Confidentiality Agreements in Mergers and Acquisitions: Not to be Ignored

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Every merger or acquisition process generally begins with the parties entering into a confidentiality or non-disclosure agreement ("NDA"). These agreements are largely generic and generally ensure confidentiality of the negotiations as well as protect the seller's confidential information. As recent case law makes clear, however, confidentiality agreements have taken on an increasingly important role and can have long-lasting consequences in a merger or acquisition.

This article highlights four areas where practitioners are cautioned to pay particular attention when drafting confidentiality agreements: standstill provisions, don't ask don't waive standstill provisions, anti-reliance clauses, and forum selection clauses.

Implicit Standstill Provisions in Confidentiality Agreements

Before entering into negotiations with a potential buyer and disclosing confidential information in the diligence process, sellers will often try to obtain the potential buyer's agreement that it will not pursue a hostile transaction. Such explicit "standstill" provisions allow sellers to reveal confidential information without fear that this sensitive material will be used or disclosed by the receiving party to carry out a non-negotiated, hostile acquisition. A recent Delaware decision makes clear that explicit standstill provisions are not the only way to prevent a party from pursuing a non-negotiated, hostile acquisition.

In *Martin Marietta Materials, Inc. v. Vulcan Materials Co.* ("*Martin Marietta Materials*"), Vulcan Materials Company ("Vulcan") sought judicial assistance in preventing a hostile takeover by Martin Marietta Materials, Inc. ("Martin Marietta") following failed negotiations between the parties.[2] Although the parties had not agreed to an "express standstill" provision,[3] a confidentiality agreement between the parties did restrict the use and disclosure of information provided pursuant to the agreement. The Court found that Martin Marietta had breached the confidentiality agreement by using and disclosing nonpublic information obtained under the agreement to formulate and pursue a hostile acquisition. As a remedy, the Court enjoined Martin Marietta from attempting any hostile takeover for a period of four months, effectively imposing a standstill.

The use and disclosure terms of Martin Marietta and Vulcan's NDA provided that "[e]ach party . . . shall use the other party's Evaluation Material solely for the purpose of evaluating a

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[2] *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, C.A. No. 7102-CS, 56 A.3d 1072, 1076-77 (Del. Ch. 2012), *aff'd*, 2012 WL 2783101 (Del. Jul. 10, 2012).

[3] The Court found that "the failure to discuss a standstill most likely flowed from both CEO's evident desire for confidentiality and the shared premise that they were seeking to explore whether a friendly, consensual merger agreement could be reached." *Martin Marietta Materials*, 56 A.3d at 1082.

Transaction." A "Transaction" was defined as a "possible **business combination transaction [] between** [Martin Marietta] and [Vulcan] or their respective subsidiaries."[4]

The Court found that the bolded terms restricted the use and disclosure of sensitive information learned pursuant to the NDA in furtherance of a "contractual, transactional agreement between Martin Marietta and Vulcan to effect a business combination," not for purposes of carrying out a hostile acquisition.[5] Because the Court found the language in the agreement was ambiguous, the Court relied on extrinsic evidence in interpreting the scope of the provision, including:[6]

- Evidence supporting the notion that Martin Marietta only entered into the agreements for the purpose of facilitating a consensual transaction, not an "unsolicited exchange or tender offer or a proxy contest";[7]
- Martin Marietta's revisions to the NDA, which reflected Martin Marietta's desire to proceed only with a consensual transaction;[8] and
- Martin Marietta's conduct after it decided to pursue a hostile offer.[9]

