Taubenfeld in DBA's Headnotes: Transactional Insurance As a Deal-Saving Tool

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PRACTICES Insurance Recovery Appeals

Insurance products have expanded over the past decade to cover a wide range of risks. Haynes Boone Partner **David Taubenfeld** authored an article for the Dallas Bar Association's *Headnotes*, examining how parties should not abandon potential mergers, acquisitions or other complex deals due to perceived risks before fully exploring available insurance solutions. The article highlights representations and warranties insurance as a replacement for escrow arrangements, as well as tax and contingent risk insurance policies that can address complex liabilities and support deals.

Read an excerpt below:

Parties negotiating a deal should never give up on a prospective transaction, merger,

acquisition, or purchase of real property or other assets because of risks in the transaction before fully exploring all potential insurance and alternative risk transfer methods that might be available to alleviate or bridge the risk. Insurance products have expanded over the past decade to protect against virtually any imaginable risk, including normal transactional risks. Given the current state of the insurance industry, no transaction should die because of risk before the parties determine whether insurance could bridge the risk gap.

Historically, mergers and other forms of business acquisitions have utilized Representations and Warranty (Rep and Warranty) Insurance Policies, and their non-U.S. counterparts, Warranty and Indemnity Insurance policies. These policies insure against breaches of the Seller's representations and warranties in the transaction documents. They have essentially replaced the need to escrow significant portions of the sales price in transactions by replacing the escrow funds with insurance dollars. The use of these policies has grown exponentially over the past 20 years to the point where over 30 insurers sell them, and all the big brokers specialize in these types of policies.

One major difference between Rep and Warranty Insurance and most other types of insurance is that the insurers had to figure out how to initially assess a transaction upfront by doing their own due diligence on a pending transaction. Insureds pay an underwriting fee that is separate from the policy premium to fund the insurer's diligence, and the insurers retain well-respected law firms to piggy-back off the buyer's diligence and perform deal diligence on behalf of the insurers. Over time, this process has gotten more efficient.

Read the full June issue of DBA's *Headnotes* **here**.