The Three Most Highly Negotiated and Often Disputed Provisions in an M&A Deal:

Are you Ready for the Litigation That May Follow?

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Panelists

Thomas O. Bean, Verrill Dana LLP
tbean@verrilldana.com

James F Byman, McGladrey LLP
James.Byman@mcgladrey.com

Alan D. MacEwan, Verrill Dana LLP
amacewan@verrilldana.com

Robert J. Schena, McGladrey LLP
rob.schena@mcgladrey.com

Dennis J. White, Verrill Dana LLP
dwhite@verrilldana.com

Jeffrey A. Ayres, JPMorgan Chase
jeffrey.a.ayres@jpmorgan.com
THE “BIG THREE”

I. Post-Closing Purchase Price Adjustments

II. Indemnification and Escrows

III. Earnouts
COMMON THEMES

• Each issue impacts the ultimate purchase price.

• Each issue spawns disputes and litigation.

• Each issue deserves careful consideration, precise drafting and planning.
I. POST-CLOSING PURCHASE PRICE ADJUSTMENTS

A. What Is The Purpose?

- Intended to reconcile differences in the financial condition of the seller between signing and close.
- Helps ensure the buyer receives the benefit of its bargain by receiving the agreed upon balance sheet (or an adjustment to the price).
- Allocates the benefits and risks of business operations between signing and close.
- Protection against “manipulation” by the seller (accelerating receivables, stretching payables, selling off inventory, etc.).
- A “true-up” - not a substitute for a MAC clause.
I. PURCHASE PRICE ADJUSTMENTS (Cont’d)

B. What is the Appropriate Measure?

- Stockholder’s Equity.
- Net Working Capital.
- Net Book Value.
- Something else.
I. PURCHASE PRICE ADJUSTMENTS (Cont’d)

C. What Is The Appropriate Base Amount?

• The amount reflected in last audited financial statements.

• The amount reflected in latest interim financial statements.

• An amount based on historical performance and estimates given assumed events (e.g., dividends, anticipated interim profits, anticipated interim losses, etc.).

• An amount that takes into account the cyclicality of the business.
The table below illustrates how the working capital target can fluctuate depending on the individual deal:

<table>
<thead>
<tr>
<th>Working Capital as percentage of deal value</th>
<th>US$ in thousands</th>
<th>Deal #1</th>
<th>Deal #2</th>
<th>Deal #3</th>
<th>Deal #4</th>
<th>Deal #5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purchase Price</td>
<td>$96,000</td>
<td>$27,000</td>
<td>$41,000</td>
<td>$12,000</td>
<td>$30,000</td>
<td></td>
</tr>
<tr>
<td>Working Capital (1)</td>
<td>22,000</td>
<td>1,000</td>
<td>6,000</td>
<td>(4,000)</td>
<td>13,000</td>
<td></td>
</tr>
<tr>
<td>% of deal value</td>
<td>23%</td>
<td>4%</td>
<td>15%</td>
<td>-33%</td>
<td>43%</td>
<td></td>
</tr>
<tr>
<td>Sales, LTM period</td>
<td>$81,000</td>
<td>$19,000</td>
<td>$25,000</td>
<td>$10,000</td>
<td>$43,000</td>
<td></td>
</tr>
<tr>
<td>% of sales</td>
<td>27%</td>
<td>5%</td>
<td>24%</td>
<td>-40%</td>
<td>30%</td>
<td></td>
</tr>
</tbody>
</table>

(1) Debt free, cash free working capital
D. Mechanics of the Adjustment?

- Dollar-for-dollar, or not?
- Collars?
- De Minimis Requirements?
E. Drafting Pitfalls

• Overlap with the general indemnification and tax indemnification provisions.

