

WILLIAM FRY

Warranty and Indemnity Insurance: A Strategic Tool in Irish M&A

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Warranty and indemnity (“**W&I**”) insurance is a mainstream feature of Irish private M&A transactions. Originally developed in the UK, US and Australian markets, W&I insurance has been a feature of Irish M&A transactions since the mid-2010s. It has evolved into a widely used mechanism for allocating transactional risk, facilitating clean exits for sellers and enhancing protection for buyers. W&I insurance provides cover for losses arising from breaches of warranties or indemnities given in a Share Purchase Agreement (**SPA**) or Asset Purchase Agreement (**APA**).

What is the difference between warranties and indemnities in SPAs and APAs?

It is important to differentiate between warranties and indemnities:

- **Warranties are contractual statements of fact** given by one party to another, normally about the condition, status, or performance of something at the time the contract is signed (e.g. title, accounts, compliance). A breach of warranty may allow a recovery, for example, against the sale price. They are a key feature of SPAs and APAs.
- **Indemnities are contractual promises to compensate** another party for a specific loss, liability, or event, regardless of whether a breach of contract has occurred (e.g., a tax indemnity under which the seller agrees to compensate the buyer for any pre completion tax liabilities of the target company).

What are the different types of W&I insurance?

W&I insurance can be either “**sell-side**” or “**buy-side**”. In practical terms, the insurer “steps into the shoes of the warrantor” (or, in some cases, protects the warrantor directly), allowing claims to be pursued against the insurer rather than the seller/warrantor. While the seller is commonly the warrantor, there are transactions where another party assumes this role, for example, where the seller is a passive investor or a shell entity.

W&I insurance is designed to cover “unknown risks” that were not identified through due diligence or disclosure and where there may then be a breach of warranties or a recoverable under indemnities in the transaction document.

“Sell-side” insurance

“Sell side” W&I insurance is taken out by the seller to back the warranties they – or any other warrantor – provide, protecting them against warranty claims by the buyer. This often covers not only liability but also the associated defence and investigation costs. It allows sellers to distribute sale proceeds immediately without needing to hold funds in escrow, giving them faster access to the consideration and greater certainty post completion. This type of insurance is less common in practice than “buy-side” insurance.

“Buy-side” insurance

“Buy side” W&I insurance is the most common structure in Irish M&A transactions today. These policies are typically taken out by the buyer (or occasionally by the seller for the buyer’s benefit). They allow the seller to achieve a clean exit with little or no liability after completion. They are widely used in private equity exits and competitive auction processes. They give the buyer the ability to bring claims directly against the insurer rather than pursuing the warrantor.

What is the typical scope, exclusions and terms of W&I insurance policies?

The conduct of claims provisions of the W&I insurance policy must align with the SPA, and insurers generally expect to control or jointly manage any claims. **“Knowledge based” exclusions** apply, meaning buyers are treated as knowing matters revealed through due diligence or disclosures. Such known issues are generally excluded from cover.

Market standard exclusions typically apply to:

- known or disclosed matters;
- forward looking statements;
- forecasts;
- purchase price adjustments or leakage;
- pension underfunding;
- environmental contamination (unless specifically underwritten);
- criminal fines; and
- uninsurable tax penalties.

Under an SPA or APA, in exchange for the price paid, a combination of “general” warranties and a suite of tax warranties is typically provided. In terms of the timeframe and other commercial terms of the agreement under which recourse to the warranties may be had, “general” warranties usually apply for 2 to 3 years, while tax warranties customarily last for 5 years from the end of the year in which the transaction is completed. The W&I insurance recourse period under the policy will then align with this, as will other key terms under the SPA or APA (e.g., around conduct of claims and relevant limitations).

What current trends are shaping the development of W&I insurance?

The W&I insurance domain is constantly evolving, including new areas which insurers have traditionally been unwilling to cover. Some recent developments include the following:

1. **Broader coverage & increased focus on new areas**

The prevalence of W&I insurance in M&A deals has increased in the past decade. Insurers have also shown greater willingness to increase their scope of coverage. For instance, insurers were previously reluctant to cover tax risks and contingent liabilities, but some are now showing growing interest in offering cover for these areas.

The increase in technology-driven transactions and a rising interest for coverage in domains like infrastructure and property, means that insurers will closely scrutinise evolving risk areas where cover is available such as:

- **Data protection and cybersecurity warranties:**
 - Disputes over cyber incidents, data breaches, and IP ownership are increasing, driven by AI-enabled threats and attacks on third-party suppliers.
 - As the market has grown more competitive, cyber-related warranty cover has become more available.
 - However, the frequency and sophistication of incidents, combined with regulatory enforcement, mean these areas remain high-risk for W&I underwriters.
- **ESG disclosures:**
 - Failures to disclose hiring practices and employment policies are an increasing area of focus.
 - Environmental disclosures are expected to become a growing source of claims, particularly when companies fail to accurately disclose climate-related risks under IFRS S2 *Climate-related Disclosures*.

