Alerts

A Review of Emerging Trends in Mergers & Acquisitions and Representations & Warranties Insurance

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Insights for Insurers

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Traditionally, buyers and sellers of companies perform due diligence and risk assessments in connection with corporate transactions. To protect against a seller's breach of representations and warranties concerning the target company, acquiring companies often insist on the inclusion of broad indemnification, holdback, and earn-out provisions in the transaction documents, as well as the establishment of seller-funded escrow accounts. Negotiations concerning these issues have the potential to become contentious and time-consuming, creating delays and other roadblocks to finalizing the transaction. Over the past few years, however, buyers and sellers have looked with increasing frequency to transactional or merger and acquisition (M&A) insurance to avoid or limit some of these deal impediments.

Although transactional insurance may not have been intended to supplant the traditional protections employed in corporate transactions, in practice, the availability of these insurance products has impacted the due diligence process and the representations and warranties made in connection with corporate transactions and has enabled parties to move forward more quickly and with less uncertainty and post-closing risk.

Transactional or M&A Insurance

In recent years, various forms of transactional or M&A insurance have emerged and grown appreciably in the marketplace, affording protection to both buyers and sellers. The most common form of transactional insurance is representations and warranties (R&W) insurance used in the merger and acquisition context in a wide-range of deal types. A number of other insurance products also are available, including tax indemnity insurance, successor liability insurance, fraudulent conveyance insurance, litigation insurance, as well as environmental, *Committee on Foreign Investment in the United States* (CFIUS), and wage and hour insurance for M&A transactions. These products, in large part subject to their terms and conditions, provide some coverage for items often outside the scope or excluded from R&W policies.

Transactional insurance has existed since the early 1980s when Lloyd's of London first provided tax insurance for leasing transactions. R&W policies emerged in the late 1990s. These early insurance products were perceived as providing too limited coverage and being associated with a process that was too costly and time-intensive to offer much utility in the marketplace. Originally, insurers typically would undertake a lengthy and independent due diligence review of the target company with respect to the representations and warranties to be covered by a given policy. This process could take several weeks, and often the parties would engage multiple insurers to see which would one ultimately provide acceptable terms. The process often was intrusive at a time when the transaction was in process.

Today, however, the products have matured, and the process has been streamlined, resulting in much greater use of transactional insurance. Although precise information concerning sales of transactional insurance is not publicly available, Aon estimated that, in 2018, over 45% of private North American M&A transactions ranging from $25M to $108B used R&W insurance, up from 34% in 2017. In 2020, Aon reported that it had placed R&W insurance in more than 1,750 North America transactions, representing over $70B in policy limits. Similarly, AIG has reported that it underwrote more than 800 policies in 2019. Woodruff Sawyer observed that R&W policy submissions dropped by 70% in March and April 2020, compared with 2019, as a result of the COVID-19 pandemic, but rebounded in May, June, and July to pre-COVID levels.

The Underwriting Process

Typically, as part of the underwriting process, insurers will review the transaction documents and schedules, documents housed in the seller's data room, and diligence reports prepared by the buyer and its representatives. Insurers generally are required to execute a non-disclosure agreement. The due diligence reports generally are made available with the agreement that they may not be relied on by the insurer, as accounting and other firms conducting due diligence do not want to risk claims from insurers. Insurers typically will conduct a due diligence call, meeting, or otherwise communicate with the buyer and its representatives. The process usually is conducted in two parts: an initial non-binding indication of interest on the part of the insurer, followed by a more detailed underwriting/due diligence process. The insurer's initial indication of interest generally is communicated quickly. The second part generally requires more time and some insurers charge an upfront underwriting or due diligence fee for this more detailed process.

The streamlining of the process was largely a response to market concerns designed to make transactional insurance more attractive. Insurers, however, appear to have become more comfortable relying upon the diligence performed by a buyer—such that the insurer focuses on conducting secondary diligence of the buyer's primary diligence. Insurers commonly staff their underwriting teams with M&A attorneys familiar with applicable deal terms and mechanics and due diligence practices, which facilitates their ability to evaluate and access risks and to tailor policies.

The Transactional Insurance Market

The transactional insurance market has grown considerably in recent years. Several additional insurers have entered the market, increasing competitiveness and overall capacity. For example, data acquired from brokers Aon, Lockton, Marsh, and Willis indicate that there were 1,611 deals bound in 2018, up from 2008, with premiums increasing from $541M to $38.6B, respectively. In 2018 premiums totaled $912M, compared with $16M in 2008.

As mentioned, R&W insurance is the most common type of transactional insurance. Other transactional liability policies address specific risks, misrepresentations, and failure of conditions that may not be covered under R&W policies. Accordingly, much of the following discussion is focused on that coverage.

Representations & Warranties Insurance

R&W insurance is used in the M&A context to protect against losses arising from the seller's breach of certain representations and/or warranties contained in the acquisition agreement.

Most R&W insurance policies are "buyer side," meaning they protect a buyer against loss from unknown breaches of representations and warranties of either a target company or its selling equity holders that are discovered post-closing (or even post-signing, if structured accordingly). "Seller side" R&W insurance—estimated to constitute less than 20% of the market—serves as a backstop against a seller's indemnification obligations post-closing. Specifically, R&W insurance may benefit sellers by: (1) reducing the traditional seller's indemnity for breach of representations and warranties; (2) reducing or eliminating escrows or holdbacks that would otherwise decrease the proceeds distributed to the sellers or its stakeholders at closing; (3) facilitating a "cleaner" exit for the seller with fewer contingent liabilities associated with the sale of the company; (4) facilitating transactions where payoff or paydown of financial obligations is a substantial issue; and (5) providing greater flexibility to permit more extensive representations and warranties without as many "materiality" and "knowledge" qualifiers, leading to a quicker closing of the transaction.

The benefits to the buyer may include: (1) making the bid more attractive to a seller if there is a lessor or no escrow or holdback required due to the buyer's reliance on the insurance for indemnification protection; (2) extending the duration of the representations and warranties through the insurance, often giving the buyer additional time to discover problems with the acquired business; (3) increasing the amount of protection to the buyer than the seller might otherwise agree to; (4) increasing the seller's willingness to provide more extensive (less qualified) representations and warranties in the acquisition agreement; and (5) facilitating transaction financing.

Key Policy Provisions

R&W insurance generally is not written on standardized forms, with insurers offering coverage on different terms and employing policies that typically are further tailored with respect to the particular transaction subject to the policy. R&W insurance is available on a primary and excess basis and usually is written on a claims-made basis.

Limits of Liability: Coverage limits vary but typically are a dollar amount equal to 10% to 20% of the purchase price or enterprise value of the transaction. Sometimes the parties may insure a larger percentage or buy additional limits to protect specific representations such as certain fundamental representations in the context of the transaction. Market capacity has grown considerably, with many insurers offering $25 to $50M in limits or more, and affording parties the ability to purchase successive layers of coverage.

Policy Period: Policy periods also vary from policy to policy but commonly extend six years from closing or signing for breaches of fundamental and tax representations, with a three-year term for other representations. These term lengths usually apply regardless of the length of survival of the representations and warranties in the underlying transaction documents. Stated differently, an R&W insurance policy may provide coverage beyond the period of time that the buyer may have recourse from the seller under the transaction documents. The policy may incept upon signing of the acquisition agreement, closing of the transaction, or some other date. Consequently, there is a potential for a gap in coverage when the signing and closing dates differ appreciably.

Retention/Deductible: Most primary policies are subject to a retention or deductible, which often ranges from 0.75% to 4% of the total transaction value. It sometimes is shared between the buyer and seller. Where the deal is structured as a "no seller indemnity" transaction, the retention generally will be borne entirely by the buyer. Under some policies, the retention or deductible may be reduced as an escrow fund is released over the next year or two. Premium payment often is a point of negotiation between buyer and seller.

Defense/Defense Costs: Most R&W policies do not obligate the insurer to provide a defense (*i.e.*, do not contain a duty to defend.) One common provision provides that the insurer does not assume any duty to defend the policyholder with respect to any third party demand or otherwise. Instead, it requires the policyholders to defend and contest any third party demand, with counsel consented to in writing by the insurer. The insurer, however, is entitled at its sole option to associate in the defense, prosecution, negotiation, and settlement of any third party demand.

Many R&W insurance policies do indemnify the policyholder for some defense costs or to pay some defense costs on behalf of the policyholder, usually as part of loss (*i.e.*, payment of defense costs erode limits of limits) and after the retention or deductible has been exhausted or satisfied. This obligation usually requires the costs to be "reasonable" and "necessary" and be consented to in writing by the insurer. It is common for types of some costs, such as internal costs and salaries, to be excluded from coverage.

