CONTRACT "KILLER CLAUSES"

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Overview

- Commonly used documents such as Memoranda of Understanding, Letters of Intent, Non-Disclosure Agreements and commercial arrangements may create pitfalls and landmines in bet-the-company and other scenarios
- Lessons learned from litigation in the M&A context can help guide practice in all manner of contract negotiations

"Killer Clauses"

- "Non-binding" preliminary agreements
  - Good faith obligations
  - Survival Clauses and Course of conduct
  - Choice of law
- Non-disclosure agreements and confidentiality provisions
  - Liability for data breaches
  - Interaction with other agreements / conflicts
- Limitations of liability and consequential damage waivers
  - Potential unintended consequences
- Insurance representations
- Liability allocations

"Non-binding" preliminary agreements

- "Non-binding" letters of intent, term sheets, memoranda of understanding or similarly titled-documents can facilitate detailed negotiations and an agreement on principal terms

- Binding obligations can arise from:
  - Express or implied obligations to act in good faith
  - the parties' subsequent actions
  - "best efforts," "commercially reasonable efforts" or similar clauses

SIGA Technologies, Inc. v. PharmAthene, Inc.

- PharmAthene sought to acquire SIGA by merger or obtain a license to SIGA's treatment for small pox
- Term sheet for license included a footer on each page saying "Non Binding Terms" and was not signed
- Term sheet was attached to and referenced in subsequent documents, saying that the parties would "*negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the License Agreement Term Sheet*"
- SIGA developed seller's remorse. After the parties' merger negotiations failed, SIGA proposed license terms that differed significantly from the terms in the term sheet

SIGA Technologies, Inc. v. PharmAthene, Inc. (cont.)

- Delaware Supreme Court found that the agreements referencing the License Agreement Term Sheet and providing that the parties would negotiate in good faith constituted a binding obligation
- SIGA's significant departure from the term sheet in subsequent negotiations amounted to a breach of the obligation to negotiate in good faith
- But for SIGA's bad faith negotiations, the parties would have reached an agreement.
- The Court held that PharmAthene could recover contract expectation damages (benefit-of-the-bargain damages), and not just reliance damages

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