damages claims, neither of the Plaintiffs offered or attempted to offer to return their settlements, nor did they seek to add a claim for rescission of the release contracts. (Id.)

On July 25, 1997, United States District Court Judge Joan A. Lenard dismissed five related cases, ruling that the general release clauses in settlement agreements identical or similar to those executed by Mazzoni and Jack Martin barred all claims against DuPont and Crawford, including claims for fraud. (Mazzoni R2-38-4-6; Jack Martin R2-34-4-5.) **Based upon the comprehensive releases and the failure to plead and conform with the requirements of rescission, the District Court denied as futile Plaintiffs' motions to file Second Amended Complaints, and directed the Plaintiffs to respond to Defendants' pending dispositive motions. (Mazzoni R2-38; Jack Martin R2-34.)**

IV. RULINGS BY THE FEDERAL DISTRICT COURT AND THE ELEVENTH CIRCUIT COURT OF APPEALS

A. The Federal District Court's Opinion

On November 5, 1997, the federal district court granted

Defendants' Motions to Dismiss, finding that the claims asserted were barred by the comprehensive general releases executed by the Plaintiffs in 1994. (Mazzoni R2-47-4; Jack Martin R2-43-3-4.)

The district court explained that any party claiming fraudulent inducement must choose between two remedies: (a) "sue in equity to set aside, or rescind, the fraudulently induced contract"; or (b) "sue at law on the fraudulently induced contract to recover damages which stemmed from the fraud," affirming the contract and thus being bound by its terms. (Mazzoni R2-47-5; Jack Martin R2-43-4-5.) Judge Lenard found that Plaintiffs had elected the legal remedy of damages, because their Complaints neither requested rescission nor addressed the equitable requirement that Plaintiffs "refund the amounts they received in settlement of their claims." (Mazzoni R2-47-6; Jack Martin R2-43-6.)

Because the Plaintiffs had chosen to affirm their settlement agreements, the court held that their damages claims remained subject to the release provisions:

> **[G]iven the Court's finding that the Plaintiffs elect to stand on the contract and sue for damages sustained by virtue of the Defendant's alleged tortious activity, the Plaintiffs must also abide by the provisions of the agreement which release DuPont from the Plaintiffs' claims against it, past and future. Simply stated, the Plaintiffs have taken two distinct remedies and attempted to obtain the benefits of both.**

(Mazzoni R2-47-7; Jack Martin, R2-43-6-7.) Accordingly, Plaintiffs' Complaints were dismissed, and all other pending motions were denied as moot. (Id.)

B. The Eleventh Circuit's Certification Order

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[1] **Defendants had moved for summary judgment on the ground that the stipulations for dismissal with prejudice filed in Plaintiffs' underlying cases were res judicata as to their current claims. Because the federal district court denied the motion as moot, Defendants did not address their res judicata defense on appeal, but without prejudice to renewing the motion for summary judgment upon any remand.**

Plaintiffs appealed to the Eleventh Circuit. On February 4, 1999, after oral argument, the Court of Appeals issued its order certifying questions to this Court. 166 F.3d 1162. Regarding the choice-of-law provision in the settlement agreements, the court concluded that the provision would be enforceable under Section 201 of the Restatement (Second) of Conflict of Laws (1971), but observed that no Florida court had yet considered Section 201. Id. at 1164. The court further acknowledged that Florida courts applied reasoning analogous to the Restatement's approach with respect to arbitration clauses, but observed that those cases arguably could be distinguished as relying on the federal policy favoring arbitration. Id.

Plaintiffs argued to the Eleventh Circuit that all of the provisions in the release contracts at issue (including the release and the choice-of-law clauses) were "voidable" for fraud, but they did not allege that the fraud was directed specifically to the choice-of-law provisions. Id. at 1165. Because the Restatement rule would give effect to the choice-of-law provision, whether or not the rest of the contract was voidable for fraud, and because the Court of Appeals determined that Florida law had not yet supplied a clear answer to the question, the Court certified the choice-of-law question to this Court. Further, because Plaintiffs' choice-of-law argument was the same as its merits argument (i.e., that allegations of fraud made all of the terms of the release contracts voidable), the merits question was likewise certified in the event this Court declines to enforce the choice-of-law provisions. Id.

SUMMARY OF ARGUMENT

Plaintiffs' 1992 lawsuits claimed not only that DuPont's fungicide Benlate had damaged their crops, but also that DuPont had fraudulently concealed information regarding Benlate's alleged defects. In 1994, when Plaintiffs settled those cases, they signed comprehensive general releases, containing Delaware choice-of-law clauses, and released "any and all ... claims ... known or unknown ... by reason of any fact or matter whatsoever, existing or occurring at any time up to and including the date this Release is signed." In 1996, without returning or offering to return the money and seek a rescission, Plaintiffs sued DuPont again for alleged pre-release fraudulent concealment, claiming that the mere allegation of fraud rendered the terms of their settlement agreements meaningless. Florida's important policy of enforcing contractual undertakings, however, requires that the parties' choice of Delaware law be respected; moreover, in Delaware and in Florida, the fundamental policy favoring settlements dictates that Plaintiffs' claims be dismissed.

Florida courts regularly enforce choice-of-law provisions. A choice-of-law clause can be disregarded only when the chosen law clearly violates a "fundamental" Florida public policy. Plaintiffs do not even acknowledge, much less satisfy, this

demanding standard. Moreover, Plaintiffs do not and cannot dispute that they have "affirmed" their settlement agreements (and thus the choice-of-law provisions) by retaining the millions of dollars paid to settle their prior lawsuits and suing on the settlement agreements. Because Plaintiffs have kept the benefits of their settlements, they are bound by the release obligations, including the Delaware choice-of-law provisions.

Even were the choice-of-law provisions not to be honored, Plaintiffs' claims fail. As the federal district court held, in Florida and elsewhere, a party allegedly defrauded into entering a contract must elect between the remedies of "rescission" and "affirmance." Under the former, both parties are returned to their pre-contractual position. Under the latter, the defrauded party is able to keep the benefits of the contract, but remains bound by its obligations. Here, the Plaintiffs elected to retain the benefits of the settlements and affirm their release contracts; thus they are barred from suing on claims that are subject to the releases contained in those contracts.

The comprehensive general release clauses of Plaintiffs' affirmed settlement agreements extend to "any and all" claims, "known or unknown." As this Court and the Eleventh Circuit have held, and which Plaintiffs do not contest, such general release

terms unambiguously include all claims between the parties, including fraud claims that were allegedly "unknown" to the releasing party at the time of settlement.

Accordingly, this Court should enforce the Delaware choice-of-law clause and answer the first certified question in the affirmative, leaving the second question to be determined pursuant to Delaware law. Were this Court to reach the second question, the affirmed general releases should be held to bar Plaintiffs' claims.

