Representation & Warranty Insurance

Overview and Recent Developments

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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

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

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

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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