Non-Disclosure Agreements and Other Preliminary Agreements in Business Transactions

By:
Byron F. Egan
Jackson Walker L.L.P.
2323 Ross Avenue, Suite 600
Dallas, Texas 75201
began@jw.com

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Byron F. Egan – Bio Information

Practice: Byron F. Egan is a partner of *Jackson Walker LLP* in Dallas. He is engaged in a corporate, partnership, securities, mergers and acquisitions (M&A), and financing practice. Mr. Egan has extensive experience in business entity formation and governance matters, M&A, and financing transactions in a variety of industries including energy, finance, and technology. In addition to handling transactions, he advises boards of directors and their audit, compensation, and special committees with respect to fiduciary duty and other corporate governance issues, the Sarbanes-Oxley Act, special investigation, and other issues.

Involvement: Mr. Egan is senior vice chair and chair of the Executive Council of the M&A Committee of the American Bar Association and served as co-chair of its Asset Acquisition Agreement Task Force, which wrote *the Model Asset Purchase Agreement with Commentary*. He has been chair of the Texas Business Law Foundation, the Business Law Section of the State Bar of Texas and that section's Corporation Law Committee. On behalf of these groups, he has been instrumental in the drafting and enactment of many Texas business entity and other statutes. He is also a member of the American Law Institute.

Honors: For more than 25 years, Mr. Egan has been listed in "The Best Lawyers in America" under corporate, M&A, or securities law. He is a 2018 recipient of the Texas Lawyer Lifetime Achievement Award, a 2018 recipient of the Distinguished Alumni Award of the Highland Park Independent School District, and the 2015 recipient of the Texas Bar Foundation's Dan Rugeley Price Memorial Award, which is presented annually to a lawyer who has an unreserved commitment to clients and to the legal profession. A four-time winner of the Burton Award for distinguished legal writing, in 2009 his article, "Director Duties: Process and Proof," was awarded the Franklin Jones Outstanding CLE Article Award and an earlier version of that article was honored by the State Bar Corporate Counsel Section's Award for the Most Requested Article in the Last Five Years. Mr. Egan has been recognized as one of the top corporate and M&A lawyers in Texas by a number of publications, including *Corporate Counsel Magazine, Texas Lawyer, Texas Monthly, The M&A Journal* (which profiled him in 2005) and *Who's Who Legal*. See http://www.jw.com/ for additional information regarding his civic and other activities.

Education: Mr. Egan received his B.A. and J.D. degrees from the University of Texas. After law school, he served as a law clerk for Judge Irving L. Goldberg on the United States Court of Appeals for the Fifth Circuit.

