Transactional Insurance Products

Transactional Insurance Products are effective tools offered by insurers to facilitate the closing of mergers and acquisition and finance transactions where the parties require additional comfort on a variety of issues. These products also are used by Boards of Directors to bring additional certainty to their decision making process where traditional legal opinions/expert advice do not provide adequate financial comfort. The Aon Financial Solutions Group has broad expertise and experience assisting its clients to structure and implement such coverages to achieve their unique transaction goals.

Transactional insurance products include the following:

- Representations and Warranties Insurance
- Tax Indemnity Insurance/Tax Opinion Insurance
- Regulatory Qualification Insurance
- Litigation Buyout Insurance
- Environmental Insurance

Litigation Buyout Insurance (“LBI”)

LBI is an insurance product by which an insurer takes over from the insured liability associated with pending litigation. LBI is unique in that it relates to a known, ongoing dispute; by contrast traditionally insurance seeks to cover events which occur after the inception date and which are not known to the insured when the policy is purchased. Possible subject matters are broad, including securities and other class actions, antitrust, products liability, and construction litigation. Policies have also been used in the context of foreign risks, tax disputes, will litigation and intellectual property disputes. First generation LBI involved the insurer stepping into the shoes of the insured and taking over a pending litigation and ensuing liability, if any. The product has advanced to the stage where insurers will now consider insuring against the reversal of a verdict on appeal.

From the insured's perspective, LBI can accomplish one of several goals. It may (1) effectively transfer the litigation from the defendant’s books, (2) act as a stop loss for pending litigation or (3) serve as a hedge against reversal of a judgment on appeal. LBI can be used in the context of an M&A transaction (to address concerns of a buyer over an unexpected adverse result in the subject litigation); in a financing (to address concerns of a lender or investor over an unexpected adverse result in the subject litigation); or simply to assist the defendant in managing the risk of litigation.

As a buyout, the insured would pay the insurer a risk premium, plus an amount in respect of the maximum probable loss or the expected settlement value. In the context of the appeal hedge or the stop loss, the insurer would be paid only a risk premium relative to the amount of coverage purchased.
LBI requires the insurer to be granted rights to take over the conduct of the litigation or, at a minimum, the right to associate with the insured’s legal counsel and to approve all major strategic decisions. In addition, the insurer will require the right to approve all settlements in advance.

Examples of LBI

**Appeal Hedge.** A publishing company won a summary judgment in Federal district court dismissing antitrust claims against it. The damages sought of under $10 million would have been trebled under the relevant antitrust rules. The plaintiff in the case sought to have the summary judgment reversed by a U.S. Circuit Court of Appeals. While the appeal was pending a third-party sought to purchase the defendant, but was concerned with the contingent liability from the case should it be remanded for trial and treble damages be awarded. Insurer’s agreed to provide an LBI policy, but the appeal was denied before the policy was finalized.

**Stop Loss (Construction Litigation).** The owners of a hotel were involved in complex federal and state court litigation with the general contractor and hundreds subcontractors over various disputes concerning the construction and timely completion of the hotel. The amounts claimed in the disputes were substantial; however, the hotel valued its likely liability not to exceed a fraction of the amount claimed. There were also counterclaims against the general contractor for lