M&A Perspectives

September 2018

troutman.com

Troutman Sanders is pleased to present its latest issue of *M&A Perspectives*, a publication featuring analysis of U.S. mergers & acquisitions market and legal developments.

Table of Contents

Recent Trends in Private M&A Deal Terms. 3

The Triumph of the Materiality Scrape 6

Insuring the Deal: Key Trends and Terms in R&W Insurance 9

Prioritizing Consumer Products Safety Due Diligence 13

Troutman Sanders by the Numbers 15

Representative Transactions 16

Contributors

Coby Beck
Partner
Richmond
804.697.1262
coby.beck@troutman.com

John Bradley
Partner
Orange County
949.622.2742
john.bradley@troutman.com

Tyler Dempsey
Partner
Atlanta
404.885.3764
tyler.dempsey@troutman.com

Dave Meyers
Partner
Richmond
804.697.1239
dave.meyers@troutman.com

Chad Warpula
Partner
Charlotte
704.998.4043
chad.warpula@troutman.com

Recent Trends in Private M&A Deal Terms[1]

By: John Bradley, Bardia Moayedi and Dean Longfield

During the past several years, the private-target mergers and acquisitions (M&A) market experienced robust growth and valuations, generally strengthening through 2017 from its most recent trough in 2009. The period from 2015 to 2017 in particular witnessed a stronger M&A market relative to prior periods within the last decade. (For more information on the general state of the market, please see the U.S. Deal Flow chart below.)

Consistent with a strong M&A market, sellers have enjoyed an expansion of pro-seller deal terms. For example, pro-sandbagging clauses are in decline, as are buyer-required legal opinions from seller's counsel, while deductible baskets, representations and warranties insurance[2] coupled with firm indemnification limitations, buyer termination fees, no-other-representations clauses and non-reliance clauses have all increased in frequency. In addition, fundamental representations and warranties are less likely to survive indefinitely and a seller's representations and warranties at closing are more often qualified by a "material adverse effect" standard of accuracy. This article examines trends in certain seller-friendly deal terms over the prior three calendar years.

[1] Statistics and trends based on data provided by 2016, 2017 and 2018 SRS Acquiom M&A Deal Terms Studies, prepared by SRS Acquiom, Inc. with reference to 2016 and H1 2017 Private Target Mergers & Acquisitions Deal Points Studies prepared by the American Bar Association Subcommittee on M&A Market Trends.

[2] For further information on representations and warranties insurance, see *Insuring the Deal: Key Trends and Terms in Representation and Warranty Insurance*, on pages 9-12 of *M&A Perspectives*.

