

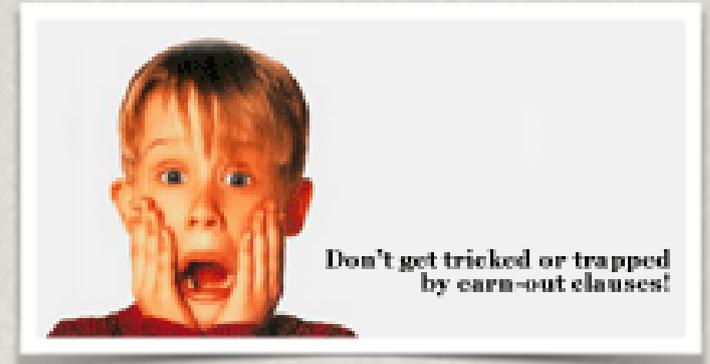
Trademark Valuation and Earnout Clauses

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What is an earnout clause?

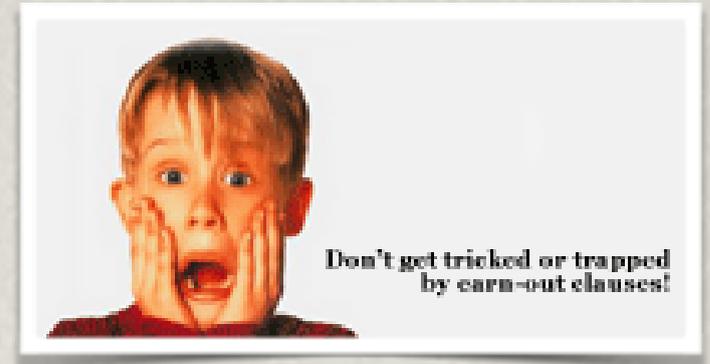


- ◆ *Example 1A – a simple standard earnout:*

Joe Bloggs buys a trademark "X" from Mary Jane.

Due to the uncertainty of the value of the trademark, Joe Bloggs agrees to pay Mary Jane \$200,000 for it upfront, with a further \$20,000 payable in 12 months time if the turnover from the use of the trademark achieves a certain level of profitability.

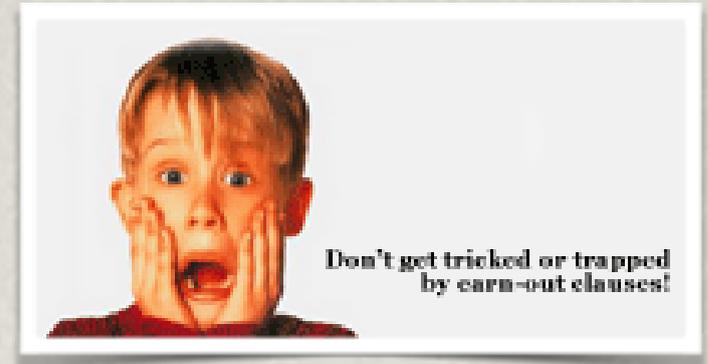
What is an earnout clause?



- ✦ *Example 1B – a simple reverse earnout arrangement:*

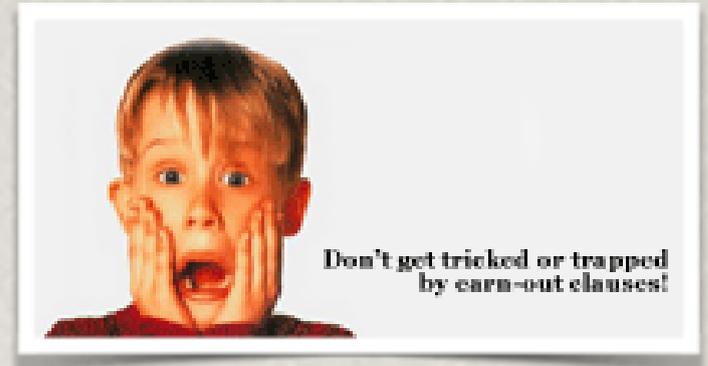
In contrast, a reverse earnout arrangement would be that Joe Bloggs agrees to pay Mary Jane \$200,000, on the condition that Mary Jane pay him \$20,000 in 12 months time if the turnover from the use of the trademark does not achieve a certain level of profitability.

Uses for earnout clauses



- 1. Trademarks in the development or entrepreneurial stage with limited operating history.*
- 2. Trademarks of a new product line or technology that do not have a track record as of the date of negotiations.*
- 3. As an incentive to keep the seller involved in the operations after the deal closes and the buyer wants the seller to have some "skin in the game."*
- 4. Where the owner's concept of value is based upon projections that are more optimistic than the projections made by the buyer.*
- 5. A "value buyer" wants to acquire a trademark but is unable or unwilling to pay the entire price upfront. This is especially helpful when negotiating with a seller that is under some pressure to sell.*

