# Top 5 Trends – Representation and Warranty Insurance for M&A Transactions

By J. Tyler Finn, John J. Koeppel

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Our Mergers & Acquisitions / Private Equity Team recently attended Marsh's panel on its 2021 Global Trends Report on transactional risk.  Consistent with what we have seen in the market, industry experts confirmed that an increasing number of deals have utilized representations and warranties insurance ("RWI").  This post identifies five key trends in the current marketplace:

1. **Record Setting M&A and its Effect on RWI.** 2021 represented a new high-watermark for RWI, with records set both in terms of the number of transactions closed and the aggregate value of the transactions.  At least one insurance provider stated that the number of RWI policies it placed in 2021 represented a 71% increase over 2020. While new underwriting organizations such as Mosaic Insurance and RiskPoint entered the market, and the existing pool of roughly 20 underwriters worked at full capacity, by Q4 of 2021 the increased deal volume had effectively overwhelmed the capacity of RWI underwriters to the point that declination rates exceed 60% for that quarter.  It is unknown whether the incredibly high deal will continue throughout 2022, but to the extent that the M&A market remains as active has it has been, RWI underwriters will continue to struggle to meet client demand as they try to remedy the human capital shortages that contributed to the high declination rates in 2021.

2. **Increased Access to RWI.** Expansion of the RWI market has come from a variety of places. While RWI's initial growth may have been driven by middle market private equity transactions in the U.S. and Europe, transactions below $50 million represented close to 20% RWI policies for 2021, and the panelists discussed how the underwriting process has adapted to provide strategics using limited outside advisors, as well as participants in Asia, Africa, and the Middle East, access to RWI policies for their transactions.

3. **A New Normal for Indemnity.** For the first time "no seller indemnity" transaction structures were used in a majority (52%) of transactions in at least one insurance company's U.S. and Canada portfolio. The maturity of the RWI market and its underwriters, the established precedent of transactions using this structure, and the potential efficiency of interacting with the underwriter's claim process instead of a seller and, potentially, the court system all indicate that this trend will continue to grow, making it the new normal in transactions with access to RWI policies.

4. **Supply and Demand Pricing.** As a result of insurance carriers struggling to meet demand with respect to transactions in 2021, the primary RWI rates increased by more than 40% across the U.S. and Canada in 2021, a sharp contrast to the steadily decreasing rates seen since 2015.

5. **Claims Volume and Risk.** Panelists confirmed that the number of policies written in 2021 caused RWI underwriters to consider their future claim risk carefully. 2021 showed a substantial decrease in claims over the previous year, however, panelists speculated that this was simply a residual result of both the increased financial strain on companies leading to an increase in claims in 2020 and the lower number of policies placed in 2020 resulting in fewer early policy period claims in 2021. Panelists expected claims to rise—possibly substantially—over the next few years. Increased claim liability could potentially drive changes in the cost of RWI policies and the underwriting process insurers undertake with respect to such policies.

Our M&A / Private Equity team, alongside our Insurance Team, works with clients on all aspects of R&W Insurance in transactions, as well potential post-closing claims. To further discuss, please feel free to contact any of John Koeppel (Partner and Private Equity Leader), Kevin Merriman (Partner and Insurance Recovery, Counseling and Litigation Leader), Sean Balkin (Senior Associate – Private Equity), or Tyler Finn (Associate – Private Equity).

# Related Team

**J. Tyler Finn**
Associate

**John J. Koeppel**
Partner | Team Leader - Private Equity

**Sean P. Balkin**
Senior Associate

**Kevin T. Merriman**
Partner | Team Leader - Insurance Recovery, Counseling & Litigation

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LippesMathias LLP ATTORNEYS AT LAW

**ALBANY** | 54 State Street, Suite 1001 • Albany, NY 12207 • 518.462.0110

**BUFFALO** | 50 Fountain Plaza, Suite 1700 • Buffalo, NY 14202 • 716.853.5100

**CHICAGO** | 125 S Clark St., 17th Floor • Chicago, IL 60603 • 872.254.5500

**GREATER TORONTO AREA (PRACTICE FOCUSED ON U.S. LAW)** | 1100 Burloak Drive, Suite 300 • Burlington, ON L7L 6B2 • 905.319.8964

**JACKSONVILLE** | 10151 Deerwood Park Blvd. , Bldg. 300, Suite 300 • Jacksonville, FL 32256 • 904.660.0020

**LONG ISLAND** | 1979 Marcus Ave, Suite 210 • Lake Success, NY 11042 • 516.820.1500

**NEW YORK CITY** | 260 Madison Avenue, 17th Floor • New York City, NY 10016 • 332.345.4500

**ROCHESTER** | 400 Linden Oaks Dr., Suite 150 • Rochester, NY 14625 • 585.770.7590

**SAN ANTONIO** | 4499 Pond Hill Road, • San Antonio, TX 78231 • 210.436.6222

**WASHINGTON, D.C.** | 1900 K Street, NW, Suite 730 • Washington, DC 20006 • 202.888.7610