

## Jacobs in Bloomberg: J&J's Billion-Dollar Appeal Aims Spotlight at 'Litigation Trap'

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**PRACTICES** Corporate, Litigation

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Haynes Boone Partner [Zachary Jacobs](#) spoke with *Bloomberg Law* as Johnson & Johnson's bid to erase a record \$1 billion court loss is spotlighting a deferred-payment transaction structure that continues to tempt dealmakers despite its tendency to spawn high-stakes litigation.

*Earnouts are useful for pharma deals, which are "more about the uncertainty on all sides—is this product going to be a home run?" said Haynes Boone partner Zachary Jacobs. "But it's becoming a bit of a litigation trap.*

*While Delaware's judges "respect the ability of sophisticated parties to agree to a specific standard," Jacobs said, they'll seek "creative routes to liability" if they suspect milestone sabotage.*

*The judges are applying the flexibility they're famous for—honed in the fact-intensive fiduciary duty context—to efforts clauses that can be just as slippery.*

*J&J [has argued](#) Will's misinterpretations of the efforts clause "infected" her entire ruling. In citing the implied covenant, meanwhile, she "rewrote" the contract, threatening deals across the board by sowing "doubts that courts will enforce earnout provisions," the company says.*

*But an approach focused on "the spirit of the deal" has already begun to sink in with corporate planners, who are now "putting more meat on the bones" of efforts clauses "to limit future reading-between-the-lines," Jacobs said.*

To read the full article from *Bloomberg Law*, click [here](#).