



Representations & Warranties Insurance in M&A Transactions

October 29, 2018

6:00 p.m. – 8:00 p.m.

CBA Law Center

New Britain, CT

CT Bar Institute Inc.

CT: 2.0 CLE Credits (General)
NY: 2.0 CLE Credits (AOP)

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

Program Agenda

Time	Topic	Speaker
6:00 – 6:05	Introduction	J. Camarco & M. Federico
6:05 – 6:25	Overview of representations and warranties insurance and deals in which it is appropriate risk mitigation product	D. Albin; J. Lawrence
6:25 – 6:45	Anatomy of a representations and warranties insurance policy	J. Pitblado
6:45 – 6:55	Understanding the underwriting process; insurer's perspective	J. Pitblado/A. Zimmerman
6:55 – 7:25	Negotiating a deal with representations and warranties insurance (representations and warranties; holdbacks; indemnities)	D. Albin; J. Lawrence
7:25 – 7:50	Representations and warranties insurance claims process; identifying gaps in coverage	J. Pitblado/A. Zimmerman
7:50 – 7:55	Current trends in representations and warranties insurance market	D. Albin; J. Lawrence; J. Pitblado; A. Zimmerman
7:55 – 8:00	Questions	D. Albin; J. Lawrence; John Pitblado; A. Zimmerman

Faculty Biographies

David Albin is a partner of Finn Dixon & Herling LLP representing clients in the areas of mergers and acquisitions, private equity and venture capital, securities law and general representation.

Mr. Albin has significant experience representing private equity and venture capital groups, as well as public and private companies, in their acquisition, disposition, investment, formation, and other activities. Clients for whom Mr. Albin has recently provided merger transactional advice include Capital Partners, Warwick Group and Return Path, Inc. Representative transactions would include the purchase of a plastic products manufacturer for a private equity fund, the purchase of automobile parts suppliers for a private equity fund, the disposition of a family-owned oil industry supply company with substantial Persian Gulf operations to a private equity backed competitor, the disposition of several locations for a private equity backed medical services company and the purchase and sale of various e-business entities for a venture capital backed client.

Mr. Albin has also provided a number of public companies with advice regarding their securities law matters and both public and private companies with advice and counsel on a wide range of corporate governance, contract and other matters. Clients for whom Mr. Albin has served in the role of outside general counsel are engaged in a wide range of activities and industries including medical devices, health care services, e-commerce, government procurement, and food and beverages.

Mr. Albin is a leader in state and federal bar activities. He has served as Chairman of the Business Law Section of the Connecticut Bar Association and is an active member of the American Bar Association's Mergers and Acquisitions Committee for which he is currently serving as Chairman of the Private Equity Subcommittee and has also served, among other tasks, as Reporter of the Model Asset Purchase Agreement with Commentary, an annual speaker for the National Institute's annual Mergers and Acquisitions Seminar and Chair of the Programs Committee.

Mr. Albin graduated with an LL.B. from Yale Law School in 1984 and a B.A. with honors, Phi Beta Kappa, from Trinity College in 1981. Among other honors Mr. Albin has been named "Band 1" for Corporate/M&A in the State of Connecticut by Chambers USA since 2011.

Julia Camarco is a member of Shipman & Goodwin's Business and Finance Practice Group, where she represents private equity funds, venture capital funds, emerging growth and mature companies, health care providers and other business entities in connection with a variety of commercial transactions, including mergers, acquisitions and dispositions, joint ventures, preferred equity investments, private placements and other strategic investments. She also represents clients in an "outside general counsel" capacity, advising on matters such as business formation, corporate governance, business operations, commercial contracting, and other general corporate matters.

Julia represents clients across a number of industries, with a particular focus on the life sciences, health care, biotech and biopharma/medical device industries, and has participated in sophisticated transactions involving emerging and leading technology and health care companies.

Julia received her J.D. from Columbia University School of Law and her B.S. from Cornell University.

Melissa Cordima is a member of the Corporate Litigation team at Travelers where she manages the company's non-claim litigation, including shareholder and securities litigation, intellectual property litigation, class action litigation relating to the company's business practices, agency disputes, and litigation concerning the company's real estate and investments. Prior to Travelers, Melissa was a commercial litigator at a regional law firm where she litigated business disputes, including breach of contract, shareholder and partnership disputes, violations of the Connecticut Unfair Trade Practices Act (CUTPA) and other business torts in state and federal trial and appellate courts. She also litigated intellectual property disputes, including patent infringement, theft of trade secrets, trademark/ trade dress infringement, copyright infringement, unfair competition and false designation of origin claims.

John H. Lawrence is a partner at Shipman & Goodwin LLP. He focuses his practice on mergers and acquisitions, venture capital and private equity transactions, angel investments, private equity fund formation, and securities transactions in a broad range of industries, including aerospace, insurance and managed care, health care, energy and natural resources, and technology. He represents public and private companies in merger and acquisition transactions, private equity and venture capital investments, joint ventures, recapitalizations, corporate governance matters, shareholder disputes and business separations and dissolutions. John has significant experience in transition planning for family-owned and closely-held businesses and assisting owners and management in preparing for and executing sale transactions and other transitions to the next generation of owners and management. John's broad range of experience as a general corporate and business lawyer has proven invaluable to business owners who have not been through a sale transaction and are unfamiliar with the complex and fast-moving process. John's collaborative approach and breadth of knowledge of business, financial and tax issues, as well as his sensitivity to the complexities of family-owned or closely-held businesses, make him particularly well-suited to manage the legal aspects of a sale process that maximizes value to the current owners and positions the company for continued growth. John has testified on numerous occasions before the Judiciary, the Commerce and the Banks Committees of the Connecticut General Assembly on behalf of the Business Law Section of the Connecticut Bar Association in support of various amendments to the Connecticut Business Corporation Act, the Connecticut Entity Transactions Act; he also played a significant role in drafting and testifying in favor of the adoption of the Connecticut Benefit Corporation Act.

John Pitblado has extensive experience representing insurers in the property and casualty, life, health, and reinsurance industries, including coverage analysis and litigation involving, class actions, ERISA, bad faith, statutory unfair insurance and trade practices, RICO, fraud, and misrepresentation claims. John also has experience handling regulatory matters, including market conduct examinations and complaints before state insurance regulatory authorities.

A member of Carlton Fields Jorden Burt PA's insurance industry group and data privacy and cybersecurity task force, John counsels clients, speaks, and writes on a range of cybersecurity issues faced by insurers, including regulatory and coverage issues.