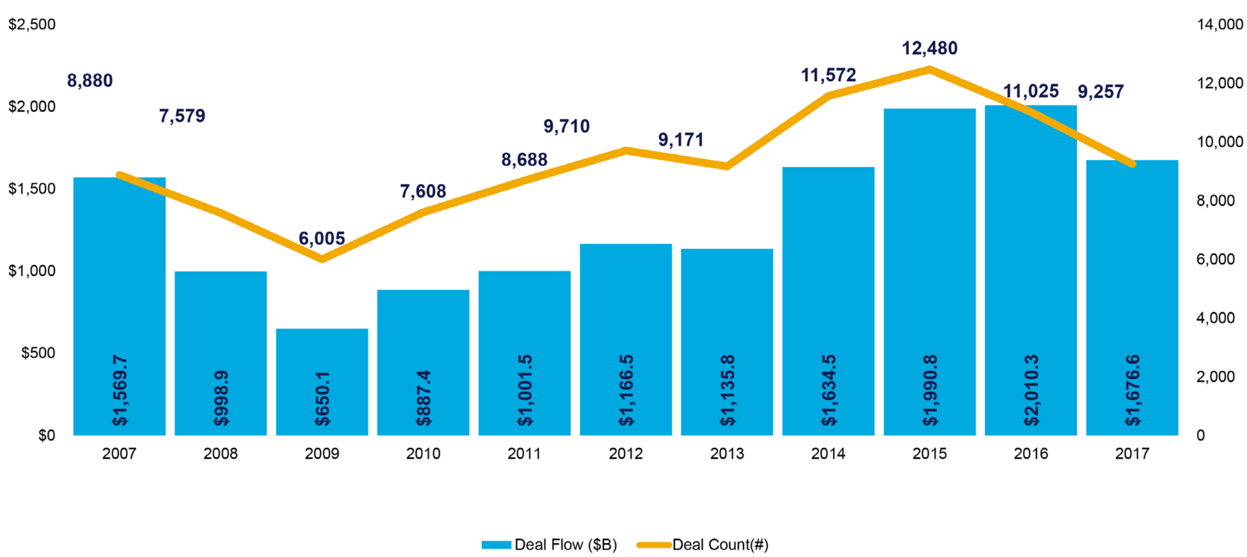


Exhibit A: U.S. Deal Flow chart
Source: PitchBook

Pro-Sandbagging Clauses

Pro-sandbagging clauses (sometimes referred to as a "benefit of the bargain" or "investigations" clause) explicitly enable a buyer to recover under a claim for breach of representations and warranties even if the buyer knew of the breach before closing. Market data indicates that pro-sandbagging clauses are in decline and in 2017 reached their lowest point in recent years. Of the deals surveyed, pro-sandbagging clauses appeared in 48% of deals in 2017 compared with 57% in 2016 and 51% in 2015. Although sellers more successfully eliminated pro-sandbagging clauses, particularly in 2017 compared to 2016, anti-sandbagging clauses, which expressly limit liability for losses resulting from a breach known by the buyer prior to closing, do not exhibit such a definitive trend. Of the deals surveyed, anti-sandbagging clauses were included in 4% of deals in 2017, none in 2016 and 4% in 2015.

Despite the general decline in pro-sandbagging clauses and the slight increase in anti-sandbagging clauses in 2017 compared to 2016, many deals remain silent on the issue. Of the deals surveyed, sandbagging clauses were entirely omitted from 47% of deals in 2017, compared with 42% in 2016 and 44% in 2015. In the absence of an explicit provision addressing sandbagging, the issue defaults to applicable state law. Many states, including Delaware, default to a pro-sandbagging position, while others, such as California, default to an anti-sandbagging stance. Because a significant number of deals are silent on the issue, this pro-seller trend may nevertheless conceal a pro-buyer undercurrent in which savvy dealmakers elect to remain silent thereby committing both parties by default to pro-sandbagging state law, a probable outcome in many instances given the prevalence of Delaware choice of law.

Deductible Baskets

Baskets limit indemnification obligations, subject to customary exceptions, through two fundamental types: a deductible basket and a first-dollar basket. A deductible basket protects one party from indemnifying the other until the amount of losses exceeds a negotiated dollar threshold. Once losses exceed the dollar threshold, a seller is liable only for the amount of losses exceeding the threshold. A first-dollar basket typically shares the same basic structure as a deductible basket, except that once losses exceed the dollar threshold, the seller is liable for the total amount of all losses, including losses below the threshold.

Of the deals surveyed, deductible baskets appeared in 52% of deals in 2017 compared with 42% in 2016 and 31% in 2015. The increasing frequency of deductible baskets corresponds with a decline in first-dollar baskets. Of the deals surveyed, first-dollar baskets appeared in 43% of deals in 2017 compared with 49% in 2016 and 63% in 2015. Overall basket sizes have remained relatively constant over the past three years, however, with a close plurality of deals containing baskets with dollar thresholds of between 0.5% and 1% of the total transaction value and a nearly equal number of deals containing baskets with dollar thresholds of 0.5% or less.

Sellers are typically able to negotiate higher dollar thresholds for first-dollar baskets than for deductible baskets given the balance of risks faced by the buyer under the two structures.

The trend in basket types may indicate buyer reluctance to increase first-dollar basket thresholds to levels high enough to reward sellers for the risk of first-dollar losses, an outcome that seems consistent with static basket sizes over the past three years.

