

What is Representations and Warranties Insurance?

by Kirk Sanderson, Equity Risk Partners

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Objective

Representations and warranties insurance (also referred to as reps and warranties insurance, RWI, R&W Insurance, warranty and indemnity insurance, or WI insurance) is designed specifically to cover losses resulting from unknown breaches for all of a seller's representations and warranties in a private acquisition agreement. Although R&W insurance can be used in a variety of scenarios, it is used primarily to achieve one of three main objectives:

1. To supplement a buyer's existing indemnification limits (i.e., indemnity cap, survival periods, etc.)
2. To provide coverage to a buyer in lieu of traditional indemnification limits, essentially replacing a buyer's remedy for breaches related to representations and warranties under the purchase agreement
3. As a means of backstopping a seller's existing escrow/indemnification obligation to the buyer

Scope of Coverage

R&W insurance is generally meant to cover breaches of all general and fundamental representations and warranties within a purchase agreement (e.g., misstated financials, unknown third-party claims over intellectual property, failure to obtain environmental permits, etc.), which are *unknown* to the buyer's deal team at the time of execution of the agreement. Additionally, pre-closing tax indemnities are generally covered, but only to the extent the seller's financials are incorrectly calculated in regard to such taxes, not for failure to collect from seller. Finally, and most importantly, a typical buy-side policy *does* provide the Buyer with the benefit of coverage for seller fraud.

Exclusions

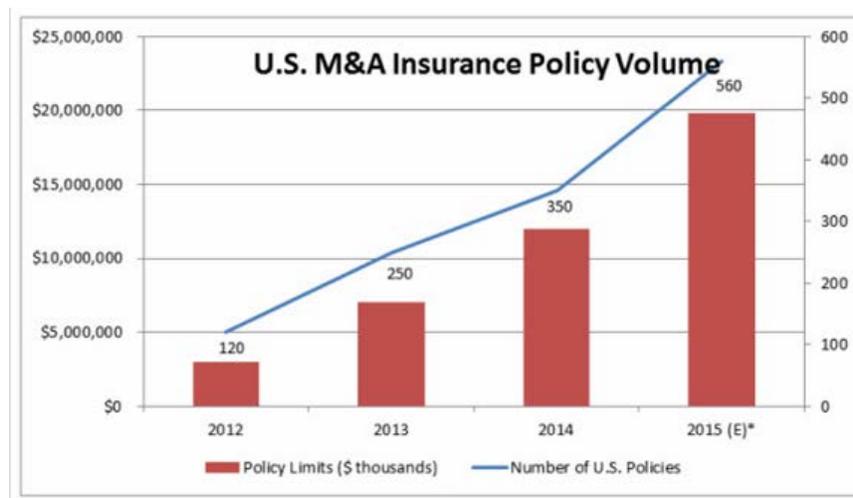
A handful of items are uniformly excluded under a typical U.S. R&W insurance policy. These common exclusions include the following:

- Breaches of which a member of the deal team had actual knowledge before the inception of the policy
- Any items listed on the seller's disclosure schedules
- Purchase price, working capital, or other similar post-closing adjustments (assuming none were a direct result of a breach)
- Breaches relating to covenants or post-closing statements
- Unfunded or underfunded benefit plans
- Asbestos or PCBs, although environmental coverage is otherwise generally available from most insurers

In addition to the above-mentioned exclusions, a standard limitation under a typical R&W insurance policy, which is worth noting, is the concept of the retention. A retention is essentially a deductible (usually borne between both the buyer and seller) whereby the insurer does not pay losses until the retention has been met, and then only up to the purchased limit. How a retention is to be split between a buyer and seller can vary greatly, but generally most insurers want to make sure that both sides have some degree of “skin-in-the-game” through some form of buyer basket and seller indemnity cap, or similar mechanics. See [Selecting the Right R&W Insurance Policy](#).