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[4] *Id.* at 1083 (emphasis added). Because the deal raised antitrust concerns, Martin Marietta and Vulcan also entered into a joint defense agreement ("JDA") to allow their respective counsel to share sensitive information. This agreement required that "Confidential Materials" be used "solely for purposes of pursing and completing *the* Transaction." *Id.* at 1084. Under the JDA, "Transaction" was defined as "a potential transaction being discussed by Vulcan and Martin Marietta . . . involving the combination or acquisition of all or certain of their assets or stock." *Id.* Since the only transaction being discussed at the time was a negotiated merger, the Court concluded "that the JDA was breached by Martin Marietta's use of Confidential Materials in preparing the antitrust analysis related to its hostile bid [because] . . . neither Martin Marietta's Exchange offer nor its Proxy Contest fit within the JDA's definition of Transaction[.]" *Id.* at 1121. The Delaware Supreme Court affirmed partly on these grounds. *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 2012 WL 2783101, at *11 (Del. Jul. 12, 2012).

[5] *Martin Marietta Materials*, 56 A.3d at 1121.

[6] Specifically, the Court explored and relied upon extrinsic evidence because it determined that both parties' interpretations of the NDA's bolded terms were "reasonable." *Id.* at 1117-1118.

[7] *Id.* ("On the evidence, I am persuaded that [Ward] Nye [,the CEO of Martin Marietta,] would never have agreed to exchange confidential information if he thought that one of the parties to the NDA was free to launch an unsolicited exchange or tender offer or a proxy contest under the terms of the Agreement."); *see also id.* at 1082 ("Nye's messages to Carr [, Vulcan's banker,] were clear: (i) Martin Marietta would talk and share information about a consensual deal only, and not for purposes of facilitating an unwanted acquisition of Martin Marietta by Vulcan; and even then only if (ii) absolute confidentiality, even as to the fact of their discussions, was maintained.").

[8] *Id.* at 1082 ("[E]very one of the proposed Martin Marietta changes had the effect of making the NDA stronger in the sense of broadening the information subject to its restrictions and limiting the permissible uses and disclosures of the covered information.").

[9] This conduct, Chancellor Strine found, revealed that Martin Marietta believed that the NDA and JDA barred it from using the nonpublic information that it learned in the context of friendly negotiations with Vulcan in its pursuit of a hostile offer. Martin Marietta, for example, "made a clunky attempt to gather up all the Evaluation Material in the possession of Martin Marietta management and put in a sealed box[.]" *Id.* at 1119.

The Court also looked to provisions in the NDA allowing disclosure only when "legally required." "Legally required" was narrowly defined to include only those situations where a party was "requested or required (by oral questions, interrogatories, requests for information or documents in legal proceedings, subpoena, civil investigative demand or other similar process) to disclose."[10] According to the Court, this definition did not encompass Martin Marietta's voluntary actions in pursuing an exchange offer and proxy context, and thereby subjecting itself to SEC disclosure requirements.[11] The Court distinguished this limitation from one which permitted disclosure "if required by applicable law." As the Court warned, where a confidentiality agreement contains language limiting legally required disclosure to scenarios where a party receives an external demand, such as a subpoena, "practitioners are advised that disclosure of confidential information in the context of a hostile bid will not be allowed, even in the absence of a standstill."[12]

Martin Marietta Materials underscores the importance of carefully negotiating use and disclosure provisions and makes clear that these provisions can have the effect of creating an implicit standstill provision, even when standstills are not negotiated. An NDA that allows a party to use or disclose nonpublic information learned pursuant to the agreement only for the purposes of a "negotiated" or "mutually agreed" upon transaction will likely preclude use of the information for a hostile acquisition.[13] As *Martin Marietta Materials* teaches, depending on the circumstances, even broad language like "any possible business combination between" can be interpreted as precluding use in a hostile transaction. Similarly, giving the buyer the right to disclose sensitive information only when "legally required" can prevent use in a hostile transaction if "legally required" is defined

