

# 3 Clauses That Can Impact Purchase and Acquisition Agreements

## 3 Key Clauses in Purchase and Acquisition Agreements

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Investment and acquisition agreements often govern significant financial commitments and long-term relationships. These documents can be lengthy and technical, but a handful of provisions are at the center of legal and financial risk.

Below are several clauses that frequently affect investors and purchasers in private transactions.

### 1

## Purchase Price Adjustments — Debt Payoff

### The Issue

Closing adjustments can significantly change the final price when compared to the "headline" price.

### Sample Language

*"The Purchase Price shall be reduced by the amount of all Indebtedness of the Company outstanding as of the Closing, which shall be paid in full at Closing."*

### Potential Problem

Many transactions require the business to be delivered free of debt, meaning it is possible that a significant portion of the purchase price is used to pay lenders directly at closing rather than going to the seller. Sellers often focus on the headline price without appreciating that all outstanding obligations — sometimes broadly defined — must be satisfied first, which can substantially reduce the cash they actually receive.

Because final payoff figures are often confirmed late in the process, sellers may not learn their true net proceeds until just before closing, when renegotiation is difficult or impractical. Without careful review and negotiation of the indebtedness definition and payoff mechanics, the buyer may technically pay the agreed purchase price while the seller receives far less than expected.

### Example

A buyer agrees to acquire a company for \$10 million. At closing, the agreement requires that all outstanding debt be paid off using the purchase price. When the payoff letters arrive, the company's debt is higher than expected due to accrued interest, fees, and early-termination penalties. Several million dollars must be used to satisfy lenders before the seller receives anything. As a result, the seller receives significantly less cash than anticipated — even though the headline price did not change.

## 2

### Earn-Out Provisions

#### The Issue

Additional payments may depend on future performance.

#### Sample Language

*"As additional consideration for the sale of the Company, Buyer shall pay Seller an earn-out payment of \$1,000,000, contingent upon the Company's EBITDA for the first fiscal year following the Closing equals or exceeds \$5,000,000."*

#### Potential Problem

Earn-outs are often used when the parties cannot agree on exact value. Part of the price is paid upfront, with additional payments tied to future performance.

After closing, however, the buyer usually controls the business. That means the buyer's decisions — staffing, investment, pricing, strategy, accounting methods — can directly affect whether performance targets are met. Even when both sides act in good faith, disagreements frequently arise over whether the business was operated in a way that gave the earn-out a fair chance of being achieved.

#### Example

A seller agrees to an earn-out based on revenue targets over two years. After closing, the buyer integrates the business into its existing operations, reallocates sales resources, or shifts focus to other products. Revenue from the acquired business declines, and the targets are not met. As a result, the seller receives little or no additional payment despite the original expectations.

## 3

### Non-Compete Obligations

#### The Issue

Sellers or founders may agree not to compete with the business.

#### Sample Language

*"Seller shall not engage in any competing business for five (5) years."*

#### Potential Problem

Non-compete provisions can significantly limit what a seller or founder is allowed to do after the transaction. These restrictions may cover geographic areas, specific industries, types of services, or even indirect involvement in competing activities.

In California, the enforceability of non-compete provisions can be complex and fact-specific, particularly outside the employment context. Regardless of enforceability, the existence of the clause can create uncertainty and may deter future opportunities.

#### Example

A founder sells a company and later wants to start a new venture in a related field, invest in a similar business, or join a competitor in a consulting role. A broadly drafted non-compete clause could restrict these activities, potentially affecting the founder's ability to pursue new opportunities or attract investors.

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## Final Thoughts

Investment agreements are designed to allocate risk across uncertain future events. Careful review can clarify obligations and expectations before capital is committed.

### Planning a Deal or Reviewing an LOI?

Engaging counsel before signing a letter of intent or definitive agreement can help avoid costly surprises later in the transaction.

If you are pursuing an acquisition, investment, or business sale — or have received a draft agreement — Tuchman Law, APC can help you assess key terms, negotiation points, and potential exposure so you can move forward with clarity.

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#### About the Author

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