ENDNOTES:

[1]*Sjunde AP-Fonden v. Activision Blizzard, Inc.*, 2025 WL 2803254 (Del. Ch. 2025).

[2]*Sjunde AP-fonden v. Activision Blizzard, Inc.*, 2024 WL 863290 (Del. Ch. 2024), as corrected, (Mar. 19, 2024).

THE ROLE OF THE INDEPENDENT ACCOUNTANT IN POST-ACQUISITION DISPUTES

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An earnout has long been seen as a useful mechanism in merger and acquisition transactions to bridge the valuation gap between buyers and sellers. But for nearly as long, earnouts have also proved to be a significant focus of dispute—and source of protracted, expensive litigation—in the months and years following a transaction. Over time, the nature of those disputes has changed as thoughtful M&A lawyers observe the litigation trends and then apply their drafting skills to fill gaps in key agreements that are only revealed under the microscope of judicial review.

Among other areas of focus for M&A lawyers, purchase agreements often require post-closing adjustments to address issues such as working capital calculations and earnouts. When conflicts arise about these adjustments, many agreements direct the parties to submit the dispute to an independent accountant. Two recent Delaware court decisions—*AM Buyer LLC v. Argosy Investment Partners* and *Pazos v. AdaptHealth LLC*—highlight the significance of these contractual procedures and clarify the high hurdle a disputing party must overcome to successfully challenge an independent accountant's determination. In both cases, the losing party challenged in court the independent accountant's conclusions and, in both cases, the court refused to vacate the independent accountant's determinations. The Delaware Supreme Court upheld both lower court decisions. After setting out some essential history in the developments of earnout disputes generally, this article uses these two recent cases to explore the independent accountant's role and the binding nature of their decision.

Background: How We Got Here

Early Earnout Disputes

For many years most earnout disputes that reached the courts centered on the scope of a buyer's discretion in how it runs a newly acquired business. Many of these cases followed a similar pattern: a newly acquired, promising but immature business fizzles under new ownership. The seller, which has the bulk of its compensation tied up in performance-based earnouts, claims that the buyer ran the business in an incompetent fashion (*e.g.*, hiring the wrong people, not listening to the seller's advice, etc.) that caused the business to fail. With agreements from this period often silent on these issues, sellers were left to rely on claims for breach of contract or the implied duty of good faith and fair dealing. The outcome of these cases often turned on whether the seller could prove the buyer took or failed to take certain steps in managing the new business *for the purpose of* depriving the seller of its earnout. Reasoning that where the parties' economic intents are aligned this would require a buyer to purposely sabotage its own bottom line, courts have almost uniformly rejected this type of claim.[1]

In an effort to try to avoid this type of costly litigation, M&A lawyers began to include detailed provisions in purchase agreements setting forth the scope of a buyer's discretion in operating the newly purchased business. While this gap-filling effort has not eliminated disputes on this point, anecdotal evidence suggests that it has reduced the amount of litigation significantly.

Beginning roughly 15 years ago, a small wave of litigation arose over a different issue related to earnouts: the arbitrability of certain disputes but not others. Initially, this issue arose where drafters had not clearly distinguished between "accounting" issues—typically suitable for resolution by accountants in non-judicial settings—and "operational" issues, which were generally viewed as more appropriate for judicial determination or, at minimum, resolution by lawyers in a quasi-judicial forum. When a series of court decisions produced the seemingly anomalous result of ordering parties to resolve substantive operational disputes in front of non-lawyer accountants in a quasi-judicial arbitration setting, transactional lawyers once again responded. This article focuses on the new type of dispute that resulted from this development.