Scope of Coverage: The R&W policy's insuring agreement outlines the general scope of coverage. One buyer's side R&W insurance policy**,** for example**,** provides:

> Subject to the terms and conditions of this Policy, the Insurer shall indemnify the Insureds for, or pay on their behalf, any Loss in excess of the Retention that is reported by the Named Insured to the Insurer during the Policy Period.

"Loss" is defined to mean:

> the amount to which the Insureds are contractually entitled in respect of a breach of, or inaccuracy in the representations and warranties set forth in Articles [ ] of the Acquisition Agreement (including any related Defense Costs), without regard to the aggregate liability limitations set forth in Section [__] of the Acquisition Agreement or the survival limitations set forth in Section [__] of the Acquisition Agreement.

Matters Covered and Excluded: It is important to note that not all representations and warranties of an underlying transaction are covered by an R&W policy. Reference to the policy is required to determine whether and to what extent a representation or warranty is covered.

The policy may identify the specific representations and warranties that are covered. In that circumstance, only the specific representations and warranties referenced in the policy would be covered (subject to other policy conditions and exclusions).

Often specific representations, warranties, and other matters are excluded from coverage. For example, there may be exclusions for:

- Purchase price, net worth, or similar adjustments (such as for working capital adjustments as of the closing date of the deal);
- Losses where members of the buyer's deal team had actual knowledge of a breach of representation or warranty;
- Specified tax-related issues;
- Employee/independent contractor misclassification and wage and hour law issues;
- Asbestos-related liabilities;
- Specified environmental liabilities;
- Projections, estimates, or forward-looking representations and warranties (such as revenue projections);
- Some types of product, service, or intellectual property matters;
- Material inaccuracy in the declaration of any known claims or legal actions and/or misstatements, omissions, or inaccuracies in matters identified or information sought or provided in connection with the application for insurance;
- Collectability of accounts receivable;
- Cyber and privacy-related liabilities;
- Pension underfunding;
- COVID-19 and Paycheck Protection Program (PPP) loan liabilities;
- Indemnification obligations contained in the acquisition agreement; and
- Consequential, punitive or exemplary damages, criminal or civil fines or penalties, injunctive, equitable, or other non-monetary relief.

In addition, insurers may propose or insist upon additional, deal-specific exclusions based on concerns arising from its own underwriting. These transition-specific exclusions are identified in the policy.

Common Policy Conditions: Like other forms of insurance coverage, R&W policies include a number of conditions, often requiring the policyholder, among other things, to:

- Provide timely notice of claim notices, breaches, or matters that could reasonably be expected to give rise to a breach, third party demands or actions as well as correspondence and pleadings relating to any of the foregoing;
- Obtain insurer consent to any settlement, judgment, or incurring of any defense costs;
- Take all commercially reasonable actions necessary or advisable to mitigate such Loss or potential Loss;
- Cooperate with the insurer;

- Timely provide information and documentation to the insurer; and
- Maintain due diligence records.

Other common R&W policy conditions include "Other Insurance" provisions, requirements for reimbursement to the insurer for sums that did not constitute "Loss" or that were excluded, subrogation provisions, mandatory arbitration clauses requiring disputes to be decided in binding arbitration, and choice of law provisions. Once again, reference to the particular policy is required to determine what terms and conditions are contained in the policies and what is required of the insurer and policyholder.

In addition, R&W policies typically will match the structure of the underlying transaction with respect to any so-called materiality scrape. Insurers generally will recognize the materiality scrape in the underlying agreement and disregard applicable materiality qualifiers when determining the existence of a breach and/or calculating damages, as applicable.

Claims Under Representations & Warranties Insurance

Claims frequency and severity under R&W insurance policies are increasing. For example, a 2020 claims study from AIG reports claims severity was increasing, with the largest claims (valued over $10M) at 19% of material claims, up from 15% in its 2019 report and 8% the year before. The average claims size also increased. AIG further reported that North America, in particular, was hard hit by claims severity. Finally, AIG noted that overall the frequency of claims notification remained constant at approximately one in every five policies, with increasing frequency among higher valued transactions. Aon similarly reported in 2020 a "notable trend over the past few years relate[d] to an increase in the size of claims being made," with losses paid by multiple excess layers for the first time in 2019. Aon further reported a 400% increase in total claims noticed in 2018 versus 2014.

The frequency of claims under R&W policies is likely to increase given the increase in the number of such policies being issued and the various claims and circumstances likely to give rise to claims related to COVID-19 events. The most common claims to date have involved representations and warranties relating to the disclosure of material contracts, the accuracy of financial statements, and compliance with laws. Non-disclosures of legal actions and tax matters have involved claims, but often these matters have been funneled to M&A insurances other than R&W policies.

