

University of Texas
35th Annual Technology Law Conference
Austin, Texas

**Mergers and Acquisitions of Private Companies:
Recent Trends in Deal Insurance and Other Developments**

May 2022

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Moderator:

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Panelists:

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Topics to be Covered

- Representation and Warranty Insurance
- Delaware Caselaw Update
- Questions

Representation & Warranty Insurance (RWI)

- Background
- Pros and Cons of RWI
- Impact of RWI on Indemnification Waterfall
- Impact of RWI on LOI
- Impact of RWI on Acquisition Agreement
- RWI Market Background
- RWI Market Terms
- RWI Claims Process

Background

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RWI OVERVIEW

- Created to facilitate M&A transactions by addressing indemnification issues that arise during bidding/negotiation or due diligence
- Increasingly used in private M&A to limit sellers' exposure to indemnification claims
- Popularized by private equity funds, but used by strategic buyers as well
- Can make bids more competitive by providing certainty
- Shifts to insurer the risk of **unknown** breaches of reps and warranties
- Protects purchaser against R&W breaches which are discovered after the policy is bound (typically post-closing of purchase agreement)
- Purchaser RWI policy covers seller fraud
- Other products available for specifically identified liabilities, but can be expensive (*e.g.*, tax indemnity insurance, litigation/contingent liability/environmental liability)
- Even with RWI, parties may negotiate specific, uninsured indemnities (*e.g.*, shareholder issues, pending litigation, specific identified risks)
- Key features for technology focused companies

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