Andrew S. Zimmerman joined Willis Towers Watson in early 2014, and is an experienced insurance coverage lawyer, whose insurance work was dedicated exclusively to representing policyholders in all aspects of insurance coverage, including disputed claims and coverage litigation, insurance counseling, and general risk

management. In addition, Andrew's legal career included substantial experience in general commercial litigation, environmental litigation, products liability, construction and related litigation, and providing insurance and risk transfer expertise in real estate, leasing, and corporate transactions. Andrew's background in insurance coverage, contractual risk transfer, and risk management provides valuable expertise and perspective to his work with the transactional solutions practice.

Prior to joining Willis Towers Watson, Andrew was a practicing lawyer with two national law firms, engaged primarily in commercial litigation and insurance coverage matters. Prior to law school, Andrew earned his B.A., with high honors, from Rutgers University; and his J.D. from Rutgers University-Newark, where he was a member of the Rutgers Law Review. Andrew remains licensed to practice law in New York and New Jersey.



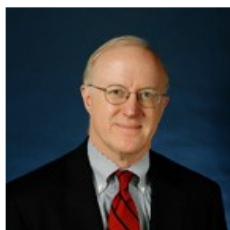
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Speakers



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Moderators



Julia R. Camarco
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Hartford



Melissa A. Cordima
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Connecticut Bar Association

Overview of RWI and Role in M&A Deals

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Acquisition Agreement

- Acquisition agreements typically contain representations and warranties by seller and/or its equity owners that are made at the signing and, if there is a subsequent closing, at the closing.
 - Accuracy of reps and warranties at signing and closing will be a closing condition where there is a subsequent closing
 - Breach of any reps or warranties will typically be the basis for a post-closing indemnification obligation of seller and/or its equity owners
- Classification of reps and warranties:
 - Fundamental reps and warranties: Due organization, due authority, consents and approvals, capitalization, title, brokers fees and others, as negotiated
 - General (normal) reps and warranties: All others reps and warranties
- Post-closing indemnification obligations:
 - Survival period: Period during which an indemnification claim can be made by buyer
 - Types of post-closing indemnification claims against seller and/or its equity owners:
 - Breach of any reps or warranties
 - Breach of any covenants
 - Specific, direct indemnities, such as retained liabilities, pre-closing taxes, pending lawsuits, etc., as negotiated
 - Third party claims
 - Fraud by seller or equity owners

Acquisition Agreement (Cont'd)

- Contractual limitations on indemnification claims by buyer for breach of reps and warranties:
 - Short survival period (contractual statute of limitations claims based on general reps)
 - Definition of covered losses: Actual (out of pocket) damages, consequential and incidental damages, diminution in value (multiple of earnings/revenues), punitive, etc.
 - Eligible claim threshold (mini-basket): De minimis claims
 - Basket: Either a true deductible (buyer's risk) or "tipping basket" (shifting risk)
 - Cap: Limit on buyer's ability to recover damages, typically for general reps
 - Indemnification (including limits on indemnification, such as basket and cap) are typically the exclusive remedy of buyer for breach of reps and warranties, except fraud and intentional misrepresentations
- Significance of non-reliance clause:

Buyer acknowledges and agrees that Seller has not made and is not making any representations or warranties whatsoever regarding the subject matter of this Agreement or the Business, express or implied, except as provided in Article III, and that Buyer is not relying and has not relied on any representations or warranties whatsoever regarding the subject matter of his Agreement or the Business, express or implied, except for the representations and warranties in Article III.

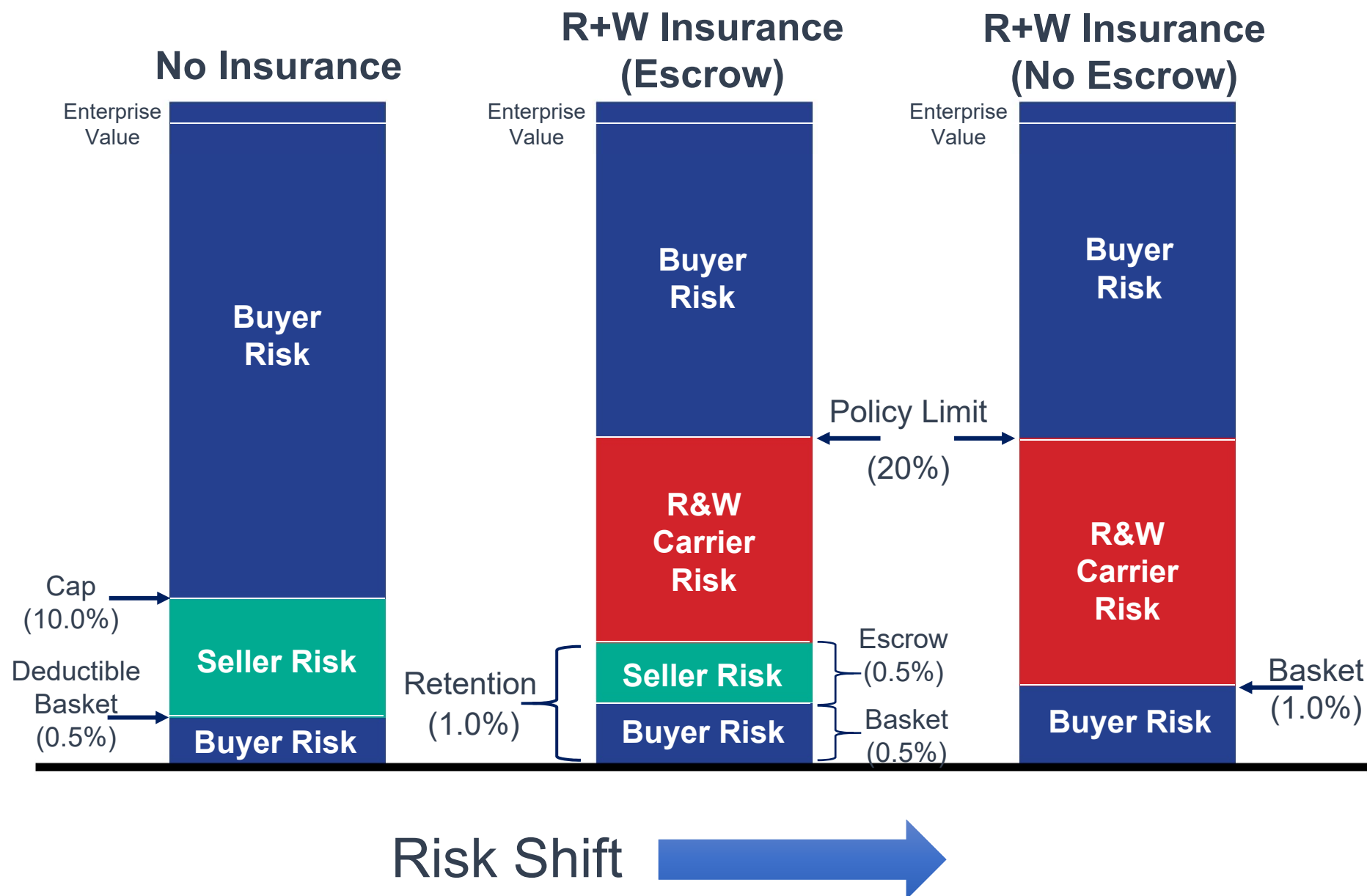
Acquisition Agreement (Cont'd)

