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Big Five: Recent W&I Insurance Trends in Ireland

by **Richard Curran**

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Warranty and indemnity insurance (W&I Insurance) has become a common feature of the Irish M&A landscape. A number of trends and developments are emerging on the use of W&I Insurance on Irish M&A deals which reflect the wider evolution of W&I Insurance on an international level.

Our Corporate Partners explore five W&I Insurance trends and developments which have been seen recently in Ireland.

1. Sell-Side Flips

Sell-side flips of W&I Insurance policies are being used with increasing frequency on Irish M&A deals. In a sell-side flip, the seller approaches a W&I Insurance broker for indicative terms (normally including pricing) with the intention that the W&I Insurance policy will ultimately be taken over by the buyer, with the seller bearing the cost. A key consideration for the seller on a sell-side flip is that any information on the W&I Insurance broker's file whenever the "flip" occurs will automatically become the buyer's information. Provided that the seller has disclosed all relevant information to the buyer, this should not be an issue for the seller.

2. Auction Processes

Both sellers and bidders are making strategic use of W&I Insurance in Irish auction processes. Many sellers are now engaging in "stapling" to channel bidders into obtaining W&I Insurance as a part of their bid. In "hard stapling", the seller will tell bidders that the warranties in the draft SPA provided by the seller are only available if the bidder obtains W&I Insurance. In "soft stapling", the seller simply caps its liability sufficiently low to induce the bidder into obtaining W&I Insurance. At the same time, some bidders are freely choosing to use W&I Insurance to enhance the attractiveness of their bid, most commonly where the sellers include a continuing management team. W&I Insurance helps to build a positive dynamic by avoiding the risk of warranty claims being brought against the management team.

3. Synthetic Tax Deeds

Many W&I Insurance providers are now offering "synthetic" tax deeds where sellers are unwilling or unable to accept tax liabilities on an indemnity basis. For sellers (such as private equity funds) wanting a clean exit, synthetic tax deeds are attractive and are now being seen more frequently in Ireland. At the same time, W&I Insurance providers are reluctant to provide meaningful cover without an appropriate level of disclosure and due diligence by the seller and buyer. Accordingly, the seller and buyer will need to engage in disclosure and diligence to the same degree as if there was no W&I Insurance cover in place or else there will likely be extensive exclusions to the cover given by the synthetic tax deed.

4. Knowledge Scrapes

Buyers are increasingly utilising W&I Insurance to mitigate or circumvent knowledge and awareness qualifiers on Irish M&A deals. Many W&I Insurance providers are now offering "Knowledge scrapes" to remove certain knowledge/awareness qualifiers from the warranties. This has the effect of making the warranty unqualified for the purposes of a claim under the W&I Insurance policy. Whilst it depends on the warranties in question, the use of knowledge scrapes traditionally results in an increase in the premium on the W&I Insurance policy.

5. Materiality Scrapes

Similarly to knowledge scrapes, many W&I Insurance providers are now offering “materiality scrapes". These are designed to remove a materiality qualifier for the purposes of calculating damages (a single materiality scrape) and also for determining whether a breach of warranty has occurred (a double materiality scrape). Until relatively recently, double materiality scrapes were relatively rare. Their use is now more common provided that the W&I Insurance provider is comfortable that the parties have undertaken a robust disclosure and due diligence exercise, regardless of materiality.

About the Author

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