ARGUMENT

CERTIFIED QUESTION I

DOES A CHOICE OF LAW PROVISION IN A SETTLEMENT AGREEMENT CONTROL THE DISPOSITION OF A CLAIM THAT THE AGREEMENT WAS FRAUDULENTLY PROCURED, EVEN IF THERE IS NO ALLEGATION THAT THE CHOICE-OF-LAW PROVISION ITSELF WAS FRAUDULENTLY PROCURED?

The choice-of-law provision at issue should be enforced for three separate reasons. First, pursuant to its policy of protecting the expectations of contracting parties, Florida regularly enforces choice-of-law clauses, even if a countervailing policy is identified. Second, Plaintiffs do not and cannot demonstrate that enforcement of the clauses would contravene any fundamental public policy of Florida. Third, Plaintiffs have affirmed their settlement agreements by keeping the settlement proceeds, and thus are bound by all of the

contracts' terms and obligations, including the Delaware choice-of-law provisions. Accordingly, the first certified question should be answered in the affirmative.

A. Florida Vigorously Enforces Choice-of-Law Provisions

"It is well-established that when the parties to a contract have indicated their intention as to the law which is to govern, it will be governed by such law in accordance with the intent of the parties." Department of Motor Vehicles v. Mercedes-Benz of N. Am., Inc., 408 So. 2d 627, 629 (Fla. 2d DCA 1981) **(citing Hirsch v. Hirsch, 309 So. 2d 47, 49-50 (Fla. 3d DCA 1975)). Florida has codified this rule with respect to commercial contracts:**

> **[W]hen a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation will govern their rights and duties.**

§ 671.105(1), Fla. Stat. (1998). See Citi-Lease Co. v. Entertainment Family Style, Inc., 825 F.2d 1497 (11th Cir. 1987) (enforcing choice-of-law clause in commercial contract). In this case, it is undisputed that the settlement agreements have a "reasonable relation" to Delaware, which is the state of DuPont's incorporation, domicile, and principal place of business.

Notwithstanding the reasonableness of the parties' choice of Delaware law, Plaintiffs assert that such clauses should be disregarded as violating Florida public policy. Two of the cases cited by Plaintiffs, however, do not involve choice-of-law clauses. Gillen v. United Servs. Auto. Ass'n, 300 So. 2d 3 (Fla. 1974); Lloyd v. Cooper Corp., 101 Fla. 533, 134 So. 562 (1931). The other cases on which Plaintiffs rely dealt with enforcement in Florida of covenants not to compete, an issue of

particular public concern regarding competition and restraint of trade in Florida. Cerniglia v. C & D Farms, Inc., 203 So. 2d 1 (Fla. 1967), aff'g in part, rev'g in part 189 So. 2d 384 (Fla. 3d DCA 1966); Temporarily Yours-Temporary Help Servs., Inc. v. Manpower, Inc., 377 So. 2d 825 (Fla. 1st DCA 1979). In these cases the chosen law clearly conflicted with the express public policy of Florida regarding covenants not to compete. Temporarily Yours, 377 So. 2d at 827 (citing § 542.12, Fla. Stat.); Cerniglia, 189 So. 2d at 386 (same).

In three cases more recent than those cited by Plaintiffs, this Court directly addressed the relationship between choice-of-law clauses and Florida public policy. These decisions show that choice-of-law provisions further the important Florida policy of protecting the expectations of contracting parties, and that such provisions will be disregarded only when the countervailing policy is "fundamental" (such as a restraint of competition in Florida).

In Continental Mortgage, Inc. v. Sailboat Key, Inc., 395 So. 2d 507 (Fla. 1981), an interstate loan contract provided for an interest rate usurious under Florida law but not usurious under Massachusetts law, the state selected by the parties in their contract. Invoking the "public policy" exception, the lower courts disregarded the choice-of-law provision and awarded usury penalties against the lender. Id. at 508-509.

This Court reversed, finding that Florida's usury laws did not embody a sufficiently fundamental public policy to override a choice-of-law provision in a commercial contract. Id. at 509.

The Court gave three reasons for its holding. First, the usury statute did not represent a "strong" public policy, because the statute contained exceptions, had been amended, and was not "fundamental" to Florida's legal system. Id. at 509-10. Second, various courts deciding usury cases, when presented with a conflict of laws, applied a "rule of validation" pursuant to which the law of the forum upholding the interest rate would be applied, rather than the law of the forum condemning the rate. Id. at 510-11. Third, important countervailing policies were implicated where, as in the case before it, the validating forum had been selected by the parties:

> A prime objective of both choice of law ... and of contract law is to protect the justified expectations of the parties. Subject only to rare exceptions, the parties will expect on entering a contract that the provisions of the contract will be binding upon them. .... The courts deem it more important to sustain the validity of a contract, and thus to protect the expectations of the parties, than to apply the usury law of any particular state.

Id. at 511 (quoting Restatement (Second) of Conflict of Laws § 203 cmt. b (1971)). This Court further explained that these countervailing interests in "party autonomy" precluded any inquiry into the "good faith of the parties," and remanded for an application of Massachusetts law. 395 So. 2d at 512-14.

This Court reaffirmed Continental in another usury case, Morgan Walton Properties, Inc. v. International City Bank & Trust

Co., 404 So. 2d 1059 (Fla. 1981), in which several of the notes at issue contained Louisiana choice-of-law provisions. The Morgan court emphasized that Continental's holding applied even if the purpose for including the choice-of-law provision was to "avoid the restrictive effects of Florida's usury law." Id. at 1062-63. Thus, even assuming the parties intended to avoid Florida policy concerning usurious rates, the choice-of-law clauses in the notes should nevertheless be honored. Id.

This Court again addressed the public policy exception to the choice-of-law rule in Burroughs Corp. v. Suntogs of Miami, Inc., 472 So. 2d 1166 (Fla. 1985). In Burroughs, the commercial contract at issue contained (1) a limitation-of-action provision requiring breach of contract claims to be asserted within two years and (2) a Michigan choice-of-law provision. A Florida statute expressly provided that a limitation-of-action provision in a contract was "void." Id. at 1167 (quoting § 95.03, Fla. Stat.). Relying on this statute, the district court determined that Florida law applied because the statute represented a public policy that prevailed over "party autonomy." Id. at 1167-68.

This Court reversed, holding that the district court's decision "directly conflicts" with Continental. Id. at 1168. The opinion first explained that the "policy" served by the Florida statute was not strong, because it contained exceptions, had been amended, and was not "fundamental" to Florida's legal system. Id. Whatever interests were served by the statute,

moreover, had to be weighed against the interest in protecting the expectations of contracting parties:

> With respect to commercial transactions, the legislature has specifically authorized contracting parties to agree that the laws of another state having a reasonable relation to the transaction may govern their rights and duties. In enacting this provision, the legislature recognized the need for parties to interstate commercial transactions to know in advance which state's laws were to apply. Instead of requiring the parties to achieve this knowledge from the myriad of cases concerning conflict of laws, the legislature has authorized the parties to make the choice themselves. This advance knowledge serves to reduce confusion and encourage quicker, easier resolutions.