- Sources of Recovery for breach of reps and warranties:
 - Direct claim against seller
 - Escrow funds
 - Set-off rights against purchase money note or earn-out payments
 - Rep & Warranty Insurance
- Resources:
 - ABA Private Target Mergers & Acquisitions Deal points Study (2017)
 - SRS Acquiom Buy-side Representations and Warranties Insurance (R&W) Deal Terms Study
 - Sample R&W Insurance Policies (Buyer-side)
 - Exhibit A: CFC Underwriting Limited
 - Exhibit B: AIG Mergers & Acquisitions Insurance Group

R&W Policies

- Buy-side Policy: First Party Coverage
 - Extend survival period (as long as 6 years)
 - Increase indemnification above seller cap
 - Cover consequential and multiplied damages
 - Direct and third party claims
- Sell-side Policy: Liability Policy
 - Covers liability of seller or its equity owners, follows seller's basket and cap

R+W Insurance / Post-Closing Risk Profile



R+W Policy Issues

- Definition of loss:
 - Knowledge and materiality scrapes: Double (breach and damages); single (damages only)
 - Consequential and incidental damages
 - Diminution in value
 - Multiple of earnings/revenues
 - Defense costs: Third party claims
 - Seller fraud
 - Buyer legal expenses

R+W Policy Issues (Cont'd)

- Exclusions:
 - Breaches within actual knowledge of buyer at time of closing
- Retention:
 - Erosion by recoveries from seller
 - Erosion by costs of suit and recoveries with release
- Subrogation:

Anatomy of a Reps & Warranties policy:

Declarations

- Named insured (in buyer-side policies, which are typical, the buyer purchases coverage and is the named insured).
- Additional insureds (may include affiliates, subsidiaries of the buyer/named insured)
- Policy Period (typically three to six years, to cover contractual indemnification period, or extend it)
- limit of liability (tailored to the value of the transaction)

Definitions – unique definitions that may be unfamiliar to most coverage lawyers include:

- Acquisition
- Acquisition agreement (also identified in the declarations and attached to the policy)
- Actual knowledge
- Breach
- Deal Team Members/Transaction Team Members/Specified Persons
- Lenders
- Loss (some policies include an entire section defining loss)
- Most Favorable Jurisdiction
- Sellers
- Third Party Demand

Anatomy of a Reps & Warranties policy

Insuring Agreement:

- The Insurer shall indemnify the Insured for Loss
- Some policies mimic “claims made and reported” policies by adding in language tying the notice requirements into the insuring agreement

Conditions

- Notice is typically “claims made” or “claims made and reported” – similar to D&O and E&O coverages, unlike “occurrence” based notice of CGL and personal lines policies)
- Some notice provisions import “actual prejudice” requirements (avoiding the 50 state mosaic on notice/prejudice)
- Cooperation

Anatomy of a Reps & Warranties policy

Dispute Resolution

- Arbitration (unusual in most policies, some states have statutes prohibiting mandatory arbitration provisions)
- Delaware Law

Exclusions

- Any Breach which any Deal Team Member had Actual Knowledge of prior to Inception Date
- Civil or criminal fines or penalties
- Long tail exposures: asbestos, polychlorinated biphenyls (PCBs), environmental/pollution



Transactional Insurance – Market Overview and Key Issues

Connecticut Bar Association
**Representations & Warranties Insurance in M&A
Transactions**

October 29, 2018

Mergers & Acquisitions Transactional Insurance

Overview of Transactional Insurance Solutions

Representations & Warranties Insurance

- Used by private equity and strategic buyers to increase competitive position in auctions – offer sellers a limited or no indemnity deal
- Facilitates clean exits – sellers avoid escrows and holdbacks, and distribute proceeds to investors
- Acceptance and use of product has increased dramatically over last five years

Tax Insurance

- Insure tax positions to facilitate transactions
- Covers taxes, penalties, interest and contest costs in the event of a challenge by the IRS or other tax authority
- Wide range of tax issues can be insured, including:
 - Tax-free mergers
 - S-corporation issues
 - Net operating losses
 - Alternative energy credits
 - Sales and use tax

Contingent Liability/Pending Litigation/Other Insurance

- Used by buyers and sellers to transfer risk on contingent exposures to insurers
- Pending litigation
- Environmental
- Successor liability
- Fraudulent conveyance
- Loss portfolio transfer
- Antitrust consent
- Legislative contingency
- Fund liquidation

REPRESENTATIONS & WARRANTIES (“R&W”) INSURANCE OVERVIEW

Purpose

- Provides insured with coverage for breaches of covered representations and warranties in acquisition agreement

Cost

- One time premium payment typically in range of 2% to 3.25% of coverage limits purchased, plus underwriting fee, excess brokerage fee (if applicable) and applicable taxes

