

Warrant and Indemnity Opens Doors to Life Sciences Deals

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The widespread availability of warranty and indemnity insurance has significantly changed the European mergers and acquisitions (M&A) landscape in recent years. Historically, warranties given by the sellers and management team in an acquisition were heavily negotiated to compel the disclosure of key risks and concerns within the business prior to exchange. Any inaccuracy of such warranties would give rise to claims by the buyer against the warrantors, requiring extensive debate around liability limitations and the creditworthiness of the warrantors. The development of warranty and indemnity (W&I) coverage has effectively shifted the risk of any breach from the parties to the transaction to the insurer. This has the double benefit of allowing the seller to walk away from the deal with limited — and occasionally no — tail liability and of granting the buyer comfort that it is adequately protected if things go awry.

Increasingly sophisticated products, W&I policies now feature in a vast array of transactions, including those in the life sciences sector. Insurers often impose slightly higher premiums on deals in this sector due to the perceived risk of regulatory and compliance issues. Premiums in other transactions typically range from 1.0 percent to 1.5 percent of policy limit, whereas life sciences transactions often see a premium of up to 2.5 percent of policy limit. Despite the comparatively higher cost, W&I coverage still presents an attractive alternative in the life sciences context to the traditional model of seller and warrantor recourse. Regardless of sector, there is no market standard for the party responsible for paying the premium, and this is therefore a matter for negotiation.

As the W&I market becomes more competitive, insurers have developed several appealing features, all of which can be available in life sciences transactions, subject in each case to due diligence, the jurisdiction of the deal and pricing. These include the following:

- “Nil recourse” policies set the seller’s liability for a breach of warranty to a nominal amount or nothing at all.
- A “knowledge scrape” provides coverage under the W&I policy for warranties in the purchase agreement but read without knowledge or awareness qualifiers.
- “New breach” cover allows for recovery relating to breaches discovered between signing and completion.
- W&I policies frequently provide longer periods of coverage than those negotiated under a purchase agreement.

It is important to remember that, despite its many advantages, W&I coverage is not a panacea for all ills nor the equivalent of a guarantee or indemnity. Most policies (other than “nil recourse” ones) will include a “deductible” or “attachment point” below which coverage will not be provided; this initial slice of risk will therefore need to be negotiated and allocated among the parties to the transaction. Exclusions in any W&I policy should also be carefully reviewed. While there are no specific exclusions that apply across

life sciences transactions, W&I insurance will sometimes cover only areas that are not already covered by operational insurance policies that are often relevant in the life sciences context, such as product or professional liability insurance.

The W&I market has shown repeatedly that it can adapt to accommodate unusual deal nuances and a spectrum of industry sectors. As the product matures, innovative new terms will no doubt continue to be created to address specific challenges within the life sciences arena.