Among the common basis for denial of coverage or reservation of rights are:

- False or incomplete insurance applications and related claims declarations;
- The claim not falling within the policies definition of Loss;
- The matter or claim circumstances were known by the insured or deal team at deal time at or prior to the closing of the M&A transaction;
- The claims did not involve a representation or warranty covered by the policy;
- Failure to satisfy the deductible or retention;
- The absence of a breach of a representation or warranty;
- Actual knowledge by a member of the deal team;
- Non-compliance with policy conditions, including requirements for consent to settle third party claims;
- Waiver of subrogation rights; and
- The claim is barred or limited by exclusions contained in the policy.

Coverage Litigation Under R&W Policies

To date, there have been only a couple of published insurance coverage decisions under R&W policies. This is not a reflection of the lack of claims or disputes. Rather, it is because most R&W policies contain arbitration clauses requiring that disputes be submitted to—and resolved through—arbitration, which typically is subject to a confidentiality agreement or orders.

The first case involves a seller-side R&W policy. *Ratajczak v. Beazley Solutions Limited*, 870 F. 3d 650 (7th Cir. 2017) arose out of the seller's alleged failure to disclose adulteration of a protein concentrate product that was sold as part of the business. More specifically, it failed to disclose to at least one customer, Land O' Lakes, the protein content of the whey it purchased. The sellers settled with the buyer for $10M. Land O' Lakes stopped purchasing additional product and subsequently filed an action asserting breach of contract, fraud, and RICO claims. The district court dismissed Land O'Lakes's suit and ruled in favor of the insurers on coverage. *Ratajczak v. Beazley Solutions Ltd.,* 2016 WL 8117956, 2016 U.S. Dist. LEXIS 189240 (E.D. Wis. Aug. 17, 2016); *Land O'Lakes, Inc. v. Ratajczak,* 2016 WL 8222933, 2016 U.S. Dist. LEXIS 186706 (E.D. Wis. Aug. 24, 2016). The U.S. Court of Appeals for the Seventh Circuit affirmed as discussed below.

Prior to selling Packerland, the owners (the Ratajczaks) purchased an R&W insurance policy from Beazley that indemnified them for loss caused by breach of warranties made to the buyer. The court recognized that the policy does not cover fraud but does cover damages for breach of contract. The contract of sale provided that a breach of warranty could come in two forms: a false statement in a Fundamental Representation—a list of specific representations made by Packerland on which the buyer relied—and a false statement not included among the Fundamental Representations. The contract set a cap of $1.5 million in damages for a false statement in the latter category. Beazley's policy had a limit of $10M with a $1.5M deductible (called a self-insured retention). Beazley contended, and the district court found, that, if there was a non-fraudulent breach of warranty, the false statement was not among the Fundamental Representations, so contractual damages were capped at $1.5M. As that matched the deductible, Beazley had no obligation to indemnify the Ratajczaks.

The Court of Appeals for the Seventh Circuit ruled that the settlement was not covered by the policy. First, it found the false representations at issue were not among the specified fundamental representations. The Seventh Circuit noted that there was no cap on liability under the acquisition contract for fraud. However, the R&W policy excluded fraud. According to the Seventh Circuit:

> the draft complaint that the buyer showed to the Ratajczaks did not specify a falsehood in one of the Fundamental Representations. Instead it accused Packerland and the Ratajczaks of fraudulently concealing the adulteration and the fact that Packerland's profits had been artificially inflated, which could not continue because the truth was bound to emerge. The Ratajczaks insist that the buyer's complaint implies accusations that could have come under a Fundamental Representation, such as warranty 3.3 about the accuracy of Packerland's books and records. The draft complaint does not mention that representation, but the Ratajczaks remind us that in federal civil procedure complaints are liberally interpreted, so that to the extent the document is ambiguous resolution is handled through motions for more definite statements, motions for summary judgment, and briefs. So far, so good. Their problem is that there was no complaint, and Fed. R. Civ. P. 8 never came into play. The buyer *threatened* litigation but did not file a suit; the Ratajczaks settled to avoid suit. There was nothing that could be liberally construed in their favor vis-à-vis Beazley.
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> What the draft complaint *did* harp on is fraud, including fraudulent statements and omissions of material facts (such as the adulteration) necessary to make the statements not misleading. Fraudulent statements are outside Beazley's policy altogether.
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> True enough, some of the draft complaint's language might be understood to specify negligent misstatements, such as some of the lulling statements the Ratajczaks used to prevent Land O'Lakes from looking too closely for the source of non-protein nitrogen, but even if this gets past the policy's fraud exclusion it does not get past the contract's $1.5 million damages cap for breach of any warranty other than a Fundamental Representation.

