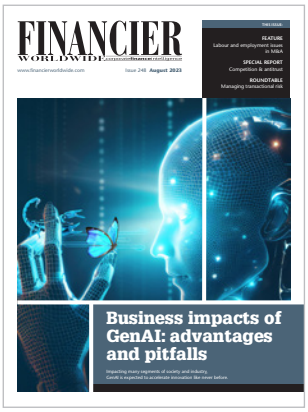

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MANAGING TRANSACTIONAL RISK

Stakeholders in the M&A game appreciate how fast risk factors change in this dynamic endeavour. Buyers understand that a typical deal will have inherent risks in both the target company and the transaction process itself, with the due diligence approach varying depending on the nature of the operations of the business to be acquired. However, despite legal, financial and tax diligence being necessary on all transactions, the reality is that some acquirers are better than others at managing transactional risk. ■

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A Stanford Law School graduate and federal district and circuit court law clerk with experience at both major and boutique law firms, Connor Williams joined Vanbridge recently from Omni Bridgeway, a leading global litigation finance firm. While at Omni Bridgeway, Mr Williams was responsible for analysing litigation in a broad array of industries and conducted all phases of the due diligence process for litigation-related investments.

FW: Do you believe acquirers in general are paying enough attention to identifying and assessing risks during the transaction process? Are they falling short on any particular aspects in today's market?

Sherman: Acquirers understand that a typical deal will have inherent risks in both the target company and the transaction. However, the M&A market, even though it has cooled down some, remains competitive for deals, which tends to shorten the time available for buyers to conduct diligence and identify and assess all risks. Some acquirers are better than others at identifying and assessing the risks. In addition, there has been a shift over time in transaction type from manufacturing and mercantile to medical, now to tech-related businesses. The shift causes new, and at times heightened and less known, risks, but with no additional time for diligence.

Fraser: Stakeholders in the M&A industry appreciate how fast risk factors change in this dynamic area of the economy. Due diligence processes consistently change to keep up with global economic, legal and social factors that can affect M&A transactions. The transactional risk market is also evolving to increase underwriting expertise and to provide innovative ways to de-risk M&A deals and underlying businesses. Acquirers hold the majority of the risk of owning an acquired business – with or without representations and warranties (R&W) insurance – and generally do their best to identify and assess risk that could affect their investment.

Reynolds: We sometimes see claims on warranty and indemnity (W&I) policies for issues that should have been identified during the due diligence process. One area of increasing frequency and severity is condition of assets. While much of the due diligence process focuses on legal risks, it is important to ensure that the quality and condition of the productive assets of the company being acquired are what the buyer bargained for. Accounting is also a key risk area. Even audited financial statements involve judgment calls on the part of the auditors. Where no audit has been conducted, it is even more important to thoroughly review the financials and to watch for signs of manipulation such as channel stuffing. In any case, buyers and their experts should thoroughly understand the financials of the company and the valuations that were applied before acquiring the company.

Williams: At this stage of market maturity, due diligence expectations are clear, and parties are generally meeting the mark. It was once thought that diligence was lighter, given the risk shifting provided by R&W insurance, however gaps in diligence were correctly responded to with exclusions, and reports today are generally thorough. Deal volume, deal size and industry all impact diligence expectations. With greater volume and time constraint pressures, diligence was as complete as able. In the US, market power has shifted the way of the buyer and diligence has been robust. Carriers are also working to be more commercial with internal diligence from strategic acquirers versus third-party diligence reports. Expectations around high-frequency or high-severity claim areas, such as financials, material customers and suppliers, cyber and billing and coding, require more thorough review.