• Overlap with escrow/indemnification provisions – does a particular dispute fall within the “purchase price adjustment” dispute resolution mechanism or fall within the “escrow/indemnification” dispute resolution mechanism.
F. Accounting Pitfalls

- Parties often mistakenly believe GAAP clearly defines one correct method
  - GAAP is subject to interpretation.
  - GAAP recognizes no generally accepted method as better than another generally accepted method.
  - “GAAP consistently applied” does not mean you should change an accepted method that had been applied by the seller in the past.
  - Not all methods used by sellers are GAAP.
  - Textbook definition of working capital is typically modified in most deals.
I. PURCHASE PRICE ADJUSTMENTS (Cont’d)

• Common disputes
  - Accounts receivable allowances.
  - Inventory valuation and reserves.
  - Accounts payable/accruals.
  - Estimates.
  - Accounting for employee benefit liabilities and other actuarially determined amounts.
  - Deferred Revenue.
  - Knowledge of subsequent events.
  - Inconsistencies between interim and fiscal year-end reporting.
The following illustrates the difference between the textbook working capital definition and working capital as defined in an agreement:

<table>
<thead>
<tr>
<th>Working Capital as reported (US$ in thousands)</th>
<th>Working Capital as defined (US$ in thousands)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cash</td>
<td>Cash</td>
</tr>
<tr>
<td>1,538</td>
<td>$ -</td>
</tr>
<tr>
<td>Accounts Receivable, net</td>
<td>Accounts Receivable, net</td>
</tr>
<tr>
<td>10,502</td>
<td>10,502</td>
</tr>
<tr>
<td>Inventory</td>
<td>Inventory</td>
</tr>
<tr>
<td>8,824</td>
<td>8,824</td>
</tr>
<tr>
<td>Prepaid expenses</td>
<td>Prepaid expenses</td>
</tr>
<tr>
<td>1,240</td>
<td>1,240</td>
</tr>
<tr>
<td>Related party receivables</td>
<td>Related party receivables</td>
</tr>
<tr>
<td>189</td>
<td>-</td>
</tr>
<tr>
<td>Notes receivable - current</td>
<td>Notes receivable - current</td>
</tr>
<tr>
<td>959</td>
<td>959</td>
</tr>
<tr>
<td>Income tax receivable</td>
<td>Income tax receivable</td>
</tr>
<tr>
<td>250</td>
<td>-</td>
</tr>
<tr>
<td>Deferred income taxes</td>
<td>Deferred income taxes</td>
</tr>
<tr>
<td>2,529</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total current assets</strong></td>
<td><strong>Total current assets</strong></td>
</tr>
<tr>
<td>$ 26,031</td>
<td>$ 21,525</td>
</tr>
<tr>
<td>Line of credit</td>
<td>Line of credit</td>
</tr>
<tr>
<td>$ 12,903</td>
<td>$ -</td>
</tr>
<tr>
<td>Accounts payable</td>
<td>Accounts payable</td>
</tr>
<tr>
<td>7,787</td>
<td>7,787</td>
</tr>
<tr>
<td>Accrued expenses</td>
<td>Accrued expenses</td>
</tr>
<tr>
<td>5,447</td>
<td>5,447</td>
</tr>
<tr>
<td>Accrued income taxes</td>
<td>Accrued income taxes</td>
</tr>
<tr>
<td>762</td>
<td>-</td>
</tr>
<tr>
<td>Deferred revenue</td>
<td>Deferred revenue</td>
</tr>
<tr>
<td>2,450</td>
<td>2,450</td>
</tr>
<tr>
<td>Current portion of long term debt</td>
<td>Current portion of long term debt</td>
</tr>
<tr>
<td>5,525</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total current liabilities</strong></td>
<td><strong>Total current liabilities</strong></td>
</tr>
<tr>
<td>$ 34,874</td>
<td>$ 15,684</td>
</tr>
<tr>
<td>Working capital, as reported</td>
<td>Working capital, as defined</td>
</tr>
<tr>
<td>$ (8,843)</td>
<td>$ 5,841</td>
</tr>
</tbody>
</table>
I. PURCHASE PRICE ADJUSTMENTS
(Cont’d)

G. Adjustment Procedures

• Who prepares the CDBS?
  - Buyer will contend it has assumed control of the business and is best positioned to do so.
  - Seller will argue that consistency is critical and it should do so.

• Other Party’s Right to Object
  - Access to pertinent records.
  - Time period for filing objection.
  - Level of required specificity.
I. PURCHASE PRICE ADJUSTMENTS (Cont’d)

H. Approaches to Dispute Resolution

• Good faith negotiation between the parties.
• The two CEOs in a room.
• Mediation.
• General arbitration provision.
• A distinct dispute resolution process expressly designed for resolving such disputes.
I. PURCHASE PRICE ADJUSTMENTS (Cont’d)

• Accounting or advisory firm stipulated in the acquisition agreement.

• Typically not the audit firm of either company.

