

# Representations and Warranty Insurance

## Overview

Carlton Fields has a sophisticated nationwide practice representing issuers of representations and warranties insurance in M&A transactions. Our uniquely experienced, multidisciplinary team has extensive experience, including successful arbitrations through final awards presented before the two largest arbitration managers in the United States.

### **Our Cohesive and Multidisciplinary Team**

Our team combines the coverage experience of our insurance practitioners with the detailed analysis and understanding of the deal developed by our corporate securities and M&A attorneys to bring to each claim analysis the level of critical expertise needed to evaluate these complex claims. We add our experienced M&A litigators when claims go to arbitration or court. Additionally, our attorneys have worked extensively with national forensic accounting firms that have the most experience in M&A transactional loss analysis and R&W insurance. If our client does not already have a forensic professional engaged, we match the capabilities and resources of the best firms to the requirements of the individual case. Our multidisciplinary team, by combining the right talent and experience, enables us to deliver innovative, cost-effective, and value-driven services in one stop for our clients.

### **The Right Team, the Right Experience, and Demonstrated Results**

Our attorneys have handled dozens of RWI matters, and we have the distinction of having tried successfully two significant arbitrations against prominent private equity firms through final award before JAMS and the American Arbitration Association, both in New York. In both cases, we obtained favorable results that represented fair and reasonable evaluations of the losses that followed from the particular warranty breaches established, concluding the matter well below the range of the claimants' demands that sought to inflate the damages well beyond what was rightfully due under the circumstances. Our team is presently representing an insurer in one of the few RWI disputes filed in court, presently pending in New York State Supreme Court in Manhattan.

### **Assisting Insurers With Effective Claims Response**

Carlton Fields' multidisciplinary approach to handling RWI claims enables insurers to respond effectively to both buyers' and sellers' coverage claims. Typically, handling these claims involves:

- Policy analysis
- Interpreting the subject acquisition agreement
- Focused knowledge of Delaware and New York contract law
- Fact-based investigation into the claimed breach (e.g., financial statements and GAAP, tax issues, product failures, regulatory investigations, compliance with laws, etc.)
- Fact-based reviews of acquisition agreement terms and limitations negotiated by the parties to the deal and their application to the claims
- Valuation of damages
- Protecting against potential bad faith claims

### **A Disciplined Approach**

Our attorneys take a disciplined approach to right-sizing claims. We start with an initial claim review and develop a program to obtain the information needed to reach a coverage determination. We add value by our team's M&A analysis to assess whether claimed breaches have occurred, and then work with subject matter experts who evaluate the potential losses resulting from any established breaches, and who create an appropriate damages model that will be critical in the final analysis. We also take the necessary steps to ensure the process is targeted and efficient. Insureds and the brokerage community appreciate our clients' efforts to achieve minimally invasive investigations, generating timely responses.

Financial statement claims often involve the assertion of a multiple of a shortfall from represented EBITDA as a claimed measure of recoverable damages. We review the pricing and valuation methodology used by the insured before closing. In many cases, we find the insured was focused more on what the investment would earn for them during their expected holding period and not on what it produced for the seller during its holding period. Breaches that would not affect future performance — those arising as a result of nonrecurring items — would not qualify for multiple-based damages. We find this methodology resonates with neutrals who have expertise in accounting and business valuation.

## **Insights**

02.21.2020

The Perils of Using Baseball Arbitration to Resolve RWI Policy Disputes

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02.21.2020

So, What Was Reserved? Potential Claims Handling Pitfalls Under a Reservation

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02.21.2020

Damages for Reps and Warranties Breaches

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Breach vs. Loss

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02.21.2020

The Impact of the Duty to Mitigate on Diminution of Value Claims

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02.21.2020

Value Claim: Non-Recurring Impact of Unknown Business or Operational Issue

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02.21.2020

RWI Claims That Keep You Up at Night

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02.20.2020

A Forensic Accountant's Take on Materiality

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02.20.2020

The Building Blocks of Materiality

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02.20.2020

Under the Microscope: Dissecting Errors to Evaluate RWI Damage Claims

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02.20.2020

When Balance Sheet Errors Turn into Multiple EBITDA Claims

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02.19.2020

Valuing Income Statement Breaches in Transactional Insurance Claims

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02.19.2020

Rep & Warranty Insurance Doesn't Guarantee Purchase Price

*Law360*

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## Our Team

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## Related Capabilities

### Practices

- Corporate Law and Governance
- Cybersecurity and Privacy
- Mergers and Acquisitions
- Private Equity and Venture Capital
- Insurance
- Health Care
- Business Transactions