Market Trends

R&W insurance solutions have been available for more than 10 years. However, within the last five years their use in the United States has increased exponentially. In 2014, an estimated \$12 billion of insurance capital was issued in the US R&W insurance market, nearly double that of 2013 and four times that of 2012; and that number is on pace to break \$20 billion per year by the end of 2015. Many leading M&A professionals have now had years of experience with these solutions and are confident that this upward trend is likely to continue beyond 2015, with R&W insurance becoming a common tool for providing indemnity protection for buyers alongside the more traditional remedies found under standard private transaction agreements.



* Early indications through Q2 of 2015 estimate growth of 65% and 60%.

Several factors are contributing to the accelerated growth of the R&W insurance market in the United States. First, over the past five years, greater efficiency in the underwriting process has dramatically reduced the amount of time necessary for obtaining a policy – now approximately seven days. Second, in this same five-year period, the cost of R&W insurance in the United States has dropped by more than 50%, with today’s rates at just 2% to 4% of the total policy limit. Third, M&A professionals have more familiarity and confidence with R&W insurance. Most legal and financial M&A professionals have used R&W insurance solutions over the past 18 months and are now routinely using forms of R&W policies that they have previously negotiated with certain insurers. Moreover, the current insurance market driving these solutions is staffed in large part by former M&A lawyers, who understand and are conditioned to work in M&A deal timeframes, which has well-positioned the R&W insurance market for continued growth.

Strategic Uses of Representations and Warranties Insurance Policies

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As the use of representations and warranties solutions has become more prevalent, so too have the ways in which M&A professionals use these tools. Generally, an R&W policy should help both buyer and seller expedite a transaction by softening laborious negotiations of reps and warranties and corresponding indemnification terms. This, in many cases, can streamline negotiations and effectively lead to the consummation of transactions a buyer and seller may not otherwise come to terms on.

Buy-Side Strategy

Prior to 2013, a buyer primarily used R&W insurance to extend or supplement inadequate indemnities offered by the seller. For instance, a buyer unable to obtain an adequate indemnity from a seller without extensive and time-consuming negotiation would purchase an R&W policy to bolster the insufficient seller indemnification provided under the purchase agreement. In other cases, a buyer receiving a satisfactory seller indemnity would still seek protection when a seller's future financial reliability to make payments on indemnification claims may be in question.

More recently, buyers have used representations and warranties insurance more strategically. Specifically, a buyer in an auction can offer a more competitive indemnity package by offering minimal (or zero) indemnification obligations to the seller post-closing while still obtaining indemnity protection by purchasing a buy-side R&W policy. In today's market, with estimates of R&W insurance being used in 20% to 25% of US private transactions, buyers are likely to be at a competitive disadvantage if they do not consider R&W insurance when structuring a bid in an auction scenario.

The availability of these policies also strengthens a buyer's bargaining position by providing an avenue to reduce a seller's escrow requirement for an indemnity in exchange for a lower purchase price or other concessions under the purchase agreement without significantly shifting the risk allocation to the buyer. Due to the existence of R&W policies, if seller has roll-over equity or will remain with the company's management post-closing, a buyer may now pursue recourse for breaches of R&W against a third-party insurer, far more favorable than making claims against such management.

Sell-Side Strategy

For sellers the most significant benefits of using an R&W insurance policy are the reduction or elimination of indemnities, escrows and corresponding tail liabilities (claw-backs) associated with post-closing breaches of representations and warranties. These benefits mean sellers can be more certain about the scope of their post-closing liability and allow for the immediate distribution of the purchase price among the sellers upon closing. Cutting off indemnity liabilities or escrows on the closing date is particularly important when a sale involves a private equity or venture capital firm looking to close out an end-of-life fund and make final distributions to its limited partners and/or other investors.

R&W insurance may also be used to protect a seller that is a passive or minority investor in the target company that was not in direct control of the business but is otherwise bound, under joint and several liability, to indemnify a buyer under the purchase agreement for breaches of representations by the company or other sellers.

Distressed asset sellers have also used an R&W insurance solution to effectively “box-in” contingent liabilities, and thereby taking troublesome deal items off the table pre-auction, by attaching a policy to their proposed deal terms to prospective buyers. The provision of a robust set of indemnities using an R&W policy to backstop or cover potential losses can increase the appeal of a transaction involving distressed assets to a greater number of participants and improve competitiveness in a bid process.

