

BUSINESS LAW SECTION PRACTICE TIP
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BUYER BEWARE: RELIANCE DISCLAIMERS DURING DUE DILIGENCE

What remedies do potential buyers have during due diligence for misrepresentations made by sellers? According to the Supreme Court of Delaware, not many - especially when the parties have entered into NDAs disclaiming reliance on representations made outside of a final purchase agreement. This was stated very clearly in the recently decided case, *RAA Management, LLC v. Savage Sports Holdings, Inc.*, 45 A.3d 107 (Del. 2012).

In 2010, RAA Management, LLC (“RAA”) entered into an NDA with Savage Sports Holdings, Inc. (“Savage”), in contemplation of a potential purchase of Savage. “In the NDA, RAA agreed that Savage was making no representations or warranties as to the accuracy or completeness of any information . . . 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.” *RAA*, 45 A.3d at 110. The NDA also waived any potential claims RAA might have unless there was a definitive purchase agreement. Negotiations eventually ended and no agreement was entered into. In 2011, RAA initiated a law suit alleging that Savage misrepresented and concealed certain material liabilities and claiming that it would never have attempted to acquire Savage had these liabilities been made known to RAA. The Superior Court dismissed RAA’s complaint, and RAA appealed to the Supreme Court.

On appeal, RAA argued, among other things, that the language of the NDA non-reliance disclaimer should be construed to provide exception to intentional or fraudulent misrepresentations and that enforcement of the language was against public policy. The Supreme Court of Delaware disagreed with RAA and upheld the Superior Court’s decision. The Court stated:

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 to 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.

RAA, 45 A.3d at 119.

So what can a buyer do to protect itself under a standard NDA? A buyer could try to negotiate more favorable terms under non-reliance disclaimers and waivers or incorporate expense reimbursement provisions in the event the deal is not consummated. This will

ultimately depend on the particular buyer's negotiating position. See Business Law Today, *Delaware Supreme Court Ruling Suggests Potential Buyers in M&A Deals Likely Have Limited Recourse Against Sellers Prior to Signing Agreement*, Allison C. Handy and William R. Kucera, August 20, 2012 available at <http://apps.americanbar.org/buslaw/blt/content/2012/08/keepingcurrent.shtml>. "In light of this reality, buyers should enter into the due diligence process with full knowledge of this potential risk and consider whether it is possible, under the circumstances, to delay relatively expensive aspects of the due diligence review (e.g., outside consultants) until later in the due diligence process when a deal is more certain." *Id.*