Johnson & Johnson v. Fortis Advisors LLC (Del. 2026): A Case Commentary on Earnouts, Commercially Reasonable Efforts and the Limits of the Implied Covenant

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Case: *Johnson & Johnson v. Fortis Advisors LLC*, No. 490, 2024, slip op. (Del. Jan. 12, 2026) (LeGrow, J., for the Court en Banc), on appeal from the Court of Chancery, C.A. No. 2020-0881-LWW.

Background

In 2019 Johnson & Johnson acquired Auris Health, a surgical robotics company, for $3.4 billion in upfront cash plus up to $2.35 billion in earnouts tied to ten milestones. Slip op. at 11, 13. Eight milestones required FDA "510(k) premarket notification" for specified devices and procedures; two depended on robotics sales. *Id.* at 11–15. Five of the regulatory milestones concerned Auris's iPlatform, a robotic surgical system intended to compete with Intuitive Surgical's da Vinci. *Id.* at 6, 13–14.

The Merger Agreement required J&J to use "commercially reasonable efforts" to achieve the regulatory milestones and defined that phrase by reference to J&J's "usual practice" for "priority medical device products of similar commercial potential at a similar stage in product lifecycle." *Id.* at 16. It listed ten factors J&J could take into account and barred J&J from acting with the intention of avoiding an earnout payment or on the basis of the cost of the payments. *Id.* at 17. Auris gave extensive representations; a one-sided anti-reliance clause bound only J&J; and an exclusive-remedy clause made indemnification the sole post-closing remedy, with a carve-out for fraud in making the contractual representations. *Id.* at 17–18.

The Court of Chancery found that J&J's post-closing conduct fell far short of that standard. It pointed to "Project Manhattan," a head-to-head internal contest between iPlatform and J&J's own Verb robot; the subsequent combination of the two programmes; the abandonment of a minimally viable product (MVP) regulatory strategy; and changes to employee incentives after J&J wrote the milestones down to zero. *Id.* at 18–29. In August 2019 the FDA told the parties that first-generation robotic systems like iPlatform could no longer use the 510(k) pathway; De Novo review was confirmed as available in January 2020. *Id.* at 27. No earnout was ever paid. *Id.* at 30.

The trial court also found that J&J's CEO had fraudulently induced Auris to accept a $100 million contingent payment for a Monarch lung-ablation milestone by describing it as "high[ly] certain" and "effective up front" consideration, without disclosing a recent patient death in a related study and a resulting FDA for-cause inspection. *Id.* at 12–13, 33–34. The Court of Chancery awarded $900 million in contract damages and $60,865,748 in fraud damages, plus prejudgment interest, and entered final judgment on 28 October 2024. *Id.* at 34–35. In all, the judgment exceeded $1 billion. *Id.* at 2.

Holding

The Delaware Supreme Court affirmed in part, reversed in part and remanded. *Id.* at 3, 87. It held:

- The implied covenant of good faith and fair dealing could not be used to treat De Novo clearance as satisfying the first iPlatform milestone, so the damages for that milestone were reversed. *Id.* at 3, 57–58.
- J&J breached its express efforts obligation for the remaining iPlatform milestones, and the damages for those milestones stood. *Id.* at 58–61, 73.
- The fraud finding was affirmed, and the exclusive-remedy clause did not bar the fraud claim in the absence of an anti-reliance promise by Auris. *Id.* at 74–87.

The case was remanded to recalculate interest on a damages figure that excludes the Milestone 1 payment. *Id.* at 87.

Reasoning

The implied covenant: a scalpel, not a brush

The Court described the implied covenant as a narrow gap-filler that protects the parties' shared expectations at signing but cannot rewrite express terms. *Id.* at 37, 42–43. "Used properly, the implied covenant functions like a scalpel, not a brush." *Id.* at 43. Drawing on *Nemec*, *Oxbow Carbon*, *Glaxo* and *Cincinnati SMSA*, it held that the covenant applies only where there is a genuine gap concerning a development that could not be anticipated. *Id.* at 45–50. As the Court put it, "hindsight cannot correct oversight." *Id.* at 46.

There was no gap here. The agreement did not speak of regulatory approval in general; it conditioned each regulatory milestone, "in express and repeated language," on 510(k) clearance. *Id.* at 50–51. The efforts definition allowed J&J to consider "guidance or developments from the FDA," and the agreement warned that some or all earnout payments might never be paid. *Id.* at 51. The parties could have written "510(k) or any successor or alternative pathway" but did not. *Id.* at 52.

The risk was also foreseeable. Before signing, the FDA had told Auris that it was unclear whether 510(k) was appropriate for iPlatform, and the agency had publicly announced plans to modernise the 510(k) programme. *Id.* at 54–55. The trial court's finding that 510(k) was the "only logical pathway" did not change the analysis: "Those points go to likelihood, not foreseeability." *Id.* at 55.

Why the other milestones survived

Reversal on Milestone 1 did not undo the rest. The remaining milestones still required 510(k) clearance, and the trial court found, without challenge, that once iPlatform obtained De Novo approval for a first indication it could serve as its own predicate for later 510(k) submissions. *Id.* at 58–59. J&J therefore remained obliged to use commercially reasonable efforts toward those milestones, including by seeking De Novo approval for an initial indication where necessary. *Id.* at 59. J&J's argument that general De Novo approval statistics undermined the damages model did not show clear error in the trial court's iPlatform-specific findings. *Id.* at 59–61.