Market Capacity

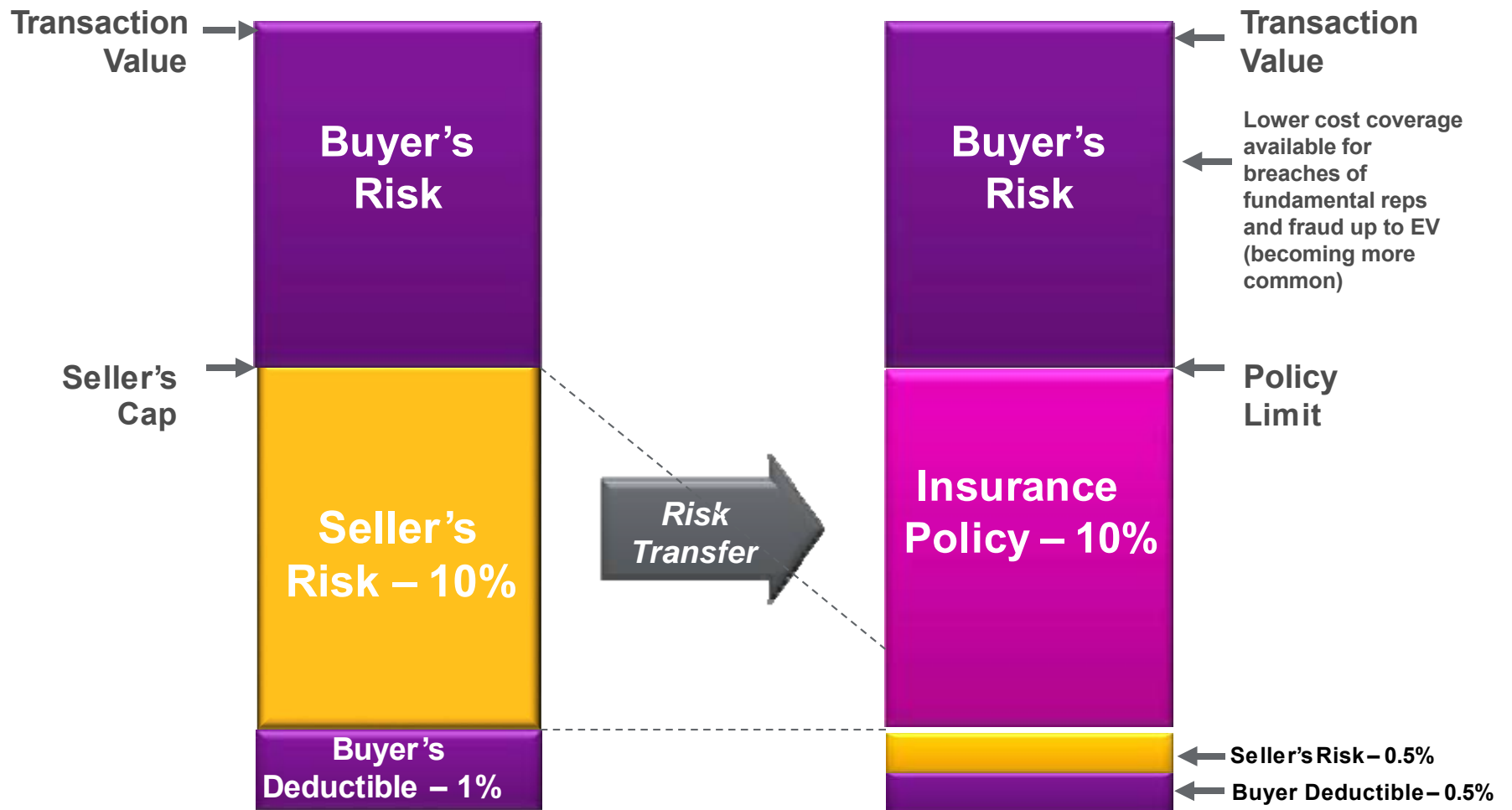
- Over 20 U.S. underwriting markets including carriers and managing general underwriters that underwrite on behalf of one or more insurers
- In excess of ~\$1 billion in coverage limits available for a single deal
- Global market

Parties

- Deal parties (buyer, seller, respective counsel)
- Underwriters
- Insurance brokers (sophisticated brokers and underwriters now staffed by many former M&A and/or insurance attorneys)
- Underwriting counsel

R&W INSURANCE

R&W Insurance Replaces Seller's Risk



Mergers & Acquisitions Transactional Insurance

Reasons for Growing Use of R&W Insurance

R&W insurance is a *deal facilitator*

In traditional (non-insurance) deals, improving terms for buyer or seller comes at a cost to the other party

By transferring risk from the seller to an insurer, R&W insurance potentially *improves terms for both parties* and *simplifies negotiation* over reps, warranties and indemnities subject to certain exceptions

Buyer Advantages

- Broader reps and warranties (within reason)
- Certain improved indemnification terms (e.g., longer coverage, broad loss definition and, subject to negotiated exclusions, fewer limitations)
- Longer indemnity period (extends survival)
- May distinguish bid in auction or other competitive process
- Avoids post-closing adversarial proceedings/litigation with sellers (including management sellers)
- Reputational considerations for insurers should result in an easier claims process
- Provides security where there is concern over the ability to collect indemnification (including distressed seller context)

Seller Advantages

- Much lower post-closing indemnification exposure
 - Generally 0.5% to 1% of EV cap for non-fundamental reps
 - No seller indemnity (public style) deals more common
- Avoid funds trapped in escrow at interest rate well below seller's hurdle rate
- Capability to build insurance into seller offering to achieve cleaner exit (pre-position lower escrows and indemnity caps)
- Provides option for reimbursement for indemnification obligation (seller-side coverage)

Mergers & Acquisitions Transactional Insurance

Current Market for R&W Insurance

Marketplace:

- New entrants in the market driving competition
- Over 20 primary underwriters in market as of Q1 2018
- Excess markets as needed
- Total Capacity: in excess of ~\$1 billion in coverage limits available, per transaction

Recent Activity:

- Estimated that approximately 2,000 R&W insurance policies placed in North America in 2017
- Continued growth in 2018

Insurer	
AIG	Euclid
Ambridge	Everest
Allied World	Great American
Beazley	Hartford
Berkley	Tokio Marine/HCC
Berkshire Specialty	Ironshore
BlueChip Underwriting	QBE
CFC Underwriting	RLI
Chubb	VALE
Concord	XL Catlin
Ethos	

CURRENT MARKET TRENDS

- Self-Insured Retention
 - Significant number of deals with no seller indemnity (over 1/3 of insured deals in 2018)
 - Thresholds: pushing lower than prior years
 - Smaller/larger EV deals more feasible (minimum premiums and retentions have reduced making more feasible on less than \$50 million deals, and retentions on larger EV deals have decreased making more feasible)
- Premium / Rate on Line / Cost
 - Recent decline in pricing due to increased competition in the market
 - Brokerage commission/fees and surplus lines tax
- Coverage Terms
 - Option to purchase excess coverage for fundamentals and fraud up to EV
 - Policy terms are better aligned with acquisition agreements and underlying indemnification provisions
 - Potential exclusions/heightened risks, including NOLs/tax attributes, transfer pricing, wage/hour, jurisdictional issues (including with respect to FCPA matters)