Ma: The attention given by acquirers to identifying and assessing risks can vary depending on their expertise, available resources and the specific circumstances of each transaction. In today's market, deal flow is influenced by uncertainties, particularly for larger transactions that require substantial financing. As a result, acquirers tend to take more time to complete thorough due diligence, demonstrating increased vigilance toward emerging risks, such as technological disruptions, environmental, social and governance (ESG) impacts and regulatory changes. They also prioritise robust integration planning and execution to address cultural differences and align strategic objectives. However, one challenge is the pressure to quickly establish a mutually agreed-upon price, which can sometimes lead to an overemphasis on financial aspects during due diligence and the neglect of other critical areas. This may result in unexpected risks arising after the transaction.

Serpemen: Buyers traditionally engage sophisticated and knowledgeable third-party experts, including financial, tax and legal advisers, to assist in their diligence. Given current headwinds in the M&A market, including inflation, high interest rates and lower deal volume, we have found that buyers currently have more time to conduct their diligence compared to prior years where the transaction process was more frequently run on a very tight timeframe. This is not to say that when timelines are more expedited that the diligence is lacking, as deal professionals are certainly able to conduct thorough diligence on condensed timelines, but with the current, more protracted timelines we often see today, parties appear to have more of an opportunity to run down more granular diligence items.

FW: What are the key areas that need to be considered as part of a due diligence process? To what extent is the scope of due diligence widening to incorporate 'non-traditional' areas of assessment?

Fraser: Areas of due diligence vary greatly depending on the nature of the operations of an acquired business. Legal, financial and tax due diligence are necessary on all transactions. Depending on the business, there may be several areas that require enhanced due diligence processes that require more specialised expertise, such as environmental, condition of assets or cyber exposures. This approach is only going to become more common as time goes on.

Reynolds: Financial statements are perhaps the most important area of focus in due diligence. Good financial statements should provide a clear picture of the company and its operations. Any misrepresentations – whether deliberate or inadvertent – may have a major impact on the projected future cash flows of the company. One of the key areas receiving increased due diligence scrutiny is cyber. To date, we have not received many

W&I claims related to hacking or other cyber exposures of that nature. We have, however, seen computer-related claims, such as inadequate computer infrastructure or lack of sufficient software licences. Many companies operate without the appropriate number of software licences, so it is worth including this issue in the due diligence process.

Williams: Diligence expectations will vary based on deal size, complexity, industry, timeline and the parties involved. With appropriate diligence, some carriers will fully underwrite to transfer pricing, interim breaches and carve out financials, without typical qualifier language stipulating that variances in shared costs and allocations do not qualify as a breach. Appetite continues to broaden in historically 'challenging' industries, as carriers have invested in intellectual capital. In all instances, however, adequate diligence remains a constant.

Ma: In a comprehensive due diligence process, key areas to consider include financial, legal, operational, commercial, technology, HR and international risks. The importance of cyber security and data privacy has surged in recent years due to the heightened risks of data breaches and the need for regulatory compliance. Acquirers prioritise evaluating the target company's cyber security measures, data protection policies and vulnerabilities to safeguard sensitive information. Furthermore, there is a growing emphasis on conducting ESG-related due diligence, driven by the recognition of its impact on a company's long-term sustainability and reputation. Moreover, acquirers closely monitor headline events in the market and expand the scope of due diligence accordingly to effectively assess risks and ensure compliance to make informed decisions in today's intricate business landscape.

Serpemen: The scope of due diligence is highly specific to the operations of the entity being acquired, although generally key areas of diligence involve financial, tax, material contracts, compliance with law and HR matters. Depending on the operations of the business, focus could also be on specialised matters, such as intellectual property (IP), environmental, permits or trade laws and regulations. The diligence should generally match the scope of the warranties made by the seller in the relevant transaction agreement. In terms of non-traditional matters, these are often influenced by current events. For example, over the past 24-36 months, we have often seen additional focus being given to matters such as the coronavirus (COVID-19) pandemic, the war in Ukraine and supply chain issues, including how these and other macro and micro economic factors may affect the target business, both now as well as in the future.