Id. at 1168-69 (citations omitted). Thus, the Court remanded with instruction that any claims barred by the limitation-of-action provision be dismissed. Id. at 1169.

While Plaintiffs fail to discuss Continental, Morgan Walton, or Burroughs, they do acknowledge Sturiano v. Brooks, 523 So. 2d 1126 (Fla. 1988), **in which this Court reaffirmed that Florida generally applies the conflicts rule of lex loci contractus. Although Sturiano did not involve a choice-of-law provision, the Court's reasons for rejecting the "significant relationship" test further illustrate the importance of the policy of protecting the expectations of contracting parties:**

> **While it is true that lex loci contractus is an inflexible rule, we believe that this inflexibility is necessary to ensure stability in contract arrangements. When parties come to terms in an agreement, they do so with the implied acknowledgment that the laws of that jurisdiction will control absent some provision to the**

> **contrary. ....**
>
> *** * ***
>
> **We recognize that this Court has discarded the analogous doctrine of lex loci delicti with respect to tort actions and limitations of actions. However, we believe that the reasoning controlling those decisions does not apply in the instant case. With tort law, there is no agreement, no foreseen set of rules and statutes which the parties had recognized would control the litigation. In the case of an insurance contract, the parties enter into that contract with the acknowledgment that the laws of that jurisdiction control their actions. In essence, that jurisdiction's laws are incorporated by implication into the agreement. The parties to this contract did not bargain for Florida or any other state's laws to control. We must presume that the parties did bargain for, or at least expected, New York law to apply.**

Id. at 1129-30. Thus, Sturiano fully accords with this Court's prior holdings that the parties' expectations as to governing law will be enforced whenever possible.

In this case, the choice-of-law clauses provide that the releases are to be "governed and construed in accordance with the laws of the State of Delaware." (Mazzoni R1-8, Ex. A ¶ 15; Jack Martin R2-33, Ex. A ¶ 15.) This language expresses the parties' expectations that Delaware law regarding the "scope and effect" of the general releases will be applied. Coral Gables Imported Motorcars, Inc. v. Fiat Motors of N. Am., Inc., 673 F.2d 1234, 1238 (11th Cir.) **(Florida law), modified in irrelevant part, 680 F.2d 105 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983). Plaintiffs do not contest that, if the choice-of-law clauses are honored, the scope and effect of the general releases would be determined according to Delaware**

law; they argue instead that enforcement of the clauses would violate Florida public policy. Initial Br., at 6-7.

Florida courts, however, will not ignore choice-of-law clauses simply because one party alleges that a countervailing policy is implicated. Florida will not disregard a choice-of-law provision except to protect some other substantive policy that is so fundamental as to outweigh the important policy of protecting the expectations of contracting parties.

B. Plaintiffs' "Public Policy" Argument is Meritless

According to Plaintiffs, "Florida public policy does not allow parties to contract against liability for their own fraud or other intentional torts." Initial Br., at 7. This assertion, if applicable to negotiated releases of claims based on conduct through the date of the release, would mean that every settlement agreement compromising an intentional tort claim would be "void" as against public policy. No intentional tort claims could be settled; all would have to be tried.

This is not the law. None of the cases cited by Plaintiffs involve negotiated settlements of claims based on conduct through the date of the release. Instead, Plaintiffs rely on cases

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[2] If, under Delaware law and as a matter of contract, the releases did not bar the Plaintiffs' claims, then it would appear that Florida law would apply to determine whether Plaintiffs can prove the elements of any damages claim for fraud, consistent with Florida's conflict rules governing tort claims. See Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980) (setting forth the Florida conflicts rule applicable to tort claims).

dealing with "exculpatory" clauses, contractual provisions that attempt to relieve a party from liability for its future conduct. See Kellums v. Freight Sales Ctrs., Inc., 467 So. 2d 816 (Fla. 5th DCA 1985); **Mankap Enters., Inc. v. Wells Fargo Alarm Servs., Inc., 427 So. 2d 332 (Fla. 3d DCA 1983); Goyings v. Jack & Ruth Eckerd Found., 403 So. 2d 1144 (Fla. 2d DCA 1981); Zuckerman-Vernon Corp. v. Rosen, 361 So. 2d 804 (Fla. 4th DCA 1978).**

Every jurisdiction, including Delaware, views such clauses with disfavor; enforces them as to future negligence claims only if

the language is "clear and unequivocal"; and holds that, as a matter of public policy, a party may not by contract avoid the consequences of its future intentional misconduct. Id.-Vernon James v. Getty Oil Co., 472 A.2d 33 (Del. Super. Ct. 1983)Robbie v. City of Miami, 469 So. 2d 1384 (Fla. 1985)Sun Microsystems of Cal., Inc. v. Engine & Mfg. Sys., C.A., 682 So. 2d 219 (Fla. 3d DCA 1996)Braemer Isle Condominium Ass'n, Inc. v. Boca Hi, Inc., 632 So. 2d 707 (Fla. 4th DCA 1994)White v. General Motors Corp., 699 F. Supp. 1485, 1488 (D. Kan. 1988), aff'd, 908 F.2d 669 (10th Cir. 1990), cert. denied, 498 U.S. 1069 (1991), 673 F.2d at 1238.

In short, the authority cited by Plaintiffs demonstrates no policy at all against the settlement of conduct through the date of the release, much less any fundamental policy overriding the strong policy of enforcing the parties' contractual expectations.

C. Because Plaintiffs Have Not Sought Rescission of the Releases, the Court Need Not Decide Whether A Choice-of-Law Clause Governs a Claim for Rescission

Plaintiffs' "public policy" argument regarding the Delaware choice-of-law provisions, demonstrated above to be meritless, was never made to the federal district court or to the Court of Appeals. Plaintiffs previously argued only that the choice-of-law clauses, like the other provisions of their release contracts, were "voidable" because DuPont fraudulently induced Plaintiffs to settle. See Mazzoni Farms, 166 F.3d at 1164-65.

DuPont responded by showing (a) that under the Restatement (Second) of Conflict of Laws § 201 (1971), Plaintiffs' general fraudulent inducement claims would be subject to the choice-of-law provision, and (b) that the Restatement's approach accorded with Florida law regarding arbitrability of fraudulent inducement claims. Id. at 1164. The Eleventh Circuit agreed that the choice-of-law provisions would be enforced under the Restatement's approach, but observed that the arbitration cases were based on the federal policy favoring arbitration. Id. at 1164 (discussing the United States Supreme Court's decision in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)). **The Court of Appeals thus deferred to this Court to determine Florida state policy regarding choice-of-law clauses.**

Before this Court, Plaintiffs briefly renew their argument that their general allegations of fraudulent inducement are sufficient to avoid the enforcement of the choice-of-law clauses. See Initial Br., at 9-10. To the extent Plaintiffs have preserved this argument, it merely illustrates additional, independent reasons for enforcing the choice-of-law provisions.

