Drafting Earnout Language in a Purchase Agreement – Three Key Takeaways from a Litigator's Perspective

By:Paige K. Zacharakis
January 13, 2026

Earnout language in an M&A purchase agreement can be beneficial to both buyers and sellers. For the buyer, it means less money paid upfront, with the possibility of additional payments post-closing depending on the performance of the purchased company (typically known as milestones). For the seller, it means a possible increase in overall deal consideration, leaving the door open to receive additional compensation based on the business's future success. If all goes exactly as planned, earnout provisions can be a win-win situation for both parties. However, the reality is that these earnout provisions can lead to stressful situations, arguments between the buyer and seller, and even lawsuits.

If an earnout dispute ends up in litigation, the contract language concerning the earnout will be placed under a proverbial microscope. The earnout language will not only be evaluated for what it says, but also for what it doesn't say. When evaluating an earnout provision, there is certain language that courts pay special attention to. A Delaware judge recently outlined how a court will evaluate an earnout provision when a dispute arises.[1]

Here are three key takeaways from a litigator's perspective on what language should be given extra attention when it comes to earnout provisions and calculating possible damages.

1. Level of Effort

Typically, drafters of the purchase agreement will insert language defining the level of effort the buyer is contractually obligated to perform to reach earnout milestones. For example, phrases like "commercially reasonable efforts" or "good faith efforts" come to mind. Surprisingly, there are no standard definitions for these types of "effort-based" language under Delaware law. Instead, there is a general understanding (and Delaware caselaw in support) that a hierarchy exists among effort-based language. The lowest effort that a buyer can commit to in reaching the earnout milestone is "good faith effort." The middle of the pack, sometimes used interchangeably, are "reasonable efforts" and "commercially reasonable efforts." Increased buyer efforts are required if the contract states that "reasonable best efforts" or "best efforts" are required. Depending on whether you are the buyer or seller, you may want to negotiate language imposing a higher or lower effort standard.

2. Outward or Inward Facing Standard for "Effort" Language

Another piece of the purchase agreement that goes hand in hand with effort-based language is what industry standard will be used to measure the buyer's efforts. For example, while stating that the buyer will use "best efforts" to ensure that the earnout milestones are reached is a good start for a seller, it is even better to define what the parties mean by "best efforts." For example, defining "best efforts" as "the exercise of the most productive and efficient efforts performed by a company in a similar industry, with similar resources, and expertise as the buyer" gives the parties, and the court, a bit more clarity on what is expected of the buyer post-closing. This sort

of outward facing standard is typically seller-friendly, as it signals that the parties will look to the industry standard of what efforts are expected. Alternatively, the parties can agree to an "inward" facing standard, which will look to what the buyer has done in earlier, similar deals. This is typically a buyer-friendly approach since it affords the buyer the opportunity to point to specific details in previous deals that led to prior sellers reaching the earnout milestones successfully (or unsuccessfully) and comparing those details against the current deal. By including an inward or outward facing standard in the definition of the efforts-based language in the purchase agreement, it provides additional clarity to both parties as to what level of effort is expected by the buyer, and what standard those efforts will be compared to.

3. Control

An important contractual provision concerning earnout milestones is which side (buyer or seller) will be in control of the post-closing company. Naturally, whoever is in control will be able to better ensure that the post-closing company reaches the earnout milestones. Buyers will want to negotiate that the buyer has sole discretion to control the post-closing operations. On the other hand, sellers will want their representatives to have a say in how the operations of the post-closing company will operate to reach its milestones. Parties should think carefully about how much control they will each have post-closing if earnout provisions are at play.

While avoiding disputes related to earnout provisions all together is ideal, sometimes they are unavoidable. When you find yourself in the crosshairs post-closing concerning earnout milestones or earnout payments, you'll want to be sure that your purchase agreement is clear and supportive of your position. The best thing to do is be proactive and make sure that you have an experienced and knowledgeable M&A lawyer negotiate the agreement for you.

If you have any questions regarding drafting earnout language, reach out to Paige Zacharakis.

See also Taxation of Earnout Payments in M&A Transactions.

[1] *Fortis Advisors, LLC v. Johnson & Johnson, et al.*, Case No. 2020-0881-LLW, 2024 WL 4048060 (Del. Ch. Sept. 4, 2024).