Selecting the Right Representations and Warranties Insurance Policy

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Coverage

Representations and warranties insurance policies are heavily negotiated to match the terms and definitions, and work hand-in-hand with the indemnity provisions, of the relevant transaction agreement. However, most policies have a set of general coverage aspects that are worth highlighting.

Transaction Size and Policy Limits

Most transactions using R&W insurance are within the range of \$50 million to \$1 billion of enterprise value, which typically will result in a policy limit of \$5 million to \$100 million, or 10% of the enterprise value (2013 ABA Private Target M&A Deal Points Study). This limit is the dollar value of insurance coverage (akin to the indemnity cap) that a buyer would otherwise receive from a seller under a traditional acquisition agreement.

Deductible/Retention

A deductible, for purposes of the R&W insurance policy, is defined as a “retention.” A retention functions similarly to a non-tipping basket or standard insurance deductible such that a specific amount of losses must be incurred before the insurer’s obligations to pay claims under the policy is triggered. However, under an R&W policy, the retention is most often shared between the buyer and the seller. Insurers use the retention to ensure that the insured has money at risk prior to being able to recover on claims made against the policy. For a \$100 million transaction, the retention might range from \$1 million to \$2 million, or 1% to 2% of the enterprise value. Most R&W insurance purchasers in today’s market will seek the lowest deductible/retention possible under an R&W policy as this effectively reduces the amount for which the buyer and seller would otherwise have to allocate. For purposes of the policy, this is often achieved with a non-tipping buyer basket and a traditional seller indemnity cap (typically satisfied with an indemnity escrow equal to the cap) under the purchase agreement that collectively make up the retention under the R&W policy. The concept is that once the buyer is no longer provided recourse against the seller for losses beyond the indemnity cap, the buyer recovers from the insurance company for losses above the indemnity cap and retention, within the policy limit. To illustrate, the buyer basket and seller indemnity cap (collectively the policy retention) and policy limit should all go “back-to-back” and provide for similar coverage up to the intended amount of indemnification for losses related to breaches of representations and warranties previously contemplated under the transaction agreement. See R&W Common Buyer Structure table provided under [Role of the Insurance Broker](#).

Note that depending on the perceived transaction risk, insurers may be willing to provide a zero-seller-indemnity policy, but this option generally increases pricing and may have other negative impacts on the extent of the terms of coverage under the policy.

Survival

The survival period under a buy-side R&W policy generally extends beyond the typical 12 to 18 months survival under a private transaction agreement, with three years survival for general representations and warranties, and six years (or until the applicable statute of limitations) for fundamental representations and warranties and indemnification for pre-closing tax matters. As the survival period under a buyer policy typically extends beyond the survival period under the transaction agreement, a buyer should be able to obtain a drop-down, or reduction, in the policy retention amount once the survival period under the transaction agreement has terminated. Sell-side policies will typically track the survival period and indemnification limitations set in the transaction agreement.

Pricing and Insurance Markets

Prices can fluctuate depending on a particular insurer's appetite for the specific risk and the insurer's program priorities at that time but, generally speaking, pricing is fairly flat with rates at 2% to 4% of the policy limit. For example, a \$100 million transaction requiring (or replacing) a \$10 million indemnification, or 10% of the enterprise value (2013 ABA Private Target M&A Deal Points Study), may lead to a policy premium of \$300,000, or 3% of the \$10 million limit. All other things held equal, policy rates tend to decrease as the size of the policy limit increases, and vice versa. This indicates an overall average cost of an R&W insurance policy at just 0.20% to 0.40% (20-40 bps) of the enterprise value of a US private M&A transaction.

