



Delaware Chancery Court Sheds Light on Protecting an M&A Earnout and Avoiding Seller Pitfalls

Client Advisories

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The Delaware Court of Chancery, in its recent [decision](#) in ACON Igloo Holdings, LLC v. Dometic Corporation, provides guidance for a seller counting on an earnout.

Background

In October 2021, Dometic Corporation acquired Igloo, a seasonal cooler manufacturer, from an affiliate of a private equity firm, ACON Investments. Total consideration was up to \$900 million — \$677 million in cash at closing plus a contingent earnout of up to \$223 million. The earnout turned on Igloo's EBITDA for the period running through December 31, 2022. If EBITDA came in below \$75.25 million, nothing was owed; at \$75.25 million of EBITDA the payment was \$75.5 million, scaling up to a \$223 million cap above \$86.20 million of EBITDA. Igloo's CEO, David Allen, and CFO, Robert Peak, stood to collect \$15.77 million and \$2.31 million personally.

Although Dometic had "discretion with regard to all matters relating to the operation of" Igloo, to protect both sides during the earnout period, the Stock Purchase Agreement (SPA) included two key covenants:

- **The Ordinary Course Covenant.** Allen would have "reasonable authority to run the daily operations," and Igloo would be run "in the ordinary course of business and consistent with past practices."
- **The No-Avoidance Covenant.** Dometic could not act "with the intent of reducing the EBITDA ... or otherwise avoiding or reducing" the earnout.

These covenants reflected a built-in conflict. The seller was motivated to maximize short-term EBITDA to trigger the payout, while the buyer wanted long-term value.

Through 2022, external cost shocks, a spike in resin prices, a surge in freight costs, and the invasion of Ukraine, pushed Igloo well behind target. By the third quarter, hitting the earnout would have required roughly \$22 million of fourth-quarter EBITDA against a budgeted \$8.5 million, in what was historically Igloo's weakest quarter.

What the Seller Did and How the Court Viewed It

Facing the shortfall, Allen developed a last-ditch strategy. He presented Dometic's CEO (Juan Vargues) with a binary choice captioned "Deliver Earnout" (reach roughly \$77.9 million in 2022 EBITDA through aggressive short-term measures) versus "Optimize Long Term Value" (about \$65.1 million but with sustained growth). The plan included pulling forward price decreases, selling off excess inventory, and offering customers like Walmart discounts Igloo had not previously extended in the fourth quarter.

Vargues responded by email that the business should be "conducted in the ordinary course of business consistent with the past practices," and that any short-term measures contradicting that principle required Dometic's approval - approval he declined to give for "customer campaigns with discounted prices." Allen, however, continued down the path of maximizing current revenues through price concessions, arguing, internally, that his strategy was consistent with Igloo's past practices. ACON then brought the action against Dometic.

The Court's Rulings

- **No breach of the Ordinary Course Covenant.** The court concluded that Allen's proposed measures were not ordinary-course actions consistent with past practice; they were "last-ditch efforts coordinated with ACON and its counsel" to hit the number or force a renegotiation. Tellingly, ACON introduced no proof that Igloo had ever offered year-end incentives to drive revenue and hit budget while under ACON's ownership. The court read Vargues's email not as a "bar" or "veto," but as a reminder of the contractual standard.
- **No breach of the No-Avoidance Covenant.** That covenant required proof of intent to avoid the earnout. The buyer's conduct, routing the scenarios to its CFO and lawyers, assessing its exposure, and evaluating whether the plan complied with the SPA, was equally consistent with legitimate evaluation, not an intent to thwart payment.
- **Implied covenant claim rejected.** Because the SPA expressly addressed this conduct and limited the buyer's discretion with an "intent" qualifier, there was no gap for the implied covenant of good faith to fill.

The court also noted facts that undercut the seller's position: Allen voluntarily abandoned the Walmart trip and shut down discount programs, and he acknowledged internally that doing so would "hurt" Igloo — but "that may be the point." The seller and its counsel then shifted to building a breach notice and litigation designed to pressure the buyer into recutting the earnout deal.

