

Representation & Warranty Insurance



Overview and Recent Developments

Abby Davis, Skadden, Arps, Slate, Meagher & Flom LLP

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I. Summary of R&W Insurance

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General Overview

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Main Types of Post-Closing Remedies / Recourse

- Breach of Contract
 - Parties generally have the right to make breach of contract claims under the Transaction Agreement unless expressly provided otherwise in the agreement
 - Elements: (1) Valid Contract; (2) Breach of Contract Terms; and (3) Damages
- Indemnification
 - One party covenants to make whole another party with respect to a loss (e.g., related to breach of covenant or R&Ws in the Transaction Agreement)
 - Sets out the responsibilities of the indemnifying party, and the parameters around things such as the scope, maximum liability, and time periods when a claim may be brought
- Representation & Warranty Insurance (“R&W Insurance”)
 - Provides protection for the insured from financial loss in the event of breach of R&Ws in the Transaction Agreement, subject to the terms of the R&W Policy
 - Can be sole and exclusive remedy, or can be combined with indemnity

The focus of this presentation will be R&W Insurance

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General Overview (cont'd)

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- R&W Insurance shifts some or almost all post-closing recourse liability / risk from seller to the R&W Policy insurer (“R&W Insurer”), subject to the terms and conditions in the R&W Policy
 - Typically covers
 - » Seller / target R&W breaches
 - » Pre-closing taxes
 - Does not cover
 - » Known matters
 - » Covenant breaches
 - » Excluded matters
- Can be sole source of buyer recovery (“public company style”) or can supplement traditional seller indemnity

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Types of R&W Insurance

- R&W Insurance can be acquired “buy-side” or “sell-side”
 - Buy-side
 - » Buyer is insured
 - » R&W Insurance may reduce / eliminate buyer’s desire for escrow / seller indemnity under the Transaction Agreement
 - » By far most prevalent type of R&W Policy
 - » Typically covers seller / target fraud (but includes R&W Insurer subrogation rights to pursue seller in the case of seller / target fraud)
 - Sell-side
 - » Seller is insured
 - » Seller remains liable to buyer under the Transaction Agreement and R&W Insurer insures seller for indemnity payments made by seller to buyer
 - » Less common than buy-side R&W Policies (including because R&W Policies include exclusions for anything known by the insured, which would be much broader for seller versus buyer)
 - » Does not cover seller / target fraud

Key Considerations

Seller Considerations

- Potentially “cleaner” exit
- Potentially no / shorter survival and, if there is indemnity, potentially lower caps
- Prompt receipt of all (or larger portion) of sale proceeds
- Areas of particular focus
 - Whether R&W Insurance will be sole recourse (“no seller indemnity”, which typically results in slightly higher premiums) or supplemental to seller indemnity (retention splitting, special indemnities, etc.)
 - Fraud carveout / subrogation right of R&W Insurer against seller

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First appeared as part of the conference materials for the
19th Annual Mergers and Acquisitions Institute session
"Getting the Piper Paid: Successfully Navigating the RWI Claims Process"