Byron F. Egan – Bio Information

Publications: Mr. Egan writes and speaks about the areas in which his law practice is focused, and is a frequent author and lecturer regarding M&A, governance of corporations, partnerships and limited liability companies, securities laws, and financing techniques. He is the author of the treatise "EGAN ON ENTITIES: Corporations, Partnerships and Limited Liability Companies in Texas," which addresses the formation, governance, and sale of business entities, including an analysis of the fiduciary duties of their governing persons in a variety of situations. In addition, Mr. Egan has written or co-authored the following law journal articles: Corporate Governance: *Delaware Supreme Court Holds Directors' Fiduciary Duties Require Monitoring Mission-Critical Risks or What's the Scoop? Bluebell Shareholder Serves Caremark Claim to Board of Directors*, XXXVII Corporate Counsel Review 271 (November 2019); *Fiduciary Duties of Corporate Directors and Officers in Texas*, 43 Texas Journal of Business Law 45 (Spring 2009); *Responsibilities of Officers and Directors under Texas and Delaware Law*, XXVI Corporate Counsel Review 1 (May 2007); Entity Choice and Formation: *Joint Venture Formation*, 44 Texas Journal of Business Law 129 (2012); *Choice of Entity Decision Tree After Margin Tax and Texas Business Organizations Code*, 42 Texas Journal of Business Law 171 (Spring 2007); *Choice of Entity Alternatives*, 39 Texas Journal of Business Law 379 (Winter 2004); *Choice of State of Incorporation – Texas Versus Delaware: Is it Now Time to Rethink Traditional Notions*, 54 SMU Law Review 249 (Winter 2001); M&A: *Express Negligence and Fair Notice Limitations on Risk-Shifting in M&A Transactions*, The Texas Lawbook (May 2021); *Non-Disclosure Agreements and Letters of Intent*, Deal Points (ABA M&A Committee Newsletter) (March 2021); *Earnouts in M&A Transactions*, XXXIX Corporate Counsel Review (November 2020); *Confidentiality Agreements are Contracts with Long Teeth*, 46 Texas Journal of Business Law 1 (Fall 2014); *Private Company Acquisitions: A Mock Negotiation*, 116 Penn St. L. Rev. 743 (2012); *Asset Acquisitions: Assuming and Avoiding Liabilities*, 116 Penn St. L. Rev. 913 (2012); *Asset Acquisitions: A Colloquy*, X U. Miami Business Law Review 145 (Winter/Spring 2002); Securities Law: *Major Themes of the Sarbanes-Oxley Act*, 42 Texas Journal of Business Law 339 (Winter 2008); *Communicating with Auditors After the Sarbanes-Oxley Act*, 41 Texas Journal of Business Law 131 (Fall 2005); *The Sarbanes-Oxley Act and Its Expanding Reach*, 40 Texas Journal of Business Law 305 (Winter 2005); *Congress Takes Action: The Sarbanes-Oxley Act*, XXII Corporate Counsel Review 1 (May 2003); and Legislation: *The Role of the Business Law Section and the Texas Business Law Foundation in the Development of Texas Business Law*, 41 Texas Journal of Business Law 41 (Spring 2005); *Texas Chancery Courts – The Missing Link to More Texas Entities*, Texas Bar Journal, Opinion Section, February 2016 Issue.

Byron F. Egan – Bio Information

Treatise by Byron F. Egan entitled *EGAN ON ENTITIES: Corporations, Partnerships and Limited Liability Companies in Texas* (First Edition 2016, Second Edition 2018 and Third Edition 2020) (the Third Edition, "EGAN ON ENTITIES"). The Third Edition is available from CSC and LexisNexis: https://store.lexisnexis.com/products/egan-on-entities-corporations-partnerships-and-limited-liability-companies-in-texas-skuusSKU5632831?utm_campaign=1-5993896761_2019-External-Referral_1-5993896601&utm_medium=referral&utm_source=CSC&utm_term=Mkt+Print&utm_content=descriptive+text_00pct_PB&access=1-5993896601&treatcd=1-5993896761.

Non-Disclosure and Other Preliminary Agreements in Business Transactions, 2021 Essentials of Business Law: Foundations and Emerging Issues, March 11, 2021 ("Confidentiality paper"): https://www.jw.com/wp-content/uploads/2022/07/Egan-Non-Disclosure-and-Other-Preliminary-Agreements-in-Business-Transactions.pdf.

M&A After the Tax Reform Act, TexasBarCLE & Business Law Section of State Bar of Texas Choice, Governance & Acquisition of Entities Course, San Antonio, May 18, 2018 ("Acquisition Structure paper"): http://www.jw.com/wp-content/uploads/2018/05/Byron-Egan-MA-After-the-Tax-Reform-Act-with-Appendices.pdf.

CONFIDENTIALITY AGREEMENTS AND OTHER PRELIMINARY AGREEMENTS IN BUSINESS TRANSACTIONS

I. CONFIDENTIALITY AGREEMENT

A. First Document

A confidentiality agreement ("Confidentiality Agreement"), also sometimes called a non-disclosure agreement ("NDA"), is typically the first stage for the due diligence process as parties generally are reluctant to provide confidential information to the other side without having the protection of a confidentiality agreement.