Sherman: The due diligence process of any company must focus on fundamental issues as well as company and industry specific issues. Diligence on the fundamental issues is required for any transaction. One example is financial performance, which is key since transaction value is driven by the historic and forecasted financial performance. Diligence on its completeness and accuracy is therefore paramount. Company specific and industry diligence is also of great consequence. Certain industries will require enhanced diligence on product efficacy, regulatory diligence, perhaps environmental diligence, and possibly diligence in unfamiliar areas. Unfamiliar risks must first be identified and then diligenced thoroughly. Diligence scope has widened over time, in part because of expanding demands on companies, like expanded regulations, crowded markets and increased competition, and in part because of shifting industry focus to tech-related businesses that present different risks and require a different knowledge base.

FW: What advice would you offer to buyers and sellers on negotiating representations and warranties (R&W) as part of an M&A transaction? Where does R&W, or warranty and indemnity (W&I), insurance fit into this process?

Reynolds: W&I insurance can streamline a transaction by eliminating the need for haggling over which deal party bears each area of uncertainty. Tax indemnity insurance is also available to cover known tax risks that have been identified by the parties. However, W&I insurance is not intended to be a substitute for thorough disclosure by the seller or careful diligence by the buyer. There is ordinarily a significant retention to account for the type of small losses that routinely arise in complex M&A transactions. Moreover, a policy ordinarily covers only 10 percent of the deal value, so the buyer is incentivised

> "DILIGENCE EXPECTATIONS WILL VARY BASED ON DEAL SIZE, COMPLEXITY, INDUSTRY, TIMELINE AND THE PARTIES INVOLVED."
>
> CONNOR WILLIAMS
> Vanbridge

to identify material risks and negotiate solutions with the seller.

Williams: R&W insurance should be fully integrated into the M&A transaction process, from the letter of intent stage forward. Its use favourably impacts negotiations. If integrated early, the insurance will not delay the deal process. The most critical advice we would offer is to negotiate the broadest representations that can be verified through the buyer's diligence process. Overly broad representations that are modified or excluded due to the lack of diligence only serve to slow the process and can result in unexpected, last-minute negotiations. In addition, knowledge and familiarity with solutions available in the market, such as tax and contingent liability, allow parties to effectively manage the transaction process. Parties should allow sufficient time to successfully underwrite a risk or, alternatively, structure an appropriate indemnity, ensure that the necessary underwriting information will be available, and negotiate the costs and requirements that may be required from both sides to complete the placement.

Ma: When negotiating R&W in an M&A transaction, both buyers and sellers should keep several key points in mind. Firstly, it is crucial to ensure clarity and specificity in the R&W provisions to prevent ambiguity and potential disputes down the line. Secondly, a fair allocation of risk must be negotiated, considering the need for buyer protection while maintaining reasonable seller liability and the burden of disclosure. For buyers, conducting thorough due diligence is essential, instead of relying solely on R&W for protection, while sellers should disclose all material information to limit future liabilities. R&W insurance, a mature product that provides coverage for R&W breaches, has become increasingly valuable in enhancing deal attractiveness and reducing the need for escrow, particularly in uncertain markets with the resurgence of larger deals. Engaging R&W insurance professionals early in the process allows for an assessment of coverage options, terms and pricing, ultimately enhancing deal certainty and facilitating a smoother transaction.

> "W&I INSURANCE CAN STREAMLINE A TRANSACTION BY ELIMINATING THE NEED FOR HAGGLING OVER WHICH DEAL PARTY BEARS EACH AREA OF UNCERTAINTY."
>
> ROY REYNOLDS
> Great American Insurance Group

Sherman: Every transaction requires parties to negotiate R&W that adequately meet their needs. However, to the extent that the parties choose to take advantage of R&W and W&I insurance, they need to ensure that each of the representations is insurable. It may be obvious that the wording of a particular representation is too broad, or the subject of the representation has not been subjected to adequate diligence to make insurers comfortable about the risk. Other times, a representation, or the wording of a representation, may be acceptable to some insurers and not to others. Keep the insurer informed to avoid the need to deal with potential exclusions or additional diligence at the last minute.