The US R&W insurance market had six core insurers by the end of 2014, with each insurer averaging roughly \$50 million in capacity for any single transaction. In 2015, a few new R&W insurers looking to capture their own share of this growing market have emerged. By combining these, and secondary insurers, total insurance capacity / aggregate policy limits can reach more than \$400 million for a single transaction. In 2014, the six core insurers collectively placed more than 95% of the US R&W insurance limits, an estimated 350 R&W policies (see US M&A Insurance Policy Volume table under [Market Trends](#)), while being staffed with less than 25 underwriting professionals combined, leaving their skill, expertise and, most importantly, time in high demand.

Understanding the Differences in R&W Policies

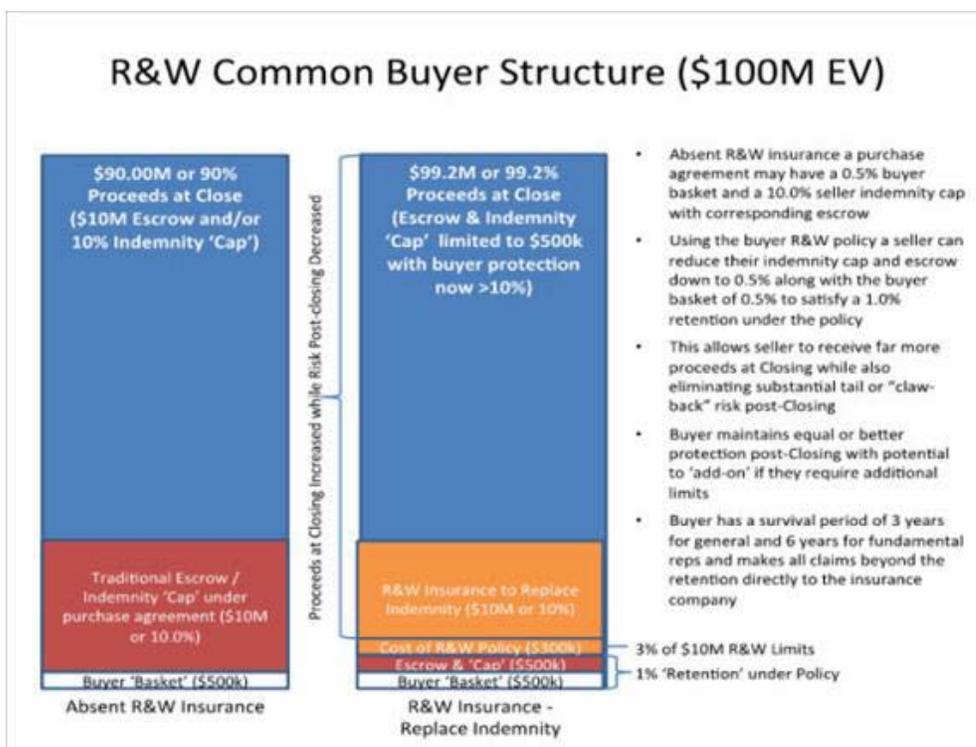
Regardless of whether a buyer or seller policy is being used, a few points are worth noting. First, all R&W policies are heavily negotiated to match and extend the language and terms of each specific transaction; in other words, there is no "one size fits all" R&W insurance policy. Second, R&W insurance is no longer a late-stage product solution. In fact, it is becoming more common in today's M&A market for a seller to structure an auction with its initial draft of a purchase agreement to prospective buyers that includes language that provides for R&W insurance as a replacement for the seller's traditional indemnification to the buyer (See sample provision [Representations and Warranties Insurance](#)). Lastly, although a seller may initially introduce, and in many cases even pay for a policy, a buyer policy is most often the preferred structure since this effectively provides the seller with a cleaner exit and the buyer with enhanced coverage, including coverage for seller fraud and an extended survival period.

Buyer Policy (Coverage and Terms)

A buyer policy is heavily negotiated to match the terms and definitions, and work “back-to-back” with the indemnity provisions. The objective is to provide coverage beyond what the seller is willing to indemnify against. This includes survival limits (three years for general representations and six years for fundamental and tax representations), nominal coverage amounts (“limits”), and other indemnification terms not always easily negotiated (i.e., materiality scrapes, definition of damages, etc.). The buyer’s primary recourse for covered losses (after the retention has been satisfied and within the policy limit) is directly toward the insurer and not the seller. Additionally, as the buyer holds the policy, it is provided the benefit of coverage for the seller’s fraud, though insurers typically maintain subrogation rights against the seller in this instance.