1. The Restatement (Second) of Conflict of Laws Would Enforce the Choice-of-Law Clauses Even if Plaintiffs Had Sought Rescission of the Releases

Plaintiffs correctly assert that a fraudulently-induced contract is "voidable" at the option of the defrauded party. See infra § II.A. (discussing Florida law); see generally Restatement (Second) of Contracts § 164(1) (1981); **1 E. Allan Farnsworth, Contracts § 4.15**

(1990). Thus, a defrauded party may either (1) "rescind" the contract, which "avoids" the terms of the agreement but requires the restoration of the contract's consideration; or (2) "affirm" the contract, which allows the party to keep the benefits of the agreement but ratifies its terms. Id.; see also Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc., 14 F.3d 1507, 1520 (11th Cir. 1994), cert. denied, 513 U.S. 1146 (1995).

Because a successful rescission avoids all the terms of the contract, courts have wrestled with the question of whether or not a fraud claim seeking rescission of the entire agreement should be decided in accordance with contractual provisions governing future disputes of the parties, such as arbitration clauses and choice-of-law provisions. In Prima Paint, for example, the plaintiff sought rescission for fraudulent inducement of a contract that contained an arbitration clause. 388 U.S. at 398. The United States Supreme Court held that, under federal arbitration law, claims of fraudulent inducement of the entire agreement would be subject to arbitration, but claims of "fraud in the inducement of the arbitration clause itself" would be judicially adjudicated. Id. at 403-404.

Courts have taken a similar approach to choice-of-law clauses. Under the Restatement (Second) of Conflict of Laws § 201 (1971), the resolution of any claim of fraudulent inducement directed to the entire agreement, even if rescission is sought, will be governed by a choice-of-law provision. As in Prima Paint, however, the clause will not control disposition of a

claim of fraud specifically directed to the inclusion of the clause itself. Id. cmt. b; see also id. § 187, cmt. b. Numerous courts have followed the Restatement's approach and applied the law chosen by the parties to claims of fraudulent inducement of the entire contract. E.g., Moses v. Business Card Express, Inc., 929 F.2d 1131, 1139-40 (6th Cir.), cert. denied, 502 U.S. 821 (1991); Tel-Phonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1142 (5th Cir. 1992); **Elgar v. Elgar, 679 A.2d 937, 942 (Conn. 1996) (adopting Restatement approach as consistent with prior decisions giving effect to parties' express choice-of-law provisions).**

While no Florida case has addressed the fraudulent inducement question in connection with a choice-of-law clause, Florida courts have followed the Prima Paint rule with respect to arbitration clauses. See, e.g., Passerrello v. Robert L. Lipton, Inc., 690 So. 2d 610, 611 (Fla. 4th DCA 1997) ("It is well settled ... that where the entire agreement is alleged to have been fraudulently induced, not the arbitration provision itself, the entire matter is to be resolved by arbitration.") (collecting cases). Consistent with Prima Paint, the rule has been applied even when the allegedly defrauded party sought rescission of the entire agreement. See, e.g., Ronbeck Constr. Co. v. Savanna Club Corp., 592 So. 2d 344, 347 (Fla. 4th DCA 1992).

The approach of Prima Paint and the Restatement properly balances the expectations of the parties regarding the litigation of future disputes against the fear that a party will be "tricked" into agreeing to the clause at issue. E.g., Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998 (11th Cir. 1986) (fraud in factum claim was not subject to arbitration when plaintiffs could

not read English and defendants misrepresented contents of agreement containing arbitration clause). A defendant may not rely on a choice-of-law clause that was itself fraudulently procured, but a plaintiff may not avoid an honestly-negotiated choice-of-law clause in a dispute merely by alleging fraudulent inducement. This approach fully accords with the Florida policy favoring the enforcement of choice-of-law clauses absent a compelling reason not to do so. See supra § I.A.

2. Plaintiffs Here Have Affirmed their Releases, Including the Choice-of-Law Provisions

Under the facts of this case, however, the Court need not reach the Restatement issue and need not address the last phrase of the first certified question, because Plaintiffs here do not seek rescission but instead have affirmed their settlement agreements and seek damages. The foregoing concepts are applicable only when a plaintiff seeks to rescind and has the prospect of voiding at least some material aspect of the contract; the question is whether the future-dispute provisions also fall or whether they remain operative to control the resolution of the fraudulent inducement claim. Here, no such issue arises, because Plaintiffs do not seek rescission.

In Prima Paint, Justice Black dissented from the Supreme Court's decision that the fraudulent inducement claim was subject to arbitration, because the plaintiff had sought rescission of the entire agreement for fraud. 388 U.S. at 407 (Black, J., dissenting). Justice Black reasoned that a rule treating arbitration clauses "separately" from the remainder of the contract violated the election of remedies rule that an agreement must stand or fall in its entirety. Id. at 423 ("I had always thought that a person who attacks a contract on the ground of fraud and seeks to rescind it

has to seek rescission of the whole, not tidbits, and is not given the option of denying the existence of some clauses and affirming the existence of others.").

Justice Black and the majority would have readily agreed to require arbitration had the plaintiff in Prima Paint, as the Plaintiffs here, elected to affirm the contract and seek damages for the fraud. Under basic contract law, a party who "affirms" a contract and seeks damages for fraudulent inducement remains subject to all of the terms of the agreement. See generally National Bank & Loan Co. v. Petrie, 189 U.S. 423, 425-26 (1903) **(Holmes, J.) (a claim for damages for fraudulent inducement "affirms the contract and relies upon it, and therefore may be subject to the same defenses as an action brought directly upon the contract");** Mitsubishi, 14 F.3d at 1520 (if the allegedly defrauded party does not seek rescission of the contract, "the rights of the parties will be fixed by the agreement") (quoting 12 Samuel Williston & Walter H.E. Jaeger, A Treatise on the Law of Contracts § 1526, at 622 (3d ed. 1970)).

Plaintiffs here have elected to affirm their settlement agreements and seek damages for fraud. Plaintiffs have never sought rescission and have made no attempt to comply with the "condition precedent" for a rescission remedy: to return, or offer to return, the settlement proceeds to DuPont. See infra § II.A. (citing, inter alia, Royal v. Parado, 462 So. 2d 849, 856 (Fla. 1st DCA 1985)); accord Mitsubishi, 14 F.3d at 1520 ("Courts ordinarily insist

that a party seeking to avoid a fraudulently induced contract tender the consideration it has received ....”). Because Plaintiffs have elected to keep the benefits of their settlement agreements with DuPont, they must remain bound by the terms and conditions of those contracts, including the Delaware choice-of-law provisions, regardless of whether the choice-of-law provision would be enforced or voided if Plaintiffs sought and obtained rescission.