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[10] Paragraph three of the confidentiality agreement stated, "*Subject to paragraph (4)*, each party agrees that . . . it . . . will not disclose to any other person, *other than as legally required*, the fact that . . . ." *Id.* at 1123. Paragraph four, titled "Required Disclosures," provided: "*In the event that a party ... [is] requested or required (by oral questions, interrogatories, requests for information or documents in legal proceedings, subpoena, civil investigative demand or other similar process) to disclose any of the other party's Evaluation Material or any of the facts, the disclosure of which is prohibited under paragraph (3) of this letter agreement*, the party requested or required to make the disclosure shall provide the other party with *prompt notice of any such request or requirement* . . . ." *Id.* at 1123-1124. After reviewing extrinsic evidence, Chancellor Strine determined that "the only reasonable way to interpret ¶ 3 and ¶ 4 in light of the extrinsic evidence is that the circumstances under which a party is permitted to make 'Required Disclosure[s]' under ¶ 4 are the only circumstances under which a party is allowed to make 'legally required' disclosures under ¶ 3." *Id.* at 1129.

[11] Notably, the Court found that: "The notion that Nye's obsessive concern with confidentiality did not extend to a situation when Vulcan itself would decide to launch a hostile bid, impose on itself an arguable legal requirement to disclose, and use that as a blank check to dump in the public domain the broad classes of information that Martin Marietta had itself asked to be treated as confidential under the NDA is one that a rational disinterested mind could not accept as plausible." *Id.* at 1130.

[12] *Id.* at 1134. The Court additionally noted that, even if SEC comment letters Martin Marietta had received could be construed as similar to a "civil investigative demand," Martin Marietta would still have breached the NDA by failing to adhere to the advance notice requirements. *Id.* at 1136. The Supreme Court also affirmed on these grounds, holding that paragraph four (4) unambiguously permitted disclosure only if triggered by an external demand and after compliance with the notice requirements. *Martin Marietta Materials*, 2012 WL 2783101, at *14.

[13] *See Martin Marietta Materials*, 56 A.3d at 1117 ("[T]reatises and models do indicate that there are other words that can serve to preclude hostile moves even if the parties to a confidentiality agreement do not agree to an explicit standstill provision, in the way that, according to Vulcan 'between' does. For example, the parties could have qualified the definition of Transaction by adding the words 'negotiated' or 'mutually agreeable,' or specifying that the receiving party could not use the Evaluation Material 'in any way detrimental' to the disclosing party.").

narrowly to include only situations "that arise in the context of some sort of discovery obligation or affirmative legal process."

"Don't-Ask-Don't-Waive" Standstills in Confidentiality Agreements

In addition to explicit standstill agreements, sellers often try to negotiate into confidentiality agreements "don't ask don't waive" standstill provisions, which generally prohibit the potential buyer from requesting, publicly or privately, that the seller later waive the standstill ("Don't-Ask-Don't-Waive Standstills"). The provisions are designed to ensure that potential bidders submit their best and final offer in any auction process because they will be prohibited from trying to top a winning bid after the seller enters into a definitive agreement.

The Delaware Court of Chancery has recently called into question the validity of these provisions. In *In re Complete Genomics, Inc. S'holder Litig.*,[14] in connection with a transaction between Complete Genomics, Inc. ("Genomics") and BGI-Shenzhen ("BGI"), shareholder plaintiffs sought to enjoin Genomics from enforcing certain standstill provisions in confidentiality agreements with other potential bidders. As part of its process in exploring strategic alternatives, Genomics had signed confidentially agreements with nine potential bidders, four of which contained standstill provisions, and one of which, an agreement with Party J, contained a Don't-Ask-Don't-Waive Standstill.[15]

Vice Chancellor Laster initially denied the request based on his understanding that the provisions at issue only barred the bidders from making public requests to waive the standstills. After subsequent briefing revealed that one bidder was subject to a traditional Don't-Ask-Don't-Waive Standstill which prohibited any request for a waiver of the standstill, the Court enjoined Genomics from enforcing the provision. According to Vice Chancellor Laster, this provision interfered with the target board's "ongoing statutory and fiduciary obligation" to "give a meaningful, current recommendation to stockholders regarding the advisability of a merger including, if necessary, recommending against the merger as a result of subsequent events."[16]