Seller Policy (Coverage and Terms)

In most instances, a seller policy is most effectively used where a buyer holds the seller to traditional indemnification terms under the purchase agreement. For this reason, a seller policy is generally a backstop to the indemnification and/or escrow obligations of the seller under the agreement. Under a seller policy, the language will typically track the indemnification limits under the transaction agreement and the insurer will make the seller whole for covered losses after the buyer makes a covered claim against the seller pursuant to the indemnity provisions of the purchase agreement. As the standard seller policy excludes any breaches known by the insured’s deal team, a seller policy naturally excludes seller fraud. In some cases, a seller policy may cover a minority or passive seller where such seller can demonstrate to the insurer that knowledge of fraud would not be imputed to him, her or it as a seller. Because a seller policy inherently provides less coverage than a buyer policy, a seller policy is more often purchased when a buyer is unwilling to replace, or limit, indemnification obligations through a buyer policy. The retention under a seller policy is borne exclusively by the seller, though in most cases this retention is set far below any escrow, thereby reimbursing, or backstopping, any covered losses paid out of the escrow, above such retention.



Role of the Insurance Broker

Since 2013, the growing comfort with R&W insurance as a replacement for traditional indemnification under a purchase agreement has moved buyers to use these policies to obtain a more competitive indemnity package and has led sellers to use the policies to limit their indemnification under agreements to levels below those traditionally provided for by sellers. Regardless of whether a buyer or seller is driving the process, building the proper R&W insurance structure for a particular transaction can be complex (See [Strategic Uses of R&W Insurance Policies](#)), and the benefits derived from using an R&W policy are best achieved through engaging an experienced R&W insurance broker at the very beginning of the structuring of a purchase agreement or at the letter of intent stage.

The ultimate goal of engaging an R&W insurance professional is to build a policy that allows both buyers and sellers to effectively structure the most favorable indemnity terms under the purchase agreement that match up back-to-back as cohesively as possible with the given policy. For example, under a \$100 million transaction with a 10% indemnity cap (\$10 million) and a 0.5% buyer basket (\$500,000), a seller and buyer may agree to split the cost of a \$10 million limit insurance policy with a 0.5% buyer basket and 0.5% seller indemnity cap. The combination of the 0.5% buyer basket and the 0.5% seller indemnity cap provides for an aggregate 1.0% retention under the R&W insurance policy, with the resulting effect that the seller indemnity has now been dramatically reduced from 10% to 0.5% (along with any correlating escrow), which allows the seller to receive nearly 99.5% of proceeds at the closing (less the policy premiums). The mechanics of the indemnity and insurance structure can be dealt with under the transaction agreement in many different ways depending on the intended structure and recourse to which a buyer and seller may agree.

R&W policy terms can vary greatly depending on the R&W broker, insurer, and/or the deal team tasked with structuring the policy and enhanced terms under the policies as extended survival periods, materiality scrapes, and knowledge definitions can be requested from the insurance broker. Engaging an R&W insurance broker with extensive knowledge and understanding of this market and complementary experience advising on the structure of indemnification provisions in purchase agreements (escrows, indemnities, caps, baskets, etc.) is paramount. It is imperative that the R&W insurance broker be able to consult on the benefits of an R&W policy as well as advise transaction parties and their outside counsel on the optimal structures, definitions, market terms, and corresponding language and notes to help in structuring the right R&W policy.

For further information, see [Checklist: Selecting the Right R&W Policy](#).