Additionally, the Seventh Circuit ruled the seller's failure to comply with the policy requirement that it obtain the consent of the insurer for the settlement precluded coverage. The court noted that the insurer did not approve the settlement before it was entered into by the sellers. In fact, the insurer was not even notified of the claim until the settlement negotiations had almost concluded. The court rejected the sellers' argument that the insurer failed to prove it was prejudiced, ruling there was no prejudice requirement in the policy and the insurers right to approve settlement was absolute.

Specifically**,** the Seventh Circuit stated:

> Beazley's policy provides that it is not bound by settlements that it did not approve. Beazley not only didn't approve the settlement but also was not notified of the claim until the settlement talks were almost done. The Ratajczaks insist that Beazley can't prove prejudice from the delay — how could one *prove* that a different sequence of events, or more time to think things over, investigate, and make suggestions, would have produced a different outcome? — but the policy does not demand that Beazley prove prejudice. The approval requirement is absolute.
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> This situation shows why. Beazley received notice of the claim less than a week before the settlement was concluded. To be precise, the Ratajczaks notified Beazley after the close of business on December 24, 2012, and signed the settlement on December 28. That was two business days' notice. It may take an insurer longer just to find the policy and send it to adjusters or analysts to begin an evaluation. It would require time after that to study a proposed settlement and make suggestions, time that the Ratajczaks did not allow. After receiving notice, Beazley swiftly asked the Ratajczaks for more information about the adulteration and the proposed settlement; they closed on the settlement before replying. That haste prevented Beazley from trying to allocate potential loss among three categories: loss attributable to fraud (not covered), loss attributable to nonfraudulent breach of a nonspecific warranty (capped at $1.5 million), and loss attributable to nonfraudulent breach of a Fundamental Representation (covered to the policy limit). By cutting Beazley out of the negotiations, the Ratajczaks prevented it from taking steps vital for self-protection.
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> The Ratajczaks' riposte is that Wisconsin law applies a prejudice requirement even if the policy does not . . . .
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> That may or may not be a correct statement of Wisconsin law, but the controlling law is New York's. The policy provides for the application of New York law. This was a multi-jurisdictional business transaction. Beazley is based in the United Kingdom. Its adjuster for U.S. claims is located in New York. It is understandable that Beazley prefers to designate one state's law for all of its business in this nation; it can become familiar with New York law more easily than it can master (and price) the intricacies of many states' insurance laws. The Ratajczaks are sophisticated business people and entered this transaction with eyes open; they cannot escape the choice-of-law clause in this policy. New York permits insurers to insist on having control of settlements. *Vigilant Insurance Co. v. Bear Stearns Cos.,* 10 N.Y.3d 170, 177-78, 855 N.Y.S.2d 45, 884 N.E.2d 1044 (2008). So the Ratajczaks lose for two reasons: the deductible offsets the maximum damages for breach of a general warranty, and they settled without Beazley's consent.

The second reported decision involves a New York state trial court's denial of an insurer's motion to dismiss in Novolex Holdings, LLC v. Illinois Union Insurance, No. 655514/2019 (N.Y. Cty. Sup. Ct. *2020).* Novolex acquired The Waddington Group (TWG), a manufacturer of food packaging and disposable products, for $2.275B pursuant to an Equity Purchase Agreement. Novolex subsequently alleged that TWG breached various representations in the agreement, claiming that TWG knew that one of its largest customers, Costco, had decided to take substantially all of its business away from TWG. Novolex claimed damages of $267M.

Illinois Union provided one of the excess layers of Novolex's R&W insurance tower. Novolex instituted a coverage action after Illinois Union denied coverage, and Illinois Union subsequently filed a motion to dismiss parts of the lawsuit on the ground that TWG breach Section 3.18 of the purchase agreement. The relevant part of that representation stated that:

> Since December 31, 2017, there has not been any written notice or, to the Knowledge of Parent, any oral notice, from any such Material Relationship that such Material Relationship has terminated, canceled, or adversely and materially modified or intends to terminate, cancel or adversely and materially modify any Contract between a Purchased Company and any such Material Relationship.