The Vice Chancellor analogized the Don't-Ask-Don't-Waive Standstill to a "no-talk" clause, which restricts a target entity's ability to converse with third parties and thus constitutes a violation of the board's continuing "duty to take care to be informed of all material information reasonably available.'"[17] Similarly, by agreeing to the Don't-Ask-Don't-Waive Standstill, the board "impermissibly limited its ongoing statutory and fiduciary obligations to properly evaluate a

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[14] *In re Complete Genomics, Inc. S'holder Litig.*, C.A. No. 7888-VCL, at 13 (Del. Ch. Nov. 27, 2012) (TRANSCRIPT) [hereinafter "Genomics II"]. *In re Complete Genomics Inc. S'holder Litig.*, C.A. No. 788-VCL, at 7-8 (Del. Ch. Nov. 9, 2012) (TRANSCRIPT) [hereinafter "Genomics I"].

[15] Party J, who voluntarily exited acquisition negotiations in the early stages of the process, never sought to breach its Don't-Ask-Don't-Waive Standstill in order to make a bid or acquisition proposal after Genomics signed an agreement with BGI. Genomics II at 7, 20.

[16] Genomics II at 17.

[17] Genomics II at 14 (citing *Phelps Dodge Corp. v. Cyprus Amax*, C.A. No. 17398, at 2 (Del. Ch. Sept. 27, 1999) (TRANSCRIPT)).

competing offer, disclose material information, and make a meaningful merger recommendation to its stockholders."[18]

Vice Chancellor Parsons expressed similar concerns in *In re Celera Corp S'holder Litig.*[19] In approving a settlement agreement in which the target agreed to waive certain Don't-Ask-Don't-Waive provisions in confidentiality agreements with other bidders, the Vice Chancellor held that plaintiffs raised a "colorable argument" that a board could breach its fiduciary duties by agreeing to a Don't-Ask-Don't-Waive Standstill in a confidentiality agreement, when combined with a "no solicitation" provision in a merger agreement. As the Vice Chancellor noted: "the Don't-Ask-Don't-Waive Standstills block at least a handful of once-interested parties from informing the Board of their willingness to bid . . . and the No Solicitation Provision blocks the Board from inquiring further into those parties' interest."[20] This combination arguably "operate[s] to ensure an informational vacuum" and provides an "increased risk that the Board would outright lack adequate information[.]"[21]

Notably, Vice Chancellor Parsons did not explicitly rule on the validity of the Don't-Ask-Don't-Waive Standstill. In fact, he specifically acknowledged the value of Don't-Ask-Don't-Waive Standstills: "Viewed in isolation, these Don't-Ask-Don't-Waive Standstills arguably foster legitimate objectives: 'ensur[ing] that confidential information is not misused . . . [,] establish[ing] rules of the game that promote an orderly auction, and . . . giv[ing] the corporation leverage to extract concessions from the parties who seek to make a bid.'"[22]

In *In re Ancestry.com Inc. S'holder Litig*, Chancellor Strine weighed in and declared that Don't-Ask-Don't-Waive Standstills are the "emerging issue of December of 2012."[23] The case involved the acquisition of Ancestry.com Inc. ("Ancentry.com") by private equity firm Permira Funds. Ancestry.com had engaged in a full exploration of strategic options following an unsolicited bid, during which the company contacted and entered into confidentiality agreements with numerous potential bidders (most of which contained Don't Ask Don't Waive Standstills).

The Chancellor refused to declare Don't-Ask-Don't-Waive Standstills "per se invalid"[24] and was "not prepared to rule out that they can't be used for value-maximizing purposes."[25] But, he did

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[18] Genomics II at 18.

