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Game Time Decisions: Drafting the Modern Earnout

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A well-drafted earnout establishes the rules of the game before the clock starts: who calls the plays, what counts toward the number, how performance is measured and who makes the call when a dispute arises. When the rules go unwritten, the buyer improvises and makes "game time decisions", which can become the subject of litigation.

In 2026, Delaware courts have been called upon to referee earnout disputes involving express covenants, buyer discretion and alleged efforts to avoid contingent payments. The decisions reinforce a central lesson: the parties should establish the rules of the game before the opening whistle, rather than expect courts to make the calls when the playbook falls short.

The Matchup Appearing in 24% of non-life-sciences private deals closed in 2025, earnouts remain a popular tool to bridge valuation gaps. The seller believes the business is worth more than the buyer is prepared to pay upfront, so the parties let future performance decide the rest. The median potential payout sits at 34% of the closing payment, and sellers' realization rate



averages at about one in five dollars of the maximum amounts. By that scorecard, the seller is playing a losing game.

First, consider the seller's perspective: a player is traded for a base fee plus a bonus tied to playing time. The player may be capable of meeting the performance threshold, but the team that owes the bonus also controls the lineup. In sports, this is sometimes called "minute management", where a team limits a player's

time on the field or court to avoid triggering a contractual bonus.

The seller faces a similar predicament: the buyer controls the business decisions that may determine whether the earnout is achieved, leaving the seller to rely on the protections negotiated in the acquisition agreement.

Across the table, buyer's team views the trade differently. Having paid the upfront consideration, the buyer views the earnout as a bonus payable only if the business delivers the promised performance. Like a team acquiring a player, the buyer expects to call the plays: integrating systems, reallocating personnel, prioritizing products and adjusting business strategies. After all, a buyer does not acquire a business expecting the seller to dictate how it should be run.

Enter the coaches, the attorneys on each side, who understand not only their own team's objectives, but also the incentives driving the opposition. So, who wins? Neither side can succeed entirely on its own. the seller depends on the buyer to invest in and support the business, while the buyer may depend on the seller's knowledge, customer relationships and key personnel to deliver the anticipated performance.

The acquisition agreement becomes the rulebook for balancing these competing interests during the earnout period, preserving the buyer's ability to call the plays while protecting the seller's opportunity to collect the contingent consideration it negotiated.

Game Film: J&J and Auris

Johnson & Johnson's acquisition of Auris Health illustrates just how costly disagreements over the rules of the game can become. In 2019, J&J acquired Auris $3.4 billion, plus up to $2.35 billion in contingent consideration tied to regulatory and sales milestones for a surgical robot. Following closing, J&J prioritized its competing in-house robotic surgery program and, after the FDA closed the anticipated 510(k) clearance pathway, ceased pursuing certain milestones.

In *Johnson & Johnson v. Fortis Advisors* (Del. Jan. 12, 2026), the Delaware Supreme Court affirmed finding that J&J breached its express efforts obligation but reversed the trial court's use of the implied covenant of good faith and fair dealing to require pursuit of an alternative FDA pathway for the first milestone. The distinction matters: an express promise can constrain the buyer's conduct without authorizing a court to rewrite the playbook when the original game plan falls apart.

The Rulebook

Delaware courts generally enforce the parties' negotiated allocation of risk, even when the earnout does not materialize.

Start with the efforts clause. Parties often require the buyer to use "commercially reasonable efforts" to achieve earnout milestones, but that standard has no single, fixed meaning under Delaware law.

The key is defining the benchmark: whose efforts, directed toward what result? An inward-facing standard measures the buyer against its own practices for comparable products, as in Auris, while an outward-facing standard measures it against what a reasonable company in comparable circumstances would do. The parties should clearly define the applicable benchmark, the activities covered and the entities bound.

Then there is "sole discretion," which may not be as absolute as it sounds. Delaware courts have read grants of discretion alongside other

express obligations, including efforts covenants, and even broad discretion remains subject to the implied covenant of good faith and fair dealing. As Zimmer (below) illustrates, however, a buyer can expressly limit its obligations and preserve considerable operational flexibility through a carefully drafted agreement.

Finally, Delaware implies a covenant of good faith and fair dealing into every contract, but keeps it narrow by design. The covenant fills gaps the parties did not anticipate, cannot override express terms and will not rescue a party from a risk it could have negotiated around. It does not impose a general duty to maximize an earnout or protect a seller against every unfavorable post-closing business decision. Where the agreement addresses a particular risk, the express bargain generally governs.

This Season's Highlight Reel

The following 2026 cases showcase how Delaware's courts applied the rulebook. A missed milestone does not automatically establish insufficient effort. In *Meyers v. Zimmer Biomet Holdings* (Del. Ch. May 1, 2026) Zimmer acquired Embody for $155 million, plus up to $120 million in milestone payments.

The agreement imposed an undefined commercially reasonable efforts obligation on the acquired company, granted broad commercialization discretion, acknowledged competing demands for resources and expressly limited additional obligations.

The court dismissed the efforts claim at the pleading stage under either an inward- or outward-facing standard, finding that the complaint failed to adequately allege a breach. The implied covenant claim also failed because the agreement expressly addressed the challenged conduct.

Affirmatively frustrating a qualifying payment may support a claim, even without an efforts clause. In *Monica v. Delta Data Software* (Del. Super. Feb. 10, 2026) a recurring-revenue earnout required an initial customer payment by March 31, 2025.

