

THE REVIEW OF
**SECURITIES & COMMODITIES
REGULATION**
AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 58 No. 15 September 10, 2025

CLAIMING WHAT'S YOURS: 10 CONSIDERATIONS FOR RECOVERY UNDER REPRESENTATIONS AND WARRANTIES INSURANCE POLICIES

Representations and warranties insurance is a valuable tool for mitigating risk in business transactions. While RWI policies are designed to mitigate risk conceptually, actual recovery in the event of a breached representation or warranty can be complex, requiring policyholders to navigate the claims process with care. This article examines 10 considerations that may affect recovery under RWI policies, ranging from fully understanding the nuances of applicable law to evaluating exclusions that could preclude coverage. By thoughtfully approaching the claims process, RWI policyholders can enhance their chances of recovering what they are owed.

By Kevin Small, Patrick McDermott, and Alex Pappas *

2025 may become a banner year for mergers and acquisitions (“M&A”) activity, with global deal volume poised to exceed \$4 trillion — the highest volume in four years.¹ Given the historically low premiums and retention levels being offered by insurers, representations and warranties insurance (“RWI”) will likely remain a mainstay in buyers’ risk mitigation toolbox.² When it becomes necessary to make a claim, various considerations will factor into buyers’ ability to

recover under RWI policies. Below we provide 10 practical legal- and policy-driven tips for buyers. While these tips are helpful starting points, their application often turns on the specific facts, applicable law, and pertinent policy language, which RWI policyholders should consider as they move through the claims process.

1. Consider the Available Remedies Under

Applicable Law: For starters, policyholders should think about the damages theory they are pursuing at the initial stages of the claims process to verify that their damages theory will not only allow the highest possible recovery, but also be well-positioned to withstand legal scrutiny. To be sure, the insurer receiving the claim will want to understand the damages theory to pay the claim without complication. The amount a policyholder can recover is driven by the policy language, which can incorporate provisions from the transaction agreements and governing state law.

¹ Anousha Sakoui, Anirban Sen & Kane Wu, *Dealmakers Eye \$4 Trillion-Plus M&A Haul in 2025 on Trump Boost*, Reuters (Dec. 19, 2024), <https://www.reuters.com/markets/deals/dealmakers-eye-4-trillion-plus-ma-haul-2025-trump-boost-2024-12-19/>.

² Kenneth Araullo, *RWI Market Sees Low Premiums, Latin America Expands – Lockton*, Insurance Business Magazine (Dec. 11, 2024), <https://www.insurancebusinessmag.com/us/news/breaking-news/rwi-market-sees-low-premiums-latin-america-expands--lockton-517683.aspx>.

* KEVIN V. SMALL is counsel at Hunton Andrews Kurth LLP’s New York City office. PATRICK M. MCDERMOTT is counsel at the same firm’s Richmond, VA office, and ALEX D. PAPPAS is an associate at the firm’s office in Washington, DC. Their e-mail addresses are ksmall@hunton.com, pmcdermott@hunton.com, and apappas@hunton.com.

- Delaware law often governs transaction agreements and RWI policies, so we focus on Delaware law. Under Delaware law, a “claim for indemnification resulting from the breach of a representation and warranty is” generally a claim for breach of contract.³ Recoverable damages include the three types of damages below. For the sake of clarity, the policy language and the law can provide additional avenues; the list below is not an exhaustive one and even these three types of damages can (and often do) overlap.
- **Expectation Damages:** One remedy for breach of contract is expectation damages, which compensates the non-breaching party for the “reasonable expectation of the value of the breached contract”⁴ These damages are sometimes also known as “benefit of the bargain” damages. As an example, let’s assume a technology company is acquired with the reasonable expectation based on the seller’s representations and warranties that the target’s proprietary software would generate \$20 million in revenue annually. But after the acquisition, it is revealed that, because of a misrepresentation about the software’s capabilities, it can only generate \$15 million annually. Expectation damages might, depending on the circumstances, compensate the buyer for the \$5 million annual revenue shortfall, reflecting the benefit of the bargain that was reasonably anticipated at the time of the transaction but not delivered as a result of a breach of the representations and warranties.
- **Diminution in Value Damages:** Diminution in value damages can compensate the non-breaching party for the difference between the promised value and the delivered value.⁵ Using the same technology company as an example, let’s assume the buyer paid

\$200 million for the target based on the seller’s representations and warranties that established that the proprietary software boosted the company’s value. However, the misrepresentation about the software’s capabilities means the actual value of the company is only \$150 million. In that case, the buyer may be able to recover the \$50 million overpayment, addressing the discrepancy between the expected and actual value of the acquired company.

- **Rescissory Damages:** These damages serve as the monetary equivalent of rescission, aiming to return parties to their pre-transaction position.⁶ While less commonly awarded, rescissory damages can be particularly useful when the breach fundamentally undermines the transaction. For example, if a company misrepresented its ownership of key intellectual property and the entire transaction presumed that asset, rescissory damages could, depending on the facts, allow the buyer to recover the entire purchase price as though the deal had never occurred.
2. **Consider the Relevant Timeframe for Measuring Damages:** Expectation and diminution in value damages are generally measured “ex ante,” or at the time the transaction agreements were signed.⁷ In contrast, rescissory damages are generally measured post-transaction and can sometimes be higher than conventional damages, as they may include value elements not captured in expectation damages.⁸ In other words, by including post-transaction events, rescissory damages may include extra amounts “attributable to events having nothing to do with” the misrepresentations at issue.⁹ Given the differences in valuation over time, policyholders may also wish to carefully evaluate the timing of their damages claims early in the claims process to best calibrate their recovery strategy.

