

When Indemnity, Purchase Price Adjustment Claims Overlap

By **Claire Frost** (October 19, 2026)

Drafters often treat indemnities and purchase price adjustments, or PPA, as separate tools addressing separate problems: the PPA addressing accounting-related discrepancies and changes to a target's business between signing and closing, and the indemnity serving as recourse for breaches of representations and warranties.

Recent case law serves as a reminder that the two mechanisms are not so easily separated. They can overlap, and courts have shown a willingness to look past how a provision is labeled to enable a buyer to select either adjustment mechanism, even if the parties did not necessarily envision that when negotiating the purchase agreement. M&A practitioners should draft with that overlap in mind.



Claire Frost

The Delaware Court of Chancery's July 2 decision in *WSP USA Services Inc. v. Versar Inc.* is an important data point on how this gets resolved, serving the latest in a long line of Delaware cases addressing this overlap.

Background

In 2023, Versar acquired Louis Berger Services Inc. from WSP under a stock purchase agreement, or SPA. As most purchase agreements do, the SPA provided for a postclosing PPA, with disputes resolved by a neutral auditor.

In connection with the deal, Versar acquired a representations and warranties insurance policy, which was Versar's sole recourse for breaches of the SPA's representations and warranties (other than for fraud). The RWI policy was incorporated into the SPA and contained language that, to avoid double-counting, any disputes that could warrant recovery under both a PPA and the RWI policy may only qualify for recovery under one.

Versar's closing statement provided for a downward PPA of roughly \$9.7 million, \$5.3 million of which it attributed to alleged underperformance by WSP under two Florida Department of Transportation contracts, which Versar treated as a current liability to reduce net working capital.

WSP objected, arguing that the issue was really about WSP's compliance with a specific representation — compliance with government contracts — and therefore had to be pursued through the RWI policy, not the PPA. When Versar initiated the neutral auditor process, WSP sued for a declaratory judgment that the dispute at issue was related to a breach of a representation, not net working capital.

The Holding

The Court of Chancery granted Versar's motion to dismiss all three of WSP's counts. It held that nothing in the SPA barred Versar from treating the Florida contracts dispute as a PPA item.

The court reasoned that the RWI policy's double-counting provision necessarily assumed that some losses could give rise to claims under either mechanism; otherwise, the language

would serve no purpose. Because WSP's representation covered only a subset of possible scenarios — there were, in the court's words, "myriad conceivable scenarios" in which the contracts could have underperformed without any representation being false — Versar's PPA theory did not necessarily require proving a breach.

The WSP ruling is not an outlier. It is the newest data point in a line of decisions running back two decades. Read together, these cases give practitioners a workable, three-part framework for predicting how a court will characterize an overlapping dispute, as well as a clear set of drafting fixes for parties that want certainty rather than litigation risk.

The Three Doctrinal Threads

1. Characterization: Is the claim necessarily a representation breach in disguise?

The oldest and most fundamental test asks a narrow question: Can the buyer's PPA theory succeed without also proving that a representation was false? If the answer is no, then the claim is an indemnification claim, and courts will not let it through the PPA door.

To put a finer point on it, in *Chicago Bridge & Iron Co. NV v. Westinghouse Electric Co. LLC*, the Delaware Supreme Court, relying on the plain-English reading, held in 2017 that letting an accounting-adjacent representation claim through the PPA process would "eviscerate the basic bargain between ... two sophisticated parties" reflected in a negotiated liability bar.

In *OSI Systems, Inc. v. Instrumentarium Corp.*, the Court of Chancery held in 2006 that a buyer's attempt to recalculate working capital using different accounting principles than the seller's historical practice was "necessarily" an assertion that the seller's financial statements and estimates of working capital violated the generally accepted accounting principles — a breach of a representation — and had to proceed through legal arbitration rather than the accounting firm.

Conversely, in a more recent ruling, the Court of Chancery's June 2025 decision in *Northern Data AG v. Riot Platforms Inc.*, the same test was applied, and the court demonstrated how to distinguish between permissible PPA claims and impermissible representation claims dressed up as PPA claims.

Two disputed items were genuine questions about how to apply Topic 606 of the Accounting Standards Codification to a set of hosting contracts and were properly resolved by the accounting expert, reviewed only for manifest error. Two other items involved an allegedly double-billed invoice and a stale accounts-payable balance; those were disguised claims for breach of the representations, properly resolved under the indemnity, and the court vacated the accounting expert's rulings on them as exceeding his authority.

WSP distinguishes OSI on exactly this ground. WSP argued that a dispute over the underperformance of certain government contracts was necessarily a breach of its compliance representation. The court disagreed: Because there were "myriad conceivable scenarios in which [WSP] did not breach any representation and yet there [would be] still some liability under the Florida Contracts that would classify as a current liability under net working capital," Versar's PPA characterization did not require proving a breach, and the claim could proceed as a PPA dispute.

As we can see from this line of decisions, including WSP, the test is not whether the dispute touches a representation, but whether the buyer's theory can only be true if there has been a breach of a representation. If both a PPA claim and an indemnity claim may apply, we

move to the next piece of the test.