This analysis fully accords with Oceanic Villas v. Godson, 4 So. 2d 689 (Fla. 1941), one of the cases cited by Plaintiffs. The contract at issue in Oceanic Villas was a 99-year lease containing an entire agreement clause (a clause providing that the contracting parties were relying upon no representations outside of the written contract). Claiming fraudulent inducement, the plaintiff sought rescission of the lease. The court found that the entire agreement clause would not prevent the plaintiffs from rescinding the lease for fraud, since a valid rescission claim “vitiated every part of the lease contract,” including the entire agreement clause. Id. at 690. Had the plaintiff “affirmed” the lease contract, a different result would have obtained, since the entire agreement clause represented “an agreement between the parties that no fraud had been committed.”

Id. at 691. Accord Pennington v. Braxley, 480 S.E.2d 357 (Ga. Ct. App. 1997) **(entire agreement clause will bar an "affirmance" fraud claim, but will not bar a claim for rescission). In Oceanic Villas, in fact, the rescission claim failed, because the plaintiff there, like the Plaintiffs here, had not returned or offered to return the benefits received under the agreement. 4 So. 2d at 691.**

D. Conclusion as to First Certified Question

Enforcement of the choice-of-law provisions at issue is supported (a) by Florida's policy favoring party autonomy in the selection of governing law, (b) by the absence of any countervailing fundamental policy, and (c) by the basic election of remedies rule that a claim for damages for fraudulent inducement "affirms" the contract and remains subject to all of its terms. Even were this a rescission case, the choice-of-law clause would still be enforceable under the Restatement's rule that general fraud claims are subject to choice-of-law clauses, which appears to be the law of Florida given Florida's protection of the parties' expectations and the analogous Florida law regarding the arbitrability of fraudulent inducement claims.

This Court should answer the first certified question in the affirmative and send this case back to the Eleventh Circuit.

CERTIFIED QUESTION II

IF FLORIDA LAW APPLIES, DOES THE RELEASE IN THESE SETTLEMENT AGREEMENTS BAR PLAINTIFFS' FRAUDULENT INDUCEMENT CLAIMS?

The answer to this question is "yes," because (a) Plaintiffs affirmed their settlement agreements, including the releases, (b) the releases unambiguously cover Plaintiffs' current claims, and (c) no Florida case allows a party to sue on fraud and other claims covered by an affirmed, unrescinded release.

A. Plaintiffs Have Affirmed their Settlement Agreements

Under Florida law, "[i]t is a fundamental proposition that a contract induced by fraud is voidable," not void. Lance Holding Co. v. Ashe, 533 So. 2d 929, 930 (Fla. 5th DCA 1988); **Columbus Hotel Corp. v. Hotel Management Co., 116 Fla. 464, 477, 156 So. 893, 898 (1934) (fraudulently induced contracts are not "illegal per se"); National Union Fire Ins. Co. v. Carib Aviation, Inc., 759 F.2d 873, 877 n.2 (11th Cir. 1985) (fraudulently-induced contracts are "voidable," not "void"). Thus, a party claiming fraudulent inducement must elect between the remedies of rescission -- in which the party "repudiates" the transaction -- or damages -- in which the contract is "ratified." Weeke v. Reeve, 65 Fla. 374, 376, 61 So. 749, 750 (1913) (remedies of rescission and damages are "coexistent and inconsistent"); Jones v. Watkins, 105 Fla. 25, 26-27, 140 So. 920, 920 (1932) ("'where one has an election to ratify or disaffirm a conveyance, he can either claim under or against it, but he cannot do both'"); Deemer v. Hallett Pontiac, Inc., 288 So. 2d 526, 528 (Fla. 3d DCA) (rescission and damages are "mutually exclusive"), cert. denied, 298 So. 2d 416 (Fla. 1974).**

A party who seeks rescission of an agreement ordinarily "must place the opposite party in status quo." Lang v. Horne, 156 Fla. 605, 615, 23 So. 2d 848, 853 (1945); Royal v. Parado, 462 So. 2d 849, 856 (Fla. 1st DCA 1985) (restoration of status quo is a "condition

precedent" to rescission). This "tender" requirement is fundamental because "the very idea of rescinding a contract implies that what has been parted with shall be restored on both sides." McDonald v. Sanders, 103 Fla. 93, 101, 137 So. 122, 126 (1931); **Billian v. Mobil Corp., 710 So. 2d 984, 990 (Fla. 4th DCA) (restoration of both parties is "prime object" of rescission), rev. denied, 725 So. 2d 1109 (Fla. 1998); see also Lowy v. Kessler, 522 So. 2d 917, 919 (Fla. 3d DCA 1988) (a contract cannot be "'partially' rescinded"). A party who continues to retain the benefits of a contract after learning of the basis for rescission "will be held to have waived his right to rescind." Rood Co. v. Board of Pub. Instruction, 102 So. 2d 139, 141-42 (Fla. 1958); Steinberg v. Bay Terrace Apartment Hotel, Inc., 375 So. 2d 1089, 1092-93 (Fla. 3d DCA 1979). Tender is not excused merely because parties assert "that they had spent the money" received pursuant to the fraudulently-induced contract. Bass v. Farish, 616 So. 2d 1146, 1147-48 (Fla. 4th DCA 1993) ("Generally, a contract will not be rescinded even for fraud when it is not possible for the opposing party to be put back in his pre-agreement status.").**

Whereas a rescission claim sets aside the voidable contract, a damages claim "affirms" the transaction, and thus "ratifies" the terms of the fraudulently-induced instrument. See, e.g., Bardwell v. Anderson, 120 Fla. 106, 107, 162 So. 321, 322 (1935) (party who does not promptly seek rescission will be "'bound by the contract'"); Bliss & Laughlin Indus., Inc. v. Malley, 364 So. 2d 65, 66 (Fla. 4th DCA 1978) (while rescission remedy is "predicated upon a disavowal of the contract," damages claim "is based upon its affirmance"); Hauser v. Van Zile, 269 So. 2d 396, 398-99 (Fla. 4th DCA 1972) (claim for damages "involves a ratification of the otherwise voidable contract"). This basic tenet of election of remedies reflects the equitable doctrine that a party who

"accepts the proceeds and benefits of a contract" must remain subject to "the burdens the contract places upon him." Fineberg v. Kline, 542 So. 2d 1002, 1004 (Fla. 3d DCA 1988), rev. denied, 553 So. 2d 1165 (Fla. 1989); see also Head v. Lane, 495 So. 2d 821, 824 (Fla. 4th DCA 1986) (party who "accepts the benefits" of a transaction is "estopped" from "repudiating the accompanying or resulting obligation"); see also supra § I.C.

