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M&A INSURANCE SPECIALISTS

W&I INSURANCE: INSURING INDEMNITIES

LIVA

Back to basics: How do warranties differ from indemnities?

Warranties are contractual statements, often contained in the acquisition agreement, which state the condition of the target company at the purchase date. In order to succeed in a claim for damages due to breach of warranty, the onus will fall on the buyer to demonstrate that a breach of contract has occurred. If the buyer is successful, it will be entitled to contractual damages, which will return the buyer to the position it would have been had there been no breach of contract.

By comparison, an indemnity is an obligation on the seller to bear the cost of certain losses or damages suffered by the buyer. Provided that an indemnity relates to a specific loss, it will not be subject to the usual legal rules on causation, remoteness of damage and the requirement to mitigate, which applies to warranty claims for damages. An indemnity will typically give rise to a right to an on-demand payment, with the indemnified party being reimbursed on a £ for £ / $ for $ / € for € basis.

How does this impact W&I insurance coverage?

The W&I insurance market will typically decline to provide coverage for indemnities as these are regularly drafted to protect the buyer against known issues. W&I policies contain market-standard exclusions which disqualify coverage for any issues which the buyer is aware, in turn striking out any insurance coverage for indemnities that were drafted on the basis of buyer knowledge.

In some cases, buyers may request that sellers provide indemnities for areas where there are no known issues to broaden their ability to bring a claim. In such cases, LIVA routinely secures coverage for general indemnities which do not speak to specific known issues provided sufficient due diligence is carried out by the buyer's external advisors. At the very least, LIVA will remove blanket exclusions relating to these indemnities.

In addition to the protection offered under a W&I insurance policy, the target's operational insurances may also be structured to ensure acts occurring prior to the transaction provide an added safeguard. Many liability insurances such as directors' and officers', professional indemnity and cyber insurance are "claims made" policies, meaning that a policy must be active in order for a claim to be covered. When a transaction occurs, the "change in control" provision means that coverage under the existing policy is immediately terminated and no claim can be lodged against it, so an extended reporting period should be purchased to ensure that claims arising from acts occurring prior to the transaction will be claimable. It is important to understand how the W&I insurance interacts with the target's operational insurances, as 'other insurance' clauses may apply.

With our team's extensive backgrounds in law and insurance, LIVA is well placed to assist in navigating the complexities of insuring indemnities along with all other insurance related aspects of a transaction.

LIVA provides a range of M&A insurance services, including: Warranty and Indemnity, Tax, Title, Environmental, Litigation, Intellectual Property and Contingent Risk insurance.

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