

REPRESENTATIONS AND WARRANTIES INSURANCE IN M&A TRANSACTIONS

May 2018

REPS AND WARRANTIES INSURANCE IN M&A TRANSACTIONS DISCUSSION OUTLINE

- I. Increasing Use of R&W Insurance in Deals
- II. Basics of R&W Insurance
- III. Drafting Considerations in M&A Agreements
- IV. Claims Experience
- V. Other Transactional Risk Insurance Products

INCREASING USE OF R&W INSURANCE IN DEALS

INCREASING USE OF R&W INSURANCE IN DEALS

- **Policies can now be obtained**
 - For high limits
 - At reasonable prices
 - On a timely basis
 - With reasonable coverage
 - That are highly customized
 - In a competitive marketplace
- **Estimated that > 1,500 reps and warranties policies were sold in 2017**



"I'm not here to take away your guns—I'm here to sell you some overpriced insurance."

INCREASING USE OF R&W INSURANCE IN DEALS

ADVANTAGES TO USING A R&W POLICY

- Transfers risk away from both seller and purchaser
- Potentially increases purchase price to seller by reducing contingent liability risk
- Protects passive sellers who have not controlled or been actively involved in the management of the target business from unintentional non-disclosure or breach of representations and warranties
- Eliminates obstacles to getting a deal done over indemnity term negotiations (e.g., survival periods, escrow, caps, baskets, materiality scrapes, etc.)
- Enhances protections of buyer for breaches of representations and warranties, supplementing or replacing entirely the indemnification provided by sellers
- Can effectively extend duration of representations and warranties, permitting more time to detect and report problems
- Eases concerns about ability to collect indemnification from single or multiple sellers
- Protects relationships with sellers who may become key employees or business partners post-closing
- Typically covers insured's cost of defense
- Can protect buyer against successor liability risk
- In distressed M&A can make up for a financially insecure seller

BASICS OF R&W INSURANCE

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Title search: Representations and Warranties. Insurance in M&A Transactions.

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