2020

Comment on Griffith's Deal Insurance: The Continuing Scramble Among Professionals

Abraham Cable
UC Hastings College of the Law, cablea@uchastings.edu

Essay

Comment on Griffith's *Deal Insurance*: The Continuing Scramble Among Professionals

Abraham J.B. Cable†

In his recent article, Professor Sean Griffith observes a substantial development in the M&A market. Increasingly, buyers and sellers replace traditional deal terms with an insurance product—representation and warranty insurance ("RWI"). This essay considers how this new product and the insurance professionals who sell and underwrite it affect the traditional role of M&A lawyers. It concludes that RWI, in its present form, does not substantially encroach on the traditional role of M&A lawyers. But it also notes that representations and warranties are ripe for technological innovation and that insurance professionals may be better positioned then lawyers to seize the opportunity.

INTRODUCTION

Nearly 35 years ago, Professor Ronald Gilson provided the seminal account of mergers and acquisitions (M&A) lawyers.[1] Gilson sought to move beyond a caricature of deal lawyers as value-destroying nitpickers arguing over comma placement. Instead, he portrayed them as "transaction-cost engineers" who design processes and agreements that help buyers and sellers overcome obstacles to mutually beneficial transactions.[2] Though legal scholars have critiqued and refined Gilson's formulation,[3]

† Professor, University of California, Hastings College of the Law. For helpful comments, the author thanks Spencer Williams, Sean Griffith, and participants in the 2019 BYU Winter Deals Conference and the summer 2019 Bay Area Corporate Law Workshops.

1. *See* Ronald J. Gilson, Value Creation by Business Lawyers: Legal Skills and Asset Pricing, 94 YALE L.J. 239, 267–94 (1984).

2. *See id.* at 253–56.

3. For alternative depictions of deal lawyers, see generally Elisabeth De Fontenay, *Law Firm Selection and the Value of Transactional Lawyering*, 41 J.

it remains foundational in legal scholarship and legal education.[4]

In his recent article, Professor Sean Griffith describes an important inflection point in transaction-cost engineering, warranting reflection on the central position of lawyers in M&A transactions.[5] After all, Gilson focused his analysis largely on representations and warranties (together, "reps")[6] and related indemnities in a typical acquisition agreement.[7] Today, in nearly a third of private-company acquisitions, buyers and sellers substantially or completely replace liability under these provisions with an insurance product—representation and warranty insurance (RWI).[8] This product was obscure just five years ago.[9] As

CORP. L. 393 (2015) (emphasizing law firm knowledge of market information); George W. Dent, Jr., *Business Lawyers as Enterprise Architects,* 64 BUS. LAW. 279 (2009); Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 OR. L. REV. 15 (1995) (emphasizing reputation brokering); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J. L. BUS. & FIN. 486 (2007) (emphasizing reduction of regulatory costs).

4. *See* John C. Coates IV, *Allocating Risk Through Contract: Evidence from M&A and Policy Implications*, 5 (May 17, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133343 [https://perma.cc/677P-NX22] (describing Gilson's account as "seminal").

5. *See generally* Sean J. Griffith, *Deal Insurance: Representation & Warranty Insurance in Mergers and Acquisitions,* 104 MINN. L. REV. 1839 (2020).

6. I follow Griffith's lead in referring to representations and warranties by the more manageable term "reps." *See id.* at 1841.

7. *See* Gilson, *supra* note 1, at 267–94.

8. An American Bar Association deal study reported that acquisition agreements for 30% of private company acquisitions by public companies (i.e., strategic buyers) referenced RWI. *See* AMERICAN BAR ASSOCIATION, PRIVATE TARGET MERGERS AND ACQUISITIONS DEAL POINTS STUDY (2017). Materials from AON Corporation, a prominent insurance broker, suggest that use in private equity transactions is substantially higher. AON CORPORATION, M&A TRANSACTION SOLUTIONS: RISK IN REVIEW (2018), https://www.aon.com/getmedia/0c91accf-ab1e-44a1-9587-4bfa3a01ce1c/Aon-Risk-in-Review-Report-2018.aspx [https://perma.cc/R46N-RE7H] (estimating that 75% of private equity deals use RWI).

9. *See* Griffith, *supra* note 5, at 1877 (showing a pronounced increase in RWI adoption starting in 2014); *see also* AIG, WHAT HAPPENS AFTER THE DEAL CLOSES? WARRANTY AND INDEMNITY INSURANCE GLOBAL CLAIMS STUDY (2016), https://www.aiginsurance.nl/content/dam/aig/emea/belgium/documents/reports-and-white-papers/m_and_a_what_happens_after_the_deal_closes.pdf [https://perma.cc/8XSY-FNPC] (stating that the insurance company AIG has issued RWI policies since the 1990s but has seen rapid growth in recent years); Hamed Meshki & Brandon Vongsawad, *Why You Need M&A Reps & Warranties Insurance*, KIRKLAND & ELLIS (July 31, 2013), https://www.kirkland.com/publications/article/2013/07/why-you-need-ma-reps-and-warranties-insurance

Griffith details, the emergence of RWI marks an important refinement, or re-engineering, of deal design as buyers and sellers no longer just allocate risk between themselves but instead offload risk to a third party for a fixed price.[10] As Griffith explores, this outsourcing of risk raises important questions about the incentives RWI creates for transacting parties[11] and the efficiency and sustainability of this new insurance market.[12]

This essay picks up where Griffith leaves off, returning to Gilson's motivating question about why deal lawyers, instead of other advisors, design M&A transactions. Gilson's account, though favorable, was not laudatory in tone. He situated lawyers in a "scramble among professionals" and noted that the legal profession's preeminent role in deal making was vulnerable because the engineering function is not inherently legal.[13] RWI now interjects new species of deal professionals into the mix—insurance brokers and underwriters (together, "insurance professionals").

After a brief literature review, this essay describes the anatomy of a typical insured deal. This description supplements Griffith's account by focusing on professional roles. It is based on a mix of publicly available practitioner materials, materials provided by insurance brokers, and original interviews with M&A lawyers, general counsel, and insurance professionals.[14] By this

[https://perma.cc/G7ZW-YDLF] (stating that RWI existed as early as the 1990s, but was used reactively when negotiations around indemnification obligations failed); Joseph Verdesca et al., *Representations and Warranties Insurance: What Every Buyer and Seller Needs to Know,* LEXISNEXIS: CORP. L. ADVISORY (2016), https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2016/01/15/representations-and-warranties-insurance-what-every-buyer-and-seller-needs-to-know.aspx[https://perma.cc/M8KU-PPTW](stating that, until "a few years ago," RWI was "the poor stepchild" of insurance policies); George H. Wang, *Representation and Warranties Insurance in Cross-Border Transactions*, HAYNESBOON (April 29, 2015), https://www.haynesboone.com/alerts/representation-and-warranty-insurance-in-cross-border-transactions [https://perma.cc/M4MU-E7JC] (stating that RWI was available in the 1990s, but was used only when negotiations faltered).

10. *See* Griffith, *supra* note 5, at 1842 ("The fact that transacting parties now commonly avoid liability for misinformation by shifting the risk to an insurer thus comes as an affront to the standard account of M&A contracting.").

11. *See id.* at 1872–75(discussing problems of adverse selection and moral hazard).

12. *See id.* at 1886–920 (manuscript at 32–55) (on file with the author) (considering why transacting parties buy RWI and why insurers sell RWI).

13. *See* Gilson, *supra* note 1, at 244.

14. I have completed 18 semi-structured interviews. I located interviewees

account, the key attribute of RWI in its present state is deference to existing M&A process. Insurers rely primarily on buyers, sellers, and their lawyers to vigorously negotiate suitable reps and to conduct suitable diligence on the seller's operations, thereby limiting disruption of the M&A ecosystem.[15] In this form, the current state of RWI speaks to the durability of the legal profession's central role in M&A transactions.

But there is a caveat. Reps seem ripe for technological innovation in the form of sophisticated data analysis, and insurers may be better situated than law firms to lead these efforts.[16] Armed with more predictive power, insurers might be more assertive in dictating acquisition agreement terms and diligence practices.[17] In short, RWI is worth keeping an eye on.

I. M&A LAWYERS

Since Gilson initially posed his question about the value of transactional lawyers, a significant amount of literature has followed. This body of work has generally expanded on Gilson's initial formulation by identifying additional functions and attributes of deal lawyers. Before turning to RWI as a case study, it is helpful to briefly summarize this literature.

A. FUNCTIONS

As a first step in understanding why lawyers play a central role in M&A transactions, this subsection starts with a threshold question: what are the basic functions of an M&A lawyer?

1. Agreement Design (Transaction-Cost Engineering)

Gilson's account focused on the role of lawyers in designing (drafting and negotiating) acquisition agreements. His analysis was based largely on the reps and associated indemnities through which sellers make promises about the condition of the target business.[18] These provisions continue to be prominent in

through professional connections, internet searches, and referrals by interviewees. The current occupations of the interviewees are: M&A lawyer at law firm (3), RWI specialist at law firm (2), general counsel at frequent buyer or seller (2), RWI broker (6), and underwriter (5). A substantial majority of interviewees began their careers as M&A lawyers at law firms. *See infra* note 169.

15. *See infra* Part II.B.3 & 4 (describing negotiation of representations and warranties and due diligence in insured deals).

16. *See infra* III.B (discussing the potential for technological innovation).