2. Did the purchase agreement address the issue?

Where both theories may be applicable, the cleanest solution is a contract term that clearly tells the court which one controls.

Alliant Techsystems Inc. v. MidOcean Bushnell Holdings LP involved two competing "sole and exclusive remedy" provisions, one for PPA disputes and one for indemnification claims. The agreement resolved the conflict with an explicit proviso in the indemnification section's "sole and exclusive remedy" provision, stating that nothing in the indemnification section would "interfere with or impede the operation" of the PPA provision. In 2015, the Court of Chancery enforced that hierarchy as written, holding that the PPA process controlled whenever the two provisions overlapped.

WSP reached a buyer-friendly result without any such proviso in the SPA itself. Instead, the court found the double-counting mechanics were contained in the RWI policy, a document attached as an exhibit to, and incorporated by reference into, the SPA. Because the policy prohibited the buyer from recovering the same loss twice, the court reasoned that the parties must have contemplated some losses being available under either path.

That distinction is worth a brief discussion because it points to a potential mismatch in how the courts view these policies versus how they are negotiated and finalized. Attention on that document tends to concentrate on the retention, the subrogation waiver, certain miscellaneous provisions and the exclusions. The "no duplication of recovery" clause, by contrast, is largely insurer-driven boilerplate that neither side, especially the seller, typically considers whether to negotiate.

WSP is a reminder that the RWI policy is not just papering the coverage provided by the insurer to the buyer; if attached as an exhibit, it is functionally part of the deal document, and it should be read in full by counsel on both sides, not reviewed for subrogation and amendment language. This is especially true if it is attached as an exhibit and thus incorporated into the document by the agreement's miscellaneous provisions.

The takeaway for practitioners: An explicit hierarchy proviso is the highest-value drafting tool available if certainty is the goal. Parties that don't want a court inferring their intent, especially from an attached insurance form, should say what they mean in the body of the purchase agreement — and parties should always consider what effect that standard "any exhibit attached hereto is incorporated into this agreement" language could have when attaching those exhibits.

3. Antiduplication clauses are a floor against double recovery, not a bar on parallel claims.

The final thread addresses a common piece of boilerplate, the "no double recovery" clause, and the recurring seller argument that such language forecloses any later indemnification claim tied to facts already touched by the PPA process.

On April 30, the Court of Chancery rejected that argument after a full trial in *Golden Rule Financial Corp. v. Shareholder Representative Services LLC*. The merger agreement barred recovery of any loss determined "without duplication of any amounts or state of facts reflected on the Final Adjustment Statement or taken into consideration in determining the Final Adjustment Amount."

The seller read this as a blanket bar on any later claim connected to the same accounting dispute that had already been resolved against the buyer in an earlier, separate action, which required the buyer to pay an additional \$38.3 million to the seller.

The court disagreed, holding that the clause functions as an antiduplication rule, preventing the same dollar of loss from being recovered twice, not as a bar on ever bringing an indemnification claim tied to facts that also affected the true-up. Because the buyer's indemnification theory sought a distinct harm, not a second bite at the same \$38.3 million, the claim survived.

The most recent application of this principle comes from *Cogent Infrastructure LLC v. Sprint LLC*, decided by the Court of Chancery on a motion to dismiss by Judge Paul R. Wallace sitting by designation, and not yet reported.

The buyer had argued, and lost, before an independent accounting firm that a long-haul fiber servicing agreement should be treated as a lease for purposes of a purchase price discount. The seller argued that this loss barred any later indemnification claim over the same \$24 million, because the item had been "taken into account" in the purchase price adjustment process.

On Aug. 11, the court rejected that reading on the plain text: The agreement excluded from indemnifiable losses only amounts "'actually' taken into account in ... the final purchase price," and an item that was raised and rejected by the accounting firm was, by definition, excluded from the final price, not included in it.

Losing the PPA fight did not forfeit the indemnification claim on the identical facts. The court explicitly grounded its reasoning in Northern Data's "distinct functions" framework and in Chicago Bridge & Iron's concern about eviscerating negotiated caps, tying together, in this recent case, most of the doctrinal threads discussed above.

Given the fact that *Cogent* is not yet reported and was decided at the pleading stage under Delaware's lenient "reasonable conceivability" standard, it carries less weight than the other cases discussed in this article, but it gives practitioners the latest piece of the operational test currently available: "Taken into account" means actually included in the final number, not merely considered and rejected.

Conclusion

WSP is a useful signal: Delaware courts will let a purchase agreement's remedy structure carry the weight of preserving optionality, even without an explicit election clause, if the rest of the instrument, including an incorporated RWI policy, supports that reading.

But *Cogent*, decided even more recently, is the reminder that this area of law is not settled doctrine and is still being refined.

For practitioners drafting the next generation of purchase agreements, that means precision at the drafting stage is more valuable now than it has ever been, because the parties that leave these questions to implication are the ones that end up litigating them.

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