CURRENT MARKET TRENDS

Trends:

- Buyers/Insureds:
 - Significant increase in use by corporate/strategic acquirers (estimated 40% of market)
 - Continued increase in use by PE buyers (especially in lower middle market)
- Timing/Execution
- Interim period coverage
- Scope of Written Diligence (especially strategic acquisitions)
- Treatment of Rollover Shareholders
- Minority Investments
- Public Deals

Current Market Trends

Strategic/Corporate Buyers

- Roles of risk manager, internal counsel, external counsel, corporate development / deal team, broker and underwriter
- Due diligence – internal diligence more prevalent.
 - Critical to ascertain what reports/documentation will be available for the insurer to review
 - Discuss scope of diligence with broker prior to selecting an insurer
- Existing relationships with insurers important to consider in the selection process
- Importance of effectively managing process and anticipating key process issues – involvement of key parties in dialogue is critical

Current Market Trends

Healthcare Transactions

Current Market

Market has expanded – over 10 insurers with capabilities to underwrite R&W insurance on healthcare transactions with coverage for healthcare legal and regulatory compliance, including government billing and coding risks

Diligence Considerations

Important to address scope of due diligence exercise pre-underwriting to ensure that scope of diligence, including on healthcare regulatory and billing matters, is sufficient to meet the insurer's underwriting requirements. Reputation of diligence providers and scope of diligence are critical to obtain full coverage

Timing Issues

Underwriting process can take longer than on other R&W placements, and key to make sure buyer and insurer are aligned on timing

Other Considerations

Minimum retentions can be higher on healthcare sector transactions and differ on a deal specific basis

Current Market Trends

Real Estate Transactions

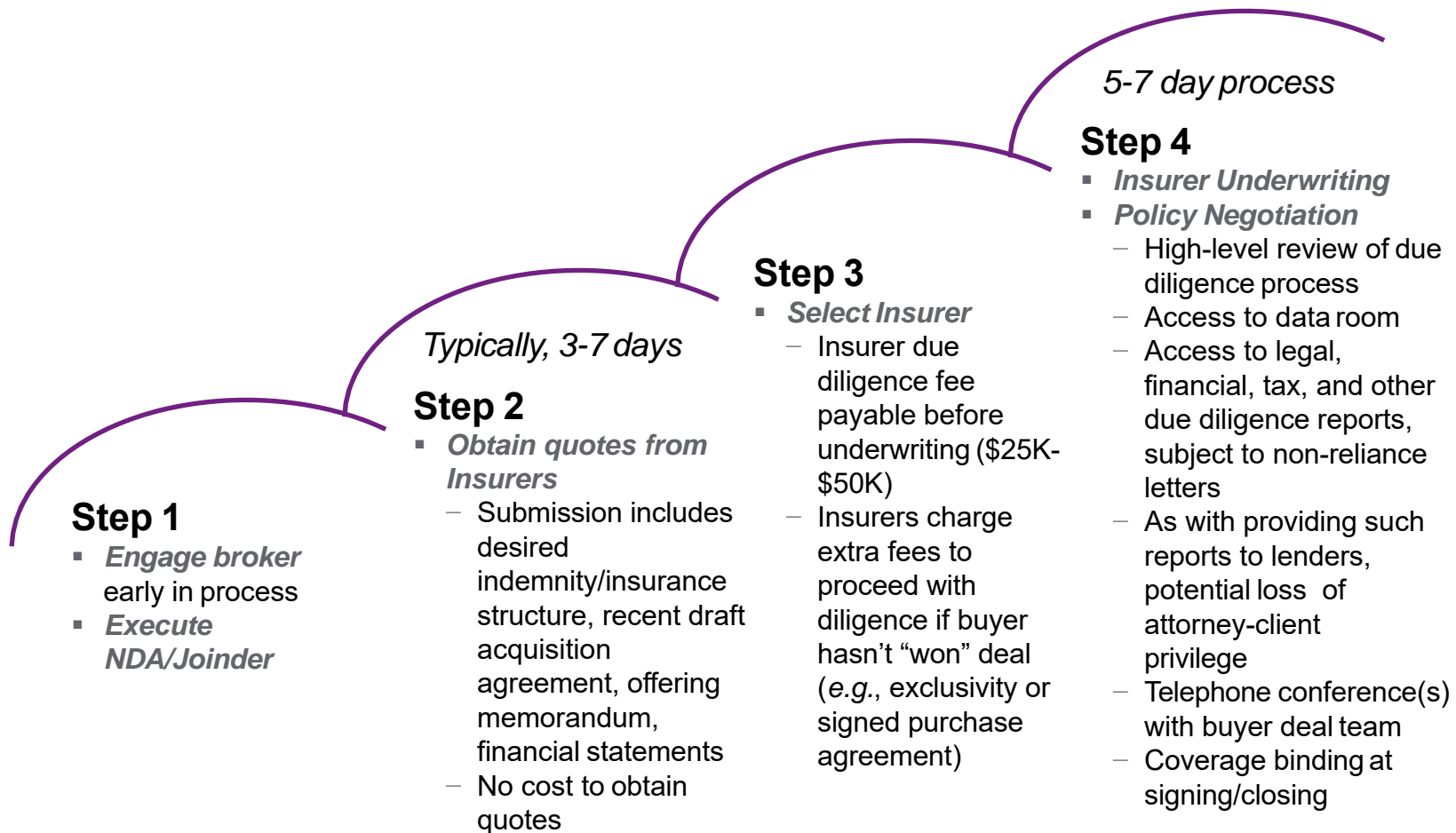
- RE transactions are different for a variety of reasons
 - Buyer's ability to do physical diligence
 - Inherent risk spreading in some cases related to multiple properties
 - Title, environmental PLL and CC, GL, and property insurance already exist
 - Centralized recordkeeping due to land records, tax records
 - Statute of frauds applies
 - There is a lower frequency of indemnity claims
- RWI should be considered for:
 - Real estate heavy stock purchases (as opposed to pure RE deals)
 - REIT transactions (REIT status)
 - Real estate heavy deals with an operations aspect to the business
 - E.g., Parking garage chains, hotels, stores, data storage sites, senior living centers, etc.

