

A Healthy Market: Representations and Warranties Insurance for Healthcare Transactions

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Journal of Health Care Finance - Summer 2019*

Representations and warranties insurance is firmly ensconced as an important tool to facilitate mergers and acquisitions. One leading insurance broker in the space estimates that, in the target North American market of private company transactions between \$25 million and \$10 billion in enterprise value, 45% employed R&W insurance in 2018, up from 34% in 2017ⁱ and 20% in 2016.ⁱⁱ Buyers, sellers and their advisors have clearly recognized the benefits that R&W insurance brings to the table. Among other things, R&W insurance can: (1) reduce or eliminate a seller's need to indemnify the buyer; (2) reduce or eliminate the need to hold back a portion of the sales price in escrow to fund any such indemnification from the seller; (3) extend the survival period of the sellers' representations and warranties to provide for a longer period in which a breach can be discovered and pursued; (4) reduce the risk that the buyer will pursue the sellers for indemnification for a breach, particularly where the sellers remain with the acquired company post-closing; and (5) reduce collection risk where there are numerous sellers, foreign sellers or sellers of questionable solvency.

Notwithstanding this dramatic overall growth for R&W insurance, certain industry sectors have lagged behind in terms of adaptation of the product as an attractive alternative to traditional seller indemnification. One such field, healthcare, has experienced a shift in underwriting appetite in response to demand over the last 12 to 24 months. R&W insurance is now available for many participants in the healthcare industry on attractive terms approaching the coverage available to the M&A market at large.