There will be other areas of key focus as the W&I insurance market continues to expand.

2. Greater insight into claims outcomes

Considerable data now exists on W&I insurance claims as experience has emerged. The data shows that W&I insurance is a responsive product, with insurers now covering a material proportion of claims amounts. A recent independent study of the European W&I insurance claims market conducted by HWF Partners found that across more than 18,500 policies placed between 2016 and 2024, 12.46% have generated a claim notification, and almost **half of all closed notifications** have resulted in payment.

According to the same study, a significant proportion of notifications (**52.44%**) relate to seller non-disclosure, fraud, or third-party claims, highlighting that W&I insurance is frequently responding to issues that could not have been identified through due diligence.

Importantly, **68.11% of claims are paid within 18 months**, indicating that insurers are not only paying claims but doing so more quickly than would be expected in uninsured warranty litigation. Overall, the statistics demonstrate a developing market in which insurers are providing meaningful protection against unforeseen transactional risks.

The maturation of the sector has also led to pronouncements by the Courts in this area. An important recent development in claims outcomes came from the English Court of Appeal decision in *Project Angel Bidco Ltd (In Administration) v Axis Managing Agency & Ors [2024] EWCA*. In that case, the buyer acquired a company and put a buy-side W&I insurance policy in place. After completion, issues emerged relating to anti-bribery and anti-corruption ("**ABC**") compliance. The policy contained:

- An ABC exclusion, excluding any loss arising out of "any liability or actual or alleged non compliance... in respect of [ABC] laws."
- Project Angel Bidco Ltd argued the exclusion contained a drafting error, that the word "or" should have been "for".
- The Court of Appeal upheld the High Court's decision that there was no obvious drafting mistake and so the exclusion was enforceable.

The Court of Appeal emphasised that exclusions are to be interpreted in accordance with standard contractual construction principles. Although it is an English decision, Project Angel Bidco Ltd highlights that W&I insurance is not a substitute for due diligence and reminds practitioners to scrutinise high-risk exclusions during underwriting.

How is a W&I insurance policy put in place?

Putting W&I insurance in place is a structured process that usually takes between two to three weeks. Those considering using a W&I insurance policy are advised to engage with a broker at an early stage. The process typically involves the following:

1. Engagement and initial assessment

The process begins with the appointment of a specialist M&A insurance broker. The broker prepares a submission for insurers, usually comprising the draft SPA or APA, financial information, and the information memorandum. Insurers then review these materials and issue a Non-Binding Indication (“**NBI**”). The NBI sets out proposed pricing, retention levels, and the indicative scope of cover.

2. Selection and preliminary underwriting

Once NBIs have been received, the buyer or the seller selects an insurer and pays an underwriting fee to commence the formal process. The insurer and its legal advisers are granted access to the virtual data room and review the buyer’s diligence reports. They then issue an underwriting questionnaire seeking clarification (assuming that is the process) on diligence findings and any areas of potential concern.

3. Underwriting call and policy negotiation

An underwriting call is held between the insurer and its legal advisers, and the buyer or seller and its legal advisers. This call normally lasts one to two hours and focuses on the diligence process, key risk areas, and the insurer’s outstanding questions. Following the call, the insurer provides a draft policy for negotiation. The parties work to ensure that the policy aligns with the warranties in the SPA or APA and to resolve any exclusions that may be required for known risks identified during diligence.

4. Closing and binding

Immediately before signing, the insured party provides a no claims declaration confirming that no known breaches of warranty or indemnity have arisen under the SPA or APA. If the warranties or indemnities are repeated in the SPA or APA at the time of completion, the process may be repeated. The policy usually becomes effective at the point the SPA or APA is signed. The premium and any applicable taxes are paid, ordinarily on completion of the transaction.

Conclusion

W&I insurance has become an important feature of Irish private M&A transactions, offering an effective means of reallocating risk and enabling cleaner exits for sellers. Its value ultimately depends on disciplined diligence and careful policy drafting. Insurers are expected to become increasingly focused on new areas such as cyber and data risks and ESG reinforcing the need for parties to scrutinise high-risk warranties and exclusions to ensure protection. With claims being paid more frequently and efficiently, and with new areas for potential cover increasing, W&I insurance is maturing and becoming increasingly more common in M&A transactions in Ireland.

For further information or guidance on W&I insurance policies in M&A transactions, please get in touch with a member of our Corporate/M&A and/or Insurance & Reinsurance team.

Further Information



Eoin Caulfield

PARTNER

Head of Insurance

+353 1 639 5192

eoin.caulfield@williamfry.com



Ian Murray

PARTNER

Insurance & Reinsurance

+353 1 639 5129

ian.murray@williamfry.com



Niall Campbell

CONSULTANT

Insurance & Reinsurance

+353 1 639 5057

niall.campbell@williamfry.com