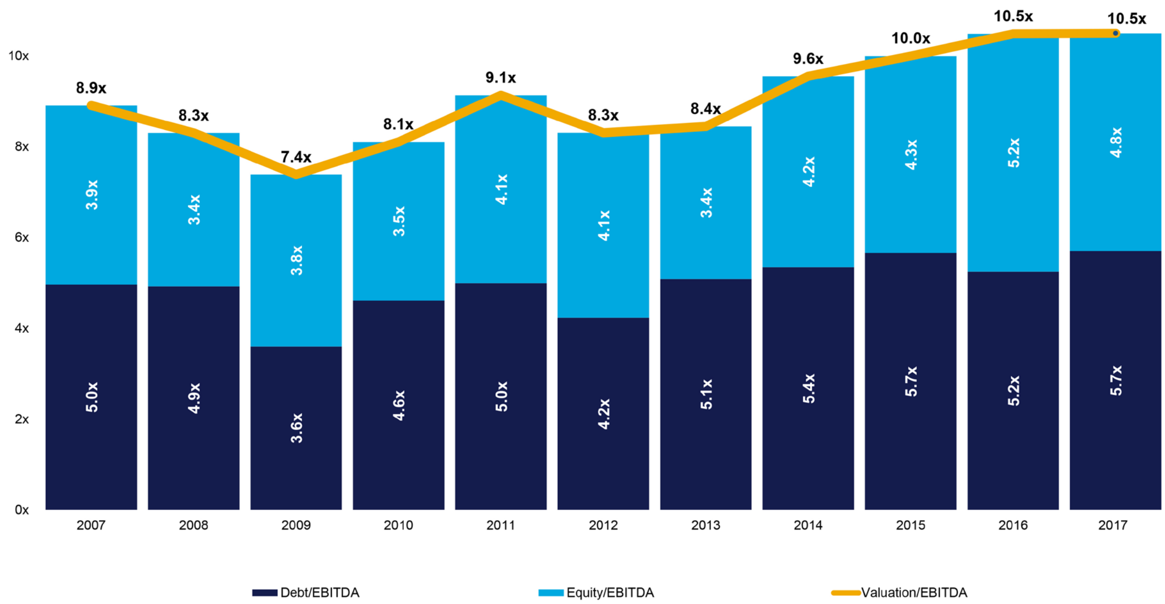


Exhibit B: Median U.S. EV/EBITDA multiples
Source: PitchBook

The increasing use of deductible baskets in recent years also correlates with a rise in popularity of the "materiality scrape". Of the deals surveyed, materiality scrapes were employed in determining breach and damages in 37% of deals in 2017 compared with 33% in 2016 and 19% in 2015. For further information on materiality scrapes, see *The Triumph of the Materiality Scrape* on pages 6-8 of *M&A Perspectives*.

Survival of Fundamental Representations and Warranties

Representations and warranties considered as "fundamental" vary from deal to deal, but typically include representations and warranties concerning at least due organization, capitalization and ownership of shares, title to assets, power and authority, and third-party broker fees. These so-called fundamental representations and warranties customarily have longer, or even indefinite, survival periods compared to the typical twelve- to eighteen-month post-closing survival period for other representations and warranties during which the buyer must pursue a claim for breach or be time-barred from pursuing such a claim. The longer or even indefinite survival period for fundamental representations and warranties results from the foundational significance of their terms.

Of the deals surveyed, fundamental representations and warranties are less likely to survive for an indefinite period, with indefinite survival appearing in only 12% of deals in 2017 compared with 19% in 2016, 18% in 2015 and 29% in 2012-2014.

In addition to the general movement toward pro-seller terms resulting from a robust M&A market, this trend also aligns with the Delaware Court of Chancery's decision in Cigna Health and Life Insurance Company v. Audax Health Solutions, Inc., 107 A.3d 1082 (2014). Audax suggests that an indefinite survival period for representations and warranties violates Delaware law when indemnification provisions allow for recovery of the full purchase price from stockholders.

The decline in indefinite survival periods may therefore be a response to Audax, as fewer buyers are willing to negotiate for a provision Delaware courts may deem unenforceable, possibly resulting in an unpredictable outcome that places buyers in a worse position than had they negotiated a definite survival period. «

The Triumph of the Materiality Scrape

By: Coby Beck, Clayton De Arment and Sarah Rust Pylant

Not long ago, sellers in private M&A deals rarely encountered what has become a buyer-favorite deal term, the “materiality scrape.” According to the ABA’s biannual Private Target Mergers & Acquisitions Deal Points Study, use of the double materiality scrape in surveyed transactions from 2006 to 2017 has increased from 16% to 49%, while use of the single materiality scape has increased from 6% to 37%.[1]

We anticipate that the materiality scrape, and particularly the double materiality scrape, will continue its steady rise, with its use further bolstered by the increasing popularity of representations and warranties insurance policies.