Current Market Trends

Real Estate Transactions

- R&W insurance can cover indemnity claims relating to:
 - Ownership/fundamental rep problems
 - Tax issues (particularly in the REIT space)
 - Permitting issues
 - ADA compliance
 - Environmental
- R&W insurance can ride in excess of underlying coverage
- Client can allocate significant deal value to opco, and separate RE into simultaneous uninsured deal
- RE deals often involve single purpose entities that themselves are owned by other entities that may distribute 100% of the proceeds; in these situations, R&W insurance can address post-closing indemnification issues

R&W Insurance – Typical Timeframe (7-15 days)



UNDERWRITING PROCESS AND DILIGENCE



Initial Steps

- Discussions between broker and insurer
- Engage UW counsel
- Draft policy documents



Review of Diligence

- Third party reports (tax, legal, financial, environmental, etc.)
- Internal memos or checklists
- Internal presentations
- Diligence tracker
- Preparation of agenda



Communication

- UW Call (about 2 hours)
- Follow-ups (outstanding items from UW call)
- Policy discussion/negotiation

Mergers & Acquisitions Transactional Insurance

Underwriting Considerations

- **Identity of the buyer, seller and their advisors**
- **Sector of target business and location**
- **Quality of the transaction process**
- **Quality of due diligence/disclosures**
- **Value of transaction**
- **Amount of policy retention (policy deductible)**
- **Scope of the insured representations/warranties**
- **Seller's liability under the SPA**

R&W POLICY STRUCTURE

Buyer Policy

First party indemnity policy structure – covers loss resulting from breaches discovered during the policy term

- Substantially more common than seller policies
- Can extend survival periods beyond acquisition agreement (can be tailored to meet needs of parties)
- Can increase indemnification above seller cap
- Seller fraud covered
- Subrogation against sellers generally limited to fraud

Seller Policy

Liability policy structure – covers claims made against the sellers alleging breach of representations and warranties

- Generally follows caps and survival periods in acquisition agreements (to a typical maximum of six years)
- Fraud / dishonesty exclusion – Sellers cannot insure against their own fraud
- Can be structured to protect passive investors in some situations even if management acted fraudulently

IMPORTANT POLICY PROVISIONS FOR COMMENT BY BUYER'S AND SELLER'S COUNSEL

Actual Knowledge	Should be limited to actual knowledge or personal awareness by specified internal deal team members. Not to include constructive or imputed knowledge. Burden on insurer to prove actual knowledge.
Definition of Losses/Damages	Seek consistency with purchase agreement. Note insurers typically will agree to silence as to consequential and multiple type damages assuming purchase agreement is silent.
Subrogation	<p>Most significant point for seller's counsel. Limit to fraud as to sellers. Tie to fraud definition in purchase agreement if feasible.</p> <p>Buyer's counsel: Seek to limit subrogation against the insureds and against the company and directors and officers of both of the foregoing. Thresholds regarding subrogation against customers and suppliers.</p>
Defense and Settlement of Claims	Important points include notice provisions, consent to settlements (include thresholds to resolve claims under the retention), provisions relative to sharing of information and involvement of the insurer in third-party claims (insured should control, subject to certain consent rights), preservation of privileged information, and duties of cooperation and mitigation.
Materiality Scrape	Insurers typically will apply a materiality scrape if one exists in the purchase agreement

EXCLUSIONS – HOW TO EFFECTIVELY NEGOTIATE TO REMOVE OR NARROW EXCLUSIONS

Standard Exclusions

Standard exclusions on all R&W policies: asbestos and PCB's, pension underfunding, purchase price adjustments, covenants and known breaches

Exclusions proposed at the non-binding quote stage

Insurers may propose exclusions at the non-binding quote stage based on review of the purchase agreement and target information. Examples include transfer pricing, FLSA / wage & hour, product liability/warranty/recall, data privacy/security, environmental matters, FCPA, NOLs and deferred tax assets, and foreign exposures; important to provide as much information as possible to insurers in effort to minimize exclusions at this stage

Exclusions during the underwriting process

Exclusions can result from either (i) concerns over the scope of diligence or (ii) from due diligence findings. Important to have dialogue with insurer pre-underwriting process on scope of due diligence being conducted and information/reports available to share. Exclusions may also result from findings in reports or information provided on the underwriting call. Insurers not looking to cover known issues. Known issues versus known risk areas often topic of negotiation.

Proposed exclusions may be narrowed or removed by providing additional information on the issue. Important to understand rationale for proposed exclusions to effectively negotiate removal or narrowing.

Not ideal, but another option is to provide additional information between signing and closing, or after closing to remove exclusions.



Negotiation of an Insured Deal

Panelists:

David I. Albin
Finn Dixon & Herling LLP
Stamford, Connecticut

John H. Lawrence Jr.
Shipman & Goodwin LLP
Hartford, Connecticut

3.7 Absence of Undisclosed Liabilities

Except as set forth in Section 3.7(b) of the Company Disclosure Letter, no Seller Company has any liability or obligation (absolute, accrued, contingent, or otherwise), except such liabilities or obligations (i) set forth or described on any other section of the Company Disclosure Letter, (ii) as are reserved against or reflected in the Most Recent Company Balance Sheet or of a nature not otherwise required pursuant to GAAP to be reserved against or reflected therein, and/or (iii) as have been incurred in the Ordinary Course of Business since the date of such balance sheet.

3.6 Intellectual Property

- (c) Except as set forth on Section 3.6(c) of the Company Disclosure Letter:
 - (i) no Seller Company has received written notice of any infringement or other violation of its right in any of the Company Intellectual Property and, to the Company's Knowledge, no claim against a third party with respect to the alleged infringement or misappropriation of the Company Intellectual Property is currently pending or threatened,
 - (i) there is no claim pending or, to the Company's Knowledge, threatened, against any Seller Company with respect to the alleged infringement, misappropriation, or violation by any Seller Company or any Company Intellectual Property of any Intellectual Property rights of any third party,
 - (i) no litigation is pending wherein any Seller Company or any Company Intellectual Property is alleged to infringe, misappropriate, or violate any Intellectual Property right of any third party, and
 - (i) **to the Company's Knowledge**, the conduct of the business of the Company by the Seller Companies does not violate, interfere with, infringe upon or misappropriate any Intellectual Property rights of any third Person.

3.24 Disclosure

(a) No representation or warranty of Sellers in this Agreement and no statement in the Disclosure Letter omits to state a material fact necessary to make the statements herein or therein, in light of the circumstances in which they were made, not misleading.

(b) No notice given pursuant to Section 5.5 will contain any untrue statement or omit to state a material fact necessary to make the statements therein or in this Agreement, in light of the circumstances in which they were made, not misleading.