CONFIDENTIALITY AGREEMENTS AND OTHER PRELIMINARY AGREEMENTS IN BUSINESS TRANSACTIONS

I. CONFIDENTIALITY AGREEMENT

A. First Document (cont'd)

The target typically proposes its form of confidentiality agreement, and a negotiation of the confidentiality agreement ensues. A seller's form of confidentiality agreement, Appendix A from my paper entitled *Confidentiality Agreements and Other Preliminary Agreements in Business Transactions*, can be found here:

APPENDIX_A_Egan_Non-Disclosure-and-Other-Preliminary-Agreements-in-Business-Transactions.pdf (jw.com)

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

B. Non Reliance Provisions.

In *RAA Management, LLC v. Savage Sports Holdings, Inc.*, 45 A.3d 107, 117 (Del. 2012), the Delaware Supreme Court held that non-reliance disclaimer language in a confidentiality agreement was effective to bar fraud claims by a prospective buyer.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

The prospective buyer had been told by seller during early discussions that seller had no significant unrecorded liabilities, but due diligence showed otherwise.

The confidentiality agreement provided that seller made no representations regarding any information provided and that buyer could only rely on express representations in a definitive acquisition agreement, which was never signed. After deciding not to pursue a transaction, the buyer sued seller to recover its due diligence and other deal costs.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

In affirming the Superior Court's dismissal of the buyer's complaint, the Delaware Supreme Court wrote:

> Before parties execute an agreement of sale or merger, the potential acquirer engages in due diligence and there are usually extensive precontractual negotiations between the parties. The purpose of a confidentiality agreement is to promote and facilitate such precontractual negotiations. Non-reliance clauses in a confidentiality agreement are intended to limit or eliminate liability for misrepresentations during the due diligence process. The breadth and scope of the non-reliance clauses in a confidentiality agreement are defined by the parties to such preliminary contracts themselves. In this case, RAA and Savage did that, clearly and unambiguously, in the NDA.
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Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

The efficient operation of capital markets is dependent upon the uniform interpretation and application of the same language in contracts or other documents. The non-reliance and waiver clauses in the NDA preclude the fraud claims asserted by RAA against Savage. Under New York and Delaware law, the reasonable commercial expectations of the parties, as set forth in the non-reliance disclaimer clauses in Paragraph 7 and the waiver provisions in Paragraph 8 of the NDA, must be enforced. Accordingly, the Superior Court properly granted Savage's motion to dismiss RAA's Complaint.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

C. No Binding Agreement Until Definitive Agreement Executed.

In *Chalker Energy Partners III, LLC, v. Le Norman Operating, LLC*, 595 S.W.3rd 688 (Tex. 2020), the Texas Supreme Court held that a provision in the confidentiality agreement for the auction of oil and gas properties that provided that no contract will be deemed to exist, and no party will be bound, unless and until a definitive agreement between the parties is executed and delivered was binding and enforceable, notwithstanding emails between the parties that one of them was the winning bidder.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

Negotiations involved exchange of multiple drafts of a purchase agreement. Several sellers out of group of 18 sent congratulatory emails to one of the bidders, who sued when the final contract was awarded to another party. The auction of the oil and gas properties, which were owned by several parties, was conducted pursuant to bidding procedures established by the investment banker.

The confidentiality agreement provided that no contract will be deemed to exist, and no party will be bound, unless and until a definitive agreement between the parties is executed and delivered as follows:

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

> No Obligation. The Parties hereto understand that unless and until a definitive agreement has been executed and delivered, no contract or agreement providing for a transaction between the Parties shall be deemed to exist and neither Party will be under any legal obligation of any kind whatsoever with respect to such transaction by virtue of this or any written or oral expression thereof, except, in the case of this Agreement, for the matters specially agreed to herein. For purposes of this Agreement, the term "definitive agreement" does not include an executed letter of intent or any other preliminary written agreement or offer, unless specifically so designated in writing and executed by both Parties.