Reading the efforts clause as a whole

J&J argued that the ten listed factors preserved its business discretion, so that decisions justified by profitability or competitiveness could not be breaches. *Id.* at 66–68. The Court disagreed. Reading the clause as a whole, the obligation to use efforts consistent with J&J's usual practice for "priority" devices set a

baseline; the ten factors allowed J&J to calibrate its efforts within that baseline, not to override it. *Id.* at 68–69, 73. J&J's reading would have left the "priority" language with "no work to do" and rendered the anti-avoidance clause superfluous, since J&J had approved the combined Verb–iPlatform plan in part because the valuation improved when the contingent payments were considered. *Id.* at 70–71.

The Court noted the contrast with the Monarch milestones, where the trial court found J&J's efforts commercially reasonable even though they were "flawed" in hindsight, because J&J had been choosing among reasonable paths toward the milestone. *Id.* at 71–73. It also observed that an "inward-facing" efforts standard, usually buyer-friendly, can become much more seller-friendly when the buyer is an industry leader and the benchmark is its own priority products. *Id.* at 63 n.171.

Fraud and the exclusive-remedy clause

On fraud, the Court found no clear error. Active concealment requires an affirmative act that prevents discovery, which can be as small as "a single word, even a nod or a wink". *Id.* at 77 (quoting *Nicolet, Inc. v. Nutt*). Describing the milestone as highly certain while J&J's deal team had been briefed on the death and the FDA inspection was such an act, and the record supported at least reckless indifference to the truth. *Id.* at 77–80.

On the exclusive-remedy clause, the Court applied *Abry Partners*: a party can bar extra-contractual fraud claims only through clear anti-reliance language from the party seeking to rely on outside statements. *Id.* at 83–84. Section 4.08 was "a textbook *Abry*-style anti-reliance provision, but it runs solely against J&J." *Id.* at 84. The Court held that where a contract contains a one-sided anti-reliance clause and the other party made no comparable promise, "an exclusive remedy clause cannot be invoked to bar the other party's post-closing claims for intentional extra-contractual fraud." *Id.* at 85. *Express Scripts* did not require a different result because it concerned limits on remedies for non-deliberate fraud in contractual representations. *Id.* at 85–87.

Significance

Drafting controls in earnouts. The decision confirms that Delaware courts will not use the implied covenant to rescue a seller from a foreseeable risk that the contract's express terms allocated. A milestone tied to one named regulatory pathway means that pathway.

Efforts clauses have teeth. At the same time, a tailored efforts clause benchmarked to the buyer's own "priority" products can impose a demanding standard, and listed discretionary factors will be read as calibrating that standard rather than replacing it.

Anti-reliance must run both ways to protect both sides. A buyer that obtains an anti-reliance promise from the seller but gives none of its own remains exposed to claims of intentional extra-contractual fraud, whatever the exclusive-remedy clause says.

The financial effect. In the Court of Chancery's damages calculation, the $400 million Milestone 1 payment, weighted at a 75% probability of achievement, accounted for $300 million of the $900 million in contract damages. *Fortis Advisors LLC v. Johnson & Johnson*, C.A. No. 2020-0881-LWW, mem. op. at 132 (Del. Ch. Sept. 4, 2024). That is the component the Supreme Court removed from the damages calculation. Slip op. at 87.

Practical Takeaways

The following are general observations drawn from the decision for deal teams and business leaders, not legal advice about any transaction.

- **Name the fallback.** If a milestone depends on a regulatory or third-party pathway that could change, the agreement should say whether an alternative pathway counts.
- **Benchmarks shape obligations.** Tying efforts to a buyer's "priority" products can make an inward-facing standard demanding; buyers and sellers should understand which internal comparator will be used.
- **Discretion operates within the standard.** Listed factors that a buyer may consider are unlikely to excuse decisions that predictably undermine the milestones.
- **Valuation discussions can become evidence.** Internal analyses that account for the cost of earnout payments may be read against an anti-avoidance clause.
- **Negotiation statements matter.** Characterising a contingent payment as near-certain while withholding known adverse facts can support a fraud claim that contract limits may not bar.
- **Check the direction of anti-reliance clauses.** A one-way clause protects only the party that obtained it.

These observations draw on pages 1–87 of the slip opinion and are offered to support informed discussion with qualified counsel.

Open Questions

The opinion leaves the recalculated judgment to the Court of Chancery. It declined to consider Fortis's request to remand a specific-performance claim under the agreement's renegotiation clause, because the argument was raised only in a footnote and was therefore waived. *Id.* at 57 n.156. And while the Court explained how listed factors interact with a "priority" baseline in this agreement, other efforts clauses with different wording may produce different results.

For parties negotiating earnouts, the most practical lesson of *J&J v. Fortis* is that courts will hold them to the words they chose, both the words that limit a buyer's obligations and the words that define them.

References

- *Johnson & Johnson v. Fortis Advisors LLC*, No. 490, 2024, slip opinion (Del. Jan. 12, 2026), Delaware Supreme Court: https://courts.delaware.gov/Opinions/Download.aspx?id=389980
- *Fortis Advisors LLC v. Johnson & Johnson*, C.A. No. 2020-0881-LWW, memorandum opinion (Del. Ch. Sept. 4, 2024), Delaware Court of Chancery: https://courts.delaware.gov/Opinions/Download.aspx?id=369060