Illinois Union argued that there was no breach of Section 3.18 because there was no allegation that a "Contract" was terminated, cancelled, or adversely modified since Costco had not committed to buying from TWG in the future. Illinois Union argued that Costco's intention to reduce its purchases in the future was not a termination or modification of any existing "Contract."

The court denied Illinois Union's motion to dismiss. First, the court determined that some promotional agreements that Novolex described as a type of purchase order involving the sale of products prior to the holidays qualified as "Contracts" encompassed within Section 3.18. Second, zeroing in on the term "or" in Section 3.18, the court determined *sua sponte* that the provision could be construed to apply where TWG had no knowledge that a material relationship would be terminated, canceled, or adversely modified even in the absence of a contractual relationship. Although this is a rare early coverage decision under an R&W policy worthy of study, it should be remembered that this is a trial court decision by a single judge on a motion to dismiss.

In view of the claim volume under R&W claims, the dollar value of disputes, and the absence of arbitration clauses in some policies, an increasing number of coverage decisions is expected.

Other M&A/Transactional Insurance

Some of the subjects of representations and warranties that are carved out or excluded from coverage under R&W policies may be covered under other forms of M&A or transactional insurance policies.

Separate tax indemnification policies, for example, may be available to protect the insured against an adverse ruling by the Internal Revenue Service or other relevant taxing authority with respect to certain manifest tax risks, including the anticipated tax treatment of the underlying transaction or a given diligence issue relating thereto. Such policies can cover tax, interest, penalties, contest costs, and gross-up for tax on the insurance proceeds. A tax indemnity policy can reduce or eliminate a known contingent tax treatment where the buyer and seller evaluate the issue differently. These policies do not necessarily require that a formal tax opinion be obtained, though providing insurers with some work product to underwrite can make for a more efficient underwriting process.

Loss mitigation or litigation buyout insurance is a contingent risk insurance product that may help policyholders manage risks arising from pending or threatened litigation. Other risks that might be eligible for coverage under transactional insurance policies include: environmental exposures, intellectual property infringement claims, employment and wage and hour matters, and exposures relating to accounting methods.

Some Underwriting and Claims Evaluation Issues For R&W Insurers

In light of trending increases in both the number of R&W claims and their severity, R&W insurers may want to consider the following issues when underwriting policies or evaluating claims:

- Does the seller have sufficient "skin in the game," meaning some financial responsibility for initial losses, which can reduce moral hazard?
- Was the claim submitted in a timely manner following the buyer's first discovery of a breach, and, where applicable law requires a showing of prejudice, what prejudice has resulted from any delay in the submission of the claim?
- Does the policy contain an objective or subjective standard with regard to the insured's knowledge related to representations and warranties?
- Consider an exclusion for an interim breach—one that occurs during the time between the signing and the closing of the underlying transaction where those dates do not coincide.
- Consider the reasonableness of any costs incurred by the insured in the defense of any claims where the insurer was not informed and/or did not provide consent.
- Consider inclusion of exclusions for cyber, privacy, COVID-19, and PPP loan matters and, where not excluded, consider employing enhanced evaluation of these issues in connection with underwriting.
- When evaluating a claim, consider whether there are offsets and whether the policyholder mitigated damages.
- Where the buyer has provided a full release to the seller in order to resolve an indemnity claim by the seller, consider whether the insurer's subrogation rights have been impacted.

Aon North American M&A and Transactions Solutions, Risk in Review 2019.
Aon Representations and Warranties Insurance Claim Study: An analysis of claim trends, data, and recoveries 2020.
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Woodruff Sawyer 2021 Trend Report, Private Equity and Transactional Risk Insurance.
Hemingway, C., Advisen: Transaction insurance takes the 10-year challenge, Feb. 6, 2019.
A materiality scrape is a buyer-preferred provision in which materiality qualifiers—such as "in all material respects"—are disregarded or "scraped" in connection with determining if a representation or warranty breach has occurred and/or in connection with calculation of damages. For example, a materiality scrape provision may provide: "For purposes of determining whether there has been any misrepresentation or breach of a representation or warranty, and for purposes of determining the amount of losses resulting therefrom, all qualifications or exceptions in any representation or warranty referring to the terms 'material,' 'materiality,' 'in all material respects,' or 'Material Adverse Effect' shall be disregarded."
AIG M&A: Mergers and Acquisitions 2020 Report: A rising tide of large claims.
Aon Representations and Warranties Insurance Claim Study An analysis of claim trends, data, and recoveries 2020.