



"Partner" On-Call Network LLC

Ted J. Leverette, president

The Original Business Buyer Advocate ®

North Palm Beach FL 33410

[PartnerOnCall.com](http://PartnerOnCall.com)

## Who loses when business buyers and sellers sandbag each other?

- Buyers and/or sellers, depending upon how they handle sandbagging.
- Sources of financing may lose money.
- Buyers and sellers might claim malpractice if their advisors did not inform them of this risk.



**You are reading the report that elaborates on a Podcast by Ted J. Leverette:**

[Who loses when business buyers and sellers sandbag each other?](#)

Herein is a snapshot of what people online are saying  
and my reaction to it.

**But first, I'll ask you:**

What's your experience and opinion  
re business buyers sandbagging in M&A transactions?

I'm referring to adverse information about the seller or the company for sale  
that should have been disclosed or might have been disclosed  
by the seller prior to signing that the buyer knows about  
prior to signing but keeps silent,  
intending to seek recourse against the seller post-closing.

[Let me know.](#)

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This report (and its online links) will be especially useful for my audiences in the USA, Canada and the U.K.

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## **WHO LOSES WHEN BUSINESS BUYERS AND SELLERS SANDBAG EACH OTHER?**

Buyers and/or sellers, depending upon how they handle sandbagging.

Sources of financing may lose money.

Buyers and sellers might claim malpractice if their advisors did not inform them of this risk.

And . . . The customers, employees, landlord, suppliers and others who are adversely affected by disputes between the new owner and the former owner.

### **Justification for my bad-news Podcast.**

I don't like people who unfairly take advantage. You don't either, do you?

I hope this report dispels wishful thinking and encourages ethical and collaborative dealmaking by everyone participating in the buying and selling of companies.

If you haven't, please listen to my Podcast:

"Who loses when business buyers and sellers sandbag each other?"

[Listen to my 5 minutes-or-less Podcasts.](#)

The Podcast differs from what you read in this report.

## **WHY SOME BUYERS OR SELLERS SANDBAG DURING DEALMAKING AND POST-CLOSING.**

Sandbagging is a coercive tactic during a pending buy/sell transaction. It can also be used post-closing to hurt the seller or buyer.

### **What does sandbagging mean?**

Sandbagging delays negotiations and/or a business deal. It can include misdirection, withholding and bluffing. It can unfairly disadvantage the other side of the dealmaking table.

Sandbagging is a behavior that gives the *buyer* the right to make an indemnity claim after closing for an inaccurate fact that a buyer *knew* was false when signing the document, despite *not* informing the seller prior to closing.

Buyers can gain leverage on the former owner, especially if the seller financed some of the buyer's purchase. And especially if the purchase and sale agreement includes provisions that empower the buyer after closing to revise some of the terms of the agreement.

*Buyers and sellers* sandbag so they can delay negotiations or a business deal in the hope of receiving a more favorable offer from somebody else or to force concessions in their pending transaction.

"Hiding the ball from each other" is how some people define sandbagging. (Hence the image on the cover of this report: The 3-card Monte hustle.)

## ONLINE COMMENTARY

Here is a sample of the comments from people before they listened to my podcast or read this report. They are responding to my question:

### **What's your experience and opinion re business buyers sandbagging in M&A transactions?**

- **Joe Sandbank** (Law office of Joe Sandbank; CEO Arriva Ventures, Inc.)  
*None. I'm not sure how buyer is going to pretend he didn't know and also be willing to close and risk that seller will be there ready to pay him for fraud after. I don't see litigation as a profit maker generally.*
- **Steven Bell, CPA, EA, CFE**  
*I see no upside to waiting until after closing; increased legal fees, longer transition or integration post closing for the buyer, less of a chance to get the actual price adjustment. Discuss with seller prior to close and adjust the price at that time or walk away if the issue is large enough.*
- **Kathryne A. Pusch, Business Broker**  
*That seems like a dangerous "bet" that the buyer could obtain compensation "maybe" post closing. In good faith, all around, he should handle it in DD and allow seller the opp to address it. Why look for post-closing trouble?*
- **Business Appraiser**  
*If the buyer knows of negative issues beforehand, he or she should confront the seller and negotiate for a lower sale price.*
- **Business Broker**  
*If the buyer knows it has effectively been disclosed.*
- **Business Broker**  
*Easily solved with disclose, disclose and disclose.*

**This comment hits the nail on the head; let's hope everyone is doing it:**

**Paul Klinge** (The Lincoln Group, Inc.)

*Our job as professional intermediaries is to see that full disclosure is made. Also, there should be constant communication by the intermediary with the buyer and the seller. Communication flow is critical. Smoothing out all the wrinkles increases the chances for a successful closing.*

And, of course, this!

