Confidentiality Agreements and Standstill Agreements

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Commonly-Encountered Provisions

- Non-Reliance Provisions
- "Back-Door" Standstills
- "Don't Ask, Don't Waive" Standstills

Sample provisions have been selected from the standard form "Confidentiality Agreement: Mergers and Acquisitions" document maintained by Practical Law Company, attached hereto as Exhibit A.

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PLC Non-Reliance Provision

"The Recipient understands and agrees that none of the Disclosing Party, the Company or any of their respective Representatives: (a) have made or make any representation or warranty hereunder, expressed or implied, as to the accuracy or completeness of the Evaluation Material or (b) shall have any liability hereunder to the Recipient or its Representatives relating to or resulting from the use of the Evaluation Material or any errors therein or omissions therefrom."

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Effect of the Non-Reliance Provision

- Clarifies that recipient of confidential information can only look to a definitive agreement for representations about the business and operations of the target company and the disclosing party.
- May limit the disclosing party's liability for the information provided during the due diligence process (including for fraud and intentional misrepresentations).

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Non-Reliance Provision at issue in: *RAA Management, LLC v. Savage Sports Holdings, Inc.*, 45 A.3d 107 (Del. 2012)

"You understand and acknowledge that neither the Company nor any Company Representative is making any representation or warranty, express or implied, as to the accuracy or completeness of the Evaluation Material or of any other information concerning the Company provided or prepared by or for the Company, and none of the Company nor the Company Representatives, will have any liability to you or any other person resulting from your use of the Evaluation Material or any such other information. Only those representations or warranties that are made to a purchaser in the Sale Agreement when, as and if it is executed, and subject to such limitations and restrictions as may be specified [in] such a Sale Agreement, shall have any legal effect."

- The NDA also included a waiver of any claims the potential acquiror might have had in connection with any potential transaction with the Company unless the parties enter into a definitive sale agreement.

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RAA Management, LLC v. Savage Sports Holdings, Inc.

- RAA Management, LLC ("RAA"), appealed the Superior Court's decision to dismiss its complaint alleging that Savage Sports Holdings, Inc. ("Savage"), made numerous misrepresentations regarding unrecorded liabilities and adverse claims in the due diligence process.
- The Supreme Court of Delaware affirmed the ruling below, holding:
  - (i) the non-disclosure agreement ("NDA") between RAA and Savage contained an unambiguous "non-reliance" clause which did not contain an exception for intentional or fraudulent misrepresentations;
  - (ii) the "peculiar-knowledge" exception was inapplicable because this exception generally does not apply where two sophisticated parties could have easily insisted on contractual protections for themselves; and
  - (iii) the Court should not decline to enforce the agreed-upon language of the non-reliance clauses in the NDA on policy grounds because of Delaware's public policy in favor of enforcing contractually binding written disclaimers of reliance on representations outside of a final agreement of sale or merger.

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RAA Management v. Savage Sports: Facts

- Savage, a Delaware corporation, and its primary operating subsidiary are one of the largest rifle manufacturers in the United States. Contemplating a sale of the company, Savage engaged Robert W. Baird & Company ("Baird"), to conduct a private auction of Savage.
- In September 2010, Baird reached out to investment companies, including RAA, to solicit interest in becoming a bidder to purchase Savage. Thereafter, RAA began exploring the possibility of purchasing Savage.
- In order to obtain confidential documents and information from Savage, as part of its due diligence process, RAA entered into a NDA with Savage, in which RAA agreed to keep confidential all information furnished by Savage "concerning the Company that is non-public, confidential or proprietary in nature."
- The NDA included the "non-reliance" clause provided above.
- RAA conducted due diligence and sent a Letter of Intent specifying terms upon which it would acquire Savage for $170 million after a 45-day exclusivity period.
- After two more months of negotiations, RAA notified Savage that it was no longer interested in acquiring Savage.

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RAA Management v. Savage Sports: Lawsuit

- RAA filed a lawsuit in the Delaware Superior Court, claiming Savage committed fraud by "misrepresent[ing] to and concealing from RAA" the existence of three alleged "material unrecorded liabilities and claims against it." RAA claimed that had it known of any one of those three liabilities, it never would have attempted to acquire Savage.
- RAA demanded payment from Savage of $1.2 million in "sunken due diligence costs."
- The Superior Court dismissed RAA's complaint, finding that "where a sophisticated investor like RAA Management agrees to perform due diligence with the understanding that the seller disclaims any warranty of accuracy or completeness in the information it provides to the potential buyer, the due diligence is governed by . . . a buyer beware notion, that even absolves the seller from intentional fraud."
- RAA appealed, arguing that (1) the Superior Court erroneously read the non-reliance disclaimer language to absolve Savage of fraud, rather than just unintentional inaccuracies; (2) the Superior Court incorrectly allowed an ambiguous disclaimer in the NDA to absolve Savage of all liability for fraud; (3) the NDA should not preclude a claim because Savage allegedly made misrepresentations "about material facts within the defendant's peculiar-knowledge"; and (4) public policy should prevent this reading.

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RAA Management v. Savage Sports: Supreme Court's Ruling

- The Delaware Supreme Court, applying New York law but concluding that the result would be the same under Delaware law, affirmed the Superior Court's ruling.
- The language in the NDA was unambiguous, and did not provide an express exception for intentional or fraudulent misrepresentations or an implicit exception for inaccurate or incomplete information attributable to fraud.
- ***"Particular-knowledge" exception.*** Some New York courts have found "in the context of completed sales transactions, that claims of fraudulent inducement due to statements made by the seller would not be barred by the non-reliance provisions at issue in those specific cases, if the facts at issue were 'peculiarly within the misrepresenting party's knowledge,'" but the Court found that this exception generally does not apply where two sophisticated parties could have easily insisted on contractual protections for themselves.
- ***Public policy.*** Citing *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006), the Court rejected RAA's public policy argument, instead upholding "Delaware's public policy in favor of enforcing contractually binding written disclaimers of reliance on representations outside of a final agreement of sale or merger."

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Non-Reliance Provision: Practice Point

- A carefully drafted non-reliance provision will limit the liability of a disclosing party—even for claims of fraud or intentional misrepresentation—for information disclosed during the diligence process.
- To the extent an acquiror desires to maintain an ability to recoup diligence costs in egregious circumstances, it should carve out intentional misrepresentations and fraud from the non-reliance provisions.
  - Otherwise, Delaware courts will follow the parties' agreed upon language.

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