

## Insights

# RWI MARKET TURNING TO UNLIKELY INDUSTRIES FOR NEW DEALS: HEALTH CARE RWI TERMS & CONDITIONS IMPROVING

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Representations and Warranties Insurance (RWI) has increasingly become a tool employed by both Buyers and Sellers to shift away from the traditional indemnification model of escrows or other mechanisms that could tie up significant amounts of sale proceeds for years, to a risk allocation model that shifts to the insurance markets risk for certain breaches of the Seller's representations and warranties. Historically, the need for independent confirmation through the underwriting process of the facts on which the representations and warranties are based, along with a general conservatism by underwriters around specific industries has created tension in terms of the effective use of the RWI product in the health care industry. In these cases, the risk aversion of underwriters relative to certain compliance or similar operational issues has sometimes resulted in either a prove-the-negative diligence expectation that may be commercially unreasonable for a particular transaction, or broad, categorical exclusions that undercut coverage for a substantial portion of the operational activities of the target that may give rise to representations and warranties breaches. Throughout the end of 2021 and much of 2022, some carriers refused to underwrite health care deals at all and others severely limited coverage for billing and coding issues, medical malpractice or other professional liability issues, cyber risk issues (including privacy and HIPAA issues) and other core health care risks.

However, given current macroeconomic conditions, the RWI market has seen a slowdown in deal flow which has renewed their appetite for new deals, including in those historically hard to underwrite industries, like health care.

Through deal flow and conversations with various insurance brokers, BCLP attorneys have seen a general improvement in the terms and conditions offered under an RWI policy for a health care deal, including a willingness of carriers to underwrite billing and coding risks, not requiring underlying medical malpractice or other professional liability insurance and underwriting cyber and privacy risks. Each deal and carrier are unique and what a carrier is willing to underwrite depends on the target business and what is discovered during due diligence.

Whether a Buyer is hoping to provide a more attractive offer to a potential Seller that includes a clearer termination of post-closing liability (and avoids tying significant sums up in escrow), or a Seller is looking to transfer post-closing liability to an insurer, this climate may be a good time to reconsider placing (or having a Buyer place) a representations and warranty insurance policy in connection with a transaction.

BCLP attorneys are equipped to evaluate the pros and cons of pursuing RWI on a transaction, consider the various indemnification structures that come along with an insured transaction, identify ways to appropriately allocate risks between parties and utilize the tools available to facilitate cleaner allocation.

## **RELATED CAPABILITIES**

- Healthcare & Life Sciences

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