The Latest Development

In the earnout context, we often observe the desirable relationship between a thoughtful court decision that provides practical guidance and attentive transactional lawyers incorporating that guidance into their drafting. A textbook example began with *PureWorks, Inc. v. Unique Software Solutions, Inc.*, where the U.S. Court of Appeals for the Sixth Circuit affirmed that the parties' agreement could be read to require arbitration of operational, non-mathematical disputes before non-lawyers.[2] Notably, one judge wrote a concurring opinion that stressed the need for clear language in M&A agreements. She presciently observed that courts sometimes "identify trends in the language of agreements that may prove to be problematic" and, in her view, "the language related to accounting arbitrations is one such area."[3] In the judge's view, the disagreement over whether the parties intended to include operational disputes within the ambit of an arbitration clause requiring resolution by non-lawyers arose from a "lack of clarity" in the agreement.[4] She observed that parties need to write their agreements "with the clarity necessary to delineate what disputes will be entrusted to what type of arbitrator" and that such "clarity would benefit both the parties and the courts."[5]

Consistent with that advice, transactional lawyers now often include two separate dispute resolution provisions in M&A agreements. The first provision is typically found adjacent to purchase price adjustment and earnout clauses and provides that if the seller timely disputes the buyer's position with respect to either issue and if the parties cannot resolve the disagreement, they must submit the disagreement to an independent accounting firm for expedited resolution. The second dispute resolution provision is typically found later in an agreement and provides for resolution of other disputes by traditional litigation (sometimes with non-binding mediation as a pre-requisite).

As one court observed, "[t]hese tracks have distinct functions."[6] The first type of provision addresses, for example, "purchase price adjustments in merger agreements [to] account for changes in a target's business between the signing and closing of the merger."[7] The second is geared to substantive legal claims, *e.g.*, indemnity claims for breach of representations and warranties, that are unrelated to accounting methodologies. Each track requires a different resolution mechanism.

The Independent Accountant—Expert or Arbitrator?

One of the main sources of litigation arising from a dispute resolution provision requiring the involvement of an independent accountant concerns whether the provision calls for an "expert determination" or an arbitration. The distinction is important because it determines both the permissible scope of the accountant's assignment and the degree of deference a court must accord that determination if challenged by a dissatisfied party. In making this determination, courts have looked to the degree of authority the parties have granted the decision-maker. If the decision-maker is granted broad "authority to decide all legal and factual issues necessary to resolve the matter," then they are likely to be deemed an "arbitrator"; if the expert's determination is limited "to deciding a specific factual dispute concerning a matter within [his] special expertise," he is acting as an "expert."

In this context, drafters must take particular care both in how they characterize the independent accountant's role in resolving post-closing accounting disputes and in defining the scope of that accountant's authority to avoid creating yet another source of litigation. For example, in one recent case the stock purchase agreement at issue defined the role of the accountant but muddied the waters by stating that the "the Independent Accountant shall act *as an arbitrator*."[8]

Once engaged, the independent accountant must conduct his analysis consistent with the parameters set forth in the applicable agreement. In one recent case the independent accountant made a determination of indemnity obligations under the agreement's representations and warranties "from an accounting perspective" even though he acknowledged those issues fell outside the defined scope of his responsibilities.[9] The Chancery Court vacated that portion of the accountant's decision, finding that to do otherwise would "eviscerate the basic bargain between [the] parties" that such claims shall not be resolved by the independent accountant as part of a true-up process.[10]

When looking beyond the magic words "arbitration" or "expert," courts look at a variety of factors including whether (1) the decision-maker's authority is limited to issues within their "specialized knowledge," (2) the relevant contract provision provided procedural rules, and (3) the dispute-resolution mechanism "is only triggered when the parties tee[ ] up a narrow, technical question."[11]

Much like in *ArchKey*, the court in *I Am Athlete* was faced with contract language that on its face seemed anomalous, *i.e.* requiring an "independent accounting firm" to resolve any matters related to the calculation of the earnout but designating the firm as the "Final Arbiter." Weighing the relevant factors, the

court determined, first, that the mechanism at issue was "an expert determination and not an arbitration provision," and, second, the seller's claims were based on contract interpretation, not calculation requiring accounting expertise; therefore, the claims fell outside the independent expert provision and were properly before the court.[12] However, the presumption that any contract interpretation is beyond the purview of an independent accountant designated as an expert is not absolute. As discussed below, in *AM Buyer* the court acknowledged that under certain circumstances, an independent accountant "may sometimes decide a disputed point of interpretation of the contract between the parties."[13]

