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Reps & Warranties Insurance
Podcast | Environmental Law Monitor

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Environmental Law Monitor · Reps & Warranties Insurance

On this episode of the Environmental Law Monitor, host Daniel Pope is joined today by Tim Wilkins and Tony Visage from Bracewell, and Michael McGinn and Adam Wilhite from Marsh. The group talks about managing environmental risk in the transactional context, including environmental reps and warranties, environmental insurance, and reps and warranties insurance.

Tim is a partner in Bracewell's Austin office, where he focuses on strategic environmental permitting assistance, the defense of environmental enforcement actions and assistance with the environmental aspects of major transactions.

Tony chairs Bracewell's securities and corporate governance litigation practice group. His trial practice focuses on shareholder class actions and derivative cases alleging violations of the Securities and Exchange Acts, as well as insider trading, fraud, accounting irregularities, reporting requirement violations and state law claims.

Michael is one of the key leaders of Marsh's environmental risk team. He handles the environmental risk components and looks to see if there's a bespoke environmental insurance solution that could be laid on top of, or in tandem with, the reps and warranties or M&A insurance.

Adam's role at Marsh is on the transactional risk team. He enlarges part, place, rep, and warranty policies, as well as looks at other potential one-off bespoke risks, but by and large, rep and warranty policy.

How many deals are using the traditional framework? How many people are starting to make more use of environmental insurance or reps and warranties insurance?
It's gotten to a point now where a very large majority, especially of certain slices of the M&A world, are using rep and warranty insurance. Speaking in broad

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strokes, we can only estimate its data as it continues to evolve. It looks like over half of all middle markets are using rep and warranty insurance which is trending upward with room to grow. We're seeing rep and warranty insurance used on nearly 70 percent of all foreign transactions and it could hit that here in the United States.

Could you talk about some of the driving forces a little bit behind the adoption of reps and warranties insurance?
Around 2010, in the wake of the financial crisis, as in when the deals started to pick back up with the economy, recovering the product, SARGENT grew significantly. In part, the product had finally gotten to a point where it was palatable and marketable to an US audience. It became a bit of a no brainer in certain circumstances. Demand for the product is largely driven. When the seller puts themselves up for auction, in the traditional auction process, they have a tremendous amount of leverage over shaping that transaction prior to signing a letter of intent. In doing that, one of their goals is to maximize their walkway proceeds transaction. Another goal would be maximizing the time value of money. So, the escrow presents risks in the sense that the buyer can access it in the event of a breach trip. But even if they don't, they still don't want their money sitting there for the year, for two years

Tell us a little more about how the environmental coverage works, where in the heavier industry, higher risk environmental industry deals RWI is of more limited applicability. How does the non RWI environmental insurance fit in?
We're going to approach the deal specifically. You're going to know that they're going to need to have a standalone environmental insurance program in concert with the reps and warranties. We will work with counsel to make sure we got the information we need and we would secure different environmental insurance options, limits, deductibles, et cetera. Then, we bring that back to counsel and the client to make sure that this is good. This is where we can really transfer the risk, or we will buy the company. Here's what we can protect ourselves from adverse development. That's fundamental stuff in what we do.

Have you ever seen the rep and warranty policy not include the excess coverage?
That could come up in a couple of ways. One is the most often or frequent way that you see that is when you have a very sensitive environmentally speaking target business. It would be expected to for insurers when we go out and obtain quotes to respond in their quote, that they're just excluded from environmental insurance and say, listen, this is entirely the wheelhouse of the environmental insurers. We're not going to touch that because, frankly, it could be a very tricky proposition even for an environmental underwriter to underwrite certain businesses. We've seen that on just, for example, certain upstream oil and gas deals where they, the insurers, would just outright exclude environmental liability for those transactions. But again, going back to the concept of putting the buyer back into position that they would have been in the absence of rep

and warranty insurance. What you typically see in the absence of rep and warranty insurance is some kind of environmental true-up. The product probably accomplishes that goal while still acknowledging that it's not a very good solution on the environmental.

For any questions you may have about managing environmental risk in the transactional context, contact Daniel Pope, Tim Wilkins, or Tony Visage.

The opinions expressed in this podcast are those of the speakers and do not necessarily reflect the viewpoint of their institutions or clients.