

# 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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