Case Studies: AM Buyer and Pazos

In *AM Buyer LLC v. Argosy Investment Partners IV, L.P.,*[14] the court found that it is the "degree of authority delegated to the decision-maker" that drives the determination of whether the independent accountant is acting as an arbitrator or an expert.[15] If the independent accountant has the authority to decide all legal and factual issues necessary to resolve the dispute, then courts will consider the independent accountant to be an arbitrator. By contrast, if the independent accountant's authority is limited to deciding a specific factual dispute concerning a matter within the special expertise of the decision maker, then courts will consider the independent accountant to be an expert. It is this conferred contractual authority that determines the scope and limits of any judicial review of the independent accountant's findings. In most cases, the substance of the independent accountant's role will be that of an expert, which is the focus of this article.

1. Authority of the Independent Accountant as an Expert

Generally, purchase agreements define precisely what the independent accountant can decide. In other words, the accountant does not have authority to rewrite entire sections of the contract or to rule on broader legal issues. In *AM Buyer*, the contract stipulated that the independent accountant "may not assign a value to any particular item greater than the greatest value for such item claimed by either [party], or less than the lowest value for such item claimed by either [party]."[16] This bracketed range ensures the expert remains tethered to the parties' positions rather than unilaterally introducing new numbers.

However, although not an arbitrator, the independent accountant as an expert does have the authority to "resolve all relevant disputations" pertinent to the items that properly are in dispute.[17] In *AM Buyer*, for example, the parties disagreed on whether the purchase agreement provided for the operation of the purchased entity during the earnout period to be subject to a budget. While the purchase agreement included an exhibit titled, "Budget re: Earnout Period EBITDA," it did not provide any mechanism to adjust the Earnout Period EBITDA for deviations from that budget, although it did expressly provide mechanisms for adjustments due to other specified factors. The buyer argued that the absence of an explicit adjustment mechanism rendered the budget irrelevant for purposes of determining the Earnout Period EBITDA. The seller, however, contended that the lack of such a mechanism did not invalidate the budget's relevance and that deviations from it should still be reflected in the Earnout Period EBITDA calculation. Before determining the disputed earnout, the independent accountant first had to decide whether the purchase agreement provided for a budget and if so, how deviations from the budget should be accounted for in determining Earnout Period EBITDA.

The independent accountant found that the agreement indeed provided for a budget and that certain deviations from the budget should be taken into consideration in determining Earnout Period EBITDA. The independent accountant ultimately concluded that the earnout had been earned by the seller. In its suit, the buyer alleged the independent accountant reached legal conclusions without authority to do so under the purchase agreement and, as a result, their determinations should be set aside. The court disagreed and found that (1) the independent accountant "didn't exceed its contracted-for authority when making determinations regarding certain factual disputes attendant to the earnout issue,"[18] and (2) "in order to decide the point which has been referred to him, an expert may sometimes decide a disputed point of interpretation of the contract between the parties."[19] Because an independent accountant acting as an expert is authorized only to "resolve all relevant disputations" properly referred to him the scope of permissible contract interpretation is limited to disputed issues that fall within the expert's mandate.

Separately, the court found that the independent accountant may impose evidentiary penalties. Specifically, in *AM Buyer* the independent accountant concluded that the buyer did not maintain separate books and records for the acquired entity as required by the purchase agreement and which could be used to calculate the earnout. As a result, the independent accountant gave the seller's positions more weight in deciding issues affected by the lack of clarity due to the absence of such separate books and records.