The federal district court properly applied these principles in ruling upon Plaintiffs' fraud claims. As the court observed, the Plaintiffs did not seek to set aside their release contracts, because they never expressed a "desire that the settlement[s] be rescinded" nor offered "to refund the amount [they] received in settlement of [their] claims." (Mazzoni R2-47-6; Jack Martin R2-43-6.) To the contrary, Plaintiffs expressly sought "compensatory damages" for Defendants' alleged fraud. Because Plaintiffs had elected to "stand on the contract and sue for fraud," they "must also abide by the provisions of the agreement," including the general releases. (Id. 6-7.)

B. The General Releases Cover Plaintiffs' Fraud Claims

Under Florida law, "settlements are highly favored and will be enforced whenever possible." Robbie v. City of Miami, 469 So. 2d 1384, 1385 (Fla. 1985); Sun Microsystems of Cal., Inc. v. Engine & Mfg. Sys., C.A., 682 So. 2d 219, 220 (Fla. 3d DCA 1996). To further that interest, Florida courts enforce "general releases," which extend to all claims between the parties, and not just specific claims at issue in a particular dispute. Cerniglia v. Cerniglia, 679 So. 2d 1160, 1164 (Fla. 1996), aff'g 655 So. 2d 172 (Fla. 3d DCA 1995) (per curiam); Sheen v. Lyon,

485 So. 2d 422, 424 (Fla. 1984).

In Cerniglia, a divorcée sued for her ex-husband's conduct prior to the execution of a marital settlement agreement. She sought damages under four theories, including "common-law fraud" based upon alleged fraudulent inducement of the settlement, and alternatively sought to "set aside" the settlement agreement. The trial court granted summary judgment to the ex-husband on all counts. 679 So. 2d at 1161-62.

The Third District affirmed, holding that all of the ex-wife's damages claims, including the claim for fraud, were barred by the unambiguous general release contained in the marital settlement agreement. 655 So. 2d at 174. This Court also affirmed the grant of summary judgment to the ex-husband on all of the wife's damages claims, holding that the general release did cover and bar all claims, including the claim for fraudulent inducement of settlement. 679 So. 2d at 1164-65.

Numerous Florida cases similarly have upheld general releases, even when the releasing party alleged that it did not know of the existence of the claim at the time of settlement. See, e.g., Braemer Isle Condominium Ass'n, Inc. v. Boca Hi, Inc., 632 So. 2d 707, 707 (Fla. 4th DCA 1994) (general release barred claims for alleged hidden defects, because language "clearly reflects the intent to release a party from any and all liabilities"); Hardage Enters., Inc. v. Fidesys Corp., N.V., 570

So. 2d 436, 436-37 (Fla. 5th DCA 1990) (general release held "clear and unequivocal" bar of all liabilities); Lipman v. Ahearn, 374 So. 2d 605, 606 (Fla. 3d DCA 1979) (general release "covered all claims which the plaintiff might have had against the defendants"); Hall v. Burger King Corp., 912 F. Supp. 1509, 1520-22 (S.D. Fla. 1995) (general release barred fraudulent inducement claims). This settled Florida law accords with the decisions of numerous other jurisdictions holding that a general release bars even claims of fraudulent inducement of settlement.

Just last year, the Eleventh Circuit summarily affirmed a district court's dismissal of claims regarding similar allegations of litigation misconduct by DuPont, finding the claims barred by a release of "any and all" claims, "known or unknown":

> [T]he releases could not be more plain. Plaintiffs gave up all rights to seek damages from defendants in connection with their use of DuPont's Benlate product and agreed that the release represented the parties' entire agreement. When a contract provides plainly that it was the intent of the parties to settle and effect a resolution of all claims and disputes of every kind and nature among them; that it is the entire agreement of the parties; and that they released and waived all claims against each other of any kind whether known or unknown, no grounds at law or in contract exist to open it to jury examination. Thus, however egregiously defendants may have behaved during the prior

> litigation, Plaintiffs' execution of such all-encompassing releases prohibits them from suing defendants for that behavior.

Kobatake v. E.I. du Pont de Nemours and Co., 162 F.3d 619, 624-25 (11th Cir. 1998) (per curiam) (internal quotations and citations omitted), reh'g denied (Jan. 29, 1999); see also Henslee v. Houston, 566 F.2d 475, 478-79 (5th Cir. 1978) **(release of "any and all" claims bars claim for fraudulent inducement); Driscoll v. Schuttler, 697 F. Supp. 1195, 1201-02 (N.D. Ga. 1988) (same); Dresden v. Detroit Macomb Hosp. Corp., 553 N.W.2d 387 (Mich. App. 1996) (release of "any and all" claims bars fraudulent inducement claim based upon pre-settlement concealment of evidence), cert. denied, 569 N.W.2d 168 (Mich. 1997); Gray v. Petoseed Co., 985 F. Supp. 625 (D.S.C. 1996) (dismissing "settlement fraud" claim based upon alleged concealment of adverse test results during prior litigation), aff'd, 129 F.3d 1259, 1997 WL 716454 (4th Cir. Nov. 18, 1997).**

Here, as in Cerniglia and Kobatake, the releases could not be clearer in expressing the parties' intent to release all claims, even those allegedly "unknown" to Plaintiffs at the time of settlement:

> **In consideration of Defendant's payment of the [settlement] amount . . . Plaintiff hereby releases Defendant from any and all causes of action, claims, demands, actions, obligations, damages, or liability, whether known or unknown, that Plaintiff ever had, now has, or may hereafter have against Defendant, by reason of any fact or matter whatsoever, existing or occurring at any time up to and including the date this Release is signed (including, but not limited to, the claims asserted and sought to be asserted in the Action).**

(Mazzoni R1-8, Ex. A ¶ 1; Jack Martin R2-33, Ex. A ¶ 1.) Other provisions further demonstrate that the release contracts unambiguously encompasses Plaintiffs' current claims. (See, e.g., id. at 1

(stating that the Plaintiffs desired not only to terminate their underlying cases, but also to "release and dispose of all claims against Defendant and all claims incident thereto") (emphasis added); id. ¶ 3 (Plaintiffs' covenant not to sue extends to any action "in any way related to" the "obligations" that are subject to the release).)

As the federal district court properly recognized, this release unambiguously discharged all claims of Plaintiffs against DuPont based upon any conduct through the date of the release and therefore released the settlement fraud claims. (Mazzoni R2-47-7; Jack Martin R2-43-7.) This conclusion fully accords with this Court's decision in Cerniglia that a general release bars even claims of fraudulent inducement of settlement, and with the Eleventh Circuit's decision in Kobatake that a substantially similar release bars "settlement fraud" claims by other Benlate claimants. Because Plaintiffs insist on retaining the settlement proceeds and thereby affirming their settlements agreements, they must remain bound by the unambiguous terms of the release contracts, which clearly bar their current damages claims.