Serpemen: Our advice would be to get the parties involved at the beginning of the process. In Europe, insurers often are engaged at the beginning of the process before a buyer has even been identified. This allows underwriters to go through seller-side diligence and be ready to move quickly with the identified buyer. The process in North America is a bit different in that there is often no seller-side diligence, other than potentially a seller-side quality of earnings report, and underwriters are generally engaged only after a buyer has exclusivity. In terms of negotiating the warranties, R&W and W&I allows the parties to spend significantly less time negotiating the R&W, so long as such R&W are reasonable and appropriate for the transaction. We would advise deal professionals and buyers that insurers expect to see that the diligence and disclosure exercise matches the breadth and scope of the R&W provided in the transaction agreement. Also, if the parties have identified potential issues or plan to limit the amount of diligence, they should proactively discuss those matters with brokers and underwriters to assess the materiality of these areas, as well as determine whether a separate contingency product may be a better solution for an identified risk.

Fraser: Buyers should engage strong broker and insurance partners early in the negotiation process. The earlier in the process that the parties consider R&W insurance, the smoother the process can be. Buyers and sellers should consider including R&W insurance as part of the negotiation at the letter of intent stage, as it provides a framework that shows how indemnification will be structured in the event of a misrepresentation and can reduce late-stage negotiations. Outlining R&W parameters early in the process

gives the seller clarity on what their post-closing obligations will be limited to and also accounts for budgetary items such as premium and retention splits. Additionally, to help prevent unexpected limitations on coverage, buyers should conduct a thorough and robust due diligence process, as they would in the absence of R&W insurance.

FW: To what extent are you seeing rising demand for tax liability insurance? What benefits does this risk-transfer solution provide?

Williams: Tax is one of the main considerations in M&A transactions, operations and general business decisions because it has an immediate impact on a company's balance sheet. Tax liability insurance transfers the contemplated tax risk from the taxpayer's balance sheet to an A-rated insurance company with substantive knowledge and expertise on the underlying tax risk. Very simply, tax coverage provides protection to taxpayers – the named insured – should a tax position fail to qualify for its intended tax treatment. Coverage is available for corporations, trusts, partnerships and, increasingly, individuals. Historically, coverage was mainly utilised in the context of 'one-off' corporate issues. However, the market has now matured to cover a broader array of risks associated with ongoing tax audits and controversies, ensuring the accuracy of a corporation's ongoing tax returns, and in the context of tax planning. The coverage provides certainty to planned tax consequences. This is a powerful tool every taxpayer should consider.

Serpemen: We are seeing a year-on-year growth in the number of requests for tax liability insurance across a broad range of jurisdictions and issues. This is driven by significant investment by the main broking houses in specialist tax brokers, increasing awareness of the product and of the benefits it can provide. Tax liability insurance looks to provide cover for identified tax issues, which can arise both inside and outside of the context of an M&A transaction. M&A transactions do provide the majority of tax liability insurance submissions. Tax liability insurance can be used by bidders in auctions to increase the attractiveness of their bid, particularly in seller-friendly M&A conditions. Equally, tax liability insurance can be used by sellers to maximise their sale consideration, remove the need for escrows, retentions and so on, or the requirement to provide specific indemnities. Tax liability insurance can be used to protect against the possible tax effects of pre-completion and post-completion reorganisations. It can be used to protect the availability on a going forward basis of tax assets in a target group that have been ascribed value by the parties when negotiating the price for the target group.

