Lowenstein Sandler's In the Know Series
Video 9 – Dispelling Common Myths About Reps & Warranties Insurance (Part One)

By Eric Jesse
FEBRUARY 2023

Eric Jesse: Hi, I'm Eric Jesse, partner in Lowenstein Sandler's Insurance Recovery Group, and welcome to "**In the Know**."

Even though reps and warranties insurance has been and remains incredibly popular in M&A transactions, it is still often misunderstood. In today's video, we're going to dispel three common myths about R&W insurance.

The first myth is that the seller must agree to have some “skin in the game” – that they must provide some indemnification for rep breaches in order for a buyer to secure an R&W policy. Not so.

While R&W insurers theoretically like to see sellers stand behind their representations financially, insurers are very willing to provide insurance in a walk-away deal. In fact, that willingness makes R&W insurance an important risk mitigation tool in public or public-style deals where the sellers are not providing indemnification.

And, while one may expect the premium for a policy to be much higher in a walk-away deal, that is not the case. As it turns out, insurers have not experienced a meaningful disparity in claims for no-seller-indemnity deals versus deals where the seller has skin in the game. As a result, the premium differential between the two deal structures is relatively small.

A second myth is that reps and warranties policies won't cover a seller's fraud. To the contrary, because R&W policies are designed to cover breaches of a seller's reps and warranties, the policies will likewise cover fraudulently made representations. What is critical is to establish that a breach occurred–regardless of how or why it occurred, whether inadvertently or intentionally.

And, because a seller's fraud is not something that comes up during the due diligence process, a key benefit of R&W insurance is that it will cover this buyer blind spot.

A third myth is that in staggered sign-and-close deals, reps and warranties insurance doesn't cover interim breaches. Interim breaches are those breaches that first occur between signing and closing, and that the buyer learns about prior to closing. This can put a buyer in a catch-22

situation, because should the buyer remain ignorant of interim breaches to preserve coverage, or should the buyer be informed about breaches involving the company that is set to acquire at the risk of losing coverage? While these interim breaches may not have been covered years ago, in the current highly competitive market, insurers are increasingly willing to cover interim breaches, for an additional premium, to eliminate this catch-22.

Thank you for joining us, and we look forward to seeing you next time on "**In the Know**" when we debunk more myths about reps and warranties insurance.