What Is a Materiality Scrape?

A materiality scrape is a provision advocated by buyers in a purchase agreement whereby any materiality qualifiers (e.g., “material”, “Material Adverse Effect”, “in all material respects”, etc.) in the seller’s representations and warranties are disregarded, or “read out”, for purposes of calculating damages (a single materiality scrape) and for determining whether a breach of a representation or warranty has occurred in the first place (when paired with the scrape for calculating damages, a double materiality scrape).

Rationale for and Against the Materiality Scrape

Buyers justify the materiality scrape by noting that a basket or deductible in a purchase agreement already serves the purpose of insulating sellers from immaterial claims. If a seller eliminates immaterial claims by means of the materiality qualifiers sprinkled throughout the seller’s representations and warranties, then arguably the seller is twice-protected for the same concern when there is a basket or deductible and no scrape. If there is also a *de minimis* claims threshold, then the buyer will contend that the seller is hiding behind three levels of protection. Another argument put forth by buyers is that the concept of “materiality” is inherently subjective and inevitably will lead to disputes post-closing as to what is, or is not, material.

Sellers argue that materiality scrapes largely eviscerate sellers’ carefully crafted and heavily negotiated representations and warranties. By including a double scrape, the materiality qualifiers exist solely for purposes of increasing the likelihood of satisfaction of the “bring down” of the representations and warranties as a closing condition. Additionally, sellers worry that disregarding materiality qualifiers can lead to countless small claims by buyers, despite any comfort provided by a basket or deductible. Sellers also argue that their disclosure burden is increased when materiality qualifiers are disregarded because sellers are then forced to prepare their disclosure schedules with an eye toward buyers bringing indemnification claims based on buyers’ post-closing scrutiny of the disclosures without the wiggle room offered by the materiality qualifiers.

[1] Statistics and trends based on data provided by 2016 and H1 2017 Private Target Mergers & Acquisitions Deal Points Studies prepared by the American Bar Association Subcommittee on M&A Market Trends.

Another argument voiced by sellers is that disregarding materiality qualifiers in certain representations and warranties (e.g., a "full disclosure" representation or the "No Material Adverse Effect" representation) renders those representations and warranties nonsensical or as having unintended consequences.

Drafting Considerations

As an ever-increasing percentage of transactions include a materiality scrape, sellers should consider how to mitigate the impact of the scrape when their arguments for outright exclusion of the scrape fail. Sellers are often successful in preventing the inclusion of a double scrape by offering the single scrape as a compromise. Sellers will agree to disregard materiality qualifiers for purposes of calculating damages but not for purposes of determining whether a breach exists. Wary buyers, however, often find this "compromise" to be one-sided in favor of sellers as many practitioners question whether a materiality qualifier would ever be relevant in the calculation of damages once it has been determined that a breach has, in fact, occurred.

Should the suggested compromise of the single scrape not persuade buyers' counsel, sellers should consider limiting the effect of the double scrape with existing commonplace seller-friendly devices.

By increasing the basket amount, converting the basket into a true deductible as compared to a first-dollar basket and/or adding a de minimis *claims threshold, sellers can lessen the impact of the double scrape.*

For further information on baskets, see *Recent Trends in Private M&A Deal Terms* on pages 3-5 of *M&A Perspectives*. Sellers can also push for carving out the impact of the double scrape on certain representations in which materiality is fundamental to the representations. These representations include the "full disclosure" representation, the "No Material Adverse Effect" representation and the financial statements representation that includes the GAAP-based standard of the financial statements presenting fairly, "in all material respects", the financial position of the business. Sellers may also persuasively argue that any representations (often called "fundamental representations") that buyers have successfully excluded from the basket should be carved out from the scrape as there is no "double protection" of sellers.

The Triumph of the Materiality Scrape

Whether one finds the arguments of buyers or sellers more compelling, the reality of the marketplace is that materiality scrapes are more prevalent than ever, and their use is continuing to expand. A primary driver of the rise in the double materiality scrape is the rapidly increasing use of representations and warranties (R&W) insurance in private M&A transactions. Most R&W insurance policies will provide coverage for buyers after giving effect to a double materiality scrape. Sellers, who have limited or no post-closing indemnification exposure when buy-side R&W insurance is employed, typically are more generous with their representations and warranties and often will agree to a double scrape as they see little downside. With sellers and insurers willing to agree to a double scrape, buyers are successfully including such a provision in more transactions.