The Buyer's Counterclaims Also Failed



This was a “both sides lose” decision. Dometic counterclaimed that ACON tortiously interfered with the executives’ confidentiality agreements and misappropriated trade secrets. Both failed. First, even though the record showed troubling disclosures of confidential Igloo information to ACON (including the CEO shifting communications to personal email), Dometic proved no injury. Its only identified loss was attorneys’ fees, which Delaware will not shift under the guise of a tort claim, and its \$45,000 “avoided-cost” theory failed because ACON had received similar materials before the deal. Second, the presentations reflected “standard financial analysis for a consumer products company,” and a confidential marking alone does not create a trade secret.

Key Takeaways

The seller’s defeat traces to a handful of avoidable missteps. The court’s reasoning provides helpful guidance to a seller in negotiating and seeking to achieve an earnout:

- **Negotiate precise earnout covenants before signing.** This dispute turned on language. “Ordinary course consistent with past practices” favored the buyer here. A seller who expects to deploy specific levers should negotiate for them expressly (e.g., a defined right to run identified promotions or pricing programs, an objective EBITDA-adjustment methodology, or a clear standard of effort the buyer owes). More broadly, where the buyer will control the business during the earnout period, sellers should consider objective protections addressing operational decisions that could materially affect the earnout. Note also that an “intent”-qualified no-avoidance covenant can impose a significant evidentiary burden on the seller and, where the parties have expressly negotiated that standard, may leave no room for an implied-covenant backstop. Sellers should therefore consider objective obligations rather than relying solely on intent-based ones.
- **Operate consistent with documented past practice - and build the record now.** The decisive gap in the seller’s case was the absence of proof that its year-end levers had ever been used before. Before and during the earnout period, document the pricing moves, discounts, promotions, and sales campaigns the business has historically used, including their timing and magnitude. A demonstrated track record can materially strengthen the argument that a particular measure is consistent with past practice; measures developed specifically to achieve an earnout may face greater scrutiny.
- **Be particularly careful with new tactics introduced principally to hit the number at year-end.** Aggressive discounts, inventory give-aways, price “pull-forwards,” and sale-leasebacks introduced for the first time to rescue an earnout may be viewed as manufactured EBITDA, rather than ordinary operations. The fact that a measure is new does not necessarily place it outside the ordinary course, but sellers should be prepared to demonstrate a legitimate business rationale for measures that depart from historical practice.
- **Frame plans around running the business, not around delivering the earnout.** The labels “Deliver Earnout” vs. “Optimize Long Term Value” were used against ACON as evidence that the measures were about the payout rather than the business. Internal materials and communications should accurately reflect the legitimate operational judgments underlying proposed actions, because they may ultimately be read in litigation.



- **Do not weaponize the contract's dispute and approval mechanics.** Where a covenant requires the buyer's approval for out-of-the-ordinary measures, request approval, document the business rationale, and treat a denial as a contract-interpretation question. Deliberately curtailing business initiatives in an effort to create leverage or support a damages claim, as the court found occurred here, can seriously undermine the seller's position.
- **Assume contemporaneous communications may become trial exhibits.** Earnout disputes frequently turn on intent, business purpose, and the parties' understanding of their contractual obligations. Emails, presentations and communications among management, the seller and their advisors may therefore become important evidence. Communications framing operational decisions primarily around achieving the earnout, creating litigation leverage or forcing a renegotiation can significantly affect how otherwise debatable business decisions are viewed after the fact.

Although the decision offers particularly important lessons for sellers, buyers should take note as well. Carefully drafted operating discretion, coupled with clearly defined limitations on that discretion, can provide meaningful protection against a later claim that legitimate business decisions improperly frustrated an earnout.

For both sides, the broader lesson is that earnout disputes are best addressed at the drafting table. The more clearly the acquisition agreement addresses not only how the earnout will be calculated, but also the rules under which the acquired business will operate during the measurement period, the less room there will be for the parties' differing economic incentives to become a post-closing dispute.

For questions about this decision or the drafting and administration of earnouts, please contact **James Smith** at jsmith@archerlaw.com or 646.863.4301, or **Stuart Goldfarb** at sgoldfarb@archerlaw.com or 646.553.1259.

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