Process - Advising the Client on the Delivery Process

There are six primary stages to completing the purchase of a R&W insurance policy:

1. *Pre-indication strategy.* The buyer, seller or counsel, or all collectively, reach out to an experienced R&W insurance broker to discuss parameters of the transaction and the objectives for purchasing a policy. This is often done collaboratively with the primary deal team and may take as little as one day to determine the best course of proceeding to the indication stage.
2. *Indication.* An R&W insurance broker needs each of the following materials to request indications from R&W insurers: (a) the most recent version of the transaction agreement (the first draft is satisfactory); (b) a management presentation; and (c) audited or reviewed financials of the target company. The R&W insurance broker will send these materials to the R&W insurers detailing the specific structures discussed in the pre-indication strategy stage. It will typically take three to five days to receive non-binding indications from insurers and for the R&W insurance broker to present a comparison of pricing, terms, and suggestions or recommendations.
3. *Underwriting.* Once an insurer has been selected, it is paid a nominal underwriting fee (typically between \$15,000 and \$30,000) and provided with access to the target's data-room, third-party diligence reports (i.e., tax/accounting, legal, environmental, etc.), and all updated transaction documents and schedules as they become available. Once the insurer has reviewed all documents, the insurance broker will organize a diligence call between the insurer, deal team, legal representatives, and specialists responsible for each diligence report. Insurers are typically ready for this call within one to two days of receiving all materials and access indicated above.
4. *Policy negotiation.* Within 24 hours of the diligence call, the insurer will provide the first draft of the insurance policy. If there is a previously negotiated insurance policy that is held by the client, broker, or counsel, insurers generally accept using it as the foundation of their first draft. The policy language typically tracks the language in the transaction agreement. The intended policyholder is also given a chance at this stage to respond or provide additional information to the insurer relating to any exclusions that the insurer may have deemed appropriate based upon or arising from the diligence call. Once an exclusion has been determined, it is often difficult to convince an insurer to remove it completely, although the insurer will consider narrowing the exclusion to the specific nature of the item that gave rise to the exclusion (i.e., a single sentence or qualifier within a full representation or a certain customer, state, case, etc.). Policy negotiations may take three to five days but are often compressed to meet transaction timing as needed.
5. *Binding the policy.* Since policyholders generally want or need the comfort of having a policy in place as of either the signing or closing date of the transaction, it is common to have a final policy fully negotiated in advance of one of those events. On or prior to the relevant date, the policyholder will be provided with a "binder" from the insurer that legally obligates the insurer to bind coverage at the time of signing or closing, as applicable, given any previously negotiated conditions. Once the insured and the insurer sign the binder, the policy may only be canceled if the negotiated conditions to effectiveness have not been met by the applicable deadline.
6. *Issuing the Policy.* Generally the policy is issued after it has been fully negotiated and a binder has been signed that provides coverage to the insured subject to the satisfaction of the negotiated conditions of the binder discussed above – typically 10 to 15 days after closing. These conditions generally include receiving final agreements and schedules (closing set), payment of premiums and taxes, and a copy of data-room CDs. Once these items have been delivered to the insurer in satisfactory form, the insurer will issue the final policy with an inception date as of signing or closing, or as otherwise agreed.

