

Using Representations and Warranties Insurance in Complex Real Estate Transactions

A. Why Purchase A Real Estate R&W Policy

- Buyer v. Seller policy
- How policy can facilitate deals
- Types of transactions/risks

B. Policy Underwriting Process

- Use knowledgeable broker
- Start process early
- Application/information submissions
- Underwriting considerations
- Limits/retention/premium parameters
- Types of acceptable/unacceptable risk
- Impact on transaction agreement terms
- Reps letter
 - Who signs
 - What due diligence
 - What representations

C. Policy Terms

- Policies are negotiable
- Claims made coverage (when Breach discovered)
- Policy Period
- Aggregate Limit of Liability and Retention
- Definitions
 - Covered R&W
 - Covered Loss (damages, tax, legal costs)

- Exclusions
 - Known existing Breach
 - Projections or estimates
 - Purchase price adjustments
 - Physical condition of property
 - Title defects
 - Non-monetary relief
- Claims process
 - Notice of Breach ASAP
 - Prior consent of Insurer to settle or incur costs
 - Insured's duty to pursue other recoveries
 - Insured's duty to cooperate/mitigate loss
 - Insured selects counsel
 - Defense cost advancement
 - Subrogation rights
 - Subsequent recoveries/offsetting benefits
- Miscellaneous terms
 - Mandatory ADR
 - Inadvertent Policy breach
 - Loss payee

D. Current Trends