The Court of Appeals held that conduct of the parties resulted in a contact with the plaintiff even though no definitive agreement signed.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

The Supreme Court reversed and held as a matter of law that the provision in the confidentiality agreement that no contract will be deemed to exist, and no party will be bound, unless and until a definitive agreement between the parties is executed and delivered was binding and controlling.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

D. Attorney Client Privilege.

Confidentiality Agreements often provide that the providing of confidential information is not intended to, and does not, waive any attorney client or work product privilege. Such a provision may not prevent a court from holding that there is no privilege for M&A due diligence, but it gives your litigators a basis for arguing common interest and the outcome may be affected by whether it ends up as a stock or asset purchase or a merger. See Asset Structure paper at § 12.6 (pages 279-289).

CONFIDENTIALITY AGREEMENTS AND OTHER PRELIMINARY AGREEMENTS IN BUSINESS TRANSACTIONS

II. Letter of Intent

A letter of intent is often entered into between a buyer and a seller following the successful completion of the first phase of negotiations of an acquisition transaction. A form of letter of intent, Appendix B from my paper entitled *Confidentiality Agreements and Other Preliminary Agreements in Business Transactions,* can be found here:

https://www.jw.com/wp-content/uploads/2022/07/APPENDIX_B_Egan_Non-Disclosure-and-Other-Preliminary-Agreements-in-Business-Transactions.pdf

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

A letter of intent typically describes the purchase price (or a formula for determining the purchase price) and certain other key economic and procedural terms that form the basis for further negotiations. In most cases, the buyer and the seller do not yet intend to be legally bound to consummate the transaction and expect that the letter of intent will be superseded by a definitive written acquisition agreement. Alternatively, buyers and sellers may prefer a memorandum of understanding or a term sheet to reflect deal terms. Many lawyers prefer to bypass a letter of intent and proceed to the negotiation and execution of a definitive acquisition agreement.

CONFIDENTIALITY AGREEMENTS AND OTHER PRELIMINARY AGREEMENTS IN BUSINESS TRANSACTIONS

III. ENTERPRISE PRODUCTS PARTNERS, L.P. V. ENERGY TRANSFER PARTNERS, L.P.

Confidentiality agreements and letters of intent often contain provisions to the effect that the parties will not be bound to consummate a transaction unless and until they each have negotiated and executed a definitive agreement to address the risk of a dispute arising over whether the parties have agreed to, or by their conduct they have, committed themselves to a transaction. Texas law embraces the principles of freedom of contract and allows parties to condition their obligations to be bound by a contract or form a partnership.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

These principles were confirmed by the Texas Supreme Court in *Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P.* which involved a series of preliminary agreements that were entered into between Energy Transfer Partners, L.P. ("*ETP*"), a Dallas based Delaware master limited partnership ("*MLP*"), and Enterprise Product Partners, L.P. ("*Enterprise*"), a Houston based Delaware MLP. ETP and Enterprise entered into these preliminary agreements with a view to forming a joint venture to build and operate a large pipeline which they called the "Double E Pipeline" from Cushing, Oklahoma, which was receiving oil from the Dakotas and Canada, to the Gulf Coast of Texas, which had refineries.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

Those preliminary agreements provided that the obligations of the parties were conditioned on the execution of a definitive joint venture agreement and approvals by their respective boards of directors. Although no definitive joint venture agreement had been signed, the parties proceeded to spend time and money on the project and, reminiscent of *Texaco v. Pennzoil*, they communicated publicly that a joint venture had been formed and marketed the pipeline to potential customers.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

The parties marketing efforts did not produce enough commitments to ship through the proposed new pipeline to meet their agreed minimum threshold. Enterprise terminated its participation in the project and shortly thereafter entered into agreements with Enbridge (US) Inc. ("*Enbridge*"), another large pipeline company, for an alternative crude oil pipeline from Cushing to the Texas Gulf Coast. Enterprise and Enbridge had begun discussions before Enterprise announced that it had terminated the project.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