Checklist: Selecting the Right R&W Policy

	Without R&W Insurance Policy	With R&W Insurance Policy
Timing / Effectiveness of representations and warranties	Commonly negotiated as to when the reps and warranties must be accurate, often giving the buyer the right to walk away if the reps, which were held to be true as of signing become untrue as of closing.	Assuming there is a gap between signing and closing, most R&W insurers will provide for coverage to incept at signing, essentially allowing a buyer and seller to close over a non-MAC/MAE level breach of the signing reps.
Survival	Typical private transaction survival periods of 12-24 months for 'general' reps are negotiated between buyer and seller, with survival of fundamental reps often held to such statute of limitations.	The market R&W policy will generally provide for 3 years for general reps and 6 years (or statute of limitations) for fundamental reps (including tax, environmental and ERISA).
Knowledge	Commonly negotiated between buyer and seller as a way for Seller's to qualify their responsibility in providing reps and warranties. Common definition considerations typically range from a Buyer- friendly 'constructive' knowledge (that which should have been known upon reasonable investigation) to a more Seller friendly 'actual' knowledge.	The Knowledge concept under the R&W policy is used by the insurers to limit their risk by providing an exclusion for any 'known' breach. Actual knowledge is the standard in the R&W market and further narrowed by a limited number of Buyer deal team members that would need to have had such actual knowledge of a breach in order for such breach to be excluded under the R&W policy.
Damages	Significant negotiation is common for the type of damages that can be recovered by a Buyer through the definition of 'Loss' or Damages' with the most frequently negotiated items being consequential, multiplied and/or diminution in value as Buyer requests under the purchase agreement. In situations where a buyer and seller cannot agree upon what will be expressly provided/excluded for, the agreement can remain silent in respect to a Buyer's ability to recourse for such damages. Additional premium is required in most cases to obtain these enhanced definitions.	Most R&W insurers are willing to, at their own discretion, provide for coverage of consequential, multiplied and/or diminution in value damages by way of removing their standard exclusions for such items. In most cases the insurer will not expressly provide for such damages but is often willing to remain silent to the extent the underlying purchase agreement also remains silent to such recourse.
Materiality Scrapes for calculating loss and determining breach	Commonly negotiated as to the required accuracy of the reps and warranties at the time of bring-down with 'materiality' considered as a threshold for purposes of both calculating loss and determining whether a breach has occurred.	Most R&W insurers will provide coverage for materiality scrapes under the R&W policy, at their discretion separately or individually, for both calculating loss and determine breach. This is generally dependent upon the insurer's comfort with and perception of the Seller's disclosure practices and/or any materiality thresholds in regards to such practices.
Subrogation (R&W Policy)	The legal right that allows one party (an insurer for instance) to make a payment that is actually owed by another party (the Seller) and then collect the money from the party that owes the debt (the Seller) after the fact.	R&W policies should provide a waiver of any and all subrogation rights to the insurer in favor of the Insured or the Sellers (except in instances of fraud).

Checklist: Selecting the Right R&W Policy (Cont.)

	Without R&W Insurance Policy	With R&W Insurance Policy
Retention (R&W Policy)	N/A	The retention is the aggregate amount of loss that would need to be experienced before the R&W policy can be used as recourse for covered losses. This retention is most often split between both the Buyer basket and Seller indemnity cap and typically ranges from 1.0-2.0% of the enterprise value. Most insurers, at their discretion, will provide a drop-down to some lower amount after the survival period under the purchase agreement has expired (often to match the existing buyer basket).
Indemnity Cap	Caps are dollar limitations placed upon the Buyers indemnification rights and recourse for damages. 10% caps are frequently used for general reps but the negotiations between a Buyer and Seller to settle on the agreed to cap amount can be unnecessarily extensive.	The cap in most cases is now replaced, to the greatest extent possible, by the R&W policy. The cap under the purchase agreement is typically reduced to the lowest possible limit to match what the policy retention will allow (see baskets / deductibles). In most cases whereby an indemnity escrow exists, the escrow will also be lowered to match this minimal seller indemnity cap.
Indemnity Escrow	Indemnity Escrows are often more heavily negotiated than a cap as the Seller seeks to maximize their proceeds at closing. Indemnity escrows are used to provide the buyer with a level of certainty that funds will exist to pay breaches up to a certain limit. This limit can be up to the full indemnity cap within the agreement or some factor thereof, with 5-7% of the enterprise value being an average cited by various publications.	Whereby the R&W policy will effectively reduce the Seller indemnity cap (and provide an A-rated funding source), so too will the escrow be reduced, in most cases to match the limited indemnity cap provided for under the R&W policy structure. However, there is no rule by the insurers requiring that an indemnity escrow be present in order to obtain an R&W policy.
Baskets and Deductibles	Baskets/deductibles are frequently used by Seller's to eliminate the need to respond to what otherwise might be considered a nuisance claim. Baskets are either negotiated to be tipping (after a threshold has been met the Seller will provide recourse to the Buyer for losses under such threshold) or non-tipping (also considered a 'true deductible' whereby the Buyer actually absorbs losses under the threshold) and on average may range from 0.50% - 1.00% of the enterprise value.	Whereby a non-tipping ('true deductible') basket is used in the agreement, such losses will contribute towards and erode the retention under the R&W policy, and therefore the buyer basket and seller indemnity cap will generally equal the R&W policy retention. For tipping baskets, since the seller will be on the hook for all losses above the basket threshold, the Seller indemnity cap would generally need to equal the full R&W policy retention.
Remedy / Recourse	In most cases the Buyer and Seller will agree for the indemnification to be their exclusive remedy/recourse for losses related to breaches of the reps and warranties.	Remedy/Recourse will now include the R&W policy and often will be the 1) sole and exclusive remedy, 2) exclusive remedy beyond the indemnity escrow or 3) exclusive remedy whereby such R&W policy would provide coverage (essentially leaving an indemnity structure of a traditional agreement as recourse should the R&W policy not provide coverage).