• Consideration of other business relationships between the parties and the accounting firm (e.g., valuation services, consulting services).

• Use of single dispute resolver versus a panel.

• Selecting the “right” professional within a firm is important since the issues are often not clear cut and significant judgment may be involved.
J. Individual dispute resolver selection criteria

- Independence.
- Prior dealings with the parties.
- Prior dealings with the parties’ advisors (e.g., counsel, accountants).
- Dispute resolution experience.
- Industry experience.
- Functional expertise.
- Transactional experience.
- Location.
K. Selecting the Applicable Dispute Resolution Procedures

- Role of the party’s auditors, legal advisors in connection with the dispute resolution process.
- Engagement letter with dispute resolver.
- Scope of review? What are the issues to be resolved?
- Discovery.
- What rules apply?
Selecting the Applicable Dispute Resolution Procedures (Cont’d)

- Written statements of position/rebuttal statements.
- Are submissions simultaneous or staggered?
- Ability of dispute resolver to seek information/documents.
- Hearing? Oral Testimony?
Selecting the Applicable Dispute Resolution Procedures (Cont’d)

- Level of detail in the dispute resolver’s report.
- Time frame.
- Final and binding nature of the dispute resolution process.
- Should dispute resolver’s costs be split equally or shift depending upon the outcome?
II. INDEMNIFICATION AND ESCROW

A. Indemnification: The Seller’s “Insurance Policy”

 – Although buyer and seller each indemnify, predominantly how buyer gets compensated for an agreement breach.

 – Representations and warranties impact “coverage” and are not mutually exclusive.
II. INDEMNIFICATION AND ESCROW (Cont’d)

B. Coverage Limits: Caps, Baskets, Time, Exceptions, and Notes for the Wary

– **Caps**: the maximum exposure for a seller/the policy limit.

– What are the buyer’s deal risks? What are the typical ranges?
II. INDEMNIFICATION AND ESCROW (Cont’d)

B. Coverage Limits (Cont’d)

– **Baskets**: Avoiding nuisance claims (at least until they aggregate).

– **Deductibles vs. Tipping Baskets**: Who gets dollar one?

– Interplay with Representations & Warranties: Materiality.
II. INDEMNIFICATION AND ESCROW

(Cont’d)

B. Coverage Limits (Cont’d)

– **Time limits**: when does the seller’s obligation to cover claims end?

– Tied to risk and to buyer’s ability to discover issues; often an audit cycle (financial purchases).
II. INDEMNIFICATION AND ESCROW
(Cont’d)

B. Coverage Limits (Cont’d)

– **Exceptions:** When the limits do not apply.

– Issues known before closing (actual costs).

– When the cap might be insufficient.

– Time for discovery inadequate.
B. Coverage Limit (Cont’d)

- Notes for the Wary:
- Who are the indemnitors?
- Buyer’s advance knowledge (“Sandbagging”).
- Insurance coverage “out”.
- Exclusive remedy provision.
II. INDEMNIFICATION AND ESCROW (Cont’d)

C. Escrows

– When are they used?
  • Purchase Price Adjustments (usually short term).
  • Temporary Indemnification (known issues pending resolution).
  • Indemnification Alternative (the Cap trade-off).
  • Negotiation Strategies (escrows tie up proceeds; what is the quid pro quo for a seller?)
  • May reduce indemnification amounts (e.g., Cap), duration.
Escrows (Cont’d)

– Addresses indemnitor issues (guaranties; contribution).
D. What is “Market”?

– The common negotiation approach: the “norm” for what others have negotiated.

– J.P. Morgan Study.
Executive Summary

Summary of Key Findings

Escrow Statistics
- The average transaction size was $254MM; the median was $60MM
- The average escrow deposit was $9.2MM; the median was $3.0MM
- The median percentage of purchase price placed into the escrow was 9%
- The most frequent expected duration of escrow accounts was 18 months; expected duration ranged from 3 months – 84 months

Claims
- 28% of terminated deals had at least one claim
- 32% of the escrow was returned to the buyer when claims were submitted in the form of a joint order (buyer and seller)
- The average size of the claim requested by the buyer was for 61% of the escrow
  - Buyers were able to recover an average of 74% of the amount originally claimed for, or 45% of the total escrow deposit
  - Working Capital Adjustments returned an average of 25% of the escrow to the buyer