17. *See id.*

18. *See* Gilson, *supra* note 1, at 267–94.

scholarly portrayals of deal lawyers. Most basically, they occupy a large percentage of a typical acquisition agreement—arguably the most tangible evidence or "tracks" from a deal lawyers' work.[19] They also soak up a large percentage of a deal lawyer's time.[20] In fact, the unfavorable view that Gilson sought to debunk can likely be traced to the tough sledding of negotiating these detailed descriptions of the seller's business, scheduling exceptions, and specifying limits to related liabilities. Commentators continue to see these lengthy provisions as fertile ground for inefficient "churning" by deal lawyers.[21]

If one steps back, however, and looks at the broader M&A process, reps appear as a kind of scaffolding for a more valuable project of information exchange and production. In economic terminology, M&A transactions must overcome pervasive informational asymmetry. Sellers tend to know more about certain aspects of their business than buyers.[22] Representations and warranties give the seller an opportunity to provide a systematic and credible description of the business and its risks. This account is credible in part because a seller agrees to be liable for inaccuracies through the agreement's indemnification clause.[23]

The engineering does not stop with the reps. Limits on indemnification, various purchase price adjustments, and requirements for third-party reports can all be understood as mitigating information asymmetry, differences in risk preference, and valuation difficulties that might otherwise impede mutually beneficial transactions.[24]

19. *See* John C. Coates IV, *Why Have M&A Contracts Grown? Evidence from Twenty Years of Deals* 49 (Eur. Corp. Governance Inst., Law Working Paper No. 333/2016, 2016) (reporting results of an empirical study of publicly available acquisition agreements); Gilson, *supra* note 1, at 257, 270.

20. *See id.* at 270.

21. *See, e.g.,* Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57, 61 (2017).

22. *See* Coates, *supra* note 4, at 13 ("The target's prior managers can be expected to have better information about [risks associated with the target's business]"); Gilson, *supra* note 1, at 269 ("[A]s a simple result of its prior operation of the business, the seller will already have large amounts of information concerning the business that the buyer does not have, but would like to acquire.").

23. Coates, *supra* note 4, at 10 (discussing how a *combination* of representations and post-closing indemnification reduce information asymmetry); Gilson, *supra* note 1, at 281–82 (describing how post-closing liability helps verify information provided by the seller).

24. For a recent and thorough review of literature providing economic analysis of M&A acquisition agreements, see Coates, *supra* note 4, at 3–9.

2. Additional Functions

Professor Stephen Schwarcz pushed back somewhat on Gilson's formulation by restoring more squarely legal work to the core of transactional lawyering. Through survey research, Schwarcz suggested that legal compliance is the primary function of deal lawyers.[25] Lawyers must be well-versed in some regulatory schemes (corporate approval requirements) and alert to others (banking regulation, antitrust, tax, etc.). Guiding the deal through these regulations is a specialized field of compliance—what Schwarcz deemed "transaction-regulatory" work.[26] According to Schwarcz's research, both lawyers and clients view this transaction-regulatory work as more important than designing deals to reduce transaction costs between buyer and seller.[27]

Commentators have also expanded the list of nonlegal functions performed by deal lawyers. For example, law firms provide substantial project-management services.[28] Bringing a transaction to completion requires coordinating due diligence, the involvement of several different experts (auditors and the like), and other logistical matters. In other words, lawyers do not just negotiate the terms of merger agreements—they help execute them.

Sometimes lawyers absorb transactional risk—another key function. Most explicitly, they offer legal opinions to transaction counterparties. For example, a lawyer for the seller might deliver an opinion to the buyer regarding proper corporate approval of the transaction, the seller's capital structure, and other customary matters, thereby serving as a kind of insurer against those risks.[29]

25. *See* Schwarcz, *supra* note 3, at 501–02 (reporting survey results).

26. *See id.* at 492–93, 501–02 (defining transaction-regulatory work).

27. *See id.* at 501–02 (reporting survey results).

28. *See* Joseph M. Green, *Legaltech and the Future of Startup Lawyering*, in MAPPING LEGAL INNOVATION: TRENDS & PERSPECTIVES 7–8 (A. Masson, D. Orozco & G. Robinson, eds.) (forthcoming) (identifying project management as a core function of transactional lawyers).

29. *See* Heather M. Field, *Tax Lawyers as Tax Insurance*, 60 WM & MARY L. REV. 2111, 2114 (2019) (considering the extent to which transactional tax lawyers serve an insurance function when issuing tax opinions and concluding that "Transactional tax lawyers, by rendering tax opinions, provide an element of insurance to clients"); Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679, 695 (1996) (discussing how transactional lawyers in Silicon Valley assume risk for client representations through legal opinions).

B. ATTRIBUTES

This same literature tries to explain why lawyers, rather than other kinds of advisors, serve these varied functions. In some instances, the answer to that question is not obvious. For example, Gilson noted that the design function could be performed by other advisors (bankers or accountants) who are angling for a "larger piece of the action."[30] Of course, a merger is a legal act governed by a statute, a merger agreement can give rise to remedies defined by contract law, and the agreement touches on a wide range of technical legal specialties such as tax, employment, and environmental law. But the design function that Gilson describes as the deal lawyer's core competency is not itself inherently legal in the sense of requiring traditional legal education or licensing.

Since there is little evidence that M&A lawyers have substantially given way to other deal professionals,[31] there must be *something* about deal lawyers that accounts for their persistence in nonlegal functions. In fact, the literature describes a number of attributes that might make lawyers hard to dislodge: economies of scope, reputation, and market knowledge.[32]

Lawyers are necessary (and have a monopoly on)[33] squarely legal services. Through these necessary legal services, lawyers presumably acquire significant information about the client and the deal. Their involvement in non-legal work may produce economies of scope—it is sometimes more efficient for an existing advisor to pick up additional tasks than to get a new advisor up to speed.[34]

30. Gilson, *supra* note 1, at 244, 296–306.

31. One indication that lawyers maintain their central roles in M&A transactions is the sustained scholarly interest in the topic. *See supra* note 3 (citing legal scholarship examining the central role of deal lawyers). The legal trade press also suggests that M&A practice remains a prominent part of large-firm practice. *See* CITI HILDEBRANDT, 2019 CLIENT ADVISORY 8 (2019), https://www.privatebank.citibank.com/ivc/docs/2019CitiHildebrandtClientAdvisory.pdf [https://perma.cc/85ST-EPK7] ("Law firm leaders identified M&A/transactional work as the primary driver [of revenue growth in 2019].").

32. *See, e.g.*, Schwarcz, *supra* note 3, at 494.

33. State laws prohibit the unauthorized practice of law by nonlawyers. *See e.g.*, CAL. BUS. & PROF. CODE §§ 6125–33 (2018).

34. *See* Schwarcz, *supra* note 3, at 494 (discussing the hypothesis that lawyers create economies of scope); Gilson, *supra* note 1, at 290, 298 (discussing economies of scope).

Lawyers might also build valuable reputations through performing traditional legal work and other tasks.[35] These reputations might enhance trust between the buyer and seller as the lawyer has something to lose by becoming involved with an unworthy client.[36] In other words, lawyers can grease the wheels of transactions by lending their reputation to a client.

Recently, Professor Elizabeth De Fontenay emphasized another important attribute—market knowledge.[37] Lawyers build valuable precedential databases through involvement in a high volume of deals. Whether through formal studies, knowledge management personnel, or ad hoc searches of document management systems, law firms house a great deal of nonpublic information on transactions. This insight might aid in the design of deal documents, as clients seek advice on "what's market."[38]

One could also take a more skeptical view of lawyers' staying power. One could look at the expansive role of lawyers as simply more evidence of agency costs in the lawyer-client relationship. Because of information asymmetry between lawyer and client,[39] perhaps clients have a difficult time discerning the proper role of lawyers, monitoring their work, and preventing lawyers from padding their bills with inefficient nonlegal work.

---

35. *See* Schwarcz, *supra* note 3, at 493 (characterizing reputational intermediation as "the most agreed upon scholarly theory of the value added by transactional lawyers"); Okamoto, *supra* note 3, at 18 (providing on overview of a theory of reputational intermediaries based on the work of Gilson and others); Gilson, *supra* note 1, at 290, 298 (discussing the value of reputation). For a discussion of reputational intermediaries more generally, see Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984).

36. *See* Okamoto, *supra* note 3, at 18 (discussing the conditions under which reputation can act as an effective commitment or bond).

37. *See* De Fontenay, *supra* note 3, at 396 ("[L]aw firms that repeatedly engage in the same type of high-stakes transactions acquire private information about the range of plausible deal terms and their current market prices that other players cannot replicate.").

38. *See id.* at 396 ("This expertise in the ever-changing, ever-expanding set of 'market' deal terms provides clients with a valuable bargaining advantage in deal negotiations.").

39. *See id.* at 399 ("The law firm-client relationship poses the classic agency problem: the principal (here, the client) lacks complete information about the agent's (the law firm's) performance of its duties, which allows the agent to act to some degree in its own interests at the expense of the principal's.").

II. A CASE STUDY: RWI

RWI presents a valuable case study of the scramble among deal professionals. As Griffith describes, RWI presents a meaningful change to a core component of the M&A deal process.[40] And this transformation is led in part by nonlawyer deal professionals, raising at least the possibility of an encroachment on the traditional role of M&A lawyers.

To better assess the implications for lawyers, this part draws from Griffith's account, publicly available practitioner materials, and original interviews to describe RWI in its current form. This account supplements Griffith's study by focusing specifically on the roles of deal professionals.

A. BASICS

As Griffith reports, RWI was rare, at least in the U.S., until about five years ago.[41] The growth of RWI in the U.S. is closely associated with a boom in the private equity sector.[42] With a large number of carriers now offering the product,[43] it is cur-

40. *See supra* note 10.

41. *See* Griffith, *supra* note 5, at 1877 (showing a pronounced increase in acquisition agreement references to RWI starting in 2014); *supra* note 9 (citing practitioner materials describing the rapid increase in RWI).

42. *See* Griffith, *supra* note 5, at 1907 ("RWI is predominantly used in private equity deals, often when private equity is on both sides of the transaction. Moreover, survey respondents overwhelmingly ranked private equity first in driving the use of RWI."); *supra* note 8 (reporting use of RWI in a high percentage of private equity transactions).

