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CURRENT TRENDS IN INDEMNIFICATION PROVISIONS IN ACQUISITION AGREEMENTS

The growing use of representation and warranty insurance (“RWI”) has led to significant changes in the negotiation and drafting of indemnification provisions in purchase agreements. The authors discuss the current insurance market, the significance of such insurance for negotiations, and its effect on specific indemnification provisions. They close with a note on protecting the attorney-client privilege in acquisitions and a “big question” about the future.

By Jennifer Wisinski and Rachael Apfel *

Indemnification provisions serve a critical role in private acquisition agreements by allocating risk between buyer and seller. In recent years, M&A lawyers have witnessed a significant shift in the content of these provisions. Notably, many of the changes can be attributed not to whether it is a “buyer’s market” or “seller’s market,” but whether the buyer purchased representation and warranty insurance (“RWI”) for the transaction. Who would have expected that RWI would have had such a significant impact on the negotiation and drafting of a purchase agreement? And, what will happen if and when this insurance is not as available or affordable as it is today — will we see a shift back?

This article summarizes recent trends in indemnification provisions, as well as recent developments on how to protect the seller’s attorney-client privilege for deal communications following a sale. Although the attorney-client privilege provision generally is not considered to be part of the indemnification provisions, it can nonetheless have a significant impact on post-closing disputes.

BACKGROUND TO RWI MARKET

RWI is an insurance policy used in M&A transactions to protect against losses from a seller’s breach of representations and warranties in the acquisition agreement. Twenty years ago, RWI was relatively new in the United States. At that time, RWI was not widely used for several reasons: (1) only a few insurers participated in the market; (2) policies tended to have high premiums and retention amounts, together with broad exclusions to coverage; (3) insurers generally required significant lead time to conduct due diligence; and (4) with little claims data, parties were uncomfortable about the likelihood that claims would be paid.

Today, the landscape looks dramatically different, with approximately 24 primary underwriters writing RWI policies. The increased competition has not only reduced costs significantly, but also has resulted in parties having leverage to negotiate more favorable

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