Financial vs Strategic Buyer Behavior
- Financial buyers did not pay for the escrow fee on their own, compared to 21% of strategic buyers
- Financial buyers placed a smaller percentage of the purchase price into an escrow than strategic buyers (median of 5% vs 9% respectively)
- Strategic buyers received all of the interest in more cases than financial buyers (28% of the time vs 15% of the time respectively)
- Transactions involving financial buyers had shorter expected durations than those that involved strategic buyers (16 months vs 20 months respectively)
J.P. MORGAN ESCROW REPORT

JPMorgan Escrow Deposits

Escrow Deposit Components

- Cash only: 98%
- Stock only: 2%
- Stock & Cash: 2%

Account Structure:

- Cash only escrow accounts are up 7%, from 99% in 2010's study.
- 24% of escrow agreements call for multiple accounts to be used for distinct purposes.
  - Out of those agreements with multiple accounts, the most common arrangement requires two accounts:
    - One for general indemnification purposes; the other either a
    - "Working Capital Adjustments" (37% of the time) or "Purchase Price Adjustments" (22% of the time).

Escrow Deposit Size Distribution

- Average deposit size: $3.2MM
- Median deposit size: $3.0MM
- Deposit size range: $0.1MM - $200.0MM

*Value of cash escrow deposit only; stock escrow deposit excluded.
Purchase Price Placed in Escrow

Distribution of the Percentage of Purchase Price Placed in Escrow

- Median percent of purchase price placed in escrow: 8%
- Range: 0.2% - 37%

Average Percentage of Purchase Price Placed in Escrow by Transaction size

- Smaller transactions tend to yield higher percentage in escrow

Percentage of Purchase Price Placed in Escrow

<table>
<thead>
<tr>
<th>Size of Merger or Acquisition</th>
<th>&lt; $15MM</th>
<th>$15 - $50MM</th>
<th>$50 - $100MM</th>
<th>$100 - $250MM</th>
<th>$250 - $500MM</th>
<th>$500MM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of each escrow deposit only; stock escrow deposits excluded</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

J.P. MORGAN ESCROW REPORT
Duration Analysis

**Expected Duration of Escrows**

- **Duration Details**:
  - Average expected duration: 19 months
  - Median expected duration: 18 months
  - Range: 3 - 84 months

**Duration Deep Dive**

- 86% of escrow agreements specify a termination date
- 18 months is the most prevalent termination date (25% of deals with termination dates specified)
- 12 and 24 months are the next most common, representing 19% and 15% respectively
- 26% of escrow agreements include at least one scheduled disbursement to the seller prior to termination

**Average Escrow Duration by Transaction Size**

- Larger Transactions (> $250MM) tend to have longer durations

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1 Expected duration is defined as the number of months that funds are scheduled to stay in an escrow account prior to the first disbursement to the seller, as explicitly stated in the escrow agreement.
Investment Options and Fee Payments

**Investment of Cash Deposits**
- Multiple Investment Types
  - NIB: 8%
  - Money Market Mutual Fund: 14%
  - Interest-Bearing Account: 77%

**Escrow Fee Payments**
- 50-50 split between counterparties
- Buyer: 18%
- Seller: 4%
- Other: 5%

**Popularity of Interest-Bearing Accounts**
- Over 75% of cash deposits were invested in Interest-Bearing Accounts
- Investment in Money Market Funds decreased 8% from the 2010 study
- NIB investment increased 5% from the 2010 study

*Other* denotes different fee structure.
D. What is “Market”? (Cont’d)

– An Alternative Negotiation Approach: Market = Arbitrary
  • What does the deal justify/demand?
  • Assess actual risks of business and assets.
  • Use Carve-outs to lower Cap (i.e., separate “mini-indemnifications”).
II. INDEMNIFICATION AND ESCROW

(Cont’d)

E. Disputes: Purchase Price Adjustment v. Breach of Representation and Warranty

- Why the distinction matters.

- General Rule: Buyers generally want disputes to be purchase price adjustments; Sellers want them to be claims for breach of representation and warranties.
II. INDEMNIFICATION AND ESCROW (Cont’d)

F. Examples

Abry Partners v. F&W Acquisition, LLC, 891 A.2d 1032 (Del. Ch. 2006)

• Stock purchase agreement limited representations and warranties to those in agreement.
• Breach of representation and warranty capped at $20M indemnity fund, or 4% of $500M purchase price.
Examples (Cont’d)

• Buyer uncovers a host of serious financial and operational problems.