While fewer than 500 R&W insurance policies were placed in 2013 and fewer than 1,000 were placed as recently as 2015, it is estimated that more than 2,000 were placed in 2017.[2]

With the expected continued proliferation of R&W policies as more insurers enter the market, policy pricing declines and claims history further develops, we can expect to see the continued inclusion of the double materiality scrape in private M&A transactions. For further information on R&W insurance, see *Insuring the Deal: Key Trends and Terms in Representation and Warranty Insurance* on pages 9-12 of *M&A Perspectives*. «

[2] Gallagher, *Market Conditions*, Representations and Warranties Insurance, Aaron M. Zeid, Esq., January 2018.

Insuring the Deal: Key Trends and Terms in Representation and Warranty Insurance

By: John McDonald and Chad Warpula

As regular participants in mergers and acquisitions (M&A) transactions know, representation and warranty (R&W) insurance has grown from an obscure product rarely seen in M&A transactions just a few years ago to a pervasive element in many (if not most) M&A transactions today. That is particularly the case in M&A transactions involving private equity sponsors.

However, the use of R&W insurance by strategic buyers and sellers of companies is rapidly becoming more pervasive as buyers, sellers and other deal participants grow more comfortable with the product. The volume of R&W-insured M&A transactions has increased exponentially over the last few years, rising to over 2,000 policies placed in 2017 in the U.S. alone. As this process has continued, some key trends and terms in R&W insurance have emerged, which are summarized below. Private equity firms and strategic buyers and sellers of companies, as well as their attorneys, investment bankers and other advisors, need to be aware of these trends and terms as they can have a major impact on their M&A transactions.

Background

By way of background, R&W insurance is an insurance policy obtained in connection with M&A transactions, typically by the buyer. In a usual, non-insured M&A transaction, the seller has the sole responsibility for indemnifying the buyer for losses resulting from breaches of the seller's representations and warranties in the purchase agreement (typically relating to undisclosed or inaccurately disclosed issues with the target company), subject to highly negotiated caps, thresholds and baskets. In an R&W-insured M&A transaction, the buyer instead obtains recovery for some or all of such losses from the R&W insurance policy, up to the policy's coverage limit and subject to certain negotiated exclusions in the policy.

Clean Exit

R&W insurance is attractive to sellers of companies because it substantially reduces or eliminates completely the possibility that they will be required to return sale proceeds to the buyer, either directly or through release of sale proceeds placed into escrow. That is particularly attractive to private equity sellers of companies, as they want to return capital to their limited partner investors as quickly as possible after closing of the sale to maximize their fund's internal rate of return from the investment and their carried interest compensation. This clean exit from their investment is the primary reason that private equity sellers often insist on insured sell-side transactions.

Competitive Advantage

R&W insurance is also attractive to buyers in competitive auction processes because it can improve the competitiveness of their bids by increasing the amount of sale proceeds that the seller receives at closing, as compared to non-R&W insured transactions in which the customary 10-20% of transaction proceeds are placed into escrow for 12-18 months after closing to act as a source of recovery for the buyer relating to undisclosed issues.

Broker-Driven Process

With the influx of carriers into the R&W insurance market, the buyer typically engages an insurance broker to obtain competitive quotes from several carriers, from which the buyer is able to select one to proceed. As discussed below, this competitive process has greatly reduced premiums and retentions for R&W insurance policies and helped narrow exclusions from coverage. The broker will typically schedule and moderate the "underwriting call" (discussed below), act as the intermediary for follow-up questions, and assist the buyer with negotiation of exclusions and other terms and conditions of the R&W insurance policy. It is highly recommended that buyers engage their broker as early as possible in the potential process, including prior to preparing or submitting an indication of interest or letter of intent.

Some Key Metrics

Coverage Limit: Coverage limits under R&W insurance policies vary, but are typically 10% of the transaction value.

Premiums: Premiums are decreasing with increased competition among carriers and are typically from 3-4% of the coverage limit of the policy. Premium costs are usually borne by the buyer, although the parties sometimes split the cost of the premium, particularly in "no seller recourse" policies as discussed below.