Fraser: Demand for tax liability insurance has continued to grow as tax and M&A practitioners have become more educated and more comfortable with the product. Furthermore, insurance underwriters and brokers have invested in expanding their tax expertise. Additionally, the Inflation Reduction Act and increased focus on expanding the use of and tradability of renewable energy-related tax credits have created more demand for tax credit insurance and new areas where tax insurance may apply. Tax insurance has varying benefits depending on what type of tax is being insured. In M&A transactions, tax insurance can help close a deal by providing a risk transfer solution for a material tax issue that may have otherwise become a sticking point between buyer and seller. In the renewable energy space, we see the product being used to de-risk new and existing projects and help facilitate the economy's clean energy transition.

Sherman: Tax liability insurance is a relatively new insurance product. Demand for the product has been on the rise, significantly – partly because of the product's young age and partly because of its tremendous value to protect against the risk and uncertainty of tax positions taken. Relative to M&A transactions, tax liability insurance can help solve sticking points in deal negotiation or issues that might otherwise require escrows or indemnities. Beyond M&A transactions, tax liability insurance has great value in its ability to be customised to address tax structures and a wide range of other tax-related risks, as well as bring a greater level of certainty to tax positions.

Ma: Tax liability insurance has witnessed a significant surge in demand, driven by the complexities of tax laws, increased scrutiny from tax authorities, and the need to mitigate financial risks associated with tax liabilities. The ever-changing global tax

> "FOR BUYERS, CONDUCTING THOROUGH DUE DILIGENCE IS ESSENTIAL, INSTEAD OF RELYING SOLELY ON R&W FOR PROTECTION, WHILE SELLERS SHOULD DISCLOSE ALL MATERIAL INFORMATION TO LIMIT FUTURE LIABILITIES."
>
> MIRANDA MA
> Euclid Transactional, LLC

landscape poses challenges for taxpayers and advisers, necessitating efficient risk management solutions. Tax liability insurance provides an effective tool to limit uncertainty and risk associated with tax positions, whether in M&A transactions or strategic positions. In the context of M&A deals, uncertain tax positions often lead to tense negotiations and potential deal breakdowns. By utilising tax liability insurance, buyers can avoid self-insuring the risk or negotiating complex indemnity or escrow arrangements, while sellers can protect themselves from indemnity obligations. Even the strongest tax positions carry some level of doubt, as obtaining private letter rulings can be time-consuming. Thus, tax liability insurance offers an ideal solution to safeguard against tax positions that may not qualify for their intended treatment.

> "DEMAND FOR TAX LIABILITY INSURANCE HAS CONTINUED TO GROW AS TAX AND M&A PRACTITIONERS HAVE BECOME MORE EDUCATED AND MORE COMFORTABLE WITH THE PRODUCT."
>
> LANCE FRASER
> Chubb

Reynolds: Awareness of, and demand for, tax liability insurance is increasing. One key growth area is real estate investment trusts (REITs). A buyer of a REIT runs the risk that the entity has not qualified for pass-through tax treatment, because it has failed to meet the statutory criteria. Tax liability insurance can cover any damages suffered if REIT status is denied. Increasingly, buyers are purchasing policies that cover not only the REIT representatives, but also the other W&Is in the purchase agreement. Tax credit insurance is also increasingly prevalent. Solar, wind and other energy tax credits are often insured against disqualification and recapture. New legislation in the US, such as the Inflation Reduction Act and the Build Back Better Act, have added new alternative energy tax credits and enhanced existing ones. With new or revised tax credits comes opportunity, but also uncertainty and the need for insurance.

FW: In an M&A transaction, what advantages can buyers and sellers gain by utilising contingent risk insurance to manage other potential liabilities?

Fraser: A large contingent risk identified at a target company in an M&A transaction can create significant headwinds in completing the deal, as neither buyer nor seller wants to be responsible for the potential liability, especially if it is a long-tail risk. Uninsured, these headwinds can ultimately create sizable valuation gaps between deal parties. Contingent risk insurance can help solve these headwinds and ultimately close the deal by allowing the seller to achieve a clean exit and the buyer to acquire the target company without a large contingent liability that could significantly affect the value of the business. We also see contingent risk insurance used outside of the context of an M&A transaction by companies looking to ring-fence potential liability or preserve previously won litigation judgements. In these cases, insurance can help businesses operate without the constraints of a large potential liability and in many cases, create new financing opportunities or reduce the cost of capital.

