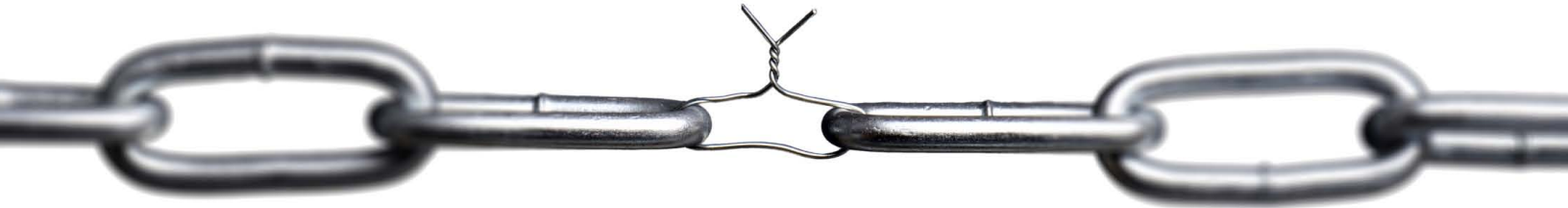


Case Study: Will your stock purchase agreements hold up to a challenge?



Risk accompanies every transaction. Whether it's negotiating purchase price, dealing with earn-outs or enforcing the full terms of an agreement, you need to ensure that your interests, and your investments, are protected at every step of the process.

We recently represented a group of investors in seeking recovery of earn-out payments from the sale of their start-up biomedical company to a large biomedical corporation. The agreement included provisions for the corporate buyer to make several substantial milestone payments based upon product development through the FDA.

The buyer challenged the agreement, alleging that the product was not working, withholding further payments. However, the buyer had also partnered with third parties to share the critical technology, which generated funds and triggered payments under the agreement. We attempted pre-suit negotiations, but the buyer showed no interest. Accordingly, Dinsmore filed suit on behalf of the investors.

Against a larger, better-financed adversary, we employed our years of experience in complex private equity matters, cutting edge software, and our efficient Ohio rate structure to wage an effective battle. Success did not occur overnight. The buyer hoped to conduct a lengthy war of attrition. It sought to avoid document productions and depositions through creative legal filings for as long as possible. Ultimately, however, given our clients' resolve and our own persistence in requesting periodic court assistance, we moved forward. Our opponent used East Coast counsel plus local counsel and outside IT vendors. We kept costs low by using document review software, internal IT staff, and a small Ohio-based litigation team.

Our aggressive, yet practical and efficient strategy prevailed. Using the cutting-edge software combined with our experience (*see details below*),

we effectively examined hundreds of thousands of documents, preparing us to handle more than 20 depositions and to conduct a thorough analysis of the intellectual property transfers. After gathering this evidence, we drafted a concise explanation to the Court, requesting summary judgment — without a trial. Faced with our brief, our opponent chose to settle, resulting in substantial payment to our client.

Could the situation have been avoided altogether? Probably not. Regardless of how carefully an agreement is constructed, disputes can inevitably arise in commercial contexts. Parties often believe they can use creative arguments and legal muscle to shift risks to an opponent, especially one they perceive to be weaker.

You can, however, follow a few best practices up front that may pay dividends over the life of your agreement. And, you can employ experienced Ohio-based counsel who understands how to efficiently respond and prevail in complex commercial disputes. See below for our experience in private equity matters. »

Best practices for drafting stock purchase agreements — Seller's perspective

If the purchaser requests an earn-out:

Carefully consider your options and review the alternatives — including potentially taking less overall — but in a lump sum upfront.

Purchase agreements should be specific.

If earn-outs are necessary, include detailed provisions that address disclosures, financial results and product development. Make them easily measurable and difficult to avoid.

Envision the worst-case scenario as a seller, then draft the agreements to lessen those risks.

What happens if the product / asset doesn't work as intended? Or if the buyer has a change in priorities, defunding the project? Should payments be adjusted? Should alternative dispute resolution (mediation or arbitration) be required?

Establish provisions that ensure a full payment schedule, regardless of earn-outs.

Construct your agreement to fully protect your investment.

[Always seek experienced legal counsel. »](#)

When litigation is unavoidable, Dinsmore can help

When litigation is on the horizon, you need attorneys who not only understand the legal ramifications, but who also understand and support your business objectives.

We advise our clients in a wide variety of transactions, and we have the knowledge and skill to help protect investors, shareholders and businesses in any situation. We understand how to balance business objectives with legal realities, and our proactive approach helps clients identify, and resolve, problems before they surface. »

Our approach

We'll work closely with you to learn not only the case facts, but also what's best for your business objectives.

We'll tailor our team and strategy to address budget constraints.

We'll use technology, including document review software, to your advantage, improving efficiency and adding value to the discovery process.

We'll rely on our resources and relationships to keep the matter moving forward, mitigating delay tactics. »

Our history of success

Assisting Private Equity interests since 2003, we have successfully resolved multiple matters.

2009-13: We successfully prosecuted a multi-million dollar earn-out dispute for local Ohio private equity clients. See details above.

2009-10: Defending a \$100 million earn-out dispute raised by a seller in federal court against our private equity client, we won a motion to dismiss the case entirely within months.

2003-07: Defending a \$60 million claim in federal bankruptcy court for recovery of the purchase price paid to our client, we gathered accounting, valuation, and business data, conducted dozens of depositions, and submitted a detailed summary judgment motion, leading to a nuisance-value settlement for less than one-half of one percent of the claim. »



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A well-respected business and commercial litigator, Rick helps his private equity clients with detailed analysis of business issues, including accounting reports, marketing issues, profitability levels and business valuation data. He excels in gathering, organizing and presenting the complex details that are necessary to obtain an efficient, favorable resolution under the law, whether in court, out-of-court or via alternative dispute resolution. Rick has an analytical style and he listens carefully to client needs to discern objectives and provide effective counsel as he did in the cases listed on this page. »