5.7 Independent Investigation. In making the decision to enter into this Agreement and to consummate the transactions contemplated hereby, other than reliance on the representations, warranties, covenants and obligations of the Company and the Seller set forth in this Agreement, Purchaser has relied solely on its own independent investigation, analysis and evaluation of the Company Units (including Purchaser's own estimate and appraisal of the value of the Business, financial condition, assets, operations and prospects of the Seller Companies). Purchaser confirms to the Seller that Purchaser is sophisticated and knowledgeable in both the industry and the Business of the Seller Companies and is capable of evaluating the matters set forth above. For the avoidance of doubt, Purchaser acknowledges and agrees that the Seller shall have no liability under this Agreement with respect to any information concerning the Seller Companies not expressly represented and warranted to in this Agreement, including, but only to the extent not also expressly represented and warranted to in this Agreement (including the Company Disclosure Letter), (a) any information set forth in any Confidential Information Memorandum distributed by [IB] with respect to the Seller Companies, (b) any information regarding the Seller Companies provided at any management presentation related to the transactions contemplated by this Agreement, (c) any information communicated by or made available through the data room process, or (d) any financial projection or forecast relating to any of the Seller Companies; provided, that the foregoing acknowledgment and agreement shall not limit, in any way, the representations or warranties made by the Company hereunder or the rights of the Purchaser Indemnified Parties with respect to breaches thereof or inaccuracies therein.

ARTICLE 10

SURVIVAL AND INDEMNIFICATION

10.1 Survival. The representations and warranties, and covenants or obligations, contained in this Agreement shall survive the Closing as follows:

(a) Representations and Warranties. The representations and warranties of the parties contained in this Agreement shall survive the Closing for the Escrow Period, and shall terminate and be of no further force or effect upon the expiration of the Escrow Period.

(b) Claims Cut-Off Date. No claim for indemnification may be made, and no Indemnifying Person shall have any liability with respect to, any claim for indemnification first asserted or delivered after the earlier of (i) the expiration of the applicable survival period and (ii) termination of the representations and warranties or covenants or obligations (in each case, as set forth in subsections (a) and (b), above) on the breach or failure of which such claim is based (the “Claims Cut-Off Date”); provided that if an Indemnified Person delivers written notice to an Indemnifying Person of an indemnification claim (stating in reasonable detail the nature of, and factual and legal basis for, any such claim for indemnification) on or before the close of business on the Claims Cut-Off Date, any such claim, and the representations and warranties, or covenants or obligations, as applicable, on which such claim is based, shall survive (solely for purposes of such claim) until such claim is resolved or judicially determined.

Note to draft: Seller has prepared this Article 10 with the expectation that Purchaser will obtain a representation and warranty insurance policy to cover any exposure in excess of the escrow. Seller is willing to add any appropriate additional clauses to this Article 10 to integrate with any such policy.

10.2 Indemnification by Seller.

(a) Subject to Section 10.4, from and after the Closing, the Seller agrees to indemnify Purchaser, its Affiliates, their successors and assigns, and any of their respective agents, employees, representatives, officers and directors (the “Purchaser Indemnified Parties”), against, and hold Purchaser Indemnified Parties harmless from, any and all Losses suffered by any Purchaser Indemnified Party to the extent arising out of any breach of or any inaccuracy in any representation or warranty made by the Company in Article 3 of this Agreement. **The Purchaser’s recovery under this Section 10.2(a) shall be limited to the Escrow Account, as set forth in Section 10.4(b).**

10.3 Limitations on Liability of Seller. Notwithstanding any other provision of this Agreement:

- (a) De Minimis Threshold. The Seller shall not have any liability for any Loss or Losses in connection with any given claim (or one or more substantially related claims) for indemnification hereunder unless and until the aggregate amount of Losses incurred with respect to such claim (or one or more substantially related claims) is equal to or greater than \$50,000 (the “De Minimis Threshold”).
- (b) Indemnifiable Losses Basket. The Purchaser Indemnified Parties shall have the right to payment by the Seller under Section 10.2 only if, and only to the extent that, Purchaser Indemnified Parties shall have incurred or suffered, as to all matters giving rise to indemnification under Section 10.2, aggregate indemnifiable Losses in excess of a deductible amount equal to \$[●] (the “Indemnifiable Losses Basket”) at which time the Purchaser Indemnified Parties shall be entitled to indemnification with respect to all such Losses in excess of the amount of the Indemnifiable Losses Basket, which shall be a deductible.
- (c) General Cap; Escrow Sole Source of Recovery. (i) The aggregate liability of the Seller for indemnifiable Losses under Sections 10.2(a) and 10.2(b)(i) **NTD – sections for indemnification for representations** shall not exceed the Escrow Amount, (ii) the Seller shall not have any liability for indemnifiable Losses under Sections 10.2(a) and 10.2(b)(i) in excess of the Escrow Amount, and (iii) the monies paid into the Escrow Account at the Closing as the Escrow Amount shall be the Purchaser Indemnified Parties’ sole and exclusive source of recovery with respect to any amounts required to be paid by the Seller under Sections 10.2(a) and 10.2(b)(i).

Note to draft: Insert amount equal to 0.5% of the Gross Purchase Price.

(d) Exclusive Remedy. The sole and exclusive liability and responsibility of the Seller to Purchaser Indemnified Parties under or in connection with this Agreement, the Transaction Documents delivered by Seller at Closing or the transactions contemplated hereby or thereby (including for any breach of or inaccuracy in any representation or warranty or for any breach of any covenant or obligation or for any other reason), and the sole and exclusive remedy of Purchaser Indemnified Parties with respect to any of the foregoing, shall be as set forth in this Article 10, except in the case of Seller's liability for **actual fraud** by the Seller **with the intent to deceive**. Notwithstanding the foregoing, nothing in this Article 10 shall prevent or restrict the right of any party to obtain injunctive relief or specific performance from a court of competent jurisdiction. To the extent that Purchaser Indemnified Parties or any Seller Company have any Losses for which they may assert **any other right to indemnification, contribution or recovery** from the Seller (whether under this Agreement, any of the Transaction Documents delivered by the Seller at Closing or under any common law or any statute, including any Environmental Law, or otherwise), Purchaser hereby (i) waives, releases and agrees not to assert such right, and (ii) agrees to cause each of the Purchaser Indemnified Parties and the Seller Companies to waive, release and agree not to assert such right.

