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Asset vs. Stock Purchase: Basic Asset Purchase Agreement Provisions

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An *asset purchase agreement ("APA")* is the heart of an acquisition, the document where the terms of the deal are struck. The terms of an APA will impact, among other things, the actual cost to the buyer, the amount received by the seller and the parties' obligations to each other for possibly years after the consummation of the sale. This post will begin a discussion of the various provisions of an asset purchase agreement and how the terms agreed to can favor one party to a transaction over the other, beginning with a brief look at terms that concern assumed and excluded assets and liabilities.

Purchased Assets and Excluded Assets

In an asset purchase, a buyer can selectively pick and choose which assets are part of the deal and which are not. This can manifest in the agreement in one of two ways - the agreement can list only the assets that the buyer will choose to purchase, or an agreement can state that the buyer will purchase all the assets of the business, excluding certain listed assets. In the first instance, the buyer has certainty with respect to the assets purchased and, barring any unforeseen complication, certainty with respect to the associated liabilities. On the other hand, the buyer will have no right to purchase an asset not listed in the APA, making it incumbent upon the buyer to ensure the list of assets is a complete list of assets necessary or useful in the conduct of the business being purchased. In the second case, the broader language allows the buyer to take any asset of the seller that is not expressly excluded, negating the risk that an important asset was overlooked on the list of purchased assets, but it may also expose the buyer to unexpected liabilities associated with that overlooked asset. The negotiation between the parties on the purchased assets and excluded assets language in the APA will likely be informed by the relative risk associated with the industry within which the seller operates, the extent to which the buyer can understand the assets and liabilities through the due diligence process, and other language in the APA itself, such as the extent of seller's obligation to indemnify the buyer after closing.

The seller in an asset sale will have the same or similar concerns regarding the assets to be excluded from the sale as the buyer has as to the purchased assets. As with the language for purchased assets, the excluded assets language may be tailored to exclude only certain listed assets or it may be broadly drafted to allow the seller to exclude all of the seller's assets except those expressly defined as purchased assets. Here again, the seller should be concerned with retaining certain assets and shedding certain liabilities and those concerns should dictate seller's position regarding the language in the APA.

Assumed Liabilities and Excluded Liabilities

Liabilities are frequently listed in much the same way as assets in an agreement and the concepts applicable to purchased and excluded assets apply equally to liabilities. The buyer will likely negotiate for narrow assumed liability language and broad excluded liability terms. In that case, a buyer may agree to assume only certain liabilities that arise or become due after closing, such as accounts payable that arise from the ordinary course of business and any liabilities that come with assigned contracts, and will insist that the excluded liability language is designed to include all liabilities other than those expressly assumed by the buyer. A buyer attempting to negotiate broad excluded liability language may wish to insert a clause stating that excluded liabilities are all of the seller's liabilities that are not expressly assumed, but may only be able to negotiate a list of specifically excluded liabilities it will not assume.

A seller, by contrast, naturally wants the buyer to assume as many liabilities as possible, so broader statements as to liabilities assumed will generally favor the seller. If a seller prefers that a buyer assume a certain liability, it must add that liability to the list of assumed liabilities, rather than merely excluding it from the list of excluded liabilities to remove doubt as to ownership of the liability.

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