Sherman: Utilising contingent risk, or contingent liability insurance, allows a buyer to manage possible financial loss and accounting uncertainty from the unknown future outcome of known risks. Similar to tax liability insurance, for sellers, contingent risk insurance can limit or eliminate transactional escrows or indemnities for known risks that follow the target company after acquisition. For both the buyer and seller, the insurance can assist in smoothing the negotiations of the transaction where the buyer has concerns about the risks inherent in certain known issues.

Ma: Known issues that might result in a future financial loss introduce risk to the business and often lead to tense negotiations that can force the parties to walk away from a deal. Subject to certain terms and conditions and satisfactory underwriting, contingent liability insurance can provide coverage for a range of issues, such as litigation risks, open-ended indemnities, product warranties and pending investigations. It can help limit a potential liability by capping the exposure with insurance. This reduces uncertainty in the accounting and financial projection model and shields buyers and sellers from 'worst case' outcomes.

Reynolds: Contingent risk insurance is a useful supplement to W&I insurance. While W&I insurance covers risks which have not been disclosed or identified in the due diligence process, contingent risk insurance can cover risks that have been identified. Since the covered risk is greater, it is generally more expensive than W&I coverage, and such coverage is not widely available. The most commonly available contingent risk insurance is specific litigation insurance. This product can cover

a buyer's risk of losing a lawsuit or having an existing judgment overturned. As the transactional risk market develops and matures, I expect to see broader availability of different types of contingent risk insurance.

Serpemen: The use of contingent risk insurance by parties in M&A transactions continues to increase, and with good reason. While R&W and W&I insurance has become standard in M&A transactions, such coverage is not designed to insure against risks and potential liabilities that have been identified during due diligence. These identified exposures are often the subject of intense negotiations and can result in one of the parties retaining an undesired level of risk post-closing of the transaction, or even lead to the cratering of the transaction if the parties cannot come to a resolution. To alleviate these issues, contingent risk insurance can be utilised to help reduce or eliminate the need for escrows, indemnities or purchase price adjustments. Consequently, the sellers can have a clean or cleaner exit, and the buyers are provided the protection they require in respect of the identified potential liabilities.

Williams: Contingent risk insurance provides certainty. Examples of risks that can be ringfenced include litigation, successor liability and environmental. Moreover, the advantages are similar to those created by other types of transactional risk insurance: buyers can simultaneously put forth a superior bid to those that require seller indemnity and secure more financial protection from an A-rated carrier than the seller may be willing to provide. Sellers can obtain better bid pricing, increased and immediate liquidity, and achieve a clean exit unencumbered by risks that may otherwise threaten to drag on for years. It is not surprising that contingent liability policies have evolved beyond the M&A transaction context. Plaintiffs, defendants, law firms and litigation funders alike should be aware of contingent liability insurance as a means of achieving financial security in the face of litigation-related risk.

FW: In your experience, what are the key attributes of an efficient, developed and well-organised claims process? What factors influence how quickly claims are processed and resolved?

Serpemen: In short, a positive claims experience, including one which is efficient, developed and well-organised, is driven by realistic expectations among stakeholders, open and frequent communication between the parties and the free flow of information from the policyholder in support of its claim. Of these, the most important component is open, constant and proactive communication between representatives of the key stakeholders. However, it is also critical that advisers help their clients manage expectations on a case-by-case basis. Every claim has its own timeline because of the unique components of that matter. For example, a third party tax claim brought by the tax authority in a developing country is inherently on a different trajectory than a first party claim for an undisclosed expense. Similarly, the type of information carriers need to review, and the efforts it might require of the insured to collect that information, in furtherance of their coverage evaluation will differ depending on the type of claim, the quantum of loss and whether the claim relates to historic information that may already be in the carrier's possession from underwriting. Where there is alignment among the parties' expectations of what the claim process will look like and when there is regular communication along the way, the claim process is more collaborative from the get-go, which in turn leads to a quicker and much more positive experience for the client.