Section 7.2 Right of Parent and Surviving Corporation to be Indemnified out of Retained Merger Consideration. The Parent, the Surviving Corporation and their respective assigns are entitled to be indemnified, defended and held harmless, out of the Escrow Fund at any time, from and against any Adverse Consequences suffered, sustained, incurred or required to be paid by the Parent, the Surviving Corporation or their respective assigns, as the case may be, based upon, arising out of or otherwise with respect to a breach or inaccuracy of any representation or warranty of the Company (or any occurrence or event which would have caused such a breach or inaccuracy but for the inclusion of any language qualifying such representation or warranty by references to materiality and knowledge) for which a claim was asserted prior to the expiration of the applicable survival period, and/or....

10.5 Net Losses; Subrogation; Mitigation.

(a) Notwithstanding anything contained herein to the contrary, the amount of any Losses incurred or suffered by an Indemnified Person shall be calculated after giving effect to (i) any insurance proceeds received by the Indemnified Person (or any of its Affiliates) with respect to such Losses, (ii) any Tax Advantage realizable by the Indemnified Person (or any of its Affiliates) arising from the facts or circumstances giving rise to such Losses, and (iii) any recoveries obtained by the Indemnified Person (or any of its Affiliates) from any other third party. Each Indemnified Person shall exercise commercially reasonable best efforts to obtain such proceeds, benefits and recoveries. If any such proceeds, benefits or recoveries net of any expenses incurred by such Indemnified Person in collecting such amount are received by an Indemnified Person (or any of its Affiliates), with respect to any Losses after an Indemnifying Person has made a payment to the Indemnified Person with respect thereto, the Indemnified Person (or such Affiliate) shall pay to the Indemnifying Person the amount of such proceeds, benefits or recoveries net of any expenses incurred by such Indemnified Person in collecting such amount (up to the amount of the Indemnifying Person's payment). With respect to any Losses incurred or suffered by an Indemnified Person, no liability shall attach to the Indemnifying Person in respect of any Losses to the extent that the same Losses have been recovered by the Indemnified Person from the Indemnifying Person, accordingly, the Indemnified Person may only recover once in respect of the same Loss.

(b) Upon making any payment to an Indemnified Person in respect of any Losses, the Indemnifying Person shall, to the extent that such payment represents payment in full of such Losses, be subrogated to all rights of the Indemnified Person (and its Affiliates) against any third party in respect of the Losses to which such payment relates. Such Indemnified Person (and its Affiliates) and Indemnifying Person shall execute upon request all instruments reasonably necessary to evidence or further perfect such subrogation rights.

(c) Nothing in this Agreement in any way restricts or limits the general obligation at Law of an Indemnified Person to mitigate any loss which it may suffer or incur by reason of the breach by an Indemnifying Person of any representation, warranty, covenant or obligation of the Indemnifying Person under this Agreement, including by asserting claims against a third party or by otherwise qualifying for a benefit that would reduce or eliminate an indemnified matter.

(d) To the extent that any breach of any representation or warranty contained in this Agreement or any other provision of this Agreement is capable of remedy, the Indemnified Person shall afford the Indemnifying Person a reasonable opportunity to remedy the matter complained of.

10.7 Notice of Third Party Claims; Assumption of Defense. The Indemnified Person shall give notice as promptly as is reasonably practicable, but in any event no later than fifteen (15) Business Days after receiving notice thereof, to the Indemnifying Person of the assertion of any claim, or the commencement of any suit, action or proceeding, by any Person not a party hereto in respect of which indemnity may be sought under this Agreement (which notice shall, to the extent such information is reasonably available, specify in reasonable detail the nature and amount of such claim together with such information as may be necessary for the Indemnifying Person to determine that the limitations in Section 10.4 have been satisfied or do not apply); provided, however, that the failure to so give such notice shall prevent an Indemnified Person from claiming indemnification with respect to such claim only if, and only to the extent that, such failure results in the forfeiture of rights and defenses otherwise available with respect to such claim or otherwise results in actual prejudice to the Indemnifying Person. The Indemnifying Person may, at its own expense, (a) participate in the defense of any such claim, suit, action or proceeding, and (b) so long as the claim involves only money damages and does not seek an injunction or other equitable relief against the Indemnified Person, upon notice to the Indemnified Person given within fifteen (15) days of the Indemnifying Person's receipt of the notice of commencement thereof, assume the defense thereof with counsel of its own choice for so long as the Indemnifying Person conducts the defense of such claim actively, diligently and in good faith. In the event of such assumption, the Indemnifying Party shall have the exclusive right to settle or compromise any such claim, suit, action or proceeding which (A) provides for the payment out of the Escrow Account and/or by the Indemnifying Person of money as the sole relief, (B) results in the full and general release of the Indemnified Person from all liabilities arising or related to or in connection with the claim and (C) involves no finding or admission of any violation of Law or the rights of any Person and has no effect on any other claims that may be made against the Indemnified Person at any time during the course of any such claim, suit action or proceeding. If the Indemnifying Person assumes such defense, the Indemnified Person shall have the right (but not the duty) to participate in the defense thereof and to employ counsel, at its own expense, separate from the counsel employed by the Indemnifying Person. Whether or not the Indemnifying Person chooses to defend or prosecute any such claim, suit, action or proceeding, all of the parties hereto shall cooperate in the defense or prosecution thereof.

In the event of any payment for **Loss** under this **Policy**, the **Insurer** shall be subrogated to the extent of such payment to, and the Insured shall assign to the **Insurer**, all of Insured's rights of recovery with respect to such payment against any person or entity (other than against the **Named Insured** and the **Acquired Company**); provided, however, that the **Insurer** shall not pursue and hereby unconditionally waives any subrogation rights against the Seller unless the **Loss** is caused by any fraud by any Seller, or against (i) the acquired business, (ii) any of the **Acquired Companies**, (iii) any **Insured**, (iv) any direct or indirect director, or officer, employee or agent (or the functional equivalent of any such position) of any of the foregoing, whether current, past or future, (v) any direct or indirect shareholder, member, or partner (or the functional equivalent of such position) of any of the foregoing, whether current, past or future, or (vi) **[Buyer's Counsel]**, except, in the case of clauses (iii), (iv) and (v) only, if and to the extent that such individual or entity was associated with the acquired business or any of the **Acquired Companies** prior to the Closing.

RWI Claims

- right to defend (as opposed to duty to defend – choice of counsel)
- eroding limits (as with most claims-made policies, such as D&O)
- Common claims by type
 - Financial (mis)statements
 - tax
 - Compliance with laws
 - material contracts
 - employee related
 - intellectual property
 - operations related
 - litigation
 - fundamentals
 - environmental

Questions?