### Industries

- Property & Casualty Insurance
- Insurance
- Health Care

# Primary Authorities

## Income Statement Breaches

- *Meda AB v. 3M Co.*, 969 F. Supp. 2d 360 (S.D.N.Y. 2013)
- *WaveDivision Holdings, LLC v. Millennium Digital Media Sys., LLC*, No. 2993–VCS, 2010 WL 3706624 (Del. Ch. Sept. 17, 2010)
- *In re Biddiscombe Int’l, LLC*, 392 B.R. 909 (M.D. Fla. 2008)
- *Cobalt Operating, LLC v. James Crystal Enters., LLC*, No. Civ.A. 714–VCS, 2007 WL 2142926 (Del. Ch. July 20, 2007)
- *Kerby v. Parsons Corp.*, No. 2:06-cv-00687, 2007 WL 2069857 (W.D. Wash. July 16, 2007)
- *MultiPlan, Inc. v. Emergis, Inc.*, No. 1:05-cv-04198, 2007 WL 1704127 (S.D.N.Y. June 11, 2007)
- *Priority E.M.S. v. Crescent City E.M.S.*, 829 So. 2d 1066 (La. Ct. App. 2002)

## Valuation Methodologies

- *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015)
- *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273 (3d Cir. 2014)
- *Merion Capital, L.P. v. 3M Cogent, Inc.*, No. 6247–VCP, 2013 WL 3793896 (Del. Ch. July 8, 2013)
- *Towerview LLC v. Cox Radio, Inc.*, No. 4809–VCP, 2013 WL 3316186 (Del. Ch. June 28, 2013)
- *In re Orchard Enters., Inc.*, No. 5713–CS, 2012 WL 2923305 (Del. Ch. July 18, 2012)
- *In re PTL Holdings LLC*, No. 1:11-bk-12676, 2011 WL 5509031 (Bankr. D. Del. Nov. 10, 2011)
- *Andaloro v. PFPC Worldwide, Inc.*, No. Civ.A. 20336, 20289, 2005 WL 2045640 (Del. Ch. Aug. 19, 2005)
- *Cede & Co. v. JRC Acquisition Corp.*, No. Civ.A. 18648–NC, 2004 WL 286963 (Del. Ch. Feb. 10, 2004)
- *Duncan v. Theratx, Inc.*, 775 A.2d 1019 (Del. 2001)
- *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999)

## GAAP Materiality

- *In re Mercury Cos.*, No. 1:08-bk-23125, 2015 WL 5920163 (Bankr. D. Colo. Oct. 9, 2015)

- *Osram Sylvania Inc. v. Townsend Ventures, LLC*, No. 8123–VCP, 2013 WL 6199554 (Del. Ch. Nov. 19, 2013)
- *Hudson’s Bay Co. Luxembourg, S.A.R.L. v. JZ LLC*, No. N10C-12-107, 2013 WL 1457019 (Del. Super. Ct. Mar. 11, 2013)
- *Alliance Indus., Inc. v. Longyear Holdings, Inc.*, 854 F. Supp. 2d 321 (W.D.N.Y. 2012)
- *S.C. Johnson & Son, Inc. v. Dowbrands, Inc.*, 167 F. Supp. 2d 657 (D. Del. 2001)
- *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984)

### Significant Delaware Law and Case Decisions

- *Henkel Corp. v. Innovative Brand Holdings, LLC*, No. 3663–VCN, 2013 WL 396245 (Del. Ch. Jan. 31, 2013)
- *Concord Plaza Assoc., Inc. v. Honeywell, Inc.*, 1987 WL 8884 (Del. Super. Ct. Mar. 20, 1987)

### Proof of Damages in Representation and Warranty Cases

- *Prairie Capital III, L.P. v. Double E. Holding Corp.*, 132 A.3d 35 (Del. Ch. 2015)
- *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006)
- *Stephenson v. Capano Dev., Inc.*, 426 A.2d 1069 (Del. 1983)