[19] *In re Celera Corp S'holder Litig.*, C.A. No. 6304-VCP, 2012 WL 1020471 (Del. Ch. March 23, 2012), *aff'd in part, rev'd in part*, 2012 WL 6707746 (Del. Dec. 27, 2012). The litigation arose out of Quest Diagnostics Inc.'s ("Quest") purchase of Celera Corp. ("Celera") over the objection of Celera's largest shareholder. Before Quest emerged as the acquirer, Quest and four other bidders entered into confidentiality agreements with Celera that contained Don't-Ask-Don't-Waive Standstills. *Id.* at *3.

[20] *Id.* at *21.

[21] *Id.*

[22] *Id.* (Citation Omitted)

[23] *In re Ancestry.com Inc. S'holder Litig*, C.A. No. 7988-CS, at 19 (Del. Ch. December 17, 2012) (TRANSCRIPT).

[24] *Id.* at 21 ("[I]t's usually for the Legislature to determine when something is per se unlawful. It's not for the Court . . . I know of no statute, I know of nothing, that says that these provisions are per se invalid. And I don't think there has been a prior ruling of the Court to that effect.").

note that they are "pretty potent provision[s,]" and he cautioned that "directors need to use these things consistently with their fiduciary duties, and they better be darn careful about them."[26] Along these lines, the Chancellor noted that, in order to use these provisions consistent with their fiduciary duties, the directors must be aware of their potency and affirmatively use them as an "auction gavel."[27]

Because the plaintiffs had "pretty obviously" established that Ancestry.com's board did not understand the provision's potency, the Court found that plaintiffs had "probabilistically" demonstrated a violation of the duty of care.[28] The Court was particularly troubled by the fact that the board had not gone to the other potential bidders immediately after signing the definitive agreement and waived the Don't Ask provisions, given that the buyer had not required that the board not do so as part of the definitive agreement. Because the Board had subsequently (after litigation was commenced) waived the provisions, the Court refused to enjoin the transaction on the basis of the underlying breach claim. But, the Court did hold that shareholders had to be informed of the particulars surrounding these provisions and the Board's actions in relation thereto, including the fact that the provisions were not waived until late in the game and that these potential bidders were previously precluded from trying to make a superior proposal.[29]

Given these holdings, particular care should be taken in utilizing Don't-Ask-Don't-Waive Standstills in confidentiality agreements. Provisions which merely prohibit public requests for waivers are likely permissible, but provisions which prohibit any request are subject to attack, especially when combined with other preclusive provisions such as no solicitation clauses. If Don't-Ask-Don't-Waive Standstills are utilized, directors must be well versed on the strategy behind them and the provisions should be considered throughout the sale process, consistent with the directors' duty to maximize shareholder value. Practitioners should also ensure that adequate disclosures are provided to shareholders. Finally, sellers may also want to consider whether the provisions will ultimately be effective if buyers do not believe they are enforceable in light of the recent Delaware case law.

Anti-Reliance Language in Confidentiality Agreements

An anti-reliance provision generally documents the parties' agreement that they are not entitled to rely on any representations made by the other party outside the four corners of the written

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[25] *Id.* at 23.

[26] *Id.* at 22.

[27] *Id.* at 25.

[28] *Id.* at 24-25.

[29] The Court stressed that shareholders voting on a proposed transaction should fully understand the affect of Don't-Ask-Don't-Waive Standstills: shareholders "should understand that . . . the board made the cost/benefit trade-off that the best way to get the [maximum] value was to draw the highest bid out from [the bidders] while they were in the process" and "in order to do that, [the board] had to incur the cost of giving to the winner the right to enforce it." *Id.* at 27-28.

contract. If a merger agreement contains such explicit language, the buyer will generally be prevented from pursuing a fraud claim based upon extra-contractual representations by the seller.[30]