C. No Florida Case Allows a Party to Sue for Fraud or Other Claims Covered by an Affirmed, Unrescinded Release

Plaintiffs collect virtually every Florida case in which a party has alleged fraud of any type in connection with a settlement, suggesting -- without showing -- that these cases allow parties to keep all the benefits of a settlement agreement while at the same time ignoring all of its obligations. A parsing of Plaintiffs' string citations demonstrates that the cases are either patently distinguishable or actually support DuPont's position.

First, Plaintiffs cite numerous cases in which the allegedly defrauded party was seeking to "rescind" or "set aside" the settlement agreement at issue. See, e.g., Winter Park Tel. Co. v. Strong, 130 Fla. 755, 764, 179 So. 289, 292 (1937) **(Florida courts will "set aside and avoid" a release for fraud); Florida East Coast Ry. Co. v. Thompson, 93 Fla. 30, 111 So. 525 (1927) (same); Defigueiredo v. Publix Super Markets, Inc., 648 So. 2d 1256, 1257 (Fla. 4th DCA 1995) ("a release may be set aside where it was obtained by fraud"); Greene v. Kolpac Builders, Inc., 549 So. 2d 1150, 1151 (Fla. 3d DCA 1989) (party had reopened litigation and sought "rescission of the settlement agreement"); McCurley v. Auto-Owners Ins. Co., 356 So. 2d 68, 68 (Fla. 1st DCA 1978) (complaint sought "to set aside" release); Buchanan v. Clinton, 293 So. 2d 120, 122 (Fla. 1st DCA 1974) (defrauded party may "avoid" a release). These cases are immaterial because rescission avoids any general release language; Plaintiffs here have not rescinded and are thus bound by the release.**

Defendants have never argued that a proper claim of rescission -- promptly instituted upon discovery of the alleged fraud and with the full restoration of benefits -- could not be maintained by a "settlement fraud" plaintiff. Plaintiffs, however, did not seek rescission and did not restore the settlement proceeds to DuPont. Thus, the authorities allowing parties to "set aside" settlement agreements are inapposite.

Second, Plaintiffs cite numerous cases involving "fraud in the factum," not "fraudulent inducement," as Plaintiffs allege here. Fraud in the factum entails the absence of actual assent to the agreement, as when a signatory is misled into signing a document different from the one negotiated. As the Ohio Supreme Court has explained:

> **A release is obtained by fraud in the factum where an intentional act or misrepresentation of one party precludes a meeting of the minds concerning the nature or character of the purported agreement. .... Where device, trick, or want of capacity produces no knowledge on the part of the releasor of the nature of the instrument, or no intention on his part to sign a release or such a release as the one executed, there has been no meeting of the minds. In such cases the act or representation of one party against the other constitutes fraud in the factum and renders the release void ab initio.**
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> *** * ***
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> **A release of liability procured through fraud in the inducement is voidable only, and can be contested only after a return or tender of consideration. Cases of fraud in the inducement are those in which the plaintiff, while admitting that he released his claim for damages and received a consideration therefor, asserts that he was induced to do so by the defendant's fraud or misrepresentation. The fraud relates not to the nature or purport of the release, but to the facts inducing its execution, as, for instance, where there is a misrepresentation as to the nature or extent of the plaintiff's injuries.**

Haller v. Borror Corp., 552 N.E.2d 207, 210-11 (Ohio 1990) (internal quotations omitted); accord Langley v. Federal Dep. Ins. Corp., 484 U.S. 86, 93-94 (1987); Federal Sav. & Loan Ins. Corp. v. Gordy, 928 F.2d 1558, 1565 (11th Cir. 1991); Restatement (Second) of Contracts §§ 163-64 (1981); 1 E. Allan Farnsworth, Contracts § 4.10, at 402-03 (1990); Black's Law Dictionary 661 (6th ed. 1990). Florida already has recognized this exact distinction through its adoption of Article 3 of the Uniform Commercial Code.

Many of the authorities cited by Plaintiffs involve classic examples of "fraud in the factum," in which the plaintiff claimed that he lacked capacity to understand that he was signing a release or that the defendant affirmatively misrepresented the legal effect of the release. E.g., McGill v. Henderson, 98 So. 2d 791, 793 (Fla. 1957) (illiterate plaintiff claimed that defendant misrepresented that legal effect of release was limited to property damage and did not include personal injuries); Winter Park

Telephone Co. v. Strong, 130 Fla. 755, 179 So. 289 (1938) (plaintiff signed release while convalescing from massive injuries, including four skull fractures); Florida Power & Light Co. v. Horn, 100 Fla. 1339, 1346, 131 So. 219, 221-22 (1930) (agent of defendant had procured "unconscionable" release from grieving widow the day after her husband's death, at a time when widow had not slept for 30 hours); Florida East Coast Ry. Co. v. Thompson, 93 Fla. 30, 111 So. 525, 529 (Fla. 1927) (plaintiff argued that his illiteracy prevented him from understanding legal effect of release and that defendants had informed him that release was a mere "receipt"); Defigueiredo v. Publix Super Markets, Inc., 648 So. 2d 1256, 1256-57 (Fla. 4th DCA 1995) (plaintiff, who had trouble understanding English, alleged that agent of defendant represented that release was mere "receipt"); McCurley v. Auto-Owners Ins. Co., 356 So. 2d 68, 69 (Fla. 1st DCA 1978) (agent of defendant misrepresented that release was limited to automobile damage alone); Buchanan v. Clinton, 293 So. 2d 120, 121-22 (Fla. 1st DCA 1974) (letter from defendant that accompanied the release stated that sole purpose of release was to allow insurer to exercise right of subrogation).

In this case, Plaintiffs make no allegation that they lacked the capacity to understand that they were executing a general release; to the contrary, it is undisputed that Plaintiffs settled existing litigation of fraud and other claims with the

assistance of sophisticated counsel. (Mazzoni R1-8, Ex. A, ¶ 10; Jack Martin, R2-33, Ex. A ¶ 10.) Nor do Plaintiffs allege that DuPont misrepresented the "legal effect" of the general release; to the contrary, Plaintiffs expressly allege that the release was a "full and complete settlement of [their] claims." (Mazzoni R1-8 ¶ 33; Jack Martin R2-33 ¶ 33.) Because Plaintiffs clearly allege that Defendants fraudulently induced the settlements through misrepresentations and omissions (see id. ¶¶ 31-32, 34), their reliance upon "fraud in the factum" authority is fundamentally misplaced.