ETP sued Enterprise in state court in Dallas alleging this breached Enterprise's contractual obligations and fiduciary duties to ETP. Notwithstanding the express provisions in preliminary agreements that no party was bound unless and until definitive agreements were signed, ETP claimed, and the jury found, that the parties' ensuing conduct served to form a Texas law general partnership and that Enterprise breached its fiduciary duty of loyalty to ETP when it negotiated with and then entered into an agreement with Enbridge. The trial court awarded ETP judgment for $535 million.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

This decision was reversed by the Court of Appeals. The Texas Supreme Court affirmed the decision of the Court of Appeals, summarizing in the first paragraph:

> "The issue in this case is whether Texas law permits parties to conclusively agree that, as between themselves, no partnership will exist unless certain conditions are satisfied. We hold that it does and that the parties here made such an agreement. Accordingly, we affirm the judgment of the court of appeals."

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

The preliminary agreements between ETP and Enterprise provided that there would be no partnership or joint venture formed unless and until later definitive agreements were executed. The parties' confidentiality agreement (the "*Confidentiality Agreement*") provided that they were not bound to pursue any transaction until a definitive agreement was signed in the following provision:

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

The Parties agree that unless and until a definitive agreement between the Parties with respect to the Potential Transaction has been executed and delivered, and then only to the extent of the specific terms of such definitive agreement, no Party hereto will be under any legal obligation of any kind whatsoever with respect to any transaction by virtue of this Agreement or any written or oral expression with respect to such a transaction by any Party or their respective Representatives, except, in the case of this Agreement, for the matters specifically agreed to herein. A Party shall be entitled to cease disclosure of Confidential Information hereunder and any Party may depart from negotiations at any time for any reason or no reason without liability to any Party hereto.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

The parties also signed a letter agreement and term sheet (the "*Letter of Intent*") that provided as follows:

> Neither this letter nor the JV Term Sheet create any binding or enforceable obligations between the Parties and, except for the [ETP] Confidentiality Agreement . . . no binding or enforceable obligations shall exist between the Parties with respect to the Transaction unless and until the Parties have received their respective board approvals and definitive agreements memorializing the terms and conditions of the Transaction have been negotiated, executed and delivered by both of the Parties.

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Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

Unless and until such definitive agreements are executed and delivered by both of the Parties, either [Enterprise] or ETP, for any reason, may depart from or terminate the negotiations with respect to the Transaction at any time without any liability or obligation to the other, whether arising in contract, tort, strict liability or otherwise.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

ETP and Enterprise formed an integrated project team of their engineers to pursue the pipeline, communicated publicly that a joint venture had been formed, and marketed the pipeline to potential customers.

Despite these actions, in August 2011, Enterprise unilaterally issued a press release, announcing the termination of the project due to lack of long-term commitments from potential shippers. A few weeks later, Enterprise and Enbridge Inc. announced they would jointly pursue a crude pipeline project from Cushing to the Gulf Coast.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

ETP filed suit in the 298th District Court in Dallas claiming that the parties' ensuing conduct served to form a Texas general partnership and that Enterprise breached its fiduciary duty of loyalty to ETP. The evidence introduced during the four-week jury trial showed that Enterprise executives had been secretly meeting with Enbridge personnel during the joint marketing efforts.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

After deliberating for less than two days, the jury found for ETP, notwithstanding the express provisions in the Confidentiality Agreement and the Letter of Intent that no party was bound unless and until definitive agreements were signed. Ignoring the conditions precedent expressed in the documents, the jury concluded that ETP and Enterprise had conducted themselves as partners and that Enterprise's conduct breached the duties it owed to ETP.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

The jury charge on whether the parties' conduct resulted in a partnership was based on the five factor test set forth in § 152.052(a) of the Texas Business Organizations Code ("*TBOC*") for determining whether a partnership exists: (i) the right to share profits, (ii) expression of intent to be partners, (iii) the right to participate in control of the business, (iv) sharing or agreeing to share losses or liabilities, and (v) agreeing to or contributing money or assets to the business.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

In July 2014, the district court signed a judgment for ETP awarding more than $319 million in actual damages, $150 million in disgorgement of wrongfully obtained benefits, and more than $66 million in interest. Enterprise appealed.

