

TRANSACTIONAL RISK

Marsh R&W Insurance Claims: A Practical Guide

Representations and warranties (R&W) insurance policies have become increasingly popular in the US as market conditions have become more favorable. Around 2,000 transactions utilized this insurance in 2019 alone.

But as the number of R&W insurance policies increased, so has claims activity. Due to its relative novelty, the claims process is new for many insureds. The below frequently asked questions aim to help insureds and their advisors better understand R&W insurance to avoid common pitfalls and facilitate a positive claims outcome.

What is an R&W insurance claim?

Recovery on a claim under an R&W insurance policy typically requires a showing of a breach of a representation and warranty in the acquisition agreement, or certain ancillary documents to the acquisition agreement, and/or a claim under the pre-closing tax indemnity. To recover losses under the R&W insurance policy, there must be a financial loss arising from the breach.

Your R&W policy will specifically define breach and loss, making it critical to negotiate insured-friendly policy language.

In general two types of claims can be brought under an R&W insurance policy:

- In a **first party claim** the insured is the only party bearing the loss. The most common example is a breach of the financial statements representation and warranty in the acquisition agreement. Another example is a claim resulting from a breach of a representation stating that all equipment is in good working condition except for ordinary wear and tear.
- In a **third party claim** the insured has liability to a third party — typically resulting from litigation or a similar proceeding. The most common example is a claim related to an undisclosed assessment of taxes related to the pre-closing period.

How do I report a claim?

If you believe you have an R&W insurance claim, you should first prepare a claim notice to report the claim to the insurer as set forth in the R&W insurance policy. Many policies require an insured to report the claim as soon as reasonably practicable after becoming aware of a breach, third party demand, or loss. Your broker, in conjunction with outside counsel, can assist with reporting the claim and provide guidance through the process.

Typical Claims Process



Breach of a covered R&W in the acquisition agreement. Contact your legal counsel and Marsh to discuss.



Prepare a claim notice to report the claim to your insurer.



Investigation commences to establish breach and related loss. Exchange of documentation responsive to insurer requests.



Coverage determination from insurer.

Claim Adjustment Process

How is a claim investigated?

An insurer will typically respond to a claim notice with an acknowledgement and reservation of rights letter. After reviewing the facts and any documentation provided, the insurer will usually provide a written request for additional information and documentation needed to further investigate the claim. However, a policyholder does not need to wait for the letter, and may begin gathering the needed documentation beforehand. Promptly respond to insurer requests with complete information to support the breach and loss calculation to expedite your claim. Any concerns related to information or documentation requests should be discussed with your broker and your advisors. It is also prudent to schedule an initial call with your insurer shortly after submitting the initial claim notice, allowing for preliminary questions to be answered verbally to streamline the process.

My insurer is requesting documents and asking questions. Wasn't this information collected during underwriting?

During underwriting, insurers and their advisors review and ask questions regarding the due diligence conducted by the buyer and their advisors. However, they typically do not conduct primary due diligence on the acquired company. While your insurer may understand some of the details of the claim based on information collected during underwriting, they will likely need additional information about the nature of the breach. The insurer's claims investigation is likely to resemble more of a primary diligence investigation of the facts and circumstances underlying the breach and will likely require a greater level of detail than was undertaken during underwriting. Your insurer might make broad requests for information as they determine what is relevant. Consider discussing information requests with your broker and the insurer to focus the insurer on the relevant information and documentation.

Do I need to engage third party or external advisors to assist with my claim?

Due to the complexity of many R&W insurance claims, it is likely that your insurer will engage an expert to help them investigate and resolve the claim. It is common for an insurer to work with outside counsel and other professionals, including forensic accountants, network security/IT consultants, engineers, and environmental consultants, depending on the nature of the claim. Although it is not required for you to engage outside advisors, they can provide a detailed description of the breach and calculation of loss to the insurer, potentially leading to a more efficient process.