Sellers often try to negotiate these provisions into confidentiality agreements. Provisions which provide that the seller is not making any representations as to the accuracy or completeness of the information provided during diligence can help limit the seller's potential liability to the buyer for extra-contractual representations, particularly if the parties do not ultimately negotiate a merger agreement.[31]

In *RAA Management, LLC v. Savage Sports Holdings, Inc.* ("*RAA*"), the Delaware Supreme Court affirmed the Delaware courts' long standing view that anti-reliance clauses are enforceable and can bar a party from pursuing claims for fraud based on alleged misrepresentations made outside the four corners of an agreement.[32]

RAA Management, LLC ("RAA") and Savage Sports Holdings, Inc. ("Savage") had entered into a non-disclosure agreement so that RAA could obtain confidential information and evaluate whether it wanted to make a bid for Savage. Under the NDA, "RAA agreed that Savage was making no representations or warranties as to the accuracy or completeness of any information (the 'Evaluation Material') being provided to RAA, and that Savage would have no liability to RAA resulting from RAA's reliance on such information, except for breaches of representations and warranties that Savage was to later make in an executed 'Sale Agreement.'"[33] In a separate paragraph of the NDA, "RAA also waived any claims it might have in connection with any potential transaction with Savage unless the parties entered into a definitive sale agreement."[34]

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[30] *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006); *Addy v. Piedmonte*, C.A. No. 3571-VCP, 2009 WL 707641, at *19 (Del. Ch. Mar. 18, 2009).

[31] *In re IBP, Inc. S'holder Litig.*, 789 A.2d 14, 32, 72-74 (Del. Ch. 2001) (barring fraud claims, in part, due to the anti-reliance language in a confidentiality agreement and stating, "[T]he Confidentiality Agreement is a short and important contract knowingly entered into by Tyson to govern its relationship with IBP . . . Under New York or Delaware law, the Confidentiality Agreement is a clear and enforceable contract that precludes Tyson's plea to be excused from its own commitment.").

[32] *RAA Mgmt., LLC v. Savage Sports Holdings, Inc.*, 45 A.3d 107, 118-19 (Del. 2012). The Court made its findings assuming that New York law applied. However, the Court acknowledged that Delaware law would result in the same holding. *Id.* at 112 ("In this appeal, we assume that New York law applies, but conclude that the outcome would be the same under Delaware law.").

[33] *Id.* at 110. Specifically, the NDA's paragraph 7 stated:

> You [**RAA**] understand and acknowledge that neither the Company [**Savage**] 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."

[34] *Id.* at 110-111. Paragraph 8 of the NDA specifically stated:

After conducting diligence for several months, RAA determined that "it was no longer interested in acquiring Savage and demanded payment" of $1.2 million, RAA's "sunken due diligence costs[.]"[35] RAA contended that Savage had committed fraud by claiming at the outset of the parties' discussions that there were no unrecorded liabilities or claims, when in fact, there were such liabilities, as RAA later discovered during diligence. The Delaware Supreme Court upheld the lower court's dismissal of RAA's claims because the non-reliance and waiver provisions in the NDA unambiguously precluded RAA from pursuing a fraud claim against Savage "for *any* allegedly inaccurate or incomplete information provided by Savage to RAA during the due diligence process."[36]

This case reaffirmed various Chancery Court decisions supporting the enforceability of anti-reliance provisions as well as the public policies supporting and limiting their enforcement: "sophisticated parties may not reasonably rely upon representations outside of the contract, where the contract . . . contains a provision explicitly disclaiming reliance upon such outside representations."[37]

RAA underscores the importance of negotiating anti-reliance language in both merger agreements and confidentiality agreements. Language must be carefully drafted which makes clear that reliance on extra-contractual representations is not permitted and that the buyer will not be able to pursue fraud claims based thereon, whether or not a merger agreement is ultimately finalized.