The Court of Appeals reversed the judgment against Enterprise, rendered judgment that ETP recover nothing from Enterprise. The Court of Appeals decision was appealed to the Supreme Court of Texas, which in a unanimous decision affirmed the Court of Appeals and held:

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

Parties can conclusively negate the formation of a partnership under Chapter 152 of the TBOC through contractual conditions precedent. ETP and Enterprise did so as a matter of law here, and there is no evidence that Enterprise waived the conditions.

In explaining its holding, the Supreme Court in *Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P.* in an opinion by Chief Justice Nathan Hecht wrote:

Section 152.051(b) of the TBOC states that "an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

whether: (1) the persons intend to create a partnership; or (2) the association is called a 'partnership,' 'joint venture,' or other name." Under § 152.052(a),

Factors indicating that persons have created a partnership include the persons':

(1) receipt or right to receive a share of profits of the business;

(2) expression of an intent to be partners in the business;

(3) participation or right to participate in control of the business;

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

(4) agreement to share or sharing:

(A) losses of the business; or

(B) liability for claims by third parties against the business; and

(5) agreement to contribute or contributing money or property to the business.

Section 152.003 provides that "[t]he principles of law and equity and the other partnership provisions supplement this chapter unless otherwise provided by this chapter or the other partnership provisions."

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

In *Ingram v. Deere* [288 S.W. 3rd, 886 (Tex. 2009)], we traced the evolution of Texas partnership law from the early common law, which required proof of five factors to establish a partnership, to TBOC Chapter 152, which sets out a nonexclusive list of factors to be considered in a totality-of-the-circumstances test. Under § 152.052(a)(2), "expression of an intent to be partners in the business" is just one factor of the totality-of-the-circumstances test. We acknowledged in Ingram that the statute "does not by its terms give the parties' intent or expression of intent any greater weight than the other factors". Moreover, under § 152.051(b), persons can create a partnership regardless of whether they intend to. This provision derives from Section 202(a) of the Revised Uniform Partnership Act. A comment to that section drafted by the Uniform Law

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

Commission warns that parties "may inadvertently create a partnership despite their expressed subjective intention not to do so." But in Ingram we expressed skepticism that the Legislature "intended to spring surprise or accidental partnerships on independent business persons". Can persons override the default test for partnership formation in Chapter 152 by agreeing not to be partners until conditions precedent are satisfied? Ingram did not involve such an agreement, and our discussion there of the role of intent in the partnership-formation analysis did not contemplate one.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

Section 152.003 imports other "principles of law and equity" into the partnership-formation analysis, and the use of the word "include" in § 152.052(a) makes the factors enumerated there nonexclusive. Against this backdrop of statutory law is a well-developed body of common law that "strongly favors parties' freedom of contract." Our decisions recognizing this policy are decades older than the TBOC or its predecessor statute. In 1951, we quoted Sir George Jessel, "one of the most influential commercial law and equity judges" in 19th Century Britain, as saying:

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

> [I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

We reinforce this public policy virtually every Court Term. Texas courts regularly enforce conditions precedent to contract formation and reject legal claims that are artfully pleaded to skirt unambiguous contract language, especially when that language is the result of arm's-length negotiations between sophisticated business entities.