What does a claim notice look like?

The R&W policy typically specifies the information required by the insurer in a claim notice. Some insurers require a specific form to be used. In general, R&W insurance policies require a claim notice to include as much information as reasonably practicable, including the implicated representations and warranties and, if available, the amount of loss. An R&W claim notice is typically similar to the notice a buyer would provide a seller when making an indemnity claim against a seller escrow pursuant to the indemnification provisions of an acquisition agreement.

Although notice requirements can be relatively minimal, it is helpful to provide a description of the claim and, as more details become available, provide any additional supporting information for the breach and the calculation of loss.

What if I think I have a multiplied damages claim?

The definition of loss in R&W insurance policies varies, however it is common for the policy to be silent with respect to the availability of consequential and multiplied damages. When a loss includes a consequential or multiplied damages component, the insured will usually need to support the applicability of such damages and the multiple figure (if being used). A forensic accounting expert may assist with the preparation of the calculation of loss, including an analysis of the impact of the loss on the buyer's valuation of the acquired company. Providing this detailed information as early as possible in the claims process can be crucial to achieve a positive outcome, as the insurer will be particularly focused on the information supporting the quantum of loss where coverage of multiplied or consequential damages is being sought.

How long does the process take?

The timing of the claim adjustment process can vary based on a number of factors, including the complexity of the claim, completeness of information available, need to engage third party specialists, and the time it takes for the insured to gather information and documentation. For third party claims, the R&W insurance claim process is driven by the timing of the underlying action. Marsh's dedicated claims specialists can help minimize timing delays in the process for both first and third party claims.

Additional Considerations for the Claims Process

A number of provisions in an R&W insurance policy may be applicable to the claims process and are important to consider. These include:

- **Settlement of an underlying action.** In general, R&W insurance policies provide the insurer with the right to consent to a settlement above a certain threshold defined by the policy. It is important to keep the insurer apprised of material developments in an underlying action and any settlement discussions, allowing the insurer to efficiently respond to any consent requests.
- **Settlement of an indemnity claim with seller.** Depending on the policy, the insurer will likely have certain rights with respect to subrogation. When settling an indemnity claim under the acquisition agreement with the seller, be aware that the insurer will likely want the insured to carefully craft any waiver or release to preserve any rights that the insurer may have under the R&W insurance policy, including the insurer's ability to bring a subrogation claim. It is prudent to maintain an open dialogue with the insurer during the settlement process to avoid impacting the insured's rights with respect to an R&W insurance claim.
- **Defense costs and expenses.** R&W insurance policies generally do not include a duty to defend obligation for insurers. Instead, R&W policies typically provide for reimbursement of reasonable defense costs and potentially other expenses, subject to the specific policy provisions. Insurers will look for regularly provided invoices to support claims for reimbursement of such costs.
- **Other Insurance.** Most R&W insurance policies are in excess of other insurance. It is common for insurers to inquire on the applicability of any other insurance coverages and whether a claim has been submitted under any such applicable insurance policy.

The above is not an exhaustive list of provisions and the insured's legal counsel and broker can provide guidance on individual policy constructs that may affect the claim.

Although R&W insurance policies generally provide broad coverage that makes each claim and process bespoke, the issues summarized above are commonly applicable to R&W claims. Marsh has successfully advocated for hundreds of millions of dollars in claims payments over the course of numerous claims processes we have overseen for our clients. Given the depth of our experience negotiating R&W policy wording and settling R&W insurance claims for our clients, we can provide a smoother claim process and optimize the chance of recovery on R&W insurance claims.



For more information visit marsh.com, contact your Marsh representative, or contact:

CRAIG SCHIOPPO
Transactional Risk Practice Leader
+1 212 345 6492
craig.schioppo@marsh.com

ASHLEY PARSA
Transactional Risk Practice Claims Leader
+1 404 995 2894
ashley.parsa@marsh.com

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