• Alleges fraud in the inducement- breach of representation and warranty that financial statements “fairly present in all material respects condition of Company as of certain dates,” and seeks rescission of transaction.
Examples (Cont’d)

• Buyer argues Delaware law should not permit party to immunize itself from a rescission claim premised on false representations of fact recognized to be the predicate for the deal.

• Seller says, “freedom of contract.” No rescission - liability limited to $20M.
II. INDEMNIFICATION AND ESCROW
(Cont’d)

Examples (Cont’d)

• Court rules: Delaware law permits sophisticated commercial parties to craft contracts to insulate a seller from a rescission claim for a contractual false statement of fact that was not intentionally made.
Examples (Cont’d)

• Public policy against fraud is strong and venerable founded on societal consensus that lying is wrong.

• Rescission is available if buyer can prove seller induced contract’s formation by lying about contractually represented fact.
Matria Healthcare, Inc. v. Coral Sr. LLC, 2007 WL 763304 (Del. Ch. 2007):

- Purchase agreement provides for two dispute resolution mechanisms: arbitration by an accountant for purchase price adjustments, and arbitration by a lawyer for suits for breach of representations and warranties. Cap on the latter.
II. INDEMNIFICATION AND ESCROW (Cont’d)

• Seller reps and warrants that “Financial Statements are true and correct in all material respects and present fairly, in all material respects, the financial condition and results of the operations of the Business as of their respective dates . . .”

• Seller is selling a medical products and services business.

• The Closing Adjustment Formula is based on a comparison of the target’s Modified Working Capital as of a Date as Compared with the Final Modified Working Capital as of the Closing Date.
II. INDEMNIFICATION AND ESCROW (Cont’d)

• The day after the Closing, Seller’s largest customer informs the Buyer that it will be conducting a clinical and financial audit of Seller’s services.

• Seller’s senior management had instructed its employees not to disclose customer’s complaints to Buyer.
II. INDEMNIFICATION AND ESCROW (Cont’d)

- Buyer negotiates settlement with customer agreeing to pay $4M.

- Buyer argues that issue with customer should have been an adjustment to working capital that goes to the accountant and is not subject to the indemnification/escrow cap.
II. INDEMNIFICATION AND ESCROW (Cont’d)

• Seller argues it was a misrepresentation claim.

• Is this a dispute about the purchase price or a dispute about the reps and warranties concerning financial statements?

• Difference: one type of dispute goes to an accountant and is not subject to a cap; the other to a lawyer subject to cap.
• Parties had included a provision in the Agreement that said:

• “In no event shall any matter, facts or circumstances pertaining to a purchase price adjustment, which would also constitute a breach of representation or warranty, give rise to a claim by Buyer on the Escrow Fund.”
III. EARNOUTS

• An earnout makes a portion of the purchase price payable in the future contingent on the target meeting certain negotiated criteria.

• Unlike a purchase price adjustment, the purchase price can only go up with an earnout.
III. EARNOUTS (Cont’d)

• Earnouts help the parties bridge the gap between their disparate views of the target’s value.

• For the buyer, it is a tool for getting the deal done and avoiding overpayment.

• For the seller, it is a means to capture the full value of the business.
III. EARNOUTS (Cont’d)

Valuation gaps can arise in a variety of situations:

- Where the company is basically sound, but underperforming because of general economic conditions.
- Where the target is a development stage company that has not yet achieved its full potential.
- Where the target will benefit from new technologies that have not yet gained market acceptance.
- Where the target’s sector is expected to be fast-growing.
- Where target has had a volatile earnings history.
- Customer concentration.
III. EARNOUTS (Cont’d)

Earnouts raise challenging drafting issues:

- What is the appropriate criteria for the earnout?
  - A milestone (e.g. FDA approval)
  - Gross revenues
  - Gross profit
  - Operating profits
  - EBITDA

- What if the target ceases to be a self-standing business?
  - Allocation of overhead
  - Benefit of synergies
How should Accounting issues be handled?

– Handling of transaction expenses, basis step up and potential for increased depreciation, acquisition indebtedness, amortization of intangibles, etc.
– GAAP versus historical accounting.
– Post transaction integration costs/timing.

What is the proper measuring period?

