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Synthetic Warranty and Indemnity M&A

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SYNTHETIC WARRANTY AND INDEMNITY (W&I) INSURANCE

A traditional W&I insurance policy is designed to protect the insured party, usually the buyer, against a breach of the warranties or a claim under the tax indemnity in a sale and purchase agreement (SPA). The product has historically relied on warranties being given in the SPA and disclosed against by the seller, even if their liability has been limited to nil.

Synthetic W&I insurance involves the warranties and / or the tax indemnity being set out in the policy, rather than being given by the seller in the SPA.

Much like the standard W&I insurance product, synthetic W&I policies are very flexible. The parties can adopt a partial or fully synthetic approach, depending on the circumstances in the transaction, to ensure they maximise the outcome in the deal.



Fully Synthetic Warranties

Insurers will agree to negotiate and incorporate a full set of warranties in the policy, when no warranties are given by the seller in the SPA. Some insurers / brokers have sought to pre-prescribe the synthetic warranty pack. AssuredPartners will always work with the buyer's lawfirm to create a suitably bespoke set of warranties that are relevant to the target business and the areas the buyer wants to focus on.

Partially Synthetic Warranties

Some transactions may see a more limited set of warranties in the SPA. Insurers will agree to include certain additional warranties in the policy. These will often be warranties that the buyer might ordinarily ask a seller to give but instead elect to add to the policy.

Synthetic Tax Indemnity

The use of a synthetic tax indemnity has become much more common in recent years. For a nominal additional premium, insurers will set out a tax indemnity in the W&I insurance policy to cater for unknown pre-completion tax liabilities. This enhancement is widely available in the market and is useful where the seller does not or cannot provide a tax indemnity in the SPA.

BENEFITS OF SYNTHETIC WARRANTIES

Distressed Deals:

A fully synthetic warranty solution is most appropriate in deals where the seller has a genuine rationale for not giving the warranties themselves. A distressed transaction involving liquidators is a good example. Insurers will be less likely to agree a fully synthetic approach where a seller could give warranties but simply chooses not to.

Bid Differentiation:

In our experience, a partially synthetic warranty arrangement is a more common client request and a very useful strategic tool for some buyers. This approach can be very valuable when in a competitive auction. We have seen clients with a seller's bid-draft SPA prefer to incorporate additional warranties that they would usually ask a seller to give in a policy meaning they position themselves very favourably in the mind of the seller.

PROCESS AND TRANSACTION APPROACH

Certain criteria are necessary for a synthetic warranty policy, whereas other conditions can be very helpful in gaining the fullest warranty cover.

Need to have:

Thorough Disclosure: A comprehensive disclosure process on the part of the seller through a well populated data room and positive responses to buyer's / insurer's Q&A and information requests. (Note: a disclosure letter is not a requirement.)

Broad Due Diligence: The buyer's diligence process will necessarily cover all areas of warranties being insured under the policy

Good to have:

Time: Insurers will need to undertake more detailed underwriting and review due diligence against data room content and warranties requested – they will also need to “negotiate” the scope of the synthetic warranties, usually something addressed by the seller.

Management Access: Access to selling management to discuss the synthetic warranties will be very helpful for insurers. (Note: insurers will agree that there is no come-back on any seller engagement in this process.)

W&I WITH ASSUREDPARTNERS

We have access to all insurers and extensive experience broking W&I insurance policies for private equity firms, real estate funds, management teams, advisors and corporates. You can be completely confident that you will have the right advice at the right time with access to the best solutions in the market for your individual transaction. Our clients trust us to make the process of arranging W&I insurance as uncomplicated and efficient for them as possible. They expect full confidence in the policy cover, insurer selection, timing and end-result.

YOUR CONTACTS



Felix Sloman

Head of M&A

E: felix.sloman@assuredpartners.co.uk

T: +44 (0) 20 3675 0075



Dan Moss

Senior Broker – M&A Insurance

E: dan.moss@assuredpartners.co.uk

T: +44 (0) 790 410 2797



AssuredPartners

A Gallagher Company

POWER THROUGH PARTNERSHIP

AssuredPartners, The Walbrook Building, 25 Walbrook, London, EC4N 8AW
T: +44 (0) 20 7337 6800 | W: www.assuredpartners.co.uk

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