

## Delaware Supreme Court Ruling Suggests Potential Buyers in M&A Deals Likely Have Limited Recourse Against Sellers Prior to Signing Agreement

The Delaware Supreme Court recently reminded potential buyers in M&A transactions that they likely will have very limited, if any, remedies or recourse against the seller in connection with the potential transaction until an agreement is signed. In *RAA Management, LLC v. Savage Sports Holding, Inc.*, the Delaware Supreme Court upheld a superior court ruling dismissing a claim by RAA (a private equity firm) seeking due diligence and negotiation costs that RAA incurred while pursuing an acquisition of Savage prior to learning late in the due diligence period of certain significant liabilities that Savage failed to disclose earlier in the process.<sup>1</sup> The dismissal was upheld based on the non-disclosure agreement between the parties that included broad, though relatively standard, non-reliance and waiver clauses.

### Background

When RAA first expressed interest in purchasing Savage, the parties entered into a non-disclosure agreement prior to RAA obtaining confidential documents and information from Savage to initiate due diligence. The non-disclosure agreement (NDA) stated that Savage was not “making any representation or warranty, express or implied, as to the accuracy or completeness of ... any ... information” it provided to RAA during due diligence. Additionally, the non-disclosure agreement stated that “[o]nly those representations or warranties that are made ... in

the [s]ale [a]greement when, as and if it is executed, and subject to such limitations and restrictions as may be specified [in] such a [s]ale [a]greement, shall have any legal effect.”

Upon executing the non-disclosure agreement, RAA conducted preliminary due diligence on Savage. A few months later, the parties entered into a letter of intent, after which RAA conducted further due diligence. During such further diligence, now several months after signing the NDA and commencing the diligence process, RAA learned of three significant liabilities of Savage, any one of which, according to RAA, “would have caused RAA to have never attempted to acquire Savage.” Additionally, according to RAA, Savage was aware of these liabilities long before they were finally disclosed to RAA and made affirmative statements to RAA during the earlier stages of the diligence process that no such liabilities existed. In light of this new information, RAA terminated negotiations before a final sale agreement was entered and brought suit against Savage in the Delaware Superior Court, demanding payment for “sunken due diligence costs’ of \$1.2 million.”

The Superior Court dismissed RAA’s suit for failure to state a claim. RAA appealed, arguing, among other things, that the non-reliance and waiver clauses of the non-disclosure agreement were not intended to bar claims based on “willful falsehoods” and that the “peculiar knowledge” of

Savage with respect to the liabilities removed RAA's claims from the scope of the non-reliance provisions under New York law.

## Delaware Supreme Court Opinion

In affirming the dismissal, the Delaware Supreme Court emphasized the intent and language of the non-disclosure agreement and the context in which it was entered into—namely, between two sophisticated parties negotiating a sophisticated M&A deal. The court noted that the intent of the non-disclosure agreement was clear: it was “designed to require ... [waiver of] any deficiencies in due diligence as basis for suit, unless that deficiency constituted a breach of representation or warranty in the resulting merger agreement.” Furthermore, the court found the language to be unambiguous and “virtually identical” to non-disclosure language enforced in other instances.

The court cited several previous cases for the proposition that express disclaimers should be enforced, even in the context of potential fraud or intentional misrepresentation. The court relied on policy considerations, along with the weight of the precedent, in reaching its conclusion. In summarizing its analysis, the court wrote:

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.<sup>2</sup>

## Takeaways from *RAA Management*

Given the court's straightforward and unambiguous decision in the face of arguably egregious facts, much can be learned from this opinion. Buyers should be aware that they will likely have limited, if any, recourse against the seller for sunken costs or any other losses incurred by the buyer in connection with the transaction if a definitive agreement is not signed, unless they are able to negotiate explicit exceptions or modifications to standard non-reliance and waiver clauses that are ordinarily included in NDAs signed in connection with M&A deals (which may not be possible depending on the deal dynamics and the parties' relative leverage) or otherwise negotiate expense reimbursement or other protections in case the deal is not consummated for various reasons. Buyers should recognize that this is true even if the reason for the failed deal is less-than-fulsome, or even fraudulent, disclosures by the seller in the due diligence process. 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.

On the other side, sellers should ensure that their NDAs contain standard non-reliance and waiver clauses of the type at issue in *RAA Management* and resist making any changes to these clauses. Given the clear statements in *RAA Management* that standard non-reliance and waiver clauses generally result in no potential liability for sellers, any deviation from standard language may be interpreted as meaning the parties meant something different, thereby potentially exposing sellers to unclear results.

As the court in *RAA Management* explained, sellers have a distinct interest in ensuring that buyers have no ability to bring claims against them based on alleged misstatements or omissions in the due diligence process out fear that any failed deal could be the source of an action for expense reimbursement based on such theories, however warranted. Therefore, in most instances, sellers would be well-served by sticking with standard disclaimers in this context.

---

*For more information about RAA Management or any other matter raised in this Legal Update, please contact any of the following lawyers.\**

**Allison C. Handy**

+1 312 701 7243

[ahandy@mayerbrown.com](mailto:ahandy@mayerbrown.com)

**William R. Kucera**

+1 312 701 7296

[wkucera@mayerbrown.com](mailto:wkucera@mayerbrown.com)

\*The authors wish to thank summer associate Stephanie Mills for her assistance with this Legal Update.

## Endnotes

<sup>1</sup> *RAA Mgmt., LLC v. Savage Sports Holding, Inc.*, 2012 WL 1813442, at \*1, \*10 (Del. Mar. 28, 2012).

<sup>2</sup> Though the case was heard by the Supreme Court of Delaware, it was actually decided under New York law. The Supreme Court stated, however, that had the case been decided under Delaware law the outcome would have been the same.

---

Mayer Brown is a global legal services organization advising many of the world's largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Please visit our web site for comprehensive contact information for all Mayer Brown offices. [www.mayerbrown.com](http://www.mayerbrown.com)

IRS CIRCULAR 230 NOTICE. Any advice expressed herein as to tax matters was neither written nor intended by Mayer Brown LLP to be used and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed under US tax law. If any person uses or refers to any such tax advice in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to any taxpayer, then (i) the advice was written to support the promotion or marketing (by a person other than Mayer Brown LLP) of that transaction or matter, and (ii) such taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

Mayer Brown is a global legal services provider comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe – Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown JSM, a Hong Kong partnership and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed herein.

© 2012. The Mayer Brown Practices. All rights reserved.