2. Final and Binding Absent Manifest Error

As is the case with many purchase agreements that provide

for the use of an independent accountant, both in *AM Buyer* and *Pazos*[20] the purchase agreements stipulated that the findings of the independent accountant are final and binding. At first glance, this may seem absolute. But some agreements include narrow exceptions—commonly for "fraud" or "manifest error." In both *AM Buyer* and *Pazos*, the trial courts held that once an independent accountant has been empowered to resolve a post-closing dispute, its determination must be followed unless the complaining party meets this stringent standard. Specifically, where the parties have agreed to allocate interpretive authority to the independent accountant for issues subject to his expertise, the court will not "conduct its own accountant-level review" in second-guessing that expert determination absent fraud or manifest error.[21]

3. Defining and Applying the "Manifest Error" Standard

Until recently, Delaware courts had not exhaustively defined "manifest error" in the context of expert determinations. In *AM Buyer* and *Pazos,* the court indicated that an expert "commit[s] manifest error if it made a plain and obvious error, and the record demonstrates strong reliance on that error."[22]

- **Plain and Obvious Mistake.** Courts will look for clear-cut computational or methodological lapses that contradict the agreement's terms. Merely disagreeing with the accountant's analysis or weighting of certain evidence does not suffice.

- **High Deference to the Expert.** The idea is that the accountant is in the best position to parse the relevant financial evidence. Thus, Delaware courts will uphold the accountant's interpretation of the agreement's accounting provisions absent proof of a clear failure to follow the contract.

In *Pazos,* the seller argued that the accountant improperly ignored certain correspondences and mislabeled key items in the working capital calculation. The trial court rejected these challenges, holding that "[t]he ability to credit and weigh documents one way or another is within the province of this expert."[23]

Other Recent Notable Decisions

In *Sapp v. Industrial Action Services, LLC*,[24] the buyer had successfully moved to compel arbitration before an accountant of the seller's challenge to an earnout calculation after which the district court refused to vacate the arbitrator's decision. The Third Circuit reversed, holding that the district court had misconstrued the distinction between an "arbitration" and an "expert determination." While observing that "some courts struggl[e] to apply the differences between them," the court noted that an arbitration occurs when parties "delegate to the decision maker authority to decide all legal and factual issues necessary to resolve the matter."[25] By contrast, "experts decide narrower issues using a less formal process," and the expert's authority is limited to applying their "specialized knowledge to resolve a specified issue of fact and does not extend to making binding decisions on issues of law or legal claims."[26] Expert determinations also do not follow "court-like procedure[]," *i.e.*, "no pleadings, evidentiary hearings, or the taking of witness testimony."[27] Instead, "an expert will often conduct its own investigation and request from the parties the information it needs to resolve the factual issue."[28]

Practical Drafting and Advocacy Tips

- **Clarity in the Agreement.** Parties should expressly delineate the independent accountant's role particularly, whether it serves as an "arbitrator" under formal arbitration rules or as an "expert." If the parties intend the latter, they should say so clearly, *e.g.*, using phrases like "expert not arbitrator," "manifest error," and "final and binding."

- **Explain the "Manifest Error" Carve-Out.** If "manifest error" is intended to allow for only the narrowest of challenges, this should be made explicit to avoid later disputes.

- **Require a Detailed Report.** As suggested in *Pazos*, a thorough final report from the expert—explaining reasoning and calculations—helps a court quickly determine if the "manifest error" threshold is met. Without such detail, supplemental discovery may be needed.

- **Comply with Contractual Obligations.** Where the contract mandates certain recordkeeping (*e.g.*, separate books for the acquired entity), parties should fulfill these obligations diligently. Failure to do so can cause the expert—and later a court—to treat the noncompliant party's evidence or arguments with more skepticism.

Conclusion

The independent accountant is a central figure in resolving M&A post-closing disputes. Its value lies in offering swift, expert-level judgments on accounting controversies without prolonged litigation. But once the parties have entrusted the accountant with that authority—often on a "final and binding" basis—the path to judicial relief is narrow. Courts will rarely re-

verse or revise the expert's decisions unless a clear and conspicuous error leaps from the page. Recent Delaware rulings reinforce that deference and underscore the importance of drafting precise contractual language to guide the independent accountant's engagement and define any limits on its power. By grasping these principles and carefully negotiating the relevant provisions at the deal table, parties can better anticipate how their disputes will be resolved—and how difficult it may be to upend the independent accountant's final report.