43. *See* Interview with Interviewee #1, Anonymous Lawyer (on file with author) [hereinafter Interviewee #1] (estimating "three or four credible players" in 2014 and 20–25 currently); Interview with Interviewee #2, Anonymous Insurance Professional (on file with author) [hereinafter Interviewee #2] (estimating over 20 insurers or underwriters currently); Interview with Interviewee #3, Anonymous Insurance Professional (on file with author) [hereinafter Interviewee #3] (estimating five RWI carriers in 2015 and over 20 currently); Interview with Interviewee #9, Anonymous Insurance Professional (on file with author) [hereinafter Interviewee #9] (estimating 25–27 RWI carriers in the current market); Interview with Interviewee #12, Anonymous Insurance Professional (on file with author) [hereinafter Interviewee #12] (estimating 24 "markets" for RWI); Jeffrey Chapman, et al., *Representations and Warranties Insurance in M&A Transactions*, HARV. L. SCH. F. ON CORP. GOVERNANCE. (Dec. 11, 2017), https://corpgov.law.harvard.edu/2017/12/11/representations-and-warranties-insurance-in-ma-transactions/ [https://perma.cc/7AFZ-22VB] ("As RWI has gained market acceptance over the last few years, a significant number of new insurers have entered the RWI market.").

rently a competitive market with declining premiums and expanding coverage.[44]

A typical RWI policy in today's market has the following attributes:

- The buyer as insured party, receiving coverage for breaches of the seller's reps.[45]
- Coverage (the insured amount) equaling 10% of the deal price, roughly corresponding to customary caps on indemnification in non-RWI deals.[46]
- A premium, paid up front, equal to 2.5-3% of the coverage amount.[47]
- Exclusions for certain reps, such as unfunded pension liabilities.[48]
- Exclusions for anything known by the buyer at the time of closing, such as matters listed on the seller's disclosure schedules.[49]
- A retention (deductible) of approximately 1% of the transaction amount, which is often allocated between the buyer and seller in the acquisition agreement.[50]

---

44. *See* Interviewee #3, *supra* note 43 (discussing the effects of competition on premiums); Interview with Interviewee #5, Anonymous Lawyer (on file with author) [hereinafter Interviewee #5] (discussing the effects of competition on premiums).

45. Seller-side policies are also available. Under this form of policy, the seller remains fully liable for breaches of reps under the acquisition agreement, and the policy backstops those obligations. These policies are currently rare. *See* Griffith, *supra* note 5, at 1866 (reporting that over 90% of policies sold in recent years are buyer-side policies); Interviewee #3, *supra* note 43 (estimating that 95% of policies are buyer-side); Interviewee #9, *supra* note 43 (describing seller-side policies as rare).

46. *See* Griffith, *supra* note 5,at 1867; Steven Lee & Ai Tajima, *M&A Trends: Representations and Warranties Insurance,* GOODWIN INSIGHTS FOR PRIVATE EQUITY & M&A (Mar. 22, 2018) (reporting information from a survey of 75 private equity firms).

47. *See* Griffith, *supra* note 5, at 1867; Chapman, *supra* note 43; Lee, *supra* note 46; Verdesca, *supra* note 9.

48. *See* Griffith, *supra* note 5, at 1868(noting that standard exceptions are narrowing); Lee, *supra* note 46; Verdesca, *supra* note 9.

49. *See* Griffith, *supra* note 5, at 1868; Chapman, *supra* note 43, at 2; Lee, *supra* note 46.

50. *See* Griffith, *supra* note 5, at 1867–68; Lee, *supra* note 46; Verdesca, *supra* note 9. Sources also refer to increasing prominence of "no survival deals" that completely relieve the seller of liability under the representations and warranties, as is typical in public company acquisitions. *See,* e.g., Griffith, *supra* note 5, at 1866; Lee, supra note 46 (discussing "no indemnity" deals); Verdesca

Insurers are developing new products intended to complement RWI. These policies might offer coverage for known claims, reps typically excluded from RWI policies, or other forms of liability under an acquisition agreement such as break-up fees.[51] RWI might therefore be viewed as part of an emerging class of "transactional liability" insurance. But for now, RWI is the core product.

B. Anatomy of an Insured Deal

It typically takes about two weeks to negotiate, underwrite, and finalize ("bind") an RWI policy.[52] Over that period, the buyer will interact with an array of deal professionals. In order to better define their roles, this part describes the key phases of an insured deal: 1) initiating a proposal, 2) negotiating a policy, 3) incorporating the policy into the acquisition agreement, 4) due diligence, and 5) claims resolution.

1. Initiating a Proposal

The first step is engaging a broker to solicit proposals from insurers. Several insurance brokerage firms maintain teams primarily dedicated to RWI.[53] These brokers are often former M&A lawyers.[54] They cultivate relationships with insurers, leading

supra note 9 (describing insurers' increasingly willingness to eliminate seller liability). But interviewees describe the typical policy as still having a retention amount. See Interviewee #5, *supra* note 44 (reporting limited experience with no-survival deals); Interview with Interviewee #6, Anonymous Lawyer (on file with author) [hereinafter Interviewee #6].

51. *See* Interviewee #2, *supra* note 43 (discussing additional forms of policies that have evolved around RWI, such as coverage for tax exposure or pending litigation); Interviewee #9, *supra* note 43 (discussing other "transactional products"); Interview with Interviewee #10, Anonymous Insurance Professional (on file with author) [hereinafter Interviewee #10] (discussing insurance for Committee on Foreign Investment in the United States (CFIUS) and other deal-related liability); Interview with Interviewee #11, Anonymous Lawyer (on file with author) [hereinafter Interviewee #11] (describing new transactional liability policies).

52. *See* Interviewee #1, *supra* note 43 (reporting that the total time to obtain a policy is now down to a week to 10 days); Interviewee #5, *supra* note 44 (reporting that it takes about two to three weeks to obtain a policy).

53. *See, e.g.*, Interviewee #2, *supra* note 43 (describing a broker's RWI group); Interviewee #3, *supra* note 43 (describing a broker's M&A division).

54. *See* Interviewee #2, *supra* note 43 (describing how former corporate lawyers with experience in "the trenches" formed an RWI broker group); Interviewee #9, *supra* note 43 (indicating that most RWI underwriters are former deal lawyers); Interviewee #10, *supra* note 51 (suggesting that experience as an

M&A law firms (as referral sources), and private equity firms (as potential clients).[55] Once engaged, the broker's duties run to the buyer seeking coverage.[56]

The broker compiles basic information about the buyer, seller, and the deal. The broker provides this information to insurers to obtain proposals outlining pricing and basic terms such as the retention amount and standard exclusions.[57]

When selecting among these proposals, buyers will consider a number of factors. Besides pricing and the scope of coverage, buyers think ahead to potential claims. An in-house lawyer for a frequent acquirer explains that an insurer's willingness and ability to pay claims and pre-existing relationship with the buyer weighs heavily in selecting among proposals.[58] A number of sources cite an emerging claims history (i.e., willingness of insurers to pay claims) as a significant factor in RWI's recent growth.[59]

2. Policy Negotiation

Once the buyer selects among the proposals, the buyer and insurer negotiate the policy. RWI policies are relatively bespoke. An RWI is not a read-only document with limited modification

M&A lawyer is necessary for a career as an RWI broker); *see also* Verdesca *supra* note 9 ("Many of the large national insurance brokerages have specialized units that deal with reps and warranties insurance. These units, for the most part, are run not by 'insurance people' but by former M&A lawyers who left private practice to become dedicated resources at the brokerages.").

55. *See* Interviewee #2, *supra* note 43 (describing brokers' relationships with law firms and educational efforts); Interviewee #3, *supra* note 43 (discussing marketing efforts of brokers); Interview with Interviewee #7, Anonymous Insurance Professional (on file with author) [hereinafter Interviewee #7] (discussing attendance at M&A lawyer conferences).

56. *See* Interviewee #2, *supra* note 43.

57. *See* Richard D. Harroch, David E. Weiss, & Richard V. Smith*, A Guide To M&A Representations And Warranties Insurance In Mergers And Acquisitions,* FORBES.COM (Jan. 23, 2019), https://www.forbes.com/sites/allbusiness/2019/01/23/guide-mergers-acquisitions-representations-warranties-insurance/#192bffcf67f3 [https://perma.cc/N9Q2-KF26] (discussing information included in a request for proposal for RWI insurance).

58. *See* Interviewee #6, *supra* note 50.

59. *See* Chapman, *supra* note 43 (noting that "the stereotype that it is more difficult to collect under as RWI policy than under a customary seller indemnity" has been "broken" as insurers started paying out claims); Verdesca *supra* note 9 (summarizing claims experience reported by two large insurers); Wang, *supra* note 9, at 4.

through pre-set endorsements.[60] One interviewee explains that RWI "is never as rote as renter's insurance."[61] Buyer's counsel will mark up an RWI policy like any other deal document.[62]

That said, market conventions are emerging. Industry publications list "standard" exceptions, policy features, and price ranges.[63] Commentators describe nuanced custom emerging on some issues, such as whether an insurer will cover multiplied damages.[64]

Buyers may have several advisors for the policy-negotiation phase. First, M&A lawyers have gained experience reviewing policies.[65] Second, as described more fully below, firms increasingly feature practice groups with dedicated RWI specialists who assist conventional M&A lawyers with policy negotiation.[66] Finally, brokers assist in negotiating policies.[67]

At this point, there is some overlap between the role of lawyers and the role of brokers. Each brings something different to

60. *See* Interviewee #7, *supra* note 55 at 4; *see also* De Fontenay, *supra* note 3, at 406 ("Consumer insurance contracts, for example, may have terms that are substantively identical from one insurer to the next and are never negotiated with the consumer.").

61. Interviewee #5, *supra* note 44.

62. *See* Interviewee #7, *supra* note 55 (discussing which sections of the policy are most heavily commented on).

63. *See supra* notes 46–50 (describing the "typical" RWI policy based on industry publications).