Retentions: R&W insurance policies also include a retention (i.e., deductible or basket) for which one or both of the parties remain liable before the policy provides coverage. Competition among carriers has put downward pressure on retention amounts, which are now typically 1-2% of transaction value, with retentions toward the higher end of that range more common in smaller transactions. A common structure is for the seller and the buyer to split the retention, with the seller's portion funded through a small escrow under the purchase agreement. Retentions typically step down to half of their original amount 12-18 months after closing. Increasingly common are R&W insurance policies in which there is "no recourse" against the seller, in which the buyer absorbs losses for the full retention amount and the R&W insurance policy covers any losses in excess of that amount, up to the coverage limit. However, no seller recourse policies are typically only available for larger M&A transactions with enterprise values in excess of $150 million in which there are correspondingly more substantial retentions and more professionalized target company management teams. Premiums in no seller recourse policies are typically higher to reflect the additional risk to the carrier from the seller not having "skin in the game," although the spread between the two types of policies has been shrinking with increased competition among carriers.

Term: A common formulation is a six-year coverage period for fundamental and tax representations and three years for all other representations and warranties, but longer or shorter coverage periods are available. Unlike traditional non-insured M&A transactions in which the buyer and seller negotiate the survival periods of the representations and warranties, the term of the R&W insurance policy is typically negotiated only by the buyer and the carrier.

Due Diligence

The carrier typically receives a fixed underwriting fee of $20,000 - $50,000 from the buyer, which is paid at the start of the process and is used by the carrier to pay its legal counsel assisting with due diligence in connection with underwriting of the policy. Since carriers usually piggyback onto the due diligence performed by buyers on target companies, rather than performing their own "ground up" due diligence processes, carriers often require buyers to obtain a full suite of third-party due diligence reports, including legal, tax, quality of earnings, employee benefits, insurance, IP/IT and environmental. Buyers are then required to provide these reports to the carriers and their counsel, along with drafts of the purchase agreement and

disclosure schedules and access to the virtual data room for the project.

Fast-Track Process

Obtaining R&W insurance can occur quite quickly – often no more than a few weeks from beginning to end – but deal parties are well advised to plan ahead and contact the broker or carrier as soon as possible in the M&A transaction process. The carrier will typically provide a "non-binding indication letter" (NBIL) outlining the terms of the R&W insurance policy. A few days to a week after the buyer due diligence reports, the draft purchase agreement and disclosure schedules, and access to the virtual data room are provided to the carrier, the "underwriting call" is typically scheduled by the broker and the carrier. During the underwriting call, the carrier and its legal counsel will inquire about the buyer's due diligence process on the target company with the buyer, its legal counsel and its other advisors.

Typical areas of focus include the background of the transaction, general corporate, accounting, tax, employee benefits, environmental, IP/IT, litigation and any other areas particularly relevant to the target company's business or the M&A transaction.

Underwriting calls usually last several hours, and, once they end, the carrier typically provides a list of follow-up questions to the broker, to which the buyer and its counsel will provide answers over the next couple of days. The exclusions and other terms and conditions of the R&W insurance policy will then be negotiated by the parties, the buyer will pay the premium for the policy to the carrier, and the policy will be "bound." Most policies are bound at signing of the purchase agreement rather than subsequently at closing.

Exclusions

Because insurance is intended to help mitigate risk by covering issues not known by the buyer when the policy is obtained, R&W insurance policies typically exclude from coverage any issue of which a defined group of buyer "knowledge parties" is aware. "Known issues" excluded from coverage under the policy will include those referenced in the due diligence reports obtained by the buyer from its legal counsel and other advisors, as well as other issues the buyer learned about during its due diligence process. Although, in theory, this means that buyers could have an incentive to limit their due diligence on the target company in order to remain intentionally blind to issues and try to minimize the "known issues" excluded from the policy, in practice, sophisticated buyers realize that doing so would be foolish, as they will ultimately own the target company and need to fully understand its business in order to successfully operate it and satisfy their obligations to their boards or investors. Doing so would also be impracticable, as the carrier will require that the buyer have conducted full and thorough due diligence as a condition to binding the policy and will exclude areas that it feels have been subject to insufficient diligence by the buyer.