**H. Winston Hines**, CBI, BiC (HWH Properties)

*WOW! Sounds like the beginning of a lawyer earning a new car for his wife . . . in other words, a lawyer's dream case!*

## COUNTERING SANDBAGGING

Your first defense against sandbagging is your offense. Wouldn't it be nice if everyone, from the get-go, involved in the evaluation of a company and dealmaking would explicitly request and agree to realistic transparency and fairness?

I don't mean giving up fair-play negotiating advantages!

Among the resources you can access online and from this report, is an article by Brendan J. McCarthy, Esq., [\*Sandbagging in M&A Deals: Is Silence Golden For Buyers?\*](#) Here's an excerpt:

Imagine this scenario: You have signed a purchase agreement to acquire a business and the parties are now driving to close the deal. The eleventh hour has arrived, and the seller proceeds with a "data dump" of documents that should have been disclosed prior to signing. During your review of the documents provided at this late hour, you learn of the inaccuracy of one of the seller's representations regarding the business. Nevertheless, you believe that any losses sustained by the business as a result of the breach will be minimal and you have come too far to walk away from the deal now. You have an out, but you would prefer to close the deal and then potentially bring a claim against the seller to recover if problems develop. What you are contemplating at the moment is sometimes called "sandbagging."

Below are abbreviated (i.e., incomplete) buy/sell contractual provisions that might help you see how buyers and sellers try to mitigate their risk. (I do not offer legal advice. This report directs you to online resources.)

**A buyer-friendly** sandbagging provision might look like this *abbreviated* example. See the entire provision from attorney, William J. Clements, in his article, [\*Buyers and Sellers of Businesses Beware: Due Diligence, Sandbagging and the Destruction of Warranties and Representations.\*](#)

The representations and warranties of the Seller shall *not* be affected or deemed *waived* by reason of any investigation made (or not made) by or on behalf of the Buyer . . . knew or should have known that any such representation or warranty is or might be inaccurate or untrue. The Seller hereby acknowledges that, regardless of any investigation . . . and regardless of the results of any such investigation, the Buyer has entered into this transaction in express reliance upon the representations and warranties of the Seller made herein.

**Sellers** try to exclude the buyer's sandbagging provision. Or sellers may include an *anti*-sandbagging provision.

Here's an *incomplete* **seller-friendly** anti-sandbag-provision:

To the extent Buyer knew or should have known that any representation and warranty made by the Seller is or might be inaccurate or untrue, Buyer hereby releases and waives any and all claims against the Seller by Buyer arising out of breach of that representation and warranty.

## ONLINE RESOURCES

These resources were online at the time this report is written. The links might not be active later, so access them now if it is important to you to know about this topic. Use the links; there is much more info than these excerpts show:

**Daniel Avery**, Goulston & Storrs, PC, and Daniel H. Weintraub, Audax Group  
[\*Trends in M&A Provisions: "Sandbagging" and "Anti-Sandbagging" Provisions\*](#)

- State law will differ from state to state. The result of choosing to be silent on the issue of sandbagging may well depend on what law the parties choose as governing law—a decision often driven more by considerations of indemnification, non-compete enforceability or other issues than by any anti-sandbagging concerns.

**Brendan J. McCarthy, Esq.**

[\*Sandbagging in M&A Deals: Is Silence Golden For Buyers?\*](#)

- Addressing the issue of sandbagging and devoting the necessary time to evaluating and negotiating the point prior to signing is critical.

**William J. Clements**, attorney

[\*Buyers and Sellers of Businesses Beware: Due Diligence, Sandbagging and the Destruction of Warranties and Representations.\*](#)

- Typically, so long as the Buyer pays the agreed-upon purchase price, the Buyer's representations and warranties will never become an issue. It is the Seller's representations and warranties that most often form the subject matter of litigation over the deal.