64. In short, multiplied damages are a form of consequential damages that insurers initially resisted. Currently, insurers will not specifically exclude such damages from the policy if buyers do not expressly *provide for* such damages in the acquisition agreement. *See* Griffith, *supra* note 5, at 1869 ("Although DIV/multiplied damages had formerly been excluded from coverage under RWI policies, the market has now settled on a practice of 'following silence with silence.'"); Interviewee #7, *supra* note 55; Lee *supra* note 46.

65. *See* Interviewee #5, *supra* note 44 ("I can certainly markup a rep and warranty binder."); Interviewee #7, *supra* note 55 (discussing how M&A lawyers are learning about insurance); Interview with Interviewee #14, Anonymous Insurance Professional (on file with author) [hereinafter Interviewee #14] (stating that law firms lead policy negotiations).

66. *See* Interviewee #2, *supra* note 43 (observing that RWI groups at law firms assist in policy negotiation); Interview with Interviewee #4, Anonymous Insurance Professional (on file with author) [hereinafter Interviewee #4] (explaining that RWI groups at firms help negotiate policies).

67. *See* Interviewee #7, *supra* note 55 (explaining that a broker will become more involved in policy negotiation if buyer's counsel is not knowledgeable about RWI); Interviewee #9, *supra* note 43 (explaining that an underwriter will negotiate with a broker, rather than buyer's counsel, as long as the broker is knowledgeable about RWI).

the task. Brokers maintain relationships with insurers and so may have influence with them.[68] They also see a larger volume of policies and so might have a better sense of market trends.[69] Lawyers, on the other hand, might benefit from a broader view of the deal and a healthy economic indifference as to whether a policy binds.[70]

3. The Acquisition Agreement

Gilson describes the acquisition agreement between the buyer and seller as a key artifact of the lawyer's broader role. It is perhaps surprising, then, that RWI usually requires only moderate changes to the standard form of acquisition agreement.

To be sure, RWI leaves tracks in an acquisition agreement. Griffith observes that sellers' maximum indemnity obligations go down considerably from the customary 10% to 1%. As Griffith notes, the 1% number corresponds to the typical RWI retention amount, suggesting that the parties allocate the retention through the indemnity.[71] In Griffith's data set, escrow accounts and baskets also scale down, suggesting they are used to allocate responsibility for the retention.[72]

Griffith notes more subtle influences. When insurers are footing the bill, sellers are more likely to concede some buyer-friendly terms such as generous materiality scrapes, undisclosed liability reps, and multiplied damages.[73] These findings are significant in that they show that "RWI transfers greater liability risk to the insurer than the typical seller would be willing to bear."[74] These findings are also consistent with interviewee accounts and practitioner materials that cite the ability to "get better reps" as a selling point of RWI.[75]

---

68. *See* Interviewee #4, *supra* note 66 (reporting that brokers have the primary relationship with the insurer); Interviewee #5, *supra* note 44 (suggesting that an M&A lawyer has limited direct interaction with insurers during policy negotiation); Interviewee #7, *supra* note 55 (describing the "leverage" that brokers have with insurers).

69. *See* Interviewee #3, *supra* note 43 (reporting that a lawyer-turned-broker saw significantly more transactions as a broker); Interviewee #4, *supra* note 66 (explaining that a large broker will see more deals than a lawyer).

70. *See id.* (observing that a broker receiving a commission has different incentives than a lawyer billing by the hour).

71. *See* Griffith, *supra* note 5, at 1880.

72. *See id.* at 1880–81.

73. *See id.* at 1882–86.

74. *Id.* at 1886.

75. *See* Interviewee #1, *supra* note 43 (stating that a seller "gives a better

But from the perspective of deal process and professional roles, it is equally impressive how little changes in the acquisition agreement. As long as the seller retains some responsibility for a retention amount, the acquisition agreement will still feature a familiar looking indemnification for breaches of reps and associated caps, baskets, and escrows. Even where the policy lacks a retention, there is a good deal of risk allocation in the acquisition agreement. The parties may need to allocate responsibility for known items that fall outside of the policy, specify whether or not the seller is responsible for claims in excess of the policy, and work out customary price adjustments for working capital and the like.[76]

Perhaps most surprisingly, even the reps in an insured deal likely look similar on their face.[77] One might expect that insurers would, as a matter of efficiency and risk management, dictate or standardize the wording and scope of the reps they insure. In the absence of such insurer control, one might expect moral hazard: sellers might become extremely generous in making promises for which insurers are mostly responsible.[78] For a number of rea-

rep package" with RWI); Interviewee #7, *supra* note 55 (stating that buyers get "better reps" with RWI); Interview with Interviewee #13, Anonymous Insurance Professional (on file with author) [hereinafter Interviewee #13] (reporting that underwriters see comments of buyer's counsel on acquisition agreements stating that "we'd expect a more expansive rep because there is rep and warranty insurance on this deal"); Interview with Interviewee #15, Anonymous Insurance Professional (on file with author) [hereinafter Interviewee #15] (reporting that sellers "give better reps" with RWI); Interview with Interviewee #16, Anonymous Insurance Professional (on file with author) [hereinafter Interviewee #16] (reporting seeing drafting notes between buyers and sellers indicating that they do not need to negotiate certain reps because they will be insured); Interview with Interviewee #17, Anonymous Lawyer (on file with author) [hereinafter Interviewee #17] (indicating that sellers give broader reps in insured deals); Interview with Interviewee #18, Anonymous Lawyer (on file with author) [hereinafter Interviewee #18] (indicating that sellers give more fulsome reps with RWI).

76. *See* PRACTICAL LAW CORPORATE & SECURITIES, PURCHASE AGREEMENT: REPRESENTATION & WARRANTY INSURANCE PROVISIONS (2019) (showing customary changes to an acquisition agreement to accommodate RWI); Interviewee #6, *supra* note 50; Interviewee #11, *supra* note 51 (suggesting that overall negotiation time is similar for an insured deal and that the role of the lawyer will "pivot" to integrating insurance into the deal).

77. As a very rough measure, note that Griffith finds reps and warranties in insured deals to be similar in length to uninsured deals. *See* Griffith, *supra* note 5, at 1881.

78. *See id.* at 1874 (defining moral hazard as "the tendency of insurance to

sons, however, it appears that buyers and sellers still retain responsibility for negotiation of reps in an insured deal.[79]

First, features of an RWI policy likely constrain sellers from being overly generous. Most basically, a majority of policies include retentions for which sellers are partly responsible.[80] Insurance scholarship has long recognized how deductibles curb moral hazard.[81] In addition, even if insurers do not directly dictate the wording of representations and warranties, they do have tools to limit coverage. They can exclude or "write out" entire representations or particular phrasing that they believe fall outside the customary range for a particular type of deal.[82]

Second, a number of practical considerations prevent insurers from exerting tighter control of the acquisition agreement. A key selling point of RWI has been timely underwriting without significant disruption of existing deal process. Dictating acquisition agreement terms would undermine this goal.[83] In addition, deal professionals do not view representations and warranties as

increase loss by reducing the insured's incentive to prevent it").

79. Griffith reports:

> Although RWI underwriting generally begins before the acquisition agreement is finalized, insurers often do not typically comment on acquisition agreements. They do not mark-up drafts, and were they to do so, their comments would likely not be taken. *Id.* at 1892.

See also Interviewee #16, *supra* note 75 (stating that in North America parties have little appetite for underwriter comments on reps).

80. *See* Griffith, *supra* note 5, at 1912 ("Insurers generally manage moral hazard through the policy's deductible and limits, terms that effectively allocate loss to the policy-holder, thereby maintaining 'skin in the game.'").

81. For an overview of moral hazard in the context of liability insurance products, see Tom Baker & Peter Siegelman, *The Law and Economics of Liability Insurance: A Theoretical and Empirical Review* (Univ. Pa. Inst. for Law & Econ., Research Paper No. 11-09, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1783793 [https://perma.cc/2XQY-NFPM?type=image].

82. From the insured's standpoint, "writing out" agreement language is preferable to excluding the subject matter from the policy. Specific language that is written out is ignored for purposes of determining insurance coverage, but the entire subject matter is not excluded from coverage. *See* Interviewee #5, *supra* note 44 (explaining the effect of "writing out" language); Interviewee #7, *supra* note 55 (explaining the distinction).

83. *See* Interviewee #1, *supra* note 43 (stating that insurers cannot dictate acquisition agreement terms because of market dynamics); Interviewee #7, *supra* note 55 (stating that the market is too competitive for insurers to dictate acquisition terms); Interviewee #17, *supra* note 75 (reporting that buyers and seller emphasize speed when engaging a broker and that buyers and sellers would hesitate to work with an underwriter that substantially marked up acquisition agreements).

one-size-fits all boilerplate. These provisions might appear formulaic, but one would expect a buyer to bolster intellectual property representations for purchase of a tech company and environmental representations for purchase of a smelting operation. Insurers apparently value the role that experienced counsel can play in this customizing process.[84]

In sum, buyers, sellers, and their lawyers still dictate agreement terms, even if insurance shades incentives and insurers police the outer boundaries of acceptable risk.

4. Due Diligence

Griffith notes that underwriters "diligenc[e] the diligence" of the buyer rather than performing independent investigations.[85] In other words, like the approach to the acquisition agreement described above, due diligence for RWI "piggybacks" on the work of the buyer and seller.[86] Interviewees use a number of different phrases to describe this dynamic. One interviewee describes the custom as "over-the-shoulder diligence."[87] Another states that the process is designed to "pressure-test" the buyer's diligence.[88]

To start the process, underwriters obtain access to the data room containing all of the materials that the seller provided to the buyer in response to the buyer's diligence request. But underwriters do not generally base their diligence on a *de novo* review of that information. Instead, they rely heavily on diligence reports from the buyer's legal, tax, and other advisors. These reports are provided to the underwriter on a "non-reliance basis"—underwriters sign a letter acknowledging that the reports cannot be the legal basis for a claim by the underwriter against the advisor.[89]

84. *See* Interviewee #7, *supra* note 55 (explaining that deals for unique "fingerprints" and the representations and warranties need to be customized); Interviewee #13, *supra* note 75 (suggesting that one obstacle to synthetic, insurer-authored, reps is that insurers value the benefit of a seller's negotiating efforts); Interviewee #14, *supra* note 65 (explaining that an underwriter wants to see that the agreement was evenly negotiated).