The policy will typically also include a list of matters that are expressly excluded from coverage. In addition to matters specific to the particular target company, there are also typically "standard" exclusions such as covenant breaches, interim breaches of representations and warranties (those occurring between signing of the purchase agreement and closing of the transaction) and issues addressed by purchase price adjustments, as well as exclusions for areas determined by the carrier to present an unreasonable risk as a matter of policy, such as asbestos claims, pension plan liabilities, Medicare/Medicaid reimbursement liabilities, wage and hour claims, net operating loss usability and S-corporation qualification.

Increased competition among carriers has reduced the number of exclusions from coverage under R&W insurance policies and narrowed the scope of exclusions in which they address specific issues, rather than having broad exclusion categories. Brokers often place substantial pressure on carriers to reduce both the number and scope of the exclusions to their policies, and negotiation of exclusion language in R&W insurance policies by buyers (aided by their brokers) and carriers is commonplace. Issues excluded from coverage under the policy will either be the subject of the special indemnities from the seller in the purchase agreement or be borne by the buyer, depending on the relative negotiating leverages of the parties.

Conclusion

The emerging trends and terms in R&W insurance discussed in this article have important ramifications for buyers and sellers of companies utilizing R&W insurance policies and the carriers insuring their deals, which will continue to play out over the coming years. Practitioners, advisors, bankers, buyers and sellers should become familiar with the customs and intricacies of R&W insurance as the policies are becoming increasingly more pervasive, and almost commonplace, in all types of M&A transactions. «

Prioritizing Consumer Products Safety Due Diligence in Mergers and Acquisitions

By: Tyler Dempsey, Brendan Thomas and Sean Ehni

As large retailers and other consumer products companies continue to replace research and development with mergers and acquisition activity in order to fuel growth, it is critical that acquirers in this industry perform robust due diligence on the product, brand or company that is the target of a potential acquisition. Failure to do so can prevent an acquirer from having the opportunity to adjust the transaction value or address the potential liability in the transaction documents.

The U.S. Consumer Product Safety Commission (CPSC) has recently taken an aggressive regulatory and enforcement approach with respect to product liability matters, and CPSC recalls and enforcement actions can have significant financial, public relations and litigation consequences to an acquirer. Properly conducting a due diligence review with respect to product quality and compliance with the Consumer Product Safety Act can help an acquirer understand any potential exposure and evaluate the overall quality of an investment and prevent an acquirer from inheriting a significant liability, either in the form of a product recall or a CPSC investigation and, as has become increasingly common, an enforcement action.

Several recent enforcement actions help highlight the need to conduct a proper CPSC due diligence review prior to acquiring a product, brand or company. In February 2018, the CPSC filed an administrative complaint against a global manufacturer of childcare safety equipment, alleging that certain models of its jogging strollers contained defects in their design that presented a substantial product hazard. The strollers that were the focus of the administrative complaint were not only those imported and distributed following a recent acquisition, but also those strollers imported and distributed by the acquired company between 1997 and the closing of the acquisition in December 2011. The administrative complaint seeks, among other things, an order that the manufacturer stop distributing various models of the strollers, notify the public of the defect and offer consumers a remedy that may include a repair, replacement or refund.

Similarly, in June 2016 an American tea company agreed to pay a civil penalty of $3.75 million to settle allegations that the company knowingly failed to report to the CPSC, as required by federal law, that its tea tumblers created an unreasonable risk of serious injury (the company had received numerous complaints about its tea tumblers unexpectedly shattering, exploding or breaking during normal use). While the tea company eventually recalled the tumblers in May 2013, its alleged failure to report this issue to the CPSC occurred prior to its acquisition by a global coffee and beverage company.

Another recent example relates to a consumer goods conglomerate's 2016 acquisition of a U.S. home appliances company and maker of a brand of coffee machines. In June 2016 the coffee machines brand reached a $4.5 million settlement with the CPSC related to allegations that it hid from the CPSC a defect in appliances

that let steam build up and possibly shoot hot water toward users. The violations alleged by the CPSC occurred between 2011 and 2012, well before the consumer goods conglomerate acquired the home appliances company.

While civil penalties imposed by the CPSC can be significant, the cost of a product recall can have much larger financial consequences for a company.