– The longer the period, the more conjectural the exercise.
III. EARNOUTS (Cont’d)

Should the seller have a say in how the buyer operates the target post-closing?

– Marketing budget.
– Location.
– Work force.
– Vendor selection.
– Buyer and target transfer pricing.
• What if the target becomes a “platform” company and is grown through add-on acquisitions?

• Should the earnout payment be accelerated in certain circumstances:
  – A subsequent sale of the target business
  – A change in control of the buyer
  – An IPO by the buyer
III. EARNOUTS (Cont’d)

How should the earnout payment be structured:

– What is the method of payment?
– Is the payment an all-or-nothing fixed sum or calculated on a sliding-sale.
– Is it a one-time payment, or in installments?
– Is there a cap?
– Should the potential earnout payment be escrowed?
– Does the mere potential for an earnout payment trigger additional fees for the investment bankers?
– Tax implications (topic for another day).
• Earnouts are an invitation to litigation.

• BUT, buyers like them because they get to pay a lower price, and sellers like them because they present an opportunity to recover what they believe is the true value of the business.
Sonoran Scanners, 585 F.3d 535 (1st Cir. 2009)

Sonoran developed a prototype of a high-speed machine that it believed would reduce costs for digital printing.
Sonoran ran out of cash and sought a buyer.
III. EARNOUTS (Cont’d)

- Buyer agrees to purchase Sonoran.

- Buyer agrees to pay up-front cash, plus additional monies based on the number of machines it sold over the next few years, up to a maximum dollar amount.
III. EARNOUTS (Cont’d)

- Buyer sells only one machine over a more than three year period after acquisition.
- The machine business is a failure.
III. EARNOUTS (Cont’d)

- Sonoran sues Buyer for, among other things, Buyer’s alleged failure to fulfill its implied obligation to exert reasonable efforts to develop and promote Sonoran’s technology.

- Buyer relies on case law from other jurisdictions saying it had no such obligation.
• The First Circuit, relying on a 1942 SJC decision, held that Buyer did have such an obligation. It stemmed from Buyer’s promise to pay the earnout resulting from the exclusive right to develop and sell the machine.

• The First Circuit vacates the grant of summary judgment to Buyer and remands the case.
Lesson: If you are a buyer who has agreed to pay an earnout, and there are multiple states whose law could be chosen to cover the agreement, consider law of a state where you would not have an implied obligation to exert reasonable efforts to develop the product.
III. EARNOUTS (Cont’d)

O’Tool v. Genmark Holdings, Inc., 387 F.3d 1188 (10th Cir. 2004) (applying Delaware law)

Classic case: Buyer purchases competitor. Agrees to pay earnout in addition to cash.

Earnout is based on percentage of gross revenues derived from sale of Seller’s products up to a maximum amount.
III. EARNOUTS (Cont’d)

• Shortly after deal closes, Buyer relegates Seller’s competing product to second priority in the event of production conflicts, and changes name of the product.

• After some time, Buyer closes Seller’s facility.

• Seller also “flips” dealers of Seller’s products to dealers of Buyer’s products.
III. EARNOUTS (Cont’d)

- Seller sues Buyer. Jury awards $2.5MM in damages.

- Court says Buyer violated the spirit of the earnout agreement by changing the brand name; setting a production schedule or priorities that effectively reduced the maximum earnout consideration; and flipping the dealers.
Accounting guidance SFAS 141(R) now ASC 805

- Assets and liabilities measured at fair value.
- Payment consideration – equity vs liability.
- Earnout versus employee compensation.
- Provisional amounts.
- Disclosure requirements.
Contingent consideration

- If fair value can be determined then recognize at this value.

- Probable and reasonably estimable criteria
  - If so, recognize at reasonably estimable amount
  - If not, disclose the contingency

- Subsequent accounting
  - Remeasure to fair value through earnings each period until settled
III. EARNOUTS (Cont’d)

- Provisional amounts
  - Preliminary estimate at the acquisition date
  - Disclosure is critical

- Measurement period adjustments
  - Facts existing as of the acquisition date
  - Acquisition date accounting is adjusted
  - Measurement period up to 1 year
  - Restate prior period
Earnout versus compensation

- Depends on facts and circumstances which may contradict contract language (Who benefits).
- Subsequent accounting.
- Payment forfeited upon termination of employment
  - If so, compensation
  - If not, look to other facts