ENDNOTES:

[1]The primary exception comes in the narrow set of circumstances where a buyer could take steps to ensure no earnout is due without harming its own interest, *e.g.*, by delaying sales so that they occur outside of the earnout period or artificially categorizing particular sales in a way that does not count toward the earnout threshold.

[2]*PureWorks, Inc. v. Unique Software Solutions, Inc.*, 554 Fed. Appx. 376, 378-80 (6th Cir. 2014).

[3]*Id*. at 380 (Stranch, J. concurring).

[4]*Id*. at 381 (Stranch, J. concurring).

[5]*Id*. at 382 (Stranch, J. concurring).

[6]*Northern Data AG v. Riot Platforms, Inc.*, 2025 WL 1661855, at *12 (Del. Ch. 2025).

[7]*Id.* (citation modified).

[8]*ArchKey Intermediate Holdings Inc. v. Mona*, 302 A.3d 975, 995 (Del. Ch. 2023) (emphasis added) (citation modified).

[9]*N. Data AG,* 2025 WL 1661855, at *13 n.136 (citation modified).

[10]*Id.* at *14 (citation modified). Drafters should bear in mind, however, that "[c]ontractual terminology is persuasive, not conclusive, evidence of if a provision calls for an expert." *I Am Athlete, LLC v. IM EnMotive, LLC*, 2024 WL 4904685, at *6 (Del. Super. Ct. 2024).

[11]*I Am Athlete, LLC*, 2024 WL 4904685, at *6 (citation modified).

[12]*Id*.

[13]*AM Buyer LLC v. Argosy Inv. Partners IV, L.P.*, C.A. No. N23C-11-167, 2024 WL 4024980, at *15 (Del. Super. Ct. Sep. 3, 2024) (citation modified), *aff'd*, No. 467, 2024, 2025 WL 2057788 (Del. July 23, 2025).

[14]Jimmy Pappas, the co-author of this article, served as the independent accountant in the *AM Buyer* case.

[15]*AM Buyer LLC*, 2024 WL 4024980, at *8 (citation modified).

[16]*Id*. at *3.

[17]*Id.* at *12.

[18]*Id*. at *11.

[19]*Id*. at *15 (citation modified) (citing *ArchKey*, 302 A.3d at 997-98).

[20]*Pazos v. AdaptHealth LLC*, 322 A.3d 492 (Del. Super. Ct. 2024), *aff'd*, No. 367, 2024, 2025 WL 901958 (Del. Mar. 25, 2025).

[21]*AM Buyer LLC*, 2024 WL 4024980, at *14.

[22]*Id*. at *13 (quoting *Pazos*, 322 A.3d at 503).

[23]*Pazos*, 322 A.3d at 507.

[24]75 F.4th 205 (3d Cir. 2023).

[25]*Id*. at 211 (citation modified).

[26]*Id.* (citation modified).

[27]*Id.*

[28]*Id*.

TUNNEY ACT TUSSLE: STATE AGS LAUNCH CHALLENGE TO DOJ MERGER SETTLEMENT

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On November 18, 2025, a U.S. federal judge granted the motion filed by Attorneys General for 12 states and the District of Columbia (together, the "States") to intervene in the California District Court proceeding involving the merger settlement between the Department of Justice ("DOJ") and Hewlett Packard Enterprise Co. ("HPE") and Juniper Networks, Inc. In their Motion to Intervene, the States criticize DOJ for accepting "wholly deficient remedies" to resolve the competitive concerns in the merger, and allege that the settlement deal was the "product of undue influence by well-connected lobbyists." Citing the States' "strong interest in ensuring that antitrust settlements are in the public interest and in preventing unlawful mergers from harming their citizens," the Motion to Intervene is the latest example of the increasingly active role that some State antitrust enforcers are playing in the second Trump administration.

HP/Juniper Settlement Controversy

In June 2025 DOJ announced that it had reached a proposed

