Representation & Warranty Insurance

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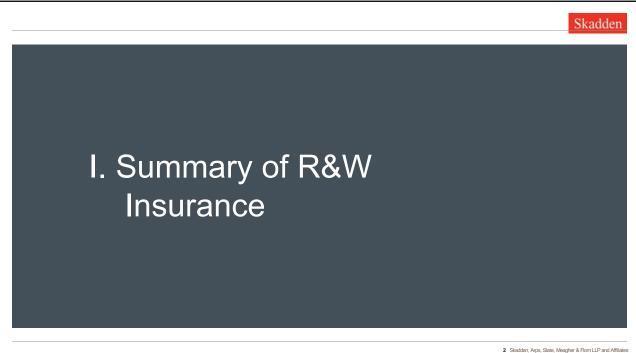
Overview and Recent Developments

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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

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- · 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

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Key Considerations

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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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Title search: Representation & Warranty Insurance

Also available as part of the eCourse 2023 Mergers and Acquisitions eConference

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"