³ *Hudson’s Bay Co. Luxembourg, S.A.R.L. v. JZ LLC*, No. 10C–12–107–JRJ CCLD, 2011 WL 3082339, at *2 (Del. Super. Ct. July 26, 2011).

⁴ *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001).

⁵ *Universal Enter. Grp., L.P. v. Duncan Petroleum Corp.*, No. 4948–VCL, 2013 WL 3353743, at *19 (Del. Ch. July 1, 2013).

⁶ *Strassburger v. Earley*, 752 A.2d 557, 579 (Del. Ch. 2000).

⁷ *Duncan Petroleum.*, 2013 WL 3353743, at *16.

⁸ *Id.*

⁹ *Id.*; see also *Strassburger*, 752 A.2d at 580 (citation omitted).

-
3. **Consider Causation Early and Often:** To recover damages for a breach of representations and warranties, the buyer often must show some sort of causal link between the breach and its losses.¹⁰ With this in mind, buyers should consider the documentation needed to establish that causal link. Collecting and presenting that documentation can be tedious and time consuming, so it is recommended that this process get started as early as possible.
 4. **Remember Incidental and Consequential Losses:** Expectation damages can include incidental or consequential losses caused by the breach.¹¹ One common example is financing costs: if a deal's purchase price is overstated, a buyer may incur additional interest or dividend costs that they would not have otherwise paid. Other incidental costs, such as legal fees, administrative expenses, and operational disruptions, may also be worth considering when calculating the total damages claim. Broad definitions of damages in RWI policies or transaction documents can encompass damages like these.
 5. **Consider Policy Exclusions:** RWI policies may contain exclusions that limit coverage for certain losses. Buyers may wish to carefully review these exclusions to avoid surprises during the claims process. As examples, RWI policies may exclude coverage for loss arising out particular issues or breaches. And RWI policies can exclude particular amounts as well. For instance, the policies often include purchase price adjustment exclusions. Those exclude losses recovered in purchase price adjustments agreed upon in the transaction agreement, potentially preventing buyers from claiming these as insured losses. Understanding these exclusions in advance can help buyers assess their coverage gaps and explore alternative recovery options.
 6. **Remember Prosecution Costs Coverage:** RWI claims can be complex and expensive to litigate. Some policies cover prosecution costs, including legal fees, expert witnesses, and other claim-related expenses incurred in the mitigation, investigation, adjustment, settlement, or defense of a claim related to a breached representation. Buyers may wish to review their policies to determine whether these costs are reimbursable and ensure they submit eligible expenses for recovery. Given the potential financial burden, understanding prosecution cost coverage can alter the net recovery for policyholders. As part of this process, buyers may wish to keep detailed records of all relevant expenses to streamline reimbursement claims.
 7. **Consider Other Recovery Avenues in Tandem:** While RWI policies provide substantial protection, they may not cover all losses. Many M&A agreements include indemnification clauses or other remedies that may provide alternative recovery options. Buyers may want to evaluate these alongside their RWI policy and consider fraud claims where applicable to maximize recoveries. A comprehensive recovery strategy may involve parallel claims against sellers, escrow funds, or even pursuing third-party litigation when necessary. Additionally, for matters that involve claims asserted by third parties, buyers may want to assess whether directors' and officers' ("D&O") insurance or other liability policies may offer supplementary protection.
 8. **Consider Offsets and the Collateral Source Rule:** Sellers and RWI insurers may try to offset their obligations by accounting for payments made by each other or other third parties. But these offsets are not always enforceable. Transaction agreements may not allow sellers to offset payments owed by RWI insurers, and policies may not permit insurers to offset amounts paid by sellers. Even when offsets are contractually possible, they generally must be for the same harm, which is often not clear. Buyers therefore may wish to carefully assess their agreements and policies as well as the law to address offset claims.
 9. **Consider the Duty to Mitigate:** Many RWI policies impose a duty to mitigate, requiring policyholders to take reasonable steps to minimize their losses. Buyers may wish to document any mitigation efforts, including communications with sellers, remedial actions, and financial assessments, to demonstrate compliance with policy terms and strengthen their claims. Failing to fulfill this duty could, depending on the circumstances, lead to reduced recoveries or even claim denials. Proactive mitigation efforts can also strengthen the policyholder's credibility with insurers.

¹⁰ See, e.g., *Twisted Ventures, LLC v. Chandler*, No. N15C-02-030 CLS, 2016 WL 4409433, at *2 (Del. Super. Ct. Aug. 16, 2016) ("[T]he measure of damages is the loss actually sustained as a result of the breach of the contract." (citation omitted)).

¹¹ *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 293 (3d Cir. 2014) (including incidental or consequential loss caused by the breach).

10. Consider Whether and When to Retain an

Expert: Retaining experts can be invaluable in complex RWI claims. Forensic accountants or valuation specialists can provide critical insights into damages, causation, and valuation, strengthening the policyholder's position during recovery efforts. Expert analysis may also help preempt potential insurer objections, ensuring a well-supported claim that can withstand the scrutiny often applied by insurers.

CONCLUSION

In sum, successfully navigating the RWI claim process often requires a strategic approach that combines legal knowledge, careful planning, and documentation. By understanding available remedies, emphasizing causation, reviewing policy exclusions, and leveraging expert insights, buyers can increase their likelihood of recovering covered amounts and protect their interests in the evolving M&A landscape. And as deal-making activity continues to surge, ensuring a robust approach to RWI claims can help buyers mitigate risk and enhance transaction value. ■