Representations and Warranties Insurance: Drafting and Counseling Considerations

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R&W Insurance Provisions

A provision in an acquisition agreement providing for the purchase of representation and warranty insurance is typically straightforward. Most commonly, the requirement to obtain an R&W insurance policy will be built into the definitions of indemnity escrow and indemnity cap limitation clauses, or found in the list of closing conditions for the acquisition. At a minimum, the clause will state which party, buyer or seller, is responsible for purchasing the policy in connection with the closing. The clause may also include a reference to the amount of coverage provided under the policy, the name of the insurer, and the liability the policy is required to cover (i.e., indemnification obligations, breaches).

In transactions where an R&W insurance policy is being obtained, other provisions of the acquisition agreement may need to be revised to include references to the policy. Below are examples of provisions that may be impacted:

Purchase Price/Expenses

The acquisition agreement must address which party will be responsible, or whether the parties will share responsibility, for the payment of the premium on the R&W insurance policy. If the purchaser will be paying any portion of the premium, the payment will likely result in an adjustment to the purchase price that must be taken into account in the agreement. The parties may also specify the allocation of responsibility between them for the payment of the premium in the acquisition agreement's expense clause.

Covenants

For acquisitions in which there will be a gap between the signing of the acquisition agreement and the closing of the transaction, the underwriting of the R&W policy may be secured during this gap period. In such cases, it will be advantageous for the party charged with purchasing the policy to obtain a covenant requiring all parties to cooperate in obtaining the policy.

Indemnification

The indemnification provisions of an acquisition agreement may need to be revised if an R&W policy is meant to be the sole recourse for certain types of indemnification liabilities or if it otherwise is going to affect the manner in which an indemnified party seeks or obtains payment for indemnified liabilities.

For further drafting guidance, see sample clause [Indemnification Provision](#) with drafting notes and optional language.

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Contributing Author

Mr. Sanderson has more than ten years of M&A and transaction advisory experience and is responsible for overseeing the Transaction Risk / M&A Insurance Practice at Equity Risk Partners. Mr. Sanderson directs the strategic planning, business development and delivery of Transaction Risk programs, such as representations and warranties insurance, tax liability and tax credit insurance, and other contingent liability insurance solutions on behalf of Equity Risk’s private equity, corporate and legal clients.

Prior to joining Equity Risk Partners in 2014, Mr. Sanderson spent seven years in Aon’s M&A Solutions (AMAS) group, most recently helping to build Aon’s Transaction Solutions team focused primarily on structuring representations and warranties insurance for Aon’s private equity, legal and corporate clients. Mr. Sanderson’s previous responsibilities at Aon included leading the strategy and innovation for the Global M&A Solutions team, a \$120M global practice group, through corporate development, business transformation and other high-profile client and product delivery initiatives.

Mr. Sanderson was a recipient of the 5th Annual 40-Under-40 M&A Advisor Recognition Awards for his contribution to the M&A community through structuring representations and warranties insurance solutions. He has been a speaker and panelist at the Association for Corporate Growth (ACG) and other numerous events in regards to his knowledge in this space. Mr. Sanderson graduated with an MBA in Strategy and Finance from Bentley University.

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