Third, Plaintiffs cite cases in which there is absolutely no indication that the settlement agreements at issue contained general release terms. See, e.g., HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238 (Fla. 1996), aff'g 661 So. 2d 1221 (Fla. 3d DCA 1995); **Levine v. Levine, 648 So. 2d 1228 (Fla. 4th DCA 1995); Estate of Gimbert v. Lamb, 601 So. 2d 230 (Fla. 2d DCA 1992); Iowa National Mutual Ins. Co. v. Worthy, 447 So. 2d 998 (Fla. 5th DCA 1984). HTP, for example, addressed the relationship of the "economic loss" to a fraudulent inducement claim. The HTP court never discussed the terms of the fraudulently-induced agreement, and there is no indication that the settlement at issue contained a broad general release of "any and all" claims, "known or unknown." Thus, HTP has**

[3] Moreover, HTP itself recognized that a claim for damages for fraudulent inducement "'stand[s] by that contract.'" Id. at 1239. Thus, to the extent HTP has any bearing on the

absolutely no bearing on the question of whether general release terms discharge claims of fraudulent inducement. That issue was clearly decided by Cerniglia v. Cerniglia, 679 So. 2d 1160 (Fla. 1996), where this Court held that general release terms will bar a damages claim for fraudulent inducement of settlement.

Fourth, Plaintiffs cite Jacksonville Terminal Co. v. Misak, 102 So. 2d 295 (Fla. 1958), in which the documents at issue did not remotely approach the level of a comprehensive general release. In Jacksonville, the plaintiff had executed a series of "Certificate[s] with Respect to Sickness Benefits and Allocation of Factors in Settlement of Claim for Personal Injuries," which had been accompanied by payment stubs expressly stating that the amounts disbursed represented "partial payment for personal injury sustained." Id. at 297-98 (emphasis in original). A manager for the defendant had testified that the payments were "partial" and that no final settlement had been made. Id. at 298. The Court upheld the trial court's determination that the documents did not constitute complete releases.

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issue here, it supports application of the election of remedies rule that a damages claim "affirms" the terms of the fraudulently-induced contract and remains subject to its terms.

Finally, Plaintiffs cite several cases in which releases were upheld, even when the releasing party claimed not to have intended to release certain claims. Braemer Isle Condominium Ass'n, Inc. v. Boca Hi, Inc., 632 So. 2d 707 (Fla. 4th DCA 1994), the plaintiff claimed that the general release it had executed in settlement of prior construction litigation should not be interpreted to bar claims for undiscoverable hidden defects. The Fourth District disagreed and upheld the release, stating that "[a] release [of] a party from any and all liabilities in connection with a construction project should be honored." Id. at 707.

Similarly, in Pan-American Life Insurance Co. v. Fuentes, 258 So. 2d 8 (Fla. 4th DCA), modified in irrelevant part, 274 So. 2d 549 (Fla. 4th DCA 1971), the plaintiff claimed not to have intended to amend an insurance policy through her execution of a release signed after the death of the insured. The district court found that this asserted intent was inconsistent with the unambiguous language of the release and enforced the release. Id.-AmericanFord v. Coleman, 462 So. 2d 834 (Fla. 5th DCA 1984)Biscoe v. Evans, 181

[4] Plaintiffs also cite several non-Florida cases involving claims of "settlement fraud." In Slotkin v. Citizens Cas. Co., 614 F.2d 301, 307, 312 (2d Cir. 1979) (New York law), cert. denied, 449 U.S. 981 (1980), the fraud claim survived the release because the settlement agreement itself contained a false stipulation regarding the amount of insurance coverage. DiSabatino v. United States Fidelity & Guar. Co., 635 F. Supp. 350 (D. Del. 1986), addressed only the threshold issue of whether Delaware law allowed a party to affirm a settlement agreement and sue for fraud; it did not discuss the terms of the settlement agreement or whether the terms themselves discharged claims of fraudulent inducement. Bilotti v. Accurate Forming Corp., 188 A.2d 24, 28, 35-36 (N.J. 1963), found that under New Jersey law, a "customary" release which made no reference to "unknown" claims did not encompass fraudulent inducement claims.

So. 2d 564 (Fla. 1st DCA 1966)

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[1] **Castleton Gardens, Inc. v. DuPont, et al., 97-0061-CIV-LENARD, Country Joe's Nursery, Inc. v. DuPont, et al., 97-0060-CIV-LENARD, Foliage Forest, Inc. v. DuPont, et al., 97-0059-CIV-LENARD, Morningstar Nursery, Inc. v. DuPont, et al., 97-0065-CIV-LENARD, and Palm Beach Greenery, Inc. v. DuPont, et al., 97-0064-CIV-LENARD (S.D. Fla. July 25, 1997). All of these orders were appealed to the Eleventh Circuit and consolidated. On April 19, 1999, the Eleventh Circuit consolidated those appeals with the appeals in the instant cases and certified questions to this Court. Foliage Forest, Inc., et al. v. DuPont, et al., Nos. 97-5696 to 97-5700, 1999 WL 224922 (11th Cir. Apr. 19, 1999).**

[1] The district court did not address Defendants' alternative argument that Plaintiffs' claims were barred by the economic loss rule. Defendants similarly did not address that argument on appeal, but without prejudice to their right to seek a ruling on the issue from the district court in any remand.

[1] The Eleventh Circuit did not certify Defendants' alternative argument that Plaintiffs could not establish justifiable reliance, and Plaintiffs did not address the argument in their Initial Brief. Accordingly, Defendants do not address that argument here, without prejudice to renewing the argument in the Eleventh Circuit after the certification proceedings.

[1] This Court specifically distinguished C & D Farms, supra, as involving the "very different policies" applicable to covenants not to compete.

[1] Oceanic Villas, Inc. v. Godson, 148 Fla. 454, 4 So. 2d 689 (1941), a case Plaintiffs cite that does not involve an exculpatory clause, is discussed infra § I.C.2.

[1] "... even if there is no allegation that the choice-of-law provision itself was fraudulently procured?"

[1] In a second action, the ex-wife sought relief from the judgment in the dissolution proceedings. The Third District determined that the divorcee's claims to set aside the settlement and the judgment were barred by the then-operative Florida rule governing relief from a judgment. 655 So. 2d at 174-76. This Court held that the conduct alleged by the wife (coercion, duress, and fraudulent financial disclosure) constituted "intrinsic fraud" which was subject to the one-year limitation on seeking relief from a final judgment. 679 So. 2d at 1163-64.

[1] Compare Fla. Stat. Ann. § 673.3051(1)(a)(3) & cmt. 1 (West 1998) (holder in due course remains subject to defense of "fraud in the factum," such as where a party "is tricked into signing a note in the belief that it is merely a receipt") with id. cmt. 2 & Seinfeld v. Commercial Bank & Trust Co., 405 So. 2d 1039 (Fla. 3d DCA 1981) (holder in due course is not subject to defense of "fraudulent inducement").