85. Griffith, *supra* note 5, at 1894 n. 268 (quoting an interviewee). *See also* Interviewee #9, *supra* note 43; Interviewee #13, *supra* note 75 (describing secondary due diligence by underwriters); Interviewee #14, *supra* note 65 (stating that underwriters are "auditing the buyer diligence").

86. *See* Interviewee #1, *supra* note 43.

87. *See* Interviewee #4, *supra* note 66.

88. *See* Interviewee #1, *supra* note 43.

89. *See* Interviewee #2, *supra* note 43 (describing the non-reliance letter);

After the underwriter and its counsel review these reports from the buyer's advisors, the parties and their advisors are ready for the main event: a "diligence call." The underwriter and its counsel ask questions about the scope of the buyer's diligence and any identified areas of risk.[90] Underwriters are looking for a disconnect between a seller's operations and risk profile and the buyer's diligence. It would, for example, raise red flags if a seller had significant stakes in foreign subsidies and the buyer's diligence was primarily limited to domestic operations.[91] If the insurer cannot get comfortable with the scope and quality of the buyer's diligence on a particular matter, the insurer might limit the scope of coverage through writing out language in a representation or creating a new policy exclusion.[92]

As Griffith notes, there is hanging over this process more potential for moral hazard.[93] RWI policies do not cover liabilities known to the buyer at closing. What prevents the buyer from engaging in theatrical due diligence designed to look effective to the underwriter but unlikely in fact to unearth exclusions?[94]

Interviewee #3, *supra* note 43 (describing the customary reports); Interviewee #9, *supra* note 43 (describing materials received by the underwriter); Interviewee #14, *supra* note 65 (describing non-reliance letters).

90. *See* Interviewee #2, *supra* note 43 (describing the diligence call); Interviewee #3, *supra* note 43 (describing the diligence call and non-reliance letters); Interviewee #14, *supra* note 65 (describing the process for a diligence call attended by specialized advisors); *infra* note 122 and accompanying text (describing the role of underwriter's counsel).

91. *See* Interviewee #2, *supra* note 43; Interviewee #15, *supra* note 75; *see also* Interviewee #16, *supra* note 75 (explaining that an underwriter is looking for "adequately scoped" diligence).

92. *See* Interviewee #3, *supra* note 43; Interviewee #9, *supra* note 43; Interviewee #14, *supra* note 65 (describing exclusions based on red flags from diligence).

93. *See* Griffith, *supra* note 5, at 1912("[I]nsofar as RWI provides coverage only for risks that remain unknown, the parties may actively avoid uncovering information that, once revealed, will be excluded from coverage.").

94. *See* Interviewee #3, *supra* note 43 (stating that diligence sometimes feels "like a game of chicken" because of the temptation to do "lighter diligence"); Interviewee #12, *supra* note 43 (suggesting that some law firms are resisting producing full diligence reports, and instead proposing to issue only "red flag" reports, potentially because longer reports will trigger exclusions); Interviewee #16, *supra* note 75 (explaining that an underwriter tries to be "alive to the effects of insurance"); Interviewee #18, *supra* note 75 (suggesting that RWI affects some private equity firms' diligence process). However, some interviewees suggest that the amount of diligence by buyer's counsel has *increased* as insurers place increasing emphasis on the lawyer's written diligence report. *See* Interviewee #11, *supra* note 51; Interviewee #12, *supra* note 43.

Griffith identifies a number of mitigating factors. Buyers sign a no-claims declaration at closing; if a liability emerges, an insurer will "interrogate" the buyer's knowledge and may void the policy.[95] Less dramatically, coverage limits and retention amounts reduce incentives to short-arm diligence.[96] RWI policies usually only cover 10% of the purchase price with the buyer often bearing the cost of failed diligence with consequences below retention amounts or above policy limits.[97] Diligence also serves important business purposes (synergies, integration, and the like) so it would be shortsighted to play ostrich just to improve RWI coverage.[98]

In addition to these mitigating factors, one should not underestimate the extent to which participants in this diligence process simply believe that over-the-shoulder diligence is effective. How can it be that such a cursory investigation, with at least ambiguous incentives, is sufficient to take on such considerable risk? One potential clue is the weight that insurers accord law firm reputation. Interviewees describe prominent advisors as a kind of lubricant for getting an RWI policy underwritten and bound, and they note that lesser known advisors add time and expense to the process.[99] The suggestion is that a prominent firm

95. *See* Griffith, *supra* note 5, at 1915; Interviewee #5, *supra* note 44 (describing the no-claims declaration); Interviewee #7, *supra* note 55 (explaining that an RWI policy is void if there is fraud, and that there is no "mechanism" for moral hazard except "straight fraud"); Interviewee #3, *supra* note 43 (stating that the "loophole is fraud"); Interviewee #4, *supra* note 66; Interviewee #9, *supra* note 43.

96. Griffith, *supra* note 5, at 1912–13.

97. *Id.* at 1866, 1912–13.

98. *See id.* at 1914–15; Interviewee #6, *supra* note 50 (stating that diligence is about "the validity of the business case"); Interviewee #10, *supra* note 51 (explaining that concerns other than liability motivate diligence); Interviewee #13, *supra* note 75 (explaining that purchasers "don't want a shitty company at the end of the day"); Interviewee #14, *supra* note 65 (stating that "it is in the interest of buyers to do good deals" and that buyers "don't want a shit company"); Interviewee #16, *supra* note 75 (explaining that the buyer has to "live with" the company); Interviewee #18, *supra* note 75 (indicating that private equity funds will not skimp on diligence too much because they "still want a quality asset"). Relatedly, lawyers might worry that a truncated diligence process will result in a malpractice claim by the client. *See* Interviewee #11, *supra* note 51 (discussing malpractice exposure if a law firm shirks on diligence).

99. *See* Interviewee #2, *supra* note 43 (reporting that underwriters have "faith in quality advisors" such as "blue-chip law firms"); Interviewee #9, *supra* note 43 (explaining that lesser known advisors increase underwriting time and expense); Interviewee #14, *supra* note 65 (explaining that an underwriter wants

would incur a reputational hit if they pulled punches in insured deals.[100]

Finally, this deferential approach to diligence may simply be a commercial necessity due to time and resource constraints. As described above, time is of the essence in M&A transactions and a lengthy additional underwriting process would be unattractive.[101] In addition, many underwriters are lean operations. As background, underwriters are themselves a kind of intermediary, linking buyers to "insurance capital."[102] Underwriters originate policies and process claims for a fee, but the capital often comes from large insurers such as Lloyd's of London. Underwriters themselves do not necessarily have the personnel to effectively diligence a large M&A transaction in the time provided.[103]

In sum, a number of factors lead to a distinctive kind of diligence. Unlike lawyers asked to give a third-party legal opinion or underwriters facing liability under federal securities law for a registered offering of securities,[104] RWI underwriters do not perform much original diligence. Instead, they diligence the diligence.

to see "parity between the buyer and seller" and would be concerned about a small firm representing a founder).

100. *See* Interviewee #17, *supra* note 75 (suggesting that underwriters would be discouraged from working with a firm associated with deals with high insurer losses). These reputational constraints may extend to sellers as well. *See* Interviewee #12, *supra* note 43 (suggesting that private equity sellers are constrained by reputational concerns because they are repeat players); Interviewee #16, *supra* note 75 (stating that reputational concerns of private equity sellers "checks" moral hazard); Interviewee #18, *supra* note 75 (suggesting that private equity sellers value their relationships with insurers).

101. *See* Interviewee #7, *supra* note 55 (stating that original diligence would be "unworkable" and "contrary to the ecosystem").

102. *See* Interviewee #13, *supra* note 75 (explaining that managing general underwriters source policies for insurance capital in exchange for a fee).

103. *See* Interviewee #9, *supra* note 43 (explaining that "time and money" prevent leanly staffed underwriters from conducting their own diligence); Interviewee #14, *supra* note 65 (explaining that underwriters are at a numerical disadvantage when negotiating with M&A law firms).

104. *See generally* DONALD W. GLAZER, ET AL., GLAZER & FITZGIBBON ON LEGAL OPINIONS (3rd ed. 2008) (discussing customary due diligence practices for lawyers giving third-party legal opinions); Dennis J. Block & Jonathan M. Hoff, *Underwriter Due Diligence in Securities Offerings*, N.Y. L. J., May 27, 1999 (discussing due diligence practices of underwriters of registered securities offerings).

5. Claims

If all goes well for the insurer, the story ends when the policy binds. But if a breach of the reps surfaces, the parties described above re-engage to resolve the claim. Buyers will usually work through their broker to assert a claim.[105] Claims are ultimately managed by the underwriters.[106] The buyer's law firm might become involved, especially if there are reasons to maintain attorney-client privilege.[107] Compared to an escrow in a traditional (uninsured) deal, there are advantages and disadvantages to this claims process.

On the one hand, RWI reduces the "social" aspect of post-closing claims. Often, a buyer, especially in the private-equity context, expects the seller to continue in a management capacity. It can be awkward to assert a claim in that circumstance, and it may be easier to bring a claim against an insurance company.[108] On the other hand, insurance companies "aren't looking to write a lot of blank checks."[109] They are presumably experienced and sophisticated in responding to claims notices, reserving rights, and pursuing subrogation rights.