A multinational toy manufacturer was forced to recall over 9 million toys, including an iconic doll, over fears that the Chinese-made toys contained excessive levels of lead in their paint. The recall cost the manufacturer at least $30 million. In 2016, a Korean electronics manufacturer paid over $5 billion after recalling a smartphone due to its batteries catching fire. The manufacturer now also faces class action suits in three states for other phone versions for failing to adequately warn customers of similar battery hazards. In addition to the financial consequences of a product recall, companies that must recall a product can suffer major reputational damage and loss of brand equity. This is particularly true if competitors' products can easily replace the recalled products.

In order to minimize the risks of inheriting product liability matters in connection with an acquisition, an acquirer should review the target company's claims history with regard to its products. Many companies escalate adverse event incidents for special consideration of safety reporting obligations. Specific inquiry into a target's safety escalation records, including final disposition and communication from consumers, could uncover hidden regulatory and liability exposure. The acquirer should also evaluate the claims history of competitors (if possible), which can show a pattern of product defects and help forecast the likelihood of future claims in the relevant industry. Furthermore, an acquirer should review a comprehensive list of the target's product offerings, a summary of the results of all tests, studies and surveys regarding existing products and products under development, a record of the manufacturing specifications and designs for all products, as well as a list of all product recalls (and the costs involved) incurred by the target. While successfully implementing a thorough due diligence process cannot eliminate all risks inherent in an acquisition, it can minimize the likelihood that an acquirer is found responsible for a consumer products liability issue that arose prior to its acquisition. «

Transacting for Growth

Over the past 3 years, our Corporate practice handled:

$50+ billion

in capital market deals

$25+ billion

in M&A and private equity deals

We provide counsel on:

Acquisitions & Dispositions

and other strategic transactions

Private equity

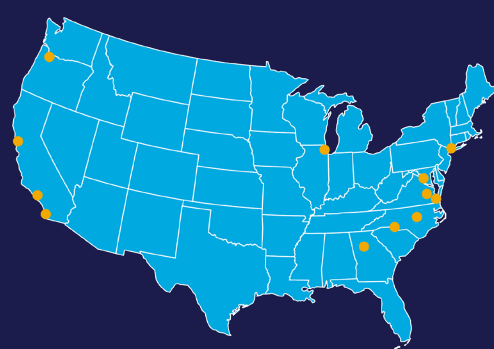
LBOs, co-invests and other portfolio investments

Fund formation

including offshore investment funds

650+

attorneys located across 12 U.S. offices to help clients achieve their business goals



Atlanta	Raleigh
Charlotte	Richmond
Chicago	San Diego
New York	San Francisco
Orange County	Virginia Beach
Portland	Washington, D.C.

Putting our market, industry and legal knowledge to work to help clients realize their goals.

Troutman Sanders has the depth of experience and a diverse transactional team across an integrated network of offices in the U.S. to handle our clients' most complex corporate needs. Our top-ranked attorneys work collaboratively with our clients to provide practical solutions and strategic advice at every stage of a company's growth and evolution.

$520,000,000 BRINKS Acquisition of Dunbar Armored, Inc.	$452,900,000 BRANDBANK Merger with Renasant	$800,000,000 ARRIS Acquisition of Ruckus Wireless and ICX Switch	$55,000,000 OILspace, Inc. Acquisition by Wall Street Systems Delaware, Inc.
$950,000,000 LUMOS NETWORKS Acquisition by EQT Infrastructure	$416,500,000 ALBEMARLE® Sale of polyolefin catalyst and components business to W. R. Grace & Co.	Value Not Disclosed HARGRAY Acquisition of ComSouth Corporation	Value Not Disclosed Melrose Buy Improve Sell Acquisition of IntelliVision by Nortek
Value Not Disclosed paymerang Sale to Aldrich Capital	CDN $1,100,000,000 Alterra POWER CORP Plan of arrangement with Innergex Renewable Energy	$78,000,000 Pacific Ethanol, Inc. Acquisition of Illinois Corn Processing, LLC	$227,500,000 windstream. Acquisition of Broadview Networks Holdings
$ 110,000,000 FIRSTATLANTIC Financial Holdings, Inc. Merger with National Commerce Corporation	$190,350,000 Southern Company Acquisition of RES Cactus Flats Wing Energy, LLC	$701,200,000 UNION® Acquisition of Xenith Bankshares, Inc.	$489,000,000 WashingtonFIRSTBANK Acquisition by Sandy Spring Bancorp, Inc.