Ma: Effective claims service plays a crucial role in any insurance product, including R&W insurance. Claims related to R&W insurance involve intricate data requests and analysis, with significant uncertainties surrounding the calculation of losses under the policy. It is vital to have an experienced claims team representing the carrier, one that demonstrates attention, speed and open communication. The size, expertise and calibre of the claims team, coupled with their strong connection to specific deal underwriters and a comprehensive understanding of deal-specific circumstances, enable the provision of a consistent, thoughtful and proactive claims process. Establishing a partnership between the claims and underwriting teams, with regular meetings for knowledge exchange and idea-sharing, proves beneficial in enhancing both the claims and underwriting processes.

Reynolds: The most important factor in expediting a claim is how quickly the insured provides information to the insurer.

> "WE HAVE SEEN GROWTH WORLDWIDE IN THE BUILDING OF SPECIFIC TEAMS FOR CONTINGENCY AND TAX AND THIS HAS BEEN INSTRUMENTAL IN THE EXPANSION OF BOTH THE AWARENESS AND USE OF THESE PRODUCTS."
>
> TANYEL SERPEMEN
> Ambridge Europe

W&I claims are very complex, and the calculation of damages often requires sophisticated forensic accounting or other analysis. Claims professionals and their advisers are motivated to resolve claims quickly. However, they need documentation of the losses to do so. As claims get larger, it is increasingly important for primary and excess insurers to cooperate on claims handling. A primary carrier that shares information and communicates with the excess insurers throughout the claims process helps its client by expediting payment of the full amount of the claim.

> THE USE OF INSURANCE PRODUCTS WILL CONTINUE TO GROW BECAUSE OF THE OBVIOUS BENEFITS, GROWING RELIANCE ON THE PRODUCTS AND INCREASES IN COVERAGE LIMITS.
>
> MARC SHERMAN
> Alvarez & Marsal

Sherman: The number of claims filed and paid relating to R&W and W&I is so vast that experience helps in knowing what attributes promote an efficient and well-organised claims process, and what leads to the opposite. First, it is critical to realise that the claims process is best accomplished when approached as a collaborative effort with the insurer. It is not an adversarial process. In order to responsibly pay a claim, the insurer must verify the claim and the loss. The policyholder's best opportunity to accomplish that efficiently is to proactively provide the insurer with everything required to prove the claim and the loss. Consider that there is a tremendous information imbalance between the insured and the insurer at the start of the process. The insured has full information about the acquisition, the operation and the problem. The insurer has none. The insured must be the catalyst to change that. Claims also get resolved more efficiently when the insured's advisers are collaborative, when they are candid with the insured about weaknesses in the claim or when the claim is overstated, and when they help the insured to understand the extent of information and substantiation needed to promote and prove the claim.

Williams: Communication is the key attribute of an efficient and well-organised claims process. Timely notice with supporting claim documentation allows the broker to analyse all potential sources of recovery – underlying insurance or transactional insurance – anticipate issues and insurer requests and to streamline the claims-handling process. Experienced brokers and underwriters will have a dedicated and proactive claims team, led by seasoned individuals with specific experience in transactional risk claims management. These teams should be integrated with the front of the house, whether that be broking or underwriting. Cooperation among parties often creates efficiencies and improves the insurance recovery and reimbursement process.