III. EFFECTS ON LAWYERS

Having introduced the cast of characters, this part considers where lawyers stand in this new deal environment. In short, the outsourcing of risk to insurance companies has not posed the substantial incursion one might on first glance expect. Instead,

105. *See* Interviewee #4, *supra* note 66; Interviewee #10, *supra* note 51 (discussing claims advocacy groups within brokers).

106. *See* Interviewee #9, *supra* note 43; Interviewee #13, *supra* note 75 (estimating that 30% of an underwriter's time is spent managing claims); Interviewee #14, *supra* note 65 (explaining that an underwriter spends significant time on claims).

107. *See* Interviewee #4, *supra* note 66 (discussing privilege considerations); Interviewee #11, *supra* note 51 (suggesting that a deal lawyer would work with firm litigators in handling indemnity claims); Interviewee #17, *supra* note 75 (reporting that M&A lawyers work "hand-in-hand" with the firm's litigation group on post-closing claims).

108. *See* Interviewee #2, *supra* note 43 (discussing the social aspect of bringing claims against a seller); Interviewee #4, *supra* note 66 (discussing reluctance to bring claims against sellers); Interviewee #14, *supra* note 65 (explaining that it may be easier for buyers to bring claims against insurers than founders); Interviewee #17, *supra* note 75 (explaining that RWI helps avoid "undesirable conversations" with founder/managers).

109. Interviewee #4, *supra* note 66.

the story of RWI so far underscores the durability of M&A lawyers' central role. Still, RWI's future is worth pondering because it is possible it evolves into a more assertive, and less deferential, feature of deal process.

A. So Far, So Good

Practitioner materials sometimes tout RWI for its ability to streamline negotiation of acquisition agreements.[110] Though smoother contracting sounds good from the client perspective, lawyers might not view it the same way. Lawyers, after all, prove their mettle in part by navigating contracting challenges. Put bluntly, easier negotiations might mean lower fees.[111]

It is important, however, to put this potential streamlining effect in perspective. First, consider only the lawyer's agreement design function.[112] Even with RWI, there is still significant risk to engineer. Buyers and sellers will still negotiate and draft indemnities allocating responsibility for retention amounts, special indemnities specifying responsibility for known risks, purchase price adjustments, and associated escrows.[113] An acquisition agreement also allocates another kind of risk—closing risk. The parties must agree on closing conditions, break-up fees, and the like.[114] RWI might reduce the stakes of some nego-

110. *See* Chapman, supra note 43 (suggesting that RWI can "meaningfully shorten" and "dramatically simplify" negotiations); Harroch, *supra* note 57 (suggesting that RWI "simplifies and speeds up" negotiation); *see also* Griffith, *supra* note 5, at 1886 (reporting that survey respondents view RWI as making "acquisition contracting more streamlined"); Interviewee #1, *supra* note 43 (referring to streamlined negotiation, especially in no-survival deals); Interviewee #4, *supra* note 66 (suggesting that RWI can "grease the wheels of negotiation" but also introduces offsetting complications); Interviewee #5, *supra* note 44 (stating that a no-survival deal significantly speeds negotiations); Interviewee #14, *supra* note 65 (suggesting that RWI means significantly less work at M&A firms because of less negotiating with the seller); Interviewee #17, *supra* note 75 (explaining that private equity funds emphasize speed and certainty in completing transactions and that RWI is helpful in that regard).

111. *See* Interviewee #3, *supra* note 43 (suggesting that with RWI "you don't spend nearly as much on legal costs").

112. *See supra* Part I.A.1 (describing the lawyer's design function based on Gilson's account).

113. *See supra* Part II.C.3 (describing the effects of RWI on acquisition agreements); *see also* Interviewee #11, *supra* note 51 (discussing negotiations over retention amounts and concluding that overall time spent on negotiation is similar for an insured deal).

114. John C. Coates IV, *M&A Contracts: Purposes, Types, Regulation, and*

tiations, but it does not obviate the need to construct a risk-allocation apparatus.

In fact, one can view RWI as an *additional* transaction (or two) to engineer. Lawyers must not only draft and negotiate the acquisition agreement, but also the RWI policy terms and a broker engagement.[115] And the lawyer must then consider a series of questions about the extent to which the policy coverage and acquisition agreement coordinate.[116]

Moving beyond agreement design, adding the insurer and broker to the deal complicates the project-management function.[117] RWI means more data room permissions, a longer closing checklist, a multiparty diligence call, and more redlines.

RWI also adds to the transaction-regulatory function by bringing insurance law into the mix.[118] The average deal lawyer may not be steeped in specialized legal doctrines governing the validity, interpretation, and scope of insurance policies, but M&A *departments* are heading in that direction. A small but noticeable number of M&A lawyers are re-branding themselves as RWI specialists, a practice that lies at the intersection of M&A and insurance law.[119]

Note too how RWI leans heavily on law firm reputation—a key attribute of deal lawyers discussed in Part I. Prominent firms add credence to the reps that lawyers negotiate and the due diligence reports they create.[120] In other ways, brokers are well positioned to compete for a larger role in agreement negotiation and diligence. In particular, they likely have as much market data as law firms on the topic of post-closing liability.[121] But

Patterns of Practice, *in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 29 (Claire Hill & Steven Davidoff Solomon eds., 2016) (providing an overview of the content of merger agreements).

115. *See supra* Part II.C.1&2 (describing the proposal and policy negotiation phases).

116. *See supra* Part II.C.3 (describing negotiation of the acquisition agreement).

117. *See supra* Part I.A.2 (describing the project management function of deal lawyers).

118. *See supra* Part I.A.2 (describing the transaction-regulatory function of deal lawyers).

119. *See* Interviewee #1, *supra* note 43 (describing the interviewee's transition from M&A lawyer to insurance specialist); Interviewee #4, *supra* note 66 (describing a career transition from M&A lawyer to insurance specialist).

120. *See supra* Part II.C.4 (describing the role of law firm reputation in the due diligence process).

121. *See supra* note 69.

perhaps an upstart brokerage group cannot lend a client the same kind of reputation as a white-shoe law firm.

Perhaps the clearest indication that RWI leaves plenty on the lawyer's plate is the new role of underwriter's counsel. Because of underwriters' lean staffing, it is standard to charge a $25,000 to $50,000 underwriting fee used to pay for outside counsel to the underwriter. These lawyers help review a buyer's diligence reports, participate in the diligence call, and craft exclusions.[122]

Putting it all together, deal lawyers seem to view RWI as a re-direction as much as an incursion, even if it does replace or hasten some traditional functions of deal lawyers. Time saved on representations and warranties is likely to be spent advising on other aspects of the deal—break-up fees, closing conditions, and purchase price adjustments, for example.[123] Prominent M&A firms tout their knowledge of RWI as a way to differentiate themselves and improve client service by adding a new "tool."[124] As one interviewee explains, "[l]awyers are happy to see" RWI because it "emphasizes a different skill set within the deal."[125]

B. BUT THERE'S A CATCH

It is also worthwhile to think about RWI's future. Specifically, does RWI have to remain so deferential to the status quo?

From Griffith's standpoint, the question seems to be whether RWI has much of a future at all. He considers, for example, whether we are at the top of a cycle that is due for a correction as loose underwriting standards catch up to insurers and dampen enthusiasm for RWI.[126] Several interviewees echo this

122. *See* Interviewee #1, *supra* note 43 (discussing underwriter's counsel); Interviewee #9, *supra* note 43 (describing the role of underwriter's counsel); Interviewee #14, *supra* note 65 (describing the role of underwriters counsel).

123. *See* Interviewee #1, *supra* note 43 (stating that lawyers "end up spending time on the termination provisions or something like that"); Interviewee #2, *supra* note 43 (stating that lawyers find negotiation of reps to be a "slog of a conversation" and that they still "find ways to deliver value"); Interviewee #12, *supra* note 43 ("Lawyers always find a way to recapture time lost."); Interviewee #17, *supra* note 75 (suggesting that RWI allows M&A lawyers to focus on other "value" such as tax efficiency).

124. *See* Interviewee #3, *supra* note 43 (describing RWI as a "tool for the client toolbox"); Interviewee #11, *supra* note 51 (describing RWI as another "tool in your toolbox"); Interviewee #17, *supra* note 75 ("We appreciate it as a tool.").

125. Interviewee #5, *supra* note 44.

126. *See* Griffith, *supra* note 5, at 1918–20; *see also* Interviewee # 1, *supra* note 43 ("We don't know what it looks like in a downturn."); Interview #2, *supra*

concern by noting lax underwriting practices by new entrants,[127] increasingly buyer-friendly formulations of reps,[128] reluctance by some law firms to provide fulsome diligence reports,[129] and aggressive claims by some insured parties.[130]

Griffith also raises interesting questions about the product's efficiency from the perspective of buyers, sellers, and their economic stakeholders. As Griffith points out, we usually find insurance where it serves some useful risk-spreading purpose, but here the ultimate economic stakeholders are diversified public shareholders and institutional investors who should not be especially risk averse as to a particular deal.[131] So what's going on? Griffith looks to the inner workings of private equity funds and hypothesizes that RWI could be either a play by fund managers to increase their compensation at the expense of investors or a rational adjustment to fund manager incentives that helpfully encourages managers to take appropriate levels of risk.[132]

note 43 (noting that there is a "good trajectory of claims" but that people could go back to escrows if there is bad behavior in claims); Interviewee #4, *supra* note 66 (stating that RWI could "fizzle out" if insurers stop paying claims); Interviewee #5, *supra* note 44 (discussing effects of a carrier facing a large claim because of poor underwriting).

127. *See* Interviewee #3, *supra* note 43 (suggesting that lower quality underwriters will "burn through the market"); Interviewee #13, *supra* note 75 (noting that "inexperienced" insurers cover forward-looking reps or "business risks" that were originally excluded from RWI).