The complaint alleged that buyer invoiced a new customer with payment due March 29, but subsequently instructed the customer not to pay and offered to void the invoice. Despite the absence of an express efforts covenant, the court allowed both an implied covenant claim and a contract-based claim based on the prevention doctrine to proceed.

The distinction was critical: the alleged conduct involved more than a missed opportunity to achieve the earnout; it involved affirmative interference with a condition necessary to trigger payment. The buyer's own playbook may reveal an effort to avoid the earnout. In *Jiggy Puzzles v. Steelhead Acquisition EE* (Del. Super. Feb. 18, 2026), Steelhead acquired a puzzle business for cash at closing plus

three payments tied to first-year revenue. Despite the absence of an express efforts covenant, the seller's implied covenant claim survived summary judgment. Steelhead's leadership discussed making "game time decisions" if earnout thresholds came too close to being met, then reduced holiday marketing, deprioritized Amazon sales and destroyed inventory.

The court concluded that a jury could find deliberate efforts to prevent the earnout, illustrating how internal communications can undermine asserted business justifications, even where the agreement provides substantial operational flexibility.

Express control rights can have meaningful remedies. In *Fortis Advisors v. Krafton* (Del. Ch.

Mar. 16, 2026), Krafton acquired Unknown Worlds for $500 million, plus up to $250 million in contingent consideration. The agreement preserved the founders' operational authority for as long as any remained employed and permitted their removal only for defined cause. Facing a projected earnout of up to $242 million, Krafton's chief executive consulted ChatGPT, assembled a takeover team and terminated all founders.

Following trial, the court found that Krafton lacked cause and that its stated justifications were pretextual. The court ordered the chief executive's reinstatement and extended the earnout period by 258 days. from his ouster. The decision demonstrates that expressly negotiated operating protections can carry meaningful consequences when a buyer attempts to change the lineup before the final whistle.

The Coaches' Playbook: Key Takeaways

1. Define the efforts standard. Choose an inward- or outward-facing benchmark, identify covered activities and specify the buyer entities and affiliates bound. Sellers should consider an express prohibition on actions intended to avoid payment and resist language unduly narrowing the buyer's obligations.

Buyers should reconcile the efforts covenant with their negotiated discretion and avoid inadvertently promising to maximize the earnout. The objective is to define the required effort without guaranteeing the score.

2. Address the operating decisions that could change the result. In *Laisure v. Voyager Technologies* (Del. Super. Aug. 14, 2026), the court dismissed an implied covenant claim alleging delayed execution of customer contracts until after the earnout period because that foreseeable risk could have been addressed expressly.

Depending on the business, sellers should negotiate protections concerning contract timing, post-cutoff receipts, revenue recognition, customer diversion, marketing, staffing, shared costs and accounting consistency. Buyers should preserve flexibility for legitimate commercial decisions. The goal is not to dictate every play, but to identify the decisions most likely to affect the scoreboard and allocate those risks before closing.

3. Allocate control and establish the consequences of termination. *Krafton* demonstrates why the agreement should identify who controls operations and when that authority can be withdrawn. If continued seller participation matters, a seller should consider defined removal standards, limited consent rights and remedies for termination without cause.

A buyer unwilling to accept continuing management protections might negotiate a predetermined buyout mechanism. The parties should resolve the consequences of changing the lineup before a dispute makes those consequences economically decisive.

4. Match the dispute resolution process to the dispute. In *Fortis Advisors v. Stillfront Midco* (Del. Feb. 13, 2026), the agreement referred earnout disagreements to an accounting firm designated as the "Arbitrator" for final resolution. The Delaware Supreme Court affirmed referral of a dispute involving marketing decisions, alleged bookings manipulation and information access, emphasizing its relationship to the calculation and the seller representative's own characterization of the process as arbitration.

The decision does not mean every accountant referral constitutes arbitration. Parties intending a limited technical role should designate the

accountant as an expert, not an arbitrator, and reserve legal and conduct-based claims for the appropriate forum. The rulebook should identify not only who makes the call, but which calls that decision-maker is authorized to make.

5. Make information rights enforceable. Sellers should negotiate meaningful reporting, inspection and audit rights, sufficient objection periods and remedies for underpayments. Buyers should limit the scope and frequency of requests, protect confidential information and establish clear deadlines for finality. As *Stillfront* underscores, the agreement should also specify the forum for information-access disputes. After all, a seller cannot challenge the final score without access to the scoreboard.

6. Preserve the contemporaneous record. As *Jiggy Puzzles* and *Krafton* demonstrate, internal communications can become critical evidence of intent. Buyers should document legitimate business reasons for decisions affecting an earnout and preserve relevant records. Sellers should negotiate access sufficient to evaluate compliance with contractual obligations. AI communications warrant similar caution, as *Krafton* illustrates. After all, decisions made off the field may determine how the game is ultimately called.

The Final Whistle

Delaware's 2026 decisions reinforce a familiar lesson: courts enforce the rules the parties negotiated. Sellers should secure clear operating protections, while buyers should define the flexibility they need. Both sides should establish performance metrics, operating authority, information rights and dispute procedures before the clock starts.

The difficult conversation belongs before signing: how much freedom does the buyer need, and how much risk will the seller accept with the unpaid purchase price? The best earnout leaves as little as possible to be decided at game time.

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