**John Jenkins**, Calfee Halter & Griswold

[Strategic Sandbagging: Let the Buyer Beware.](#)

- Webster's Dictionary defines the term "sandbagging" to mean "to conceal or misrepresent one's true position, potential, or intent especially in order to take advantage of...to hide the truth about oneself so as to gain an advantage over another." In the world of M&A, the term sandbagging generally refers to the ability of the beneficiary of a representation and warranty to rely on that rep – and sue for its breach – notwithstanding the fact that the beneficiary knew that it was untrue when it was made. Many buyers will assert that they ought to be able to rely on a representation despite knowing that it was incorrect when made. The justification for pro-sandbagging position is that representations and warranties serve a risk allocation function in M&A, and the parties have a right to bargain to allocate that risk as they see fit.

**Glenn D. West & Kim M. Shah**

[Debunking the Myth of the Sandbagging Buyer: When Sellers Ask Buyers to Agree to Anti-Sandbagging Clauses, Who Is Sandbagging Whom?](#)

- In golf, a "sandbagger" is a person who pretends to be a worse player than he or she really is in order to take advantage of an unsuspecting opponent. [In business] while the phrase "to sandbag" evokes connotations of malfeasance and wrongful intent, the actual reasons the buyer decides to sign and/or close in these situations vary and do not always involve morally questionable behavior on the part of the buyer. Allowing the seller to update disclosure schedules between signing and closing is often a compromise for the seller on this issue.

**Patricia Warsaba**, Q.C., McKercher LLP

[Buying and Selling a Business: Ethical Considerations.](#)

- In remaining silent on the issue of sandbagging in the contract, this issue will be determined by the governing law of the agreement. Representations and warranties are customarily stated in fairly broad, general terms. The specifics are in “disclosure schedules” which are attached to the contract. The party receiving the representations and warranties has to rely on the disclosure schedules and the party making the representations and warranties has to stand behind them. Both parties should thus be interested in completing the schedules as early as possible in the negotiation and make sure that senior people have reviewed them.

**Sophia Tolias and Laurie N. Duke**

[Catching the Sandbagger off the Green: Sandbagging in M&A.](#)

- Parties are increasingly turning their minds to rep and warranty insurance to protect against post-closing risks. However, this insurance usually does not cover known breaches like sandbagging. At best, the policy may be negotiated to limit the definition of “knowledge” to allow coverage in narrow circumstances.

**David P. Mason and David S. Lebolt**

[Can You Sandbag?](#)

- A buyer of a business generally assumes that if a representation or warranty made by the seller in the purchase agreement survives the closing and is untrue, the buyer will have a right to recover damages (subject to any materiality standards, deductibles, caps, etc. provided for in the agreement). However, in some situations, a buyer may not be able to recover damages for a breach of the seller's representation if the buyer was aware of the breach before closing. The relevant case law is confusing, but the purchase agreement can provide buyers (and sellers) with greater certainty.

**Daniel S. Galligan**

[Buying A Business? You May Want to Avoid the "Anti-Sandbag" Provision.](#)

- What appears to be a simple provision in an agreement can be a trap for the unknowing and have unintended consequences. Unfortunately, such traps can end up costing you real money. Be careful! Don't fall into those traps. Our advice is to seek the assistance of seasoned professional advisors who have experience in negotiating purchase and sale transactions.

## TIP

For most people who know how to manage a company, buying the right, privately held small or midsize company, the right way is among the best ways, if not *the* best way, to increase income and net worth for financial security.

## AFTERWORD

I prepared this report for you because few dealmakers are adequately informed about sandbagging. I think you or people you represent need to see this information. Please don't blame the messenger (me) for this reality check. I do not advocate for sandbagging, but it happens more than we like. Your attorney can tell you horror stories.

It's up to you to learn more about this topic, and to find advisors that can help you. I am not referring or recommending anyone I mention in this report because I do not know enough about them to do so. I'm merely sharing with you some of my homework.

Thank you for letting me share with you some of our 500 years collective experience as [Business Buyer Advocates](#) ®. When not working for buyers, we show companies how to use our [Business Profit Maximizer](#) ™.

I hope you will email me your critique of my Podcast and this report. You can do so from any of the webpages on my website: [partneroncall.com](http://partneroncall.com).

**Final tip:** If you or people you represent haven't read my how-to books, please do so . . . if you want to be more successful:

[How to Buy the Right Business the Right Way—Dos, Don'ts & Profit Strategies](#)

[How to Get ALL the Money You Want For Your Business Without Stealing It](#)  
(USA and Canadian versions.)

You can buy them from my website: [partneroncall.com](http://partneroncall.com).

Best wishes for your continued prosperity!

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