



Beyond Indemnity: Representations and Warranties Insurance

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Although on the market for several years, representations and warranties insurance (“R&W Insurance”) is still a relatively unknown risk-transferring device for M&A deals. In general, R&W Insurance provides insurance coverage for buyer losses stemming from a seller’s breach of representations and warranties. Below are some frequently asked questions regarding R&W Insurance.

Who is the insured?

R&W Insurance is available for both buyers and sellers. Under a buy-side policy, the buyer is the insured and tenders claims for a seller’s breach directly to the insurance company in order to gain coverage. Conversely, the seller is the insured under a sell-side policy, and coverage is triggered once the buyer makes a claim against the seller for a breach. The premium obligation can be exclusive to one party or shared by both the buyer and seller, regardless of which party is the insured under the policy.

What does R&W Insurance cover?

While in the past R&W Insurance was written to cover specific representations and warranties, today most R&W Insurance policies provide “blanket” protection, and thus provide coverage for most seller breaches of representations and warranties. The policy can be used to secure, extend (in time and money) or even replace a seller’s indemnification obligations. *But not all seller*

indemnification obligations under a purchase agreement are covered. R&W Insurance typically only covers a seller’s breach of representations and warranties-seller indemnification obligations for covenants, contingent liabilities and environmental risks might not be covered.

What does R&W Insurance exclude from coverage?

Exclusions will vary by insurer, the degree and type of risk insured, and the policy in place (*i.e.*, sell-side or buy-side). But in many instances coverage will be excluded where fraud is involved, or where the buyer has “actual knowledge” of a breach. Notably, most buy-side policies do not exclude coverage as a result of seller fraud. This aspect can make buy-side R&W Insurance a more attractive investment for buyers vis-à-vis a sell-side policy. Case law interpreting R&W Insurance policy language is virtually non-existent, which is all the more reason to carefully scrutinize exclusionary language and understand what is—and what is not—covered.

When should R&W Insurance be used?

The most obvious use for R&W Insurance is where the seller is unable to provide indemnification, whether due to bankruptcy or other financial distress. However, buyers and sellers should at least consider R&W Insurance in other instances, including (i) as a convenient way to address indemnification claims that may not materialize for several months or years following closing, or (ii) as a



potential solution when the parties cannot agree upon the scope and extent of indemnity. Because insurance companies will need to conduct their own due diligence before offering a quote, attorneys and experienced insurance brokers should be consulted early in the deal-making process in order to determine whether R&W Insurance may be available.



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