

Press Releases

## **Attorney Offers Guidance On Complicated M&A Insurance**

As record-setting year for M&A's spurs interest in policies, LeClairRyan's Despo fills in gaps.

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Mergers and acquisitions activity is heating up, and more companies are considering insurance that can help to manage M&A risks, according to William A. Despo, a Newark-based member of national law firm LeClairRyan's Financial Services Regulation and Securities Litigation Practice Area Team. M&A insurance— also known as Representation and Warranty insurance—is complicated, and would-be buyers and sellers in an M&A deal should be aware of what the policies do and do not cover, Despo advised in an October 15th webinar on M&A insurance organized by the New Jersey State Bar Association.

"With global mergers and acquisitions likely to hit a record level of \$4.6 trillion this year, M&A insurance has been propelled into the front-line thoughts of many companies," according to Despo, a webinar panelist. "Such policies manage risks of a transaction by reducing financial loss from inaccuracies in the representations and warranties made by the seller. Claims for breaches for representation and warranties are common, particularly concerning issues like outstanding tax liabilities, compliance and regulatory matters, accuracy of the company's financial statements, and intellectual property."

Both buyers and sellers can purchase the insurance, which has the possible side benefit of reducing or eliminating seller escrow, he noted. The insurance can be tailored for a variety of transactions, including purchasing assets out of bankruptcy; or buying a business from a private equity firm, a publicly held company, distressed entities and other sellers.

"It's highly customized for each deal, and can facilitate a transaction," said Despo. "But would-be insurance buyers should consider a few issues before making a commitment. Buy-side (buyer purchased) policies may protect against seller fraud, and enable a buyer to recover losses directly from the insurer. Sell-side policies provide 'third party' coverage, but will not provide a fraudulent seller with defense."

He also advised looking into details, such as the scope of the policy's obligation/right-to-defend provisions, arbitration requirements, choice-of-law provisions, and which party is responsible for losses within the policy's deductible.

The scope of exclusions is another consideration. For example, an "anti-sandbagging" provision may prohibit indemnification for any condition of which the buyer knew about before closing, he said.

"Environmentally sensitive and other businesses may also be subject to limitations regarding fines, penalties, and punitive damages," advised Despo. "Such conditions as underfunded liabilities, asbestos exposure and working capital adjustments may also be excluded."

To assist in speeding the underwriting process, the parties should be aware of underwriting considerations, Despo added. "Issues to be addressed include identifying the parties to be covered, the business and location, and the quality of the buyer's due diligence and the seller's disclosures," he detailed. "The parties

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William A. Despo

should also consider the nature of the underlying representations and warranties since insurers are concerned about the scope of the representations.”

Other underwriting-related considerations include the size of the transaction, and the gap between signing the transactional agreement and completing it, noted Despo, who was joined on the webinar by Gianfranco A. Pietrafesa from Archer & Greiner; David J. Singer and Joanne Censullo from Risk Strategies Company; and Alan Wovsaniker from Lowenstein Sandler.

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