128. *See* Interviewee #15, *supra* note 75 (noting that some firms "get aggressive" with the reps and use the existence of RWI as an argument for requesting a broader rep); *see also supra* note 75 (describing the effect of RWI on the breadth of reps).

129. *See* Interviewee #12, *supra* note 43 (noting a trend of law firms resisting producing full diligence reports, and instead proposing to issue only "red-flag" reports); Interviewee #15, *supra* note 75 (explaining that some law firms propose to provide only red-flag reports rather than full diligence reports); Interviewee #16, *supra* note 75 (observing that RWI's knowledge exclusion is "shortening the length of diligence reports" and that some firms are hesitating to provide full written diligence reports).

130. *See* Interviewee #13, *supra* note 75 (noting that some insureds assert questionable claims); Interviewee #14, *supra* note 65 (reporting interactions with plaintiffs lawyers focusing on RWI insurance claims); Interviewee #15, *supra* note 75 (reporting an increase in lost-customer breaches and expressing concern that buyers might look to RWI as a source of capital in a downturn).

131. *See* Griffith, *supra* note 5, at 1889 (noting that only sellers of manager-owned firms would be risk averse and that such sellers are rare in insured deals).

132. *See id.*

For purposes of this discussion, we do not need to resolve these important questions. Even if the underwriting cycle turns, for example, RWI might change or retreat but would presumably not vanish altogether.[133] As to the internal incentives of private equity investing, RWI could survive as either a useful adjustment to manager incentives or a persistent agency cost that is not worth resolving.[134] Either way, interviewees generally assume that RWI will have some kind of future based on its potent effect on competitive sale processes and growing acceptance in the market.[135]

If RWI is here to stay, then we should consider how it might evolve. Imaging this future raises an intriguing possibility—rep and warranty construction is ripe for technological innovation and insurers might be better positioned than lawyers to lead these efforts.

Recall one of the more surprising aspects of RWI. Insurers do not dictate the wording of the reps for which they assume liability.[136] They may police the outer boundaries by excluding or writing out some individual reps,[137] but according to Griffith standard exclusions are narrowing.[138] Nor do insurers seem to

133. *See* Interviewee #3, *supra* note 43 (suggesting that sell-side policies could become more popular in a downturn).

134. Many agency costs are irresolvable. For example, corporate managers and corporate shareholders have different appetites for risk, creating agency costs that can be mitigated but not eliminated. *See* Abraham J.B. Cable, *Opportunity-Cost Conflicts in Corporate Law,* 66 CASE WESTERN RESERVE L. REV. 51, 70–71 (2015) (discussing incentives resulting from equity compensation to corporate managers).

135. Interviewee # 2, *supra* note 43 (suggesting that when RWI first came into use it would "shut down an auction overnight" and that the product has become sufficiently attractive to withstand a market downturn); Interviewee #3, *supra* note 43 (suggesting that RWI has become an "average part of the process" and will persist); Interviewee #5, *supra* note 44 (stating that RWI is "here to stay"); Interviewee #12, *supra* note 43 (suggesting that buyers and sellers would not likely go back to indemnities and escrows even in an economic slowdown); Interviewee #13, *supra* note 75 (suggesting that law firms will continue recommending RWI because it reduces their malpractice exposure and that a generation of lawyers will be used to it as a part of standard deal practice).

136. *See supra* note 79 (discussing the limited role of underwriters in negotiating acquisition agreements).

137. *See supra* note 82 and accompanying text (discussing the circumstances in which an insurer will exclude or write out a rep).

138. *See* Griffith, *supra* note 5, at 1868; Interviewee #11, *supra* note 51 (stating that insurers do not "fly speck" acquisition agreements and have limited exclusions for coverage).

exert significant influence over the scope of reps through charging higher premiums for more generous reps.[139] In fact, when Griffith observes RWI having an influence on the acquisition agreement, it seems to pull in the opposite direction by broadening the seller's reps.[140] On the whole, insurers appear to leave the acquisition agreement to the lawyers based on a combination of confidence in the buyer's and seller's incentives[141] and commercial necessity.[142]

But perhaps insurers could do better. Consider some of the limitations of the lawyer-led approach that currently sets the scope of reps. Start with the example Griffith provides in his introduction. Increasingly, buyers are asking for a rep that "no allegations of sexual harassment have been made to the Company against any individual in his or her capacity as an employee of the Company."[143] Buyer's counsel asks for the rep because highly publicized examples of recent litigation made some client or lawyer, somewhere along the way, alert to a particular kind of risk. Now the rep is "market." Seller's counsel knows the customary counter moves, which might include objecting that the rep is costly to confirm, is ambiguous (what counts as an "allegation"?), covers matters that the buyer may exacerbate by mishandling, and simply presents too much risk for the seller. Buyer's counsel

139. Griffith observes pricing is highly standardized and driven in large part by competition rather than the wording or scope of the reps. *See* Griffith, *supra* note 5, at 1867 n. 152 (discussing survey results); *see also* Interviewee #14, *supra* note 65 (suggesting that pricing is "market-driven" and "not quantitatively sound"); Interviewee #15, *supra* note 75 (describing RWI pricing as "highly unactuarial" and "not very scientific" as opposed to auto or homeowners insurance); Interviewee #16, *supra* note 75 (suggesting that pricing is more qualitative than "actuarial" or "scientific"). One interviewee suggests that underwriters do offer lower pricing to sophisticated repeat players (such as private equity sponsors) than to inexperienced founder/managers. *See* Interviewee #13, *supra* note 75. Another interviewee explains that it is difficult to adjust pricing to underwriting risk because price quotes are given in an initial proposal before underwriting is complete. *See* Interviewee #14, *supra* note 65. *But see* Interviewee #16, *supra* note 75 (suggesting that underwriters can adjust pricing to the scope of reps because they have at least an early draft of the acquisition agreement at the proposal stage).

140. *See supra* notes 73–75 and accompanying text (discussing findings from Griffith's study of acquisition agreements).

141. *See supra* notes 84, 95–99 and accompanying text (discussing the value that insurers place on customizing reps through negotiation between the buyer and seller and the incentives of buyers to verify full disclosure by sellers).

142. *See supra* note 83 and accompanying text (discussing the commercial necessity of fitting within normal deal process).

143. Griffith, *supra* note 5, at 1841.

must advise whether to push for the rep, agree to various qualifications, or ask for offsetting concessions.

Embedded in this negotiation is a series of risk assessments. But do deal lawyers have the right kind of data or information to make these assessments? As discussed above, De Fontenay explores one relevant attribute of deal lawyers—extensive market knowledge.[144] A law firm's experience can be incorporated into a lawyer's advice through customary practice, ad hoc searches of document management systems, deal studies, and firm forms. But these mechanisms do not systematically collect *outcomes*—the frequency and magnitude of claims under a given rep.[145] Deal lawyers see claims on only an *ad hoc* basis—their firm might be involved in an indemnification claim and a deal lawyer might have continued involvement in that part of the representation.[146] But as one insurance professional puts it, lawyers may often be engineering "in a vacuum."[147]

Brokers and underwriters, on the other hand, may have better information and motivation for sophisticated data analysis, and they can use that information to refine risk assessment.[148] Like law firms, insurance professionals have copies of acquisition agreements, including reps. In fact, they may see a higher volume of deals than lawyers.[149] They have access to accounting information and a data room that provides a trove of demographic information—industry focus, ownership structure, firm age, etc.—that might affect risk assessments.[150] Importantly, in-

144. *See supra* notes 37–38 and accompanying text.

145. *See* Spencer Williams, *Predictive Contracting,* 2019 COLUM. BUS. L. REV. 621, 627–29, 685 (2019) (distinguishing between data based on historical contract terms and data that includes contracting outcomes).

146. *See* Interviewee #2, *supra* note 43 (suggesting that the interviewee had limited visibility to rep and warranty claims as an M&A lawyer); Interviewee #11, *supra* note 51 (suggesting that M&A lawyers will have some visibility to the claims process because the client will often use the same firm that handled the transaction).

147. *See* Interviewee #2, *supra* note 43; Interviewee #10, *supra* note 51 (suggesting that very few law firms have the data to make refined predictions about deal risk).

148. *See* Interviewee #3, *supra* note 43 (stating that insurers have "so much data to analyze" that they "can make risk management efficient").

149. *See supra* note 69 (reporting that insurance professionals are exposed to more deals than lawyers).

150. *See supra* Parts II.C.1&4 (discussing the insurer's access to information at the proposal and diligence stages).

surance professionals also have extensive information about outcomes such as claims notices and dispositions.[151] Crucially, insurers and their underwriters should be especially motivated to collect and analyze this information because of their direct financial exposure to those claims.[152]

There would seem to be an opportunity to use emerging data analytics tools—such as machine learning[153] and natural language processing[154]—to make increasingly refined predictions about how particular formulations of reps perform under specified conditions. For example, such an analysis could predict the likelihood that the sexual-harassment rep described above will result in claims. A similar analysis could be performed for different formulations of the rep that limit coverage to only five years or qualify the rep to the knowledge of high-level executives. The analysis could control for relevant firm characteristics—industry, employee count, etc. An insurance company could distill this information into differentiated premiums based on agreement language and deal characteristics.

This kind of pricing could produce significant benefits for both insurance companies and transacting parties (buyer and sellers). For an insurance company, more discriminating pricing would first and foremost allow price competition while maintaining acceptable underwriting standards and claims history—in short, more profits. Taking the thought experiment one step further, insurance professionals could use these analytical tools to develop ancillary services—assisting with due diligence, for example.[155] For buyers and sellers, the benefits could be twofold.

151. *See supra* Part II.C.5 (discussing the role of underwriters and brokers in claims management).

152. Even third-party underwriters have financial exposure to claims. They are compensated based in part on claims experience from deals they underwrite. *See* Interviewee #9, *supra* note 43 (describing third-party underwriter compensation); Interviewee #15, *supra* note 75 (reporting that managing general underwriter compensation is affected by insurer losses).

