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TRANSACTION LIABILITY INSURANCE

Increased competition from private equity firms and higher multiples offered by strategic buyers has made it much more difficult for buyers to complete transactions on attractive terms. Sellers can successfully negotiate to provide very limited, if any, indemnification for breaches of representations and warranties and other post-closing items, forcing buyers to retain more risk for unknown items as well as those discovered during due diligence.

In this type of environment, Transaction Liability Insurance may be essential in successfully closing deals. This type of coverage includes:

- Representations and Warranties Insurance

Representations and Warranties Insurance (RWI) protects buyer (or sellers, in many cases) from losses resulting from a breach of the representations and warranties made by the seller or target company. Given the leverage that many sellers now possess, buyers are less able to negotiate purchase agreements with favorable terms. Sellers are able to provide minimal, if any, post-closing indemnification for breaches of their representations and warranties and buyers may be forced to accept these terms or risk losing the deal. With RWI, a buyer can accommodate the seller's desire for a lower indemnity cap without sacrificing its own protection against liabilities from breaches that exceed the cap.

RWI also provides a means of distinguishing your bid from others in an auction environment by requesting a lower indemnification from the seller, supplemented by a buyer-side RWI policy, allowing you to gain a competitive advantage.

- Tax Indemnity Insurance

For buyers, the attractiveness of a deal may hinge on favorable tax attributes of the target or on achieving a particular tax treatment for the deal itself. Legal opinions provide some comfort but are not a guarantee and pursuing a ruling from the IRS may not be a viable or timely option. A Tax Indemnity policy may be used to insure that the anticipated or required tax treatment/benefit will be available. A Tax Indemnity policy may also be obtained to insure against residual tax liabilities arising from the tax treatment of a past transaction or a tax position taken by the target company.

- Litigation Buyout and Contingent Liability Insurance

A Litigation Buyout policy covers known but uninsured or underinsured liabilities that may be derailing mutually agreeable indemnification terms. This insurance can be obtained to cover not only risks associated with outstanding litigation but a variety of other risks including regulatory risks.

The information for this article was provided by Aon Private Equity and Transaction Solutions. To find out more information on this risk coverage contact Ted Kral at Aon Risk Services (202-429-8509) or via email at Ted_Kral@ars.aon.com.