Forum Selection Clauses in Confidentiality Agreements

Mandatory forum selection clauses govern where litigation regarding a particular contract will be conducted. Parties do not often spend much time considering these clauses but the choice of forum can have important consequences. For instance, if the Delaware Court of Chancery is selected as the forum for litigation, the litigation will be adjudicated by a judge, not a jury, and the trial is likely to be more expedited than in other courts. Such considerations are particularly important in the context of merger disputes, which are often complex and fast-paced. Practitioners should carefully consider not only whether or not to include a forum selection provision in the merger agreement, but also whether to include one in the earlier confidentiality agreements with potential bidders, as illustrated by the Court of Chancey's decision in *In re IBP, Inc. S'holder Litig.*[38]

> You [**RAA**] understand and agree that no contract or agreement providing for a transaction between you and the Company [**Savage**] shall be deemed to exist between you and the Company unless and until a definitive Sale Agreement has been executed and delivered, and you hereby waive, in advance, **any** claims . . . in connection with any such transaction unless and until you shall have entered into a definitive Sale Agreement."

[35] *Id.* at 111.

[36] *Id.* at 115, 119.

[37] *Id.* at 117 (citing *Abry Partners*, 891 A.2d at 1057-59).

[38] *In re IBP, Inc. S'holder Litig.*, C.A. No. 18373, 2001 WL 406292, at *1, *8 (Del. Ch. Apr. 18, 2001).

IBP, Inc. ("IBP") and Tyson Foods, Inc. ("Tyson") had entered into a merger agreement, pursuant to which Tyson had agreed to purchase IBP. When Tyson later decided that it no longer wished to close the transaction, it terminated the merger agreement and filed a fraud action in Arkansas, alleging that IBP had misrepresented certain financial information in the diligence process. In response, IBP initiated claims against Tyson for specific enforcement of the merger agreement in the Delaware Court of Chancery.[39] Tyson asked the Delaware Court of Chancery to stay its action in favor of the Arkansas action. The Court refused to do so, holding that a forum selection clause in the parties' confidentiality agreement required litigation of Tyson's claims in Delaware.

The parties had entered into the confidentiality agreement to facilitate the diligence process. The agreement contained a forum selection clause, identifying Delaware as the exclusive forum to bring any action "arising out of or relating to" the confidentiality agreement.[40] The confidentiality agreement also, "[b]y its plain terms," restricted "IBP's liability for any false or misleading information in the [materials provided] to situations where that false or misleading information was incorporated as a representation, or in some other liability-creating way in a definitive transactional agreement."[41]

The combination of the forum selection clause and the liability limitation in the confidentiality agreement supported the Court's refusal to stay the Delaware case even though Tyson alleged that its Arkansas claims arose under the merger agreement, which did not contain a forum selection clause. The Court specifically rejected Tyson's argument that the "only purpose" of the continued existence of confidentiality agreement post execution of the merger agreement was "to permit the confidentiality agreement to govern claims regarding the continued confidentiality and use of the information provided to Tyson in due diligence."[42] Instead, the Court found that the confidentiality agreement was "expressly designed to protect IBP against claims that Tyson was injured by incomplete or inaccurate information provided during due diligence, except to the extent that the information formed the basis for a representation that was later included in the Merger Agreement."[43] The confidentiality agreement thus required Tyson to litigate its fraud claims in Delaware.

Because of the interrelated nature of confidentiality agreements and merger agreements, practitioners must carefully consider the forum selection clauses in both agreements.

Conclusion

Confidentiality agreements do not always get careful scrutiny when a merger or acquisition process is begun, but they can have long lasting effects even after a merger agreement is signed.

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[39] *Id.* at *6. Five business hours after Tyson filed its complaint in Arkansas, IBP asserted claims in an answer and cross claims in an action brought by IBP shareholders already pending in Delaware.

[40] *Id.* at *2.

[41] *Id.*

[42] *Id.* at *8.

[43] *Id.* at *9.

Counsel should get involved early in any merger or sale process to help avoid some of the potential pitfalls discussed above.