153. *See* Williams, *supra* note 145, at 634 ("Machine learning is a category of artificial intelligence research that focuses on building mathematical computer models that learn from data to improve over time.").

154. *See id.* at 653 ("Natural language processing (NLP) is a category of machine learning research focused on enabling computers to understand natural language communication.").

155. One insurance professional suggests that a skeleton crew and technological tools might be suitable to diligence small deals, but not larger deals. *See* Interviewee #10, *supra* note 51.

First, they might benefit from better pricing for the risk-spreading function for which they already buy RWI. Second, premiums calculated in this matter might convey important information about previously unquantifiable matters that could become sticking points in negotiations. The premium, after all, would represent the magnitude and probability of undisclosed matters within the scope of a particular formulation of rep.[156] This kind of residual risk, or in Griffith's terminology "unknown unknowns,"[157] is a type that will otherwise be hazy to both buyer and seller.[158]

Armed with this knowledge, we might expect insurers to directly or indirectly exert greater influence over the acquisition agreement. They might indirectly influence reps by resulting coverage decisions or pricing. More aggressively, insurers might offer packages of coverage, including menus of pre-set reps, at different price points.[159] It stands to reason that the party with the best information will ultimately dictate rep construction, and at some point that principle may override the inertia of the status quo.

The technological innovation is not as far-flung as it might sound. In a recent article, Professor Spencer Williams described an emerging field of "predictive contracting."[160] Using machine

156. The premium would also include other elements. *See* Griffith, *supra* note 5, at 1844 n. 17 ("The insurance premium must incorporate not only the present value of expected losses but also the insurance company's costs and profit margin.").

157. *Id.* at 1911.

158. For example, the analysis might result in the same high premium for: (a) the broad form of sexual-harassment rep described above and (b) a more circumscribed version of the rep that is limited by time (the previous five years). The high premium suggests to the buyer that sexual harassment is likely to be a source of risk. The consistent pricing between the two alternatives suggests that the risk of claims older than five years is low (so additional coverage for that period is cheap). In contrast, if the broad form of rep is substantially more expensive than the narrow form, that suggests that there is meaningful risk of claims older than five years. Admittedly, the price signal might not always be so straightforward. If an insurer will cover broad or narrow forms of the rep for a low premium, that could signal either that sexual harassment is a low risk or that all forms of the rep produce enough disclosure to surface the risk in disclosure schedules (and therefore take the matter outside of RWI coverage).

159. *See* Interviewee #2, *supra* note 43 (suggesting that menus of representations could be developed with more claims experience and analysis); Interviewee #13, *supra* note 75 (suggesting that insurers will develop "synthetic reps" and that buyers will receive "a quote and attached variations with pricing").

160. Williams defines predictive contracting as "a new method of contracting

learning and natural language processing, large in-house legal departments and startups are systematically analyzing contracts, background conditions, and outcomes to improve the design of commercial contracts.[161]

To be clear, it is uncertain whether the insurance industry has the capacity and appetite for these innovations. Just as some commentators question the capacity of law firms to innovate,[162] insurers may not prioritize this kind of innovation, especially while the current RWI product is still growing and competition for deals remains stiff.[163]

Moreover, even a more assertive form of RWI would not spell extinction for M&A lawyers. Presumably, clients would still turn to lawyers to help select among different pricing options, design other aspects of the acquisition agreement, handle transaction-regulatory work, and manage the deal. What might be lost is a chunk of agreement design and some kinds of diligence. While these functions are important to law firms in that they provide opportunities for training associates and leveraging partners' human capital,[164] they ultimately represent a modest part of the deal lawyer's diversified portfolio of functions and attributes. The incursion into deal lawyers' design function could be meaningful, but not existential.

in which contract drafters can design contracts using a technology system that helps predict the connections between contract terms and outcomes." Williams, *supra* note 145, at 621.

161. Williams discusses one especially relevant example. A company named Kira Systems is developing technology that will "identify the likelihood of litigation risk associated with specific terms in acquisition agreements based on data of past agreements and litigation." *Id.* at 637–38.

162. *See* Green, *supra* note 28, at 2 (describing law firms as "notoriously reticent to implement emerging technologies" based on risk aversion and economic incentives).

163. *See* Interviewee #10, *supra* note 51 (suggesting that insurers might be reluctant to innovate as long as there is "untapped growth potential for incumbents"); Interviewee #12, *supra* note 43 (suggesting that intense competition makes it hard for underwriters to assert more control over reps); Interviewee #15, *supra* note 75 (explaining how difficult it is for an underwriter to push back in negotiations because of the willingness of competitors to insure).

164. *See* MARC GALANTER AND THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 89–93 (1991) (theorizing that the principal function of law firms is to maximize the human capital of partners, in part through pushing work to associates).

C. So What?

It is customary to conclude a piece on transactional lawyering with a suggestion for how legal educators can better prepare future deal lawyers. Past recommendations include teaching more finance and transaction-cost economics to hone the design function,[165] using the traditional case method to prepare students for transaction-regulatory work,[166] and teaching soft skills to encourage good relations with opposing counsel.[167] Because this essay highlights deal lawyers' varied roles, it is hard to argue with any of the proposals.

Perhaps the more valuable lesson in this case is to take notice of the starring role played by *former* M&A lawyers in developing the market for RWI. For RWI to gain acceptance, insurance professionals needed to "speak the language" of deals.[168] The RWI universe remains populated largely by former M&A lawyers now working as brokers or underwriters.[169] Interviewees describe experience as an M&A lawyer as being nearly essential for a career on the insurance side.[170]

165. *See* Gilson, *supra* note 1, at 305.

166. *See* Schwarcz, *supra* note 3, at 507–08.

167. *See id.*

168. *See* Interviewee #2, *supra* note 43 (discussing how former M&A lawyers had to "roll up their sleeves" and build a product that was compatible with M&A practice).

169. *See supra* note 54 (discussing former M&A lawyers who became brokers); *see also* Interviewee #9, *supra* note 43 (noting the prevalence of former attorneys at an underwriter); Interviewee #10, *supra* note 51 (describing a transition from M&A lawyer to insurance professional); Interviewee #12, *supra* note 43 (describing a transition from M&A lawyer to underwriter and then broker); Interviewee #14, *supra* note 65 (describing a transition from M&A lawyer to underwriter); Interviewee #15, *supra* note 75 (discussing a common career path of M&A lawyer to underwriter); Interviewee #16, *supra* note 75 (describing a career transition from M&A lawyer to underwriter).

170. *See* Interviewee #12, *supra* note 43 (suggesting that 3–6 years of experience as an M&A lawyer is expected for an RWI underwriter and that nonlawyers and hires directly out of law school are rare). *But see* Interviewee #13, *supra* note 75 (describing a litigation career prior to becoming an underwriter); Interviewee #14, *supra* note 65 (describing efforts to build a pipeline of law school graduates but acknowledging the need for M&A experience to lead hard negotiations); Interviewee #15, *supra* note 75 (discussing an underwriter practice of mostly hiring out of large M&A firms with only limited hiring directly out of law school or of non-JDs); Interviewee #16, *supra* note 75 (describing M&A practice experience as essential for a position as lead underwriter, but noting some success in training non-JDs and other specialists for other positions on an underwriting team).

These former lawyers are a JD-advantage success story.[171] They seem satisfied with their atypical career path[172] even if it lacks some of the prestige of a large national law firm.[173] The compensation is competitive,[174] the hours no worse,[175] and I sensed in them some entrepreneurial pride in having played a role in building the RWI market.

A key question for law schools is how proactively we should prepare our students for these kinds of JD-advantage opportunities. Is it just idiosyncratic good fortune that some lawyers find careers in law-adjacent fields? Or should we be developing curriculum to support the kind of marketing skills exhibited by RWI brokers and the technical skills necessary for the innovations contemplated above? Do incoming law students want that kind of education and are law schools the right institutions to deliver it?

The answers to those questions are beyond the scope of this essay. But hopefully the story of RWI will inspire a closer look at these issues.

171. A JD-advantage job is one for which a law degree is beneficial but not required. Approximately 15% of law school graduates accept JD-advantage jobs. *See* Nat'l Ass'n for Law Placement, *What Do We Know About JD Advantage Jobs?*, NALP (November 2017), https://www.nalp.org/1117research [https://perma.cc/UY65-SF34].

172. *See* Interviewee #2, *supra* note 43 (suggesting dissatisfaction with the professional role of an M&A lawyer); Interviewee #3, *supra* note 43 (stating that the interviewee would recommend working for a brokerage); Interviewee #15, *supra* note 75 (reporting that the interviewee is "absolutely" satisfied with a career as an underwriter).

173. Interviewees note that insurance has higher status in Europe than in the U.S. *See* Interviewee #3, *supra* note 43 (reporting that working in insurance felt like a "knock down in prestige" and noting different perceptions of insurance in other countries). One broker explains that you should not expect to be surrounded by "mahogany and scotch" working in the U.S. insurance market. *See* Interview with Interviewee #8, Anonymous Insurance Professional (on file with author). Another interviewee was told that going from law firm to brokerage was an "off-ramp for your career." *See* Interviewee #3, *supra* note 43.

174. *See* Interviewee #3, *supra* note 43; Interviewee #12, *supra* note 43 (suggesting compensation is a little less as an insurance professional).

175. *See* Interviewee #9, *supra* note 43; Interviewee #12, *supra* note 43 (suggesting that quality of life is somewhat better as an insurance professional and that "people are more fun on this side").

CONCLUSION

To date, RWI underscores the durability of lawyers' central role in M&A transactions. Lawyers enjoy significant built-in advantages as incumbents. Re-working their customary process has a high price. On the other hand, if one looks over the horizon, insurance professionals seem especially well situated to change the status quo through technological innovation. Given the prominent role of former M&A lawyers in developing RWI, we might ultimately think of RWI's next step as an opportunity for a broadly defined legal profession.