

# Delaware Supreme Court upholds award of expectation damages

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## Facts Decision

In *SIGA Technologies, Inc v PharmAthene, Inc*(1) the Delaware Supreme Court upheld a \$113 million judgment against SIGA Technologies Inc over a failed merger and licensing agreement, in an opinion that provides useful guidance to practitioners as to the recovery of expectation damages.

### Facts

This decision was the second time that the Supreme Court reviewed the case, having previously remanded it back to the Delaware Court of Chancery for further review of the appropriate damages. The case arose from the failed 2006 merger between SIGA Technologies and PharmAthene. The merger agreement provided that if the merger failed to close, the parties would negotiate in good faith a licence agreement consistent with a non-binding term sheet previously agreed by the parties for the licensing of ST-246, a drug owned by SIGA Technologies for the treatment of smallpox. PharmAthene was unable to negotiate a licence agreement with SIGA and sued SIGA for breaching its obligation to negotiate the licence agreement in good faith consistent with the term sheet. The Delaware Court of Chancery initially determined that SIGA did not negotiate in good faith and breached its agreement to do so, but was unable to award expectation damages because such an amount was "speculative and too uncertain, contingent, and conjectural". As such, it awarded PharmAthene an equitable payment stream based on SIGA's future profits. On review the Supreme Court looked to New York law for guidance and determined that the agreement at issue was a 'Type II' agreement (ie, "preliminary agreements [where the parties] 'agree on certain major terms, but leave other terms open for further negotiation'"), which entitled PharmAthene to recover expectation damages. The Supreme Court remanded the case back to the Delaware Court of Chancery for "reconsideration of the damages". On remand, the Delaware Court of Chancery determined that PharmAthene was entitled to \$113 million in expectation damages. SIGA appealed the decision.

### Decision

The Supreme Court upheld the Delaware Court of Chancery's determination of the damages and held that the court's *de novo* review of damages was done in accordance with the Supreme Court's instructions from its earlier decision. The court relied heavily on the fact that SIGA had, by its breach of the agreement, caused much of the uncertainty as to the proper amount of damages. The court stated that the standard for evaluating expectation damages is based on "the reasonable expectations of the parties *ex ante*" and is measured by "the amount of money that would put the promisee in the same position as if the promisor had performed the contract". Although the injured party must prove that it was actually damaged with reasonable certainty, the amount of damages can be estimated. The court stated that "the injured party need not establish the amount of damages with precise certainty 'where the wrong has been proven and injury established'". According to the second restatement of contracts (quoted in the court's opinion), "where the existence of damages is certain, and the only uncertainty relates to the amount... the burden of uncertainty as to the amount of damages falls upon the wrongdoer". The Supreme Court noted that the Delaware Court of Chancery was correct in resolving uncertainties about costs against SIGA when the uncertainties would have been avoided if SIGA had negotiated the licence agreement in good faith. The wilfulness of the

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breaching party "is a relevant factor in deciding the quantum of proof required to establish the damages amount" and the Delaware Court of Chancery's use of wilfulness in deciding to require a lesser degree of certainty was appropriate. A court may consider post-breach evidence to confirm its conclusions as to the parties' reasonable expectations at the time of breach.

The Supreme Court's decision was a rare non-unanimous decision, and Justice Karen L Valihura authored a lengthy dissent in which she disagreed with many of the majority's conclusions and pointed out that the majority's decision would move Delaware out of alignment with other major commercial jurisdictions such as California and New York by eroding the requirement that damages be proved with reasonable certainty.

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## **Endnotes**

(1) *Siga Technologies, Inc v PharmAthene, Inc*, Del Supr, No 20, 2015 (December 28 2015).

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