Fraser: The claims process should be a collaborative partnership between insurers and the insured. This allows the insurer to better understand the details of the transaction, the issue underlying the claim, and how the associated damages ultimately impact the purchased business. It is important to avoid an adversarial start to the claims process and communicate clearly and consistently so that the insurer, insured and their advisers are aligned and can work together to reach an amicable resolution as efficiently as possible. It is critical that given the complexities involved, insureds are educated by their broker or legal counsel on the claims process before submitting an initial notice. Insureds should expect insurers to have dedicated claims expertise and there should also be a single point of contact for insureds seeking information about their claim, including any matters that may affect its result.

FW: How do you expect transactional risk management to develop in the years ahead? How might attitudes, strategies and techniques evolve?

Ma: In the years ahead, transactional risk management is expected to evolve with increased adoption and customisation of insurance solutions. Underwriting and claims processes for R&W insurance will be further enhanced through advanced claims data and actuarial analytics, technology integration, and additional underwriting and claims-handling resources in this growing industry. Technology can assist in this domain, but it cannot fully substitute the invaluable element of human interaction. Collaboration among insurance carriers, brokers, insureds and legal advisers is essential for optimising risk transfer strategies. Furthermore, there has been a notable increase in inquiry and use of R&W insurance in alternative investments such as secondaries transactions and preferred share acquisitions, reflecting the growing recognition of its benefits in managing and mitigating transactional risks. As the market continues to evolve, transactional risk management will play a critical role in providing tailored insurance solutions to address the unique risks associated with various types of transactions.

Reynolds: The transactional risk insurance industry has grown dramatically in recent years. As M&A parties and their advisers become more and more familiar with transactional liability insurance, they are likely to seek other types of coverage to mitigate the myriad risks they face. There are many more insurers specialising in transactional risk products than there used to be. As competition for more established products increases, underwriters will seek to develop adjacent products to mitigate the risks of corporate M&A. In addition to growth in specific litigation and judgment protection insurance, I would expect to see more insurance against risks, such as successor liability or potential regulatory enforcement actions.

Sherman: The use of insurance products will continue to grow because of the obvious benefits, growing reliance on the products and increases in coverage limits. I also expect coverage to expand with the underwriting of more unique and esoteric tax issues and an expanded list of contingent risks.

Williams: The R&W placement process has remained relatively unchanged since the product first became available. Several underwriters have proposed solutions that aim to expedite the process of obtaining coverage, either with unique processes for certain types of deals or by integrating technology. We expect to see ongoing advances in and utilisation of technology to streamline R&W underwriting. From a more substantive perspective, we expect to see the evolution of new solutions at the intersection of insurance and capital markets. The drop in M&A activity is fuelling this innovation. A number of unique solutions have already been structured around financing and credit arrangements. As insurance companies look to deploy capital creatively, we anticipate a broader offering of solutions that will expand beyond pure M&A transactions.

Fraser: We expect the development of longer tail claims to increasingly inform underwriting strategies and pricing and drive a more scientific approach to creating a less volatile and more sustainable R&W insurance product. Claims data will help inform a more efficient and focused underwriting process and help reduce risk on M&A deals. Insurers and brokers have substantial experience on M&A deals from an insurance and claims perspective and these parties should continue to use their expertise to help reduce risk for all stakeholders in the M&A industry. We also expect contingent liability and tax insurance to become a larger part of the transactional risk market as insurers, brokers and deal practitioners become more creative in finding areas where these products can be used to provide solutions in M&A deals and underlying businesses.

Serpemen: The opportunities for expansion of transactional risk products is exciting and continues to evolve. We are seeing opportunities for tax and W&I products in emerging markets and expect those opportunities to continue, and we anticipate underwriters and brokers will invest in continuing to build teams across the world. Managing risk is important in all transactions as well as in corporate management and strategy, and as such the opportunities to provide a solution for various identified risks continues to evolve. We have seen growth worldwide in the building of specific teams for contingency and tax and this has been instrumental in the expansion of both the awareness and use of these products. Technology will also play an important role in the future as both deal professional and insurers implement artificial intelligence in their diligence and underwriting efforts. We are excited to see what the future holds. ■