# M&A Nugget: Every Word Matters

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This Nugget is for those English majors out there. In a purchase agreement, every word matters. The omission of a keyword or the incorrect use of a word can have an adverse impact on the purchaser's or seller's rights under the agreement. For example, in describing a list of assets to be acquired, using the word "including" after a delineated list, rather than "including, but not limited to" might have the effect of limiting the assets being acquired. Although logic tells us that "including" has the same meaning as "including, but not limited to," some courts have held that "including" actually acts to limit the list of items to those listed after the word "including". Therefore, the additional words "but not limited to" should always be used. As an example of keywords being omitted, consider the indemnification clause in a purchase agreement, by which the seller agrees to indemnify the purchaser for pre-closing operations and breaches of representations and warranties. An indemnification clause may state that the seller indemnifies the purchaser for any loss, damage and "cost and expenses" incurred. Can the purchaser recover its attorneys' fees under such a clause? The answer is no. The indemnification clause must specifically include "attorneys' fees and costs of the legal proceeding" as a recoverable item. Last, suppose a seller is asked to subordinate its right to receive payment to the purchaser's lender. There are different kinds of subordination. Some lenders require "deep" subordination. The addition of the word deep drastically changes the extent to which a seller subordinates its right to payment. So, although the wordsmithing in the purchase agreement is the attorneys' responsibility, it is important to keep in mind that every word matters.