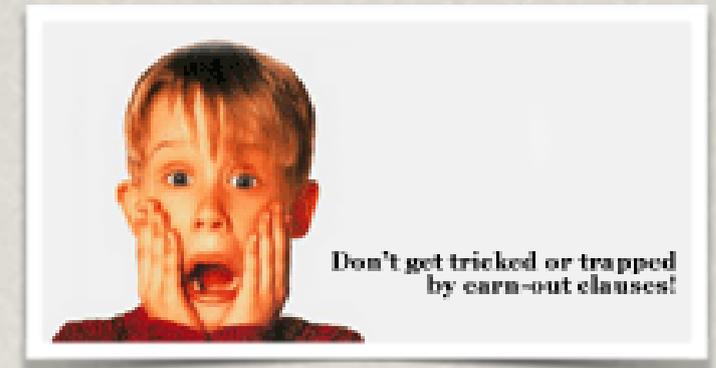
Consideration in using earnout clauses



Use has one purpose

*Bridges the
value gap between buyer and seller*

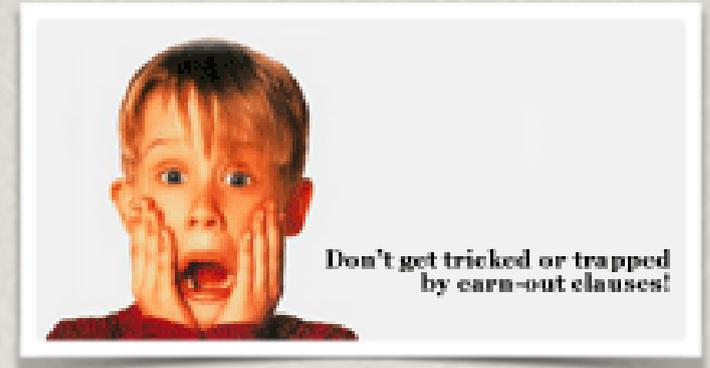
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ON SALE NOW

BONUS formal mag

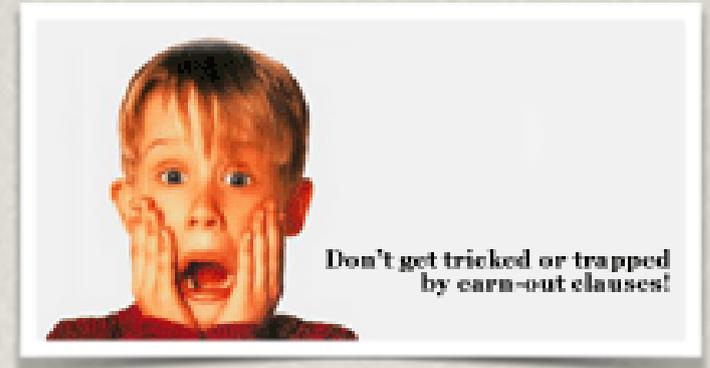
Drafting Points



Key elements of any earnout clause, are:

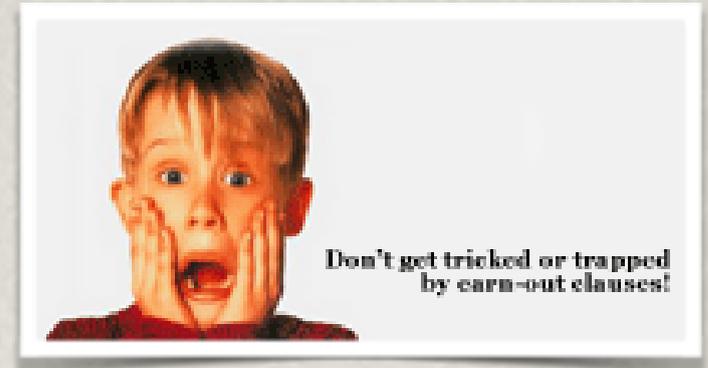
- 1. Type of Agreement*
- 2. Performance Target*
- 3. Term of the Earnout*
- 4. Earnout Formula*
- 5. Distribution of Earnout Payments*
- 6. Method or Form of Payment*

Drafting Points - Performance Target



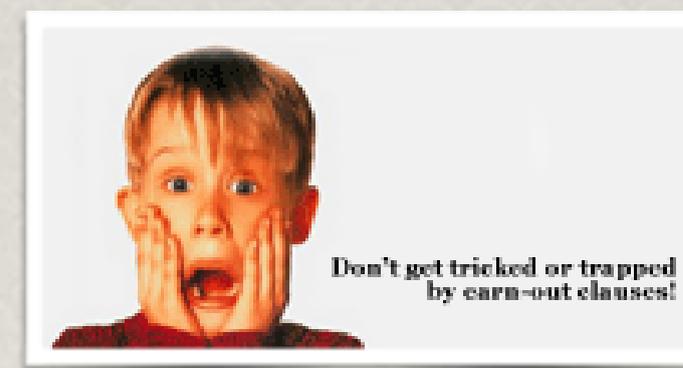
- ✦ *The performance target should be clear and understandable*
- ✦ *The greater the degree of complexity or variables involved in the calculation of the performance target, the greater the potential for misunderstanding.*
- ✦ *It is possible to have multiple performance targets each associated with a different payout formula and rate*

Drafting Points - Performance Target



- ✿ *The performance targets should deal with:*
 - ✿ *the level of involvement which the sellers are to have in the ongoing conduct of the business associated with the trademark and the extent to which the buyer has the right to terminate the employment of the sellers during the earnout period;*
 - ✿ *the extent to which the buyer is to be restricted from using the trademark / running the business as it sees fit during the earnout period;*
 - ✿ *whether the determination of the earnout payment should exclude any “one-offs” or exceptional matters such as the profit arising on the sale of significant assets or on the revaluation of any assets;*
 - ✿ *the level of financial and other support which the buyer will be required to provided to the exploitation of the trademark during the earnout period and the basis on which any support is to be provided;*

Drafting Points - Distribution of Earnout



- ✿ *It can be anything rules of thumb:*
- ✿ *Yearly after end of year results in achievement of a specified project or goal, monthly/weekly or whatever is agreed*



Take Home Point

Valuation of a trademark
is an art not a science

Questions ?

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