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We maintain our view expressed a decade ago in *Ingram* that the Legislature did not "intend[] to spring surprise or accidental partnerships" on parties. Section 152.003 expressly authorizes supplementation of the partnership-formation rules of Chapter 152 with "principles of law and equity," and of Chapter 152 with "principles of law and equity," and perhaps no principle of law is as deeply

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

engrained in Texas jurisprudence as freedom of contract. We hold that parties can contract for conditions precedent to preclude the unintentional formation of a partnership under Chapter 152 and that, as a matter of law, they did so here.

An agreement not to be partners unless certain conditions are met will ordinarily be conclusive on the issue of partnership formation as between the parties. "Performance of a condition precedent, however, can be waived or modified by the party to whom the obligation was due by word or deed." We agree with the court of appeals that under Texas Rule of Civil Procedure 279, ETP was required either to obtain a jury finding on waiver or to prove it conclusively. It has done neither.

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

The Supreme Court's opinion in *Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P.* makes clear that Texas embraces the principles of freedom of contract among sophisticated businesses, and that they can trust that their legal documents will be enforced as written. This means that in Texas companies can rely on conditions precedent to avoid an unintended partnership or joint venture, and those conditions precedent can be set forth in a confidentiality agreement, letter of intent or other preliminary agreement.

CONFIDENTIALITY AGREEMENTS AND OTHER PRELIMINARY AGREEMENTS IN BUSINESS TRANSACTIONS

IV. COLLATERAL CONSEQUENCES.

Although an NDA or Letter of Intent may not obligate any party to effect a transaction, it may have other consequences:

A. Effective Standstill. NDA's restriction on the recipient's use of confidential information may be effective as a standstill that bars the recipient from proceeding with a hostile offer. *See Martin Marietta, Maretta Materials, Co. v. Vulcan Materials, Inc.* 68-A 3rd. 1208 (Del. 2012). (Confidentiality paper at 1-2.)

CONFIDENTIALITY AGREEMENTS AND OTHER PRELIMINARY AGREEMENTS IN BUSINESS TRANSACTIONS

IV. COLLATERAL CONSEQUENCES (cont'd).

Although an NDA or Letter of Intent may not obligate any party to effect a transaction, it may have other consequences:

B. Don't Ask, Don't Wave Provisions. *Some NDA's contain express standstill provisions that (i) prohibit the bidder from making an offer for the target without an express invitation from its Board of Directors and (ii) preclude the bidder from publicly or privately asking the Board to waive the restriction. See In re Topps Company Shareholders Litigation, 926 A.2d 58, (Del. Ch. 2007). (Confidentiality paper at 3-6)*

Confidentiality Agreements and Other Preliminary Agreements in Business Transactions

Appendix A
Form of Confidentiality Agreement

https://www.jw.com/wp-content/uploads/2022/07/APPENDIX_A_Egan_Non-Disclosure-and-Other-Preliminary-Agreements-in-Business-Transactions.pdf

Appendix B
Form of Letter of Intent

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AUSTIN
100 Congress Avenue, Suite 1100
Austin, Texas 78701
TEL (512) 236-2000 **FAX** (512) 236-2002

DALLAS
2323 Ross Avenue, Suite 600
Dallas, Texas 75201
TEL (214) 953-6000 **FAX** (214) 953-5822

FORT WORTH
777 Main Street, Suite 2100
Fort Worth, Texas 76102
TEL (817) 334-7200 **FAX** (817) 334-7290

HOUSTON
1401 McKinney Street, Suite 1900
Houston, Texas 77010
TEL (713) 752-4200 **FAX** (713) 752-4221

SAN ANGELO
301 W. Beauregard Avenue, Suite 200
San Angelo, Texas 76903
TEL (325) 481-2550 **FAX** (325) 481-2552

SAN ANTONIO
112 E. Pecan Street, Suite 2400
San Antonio, Texas 78205
TEL (210) 978-7700 **FAX** (210) 978-7790

TEXARKANA
6004 Summerfield Drive
Texarkana, TX 75503
TEL (903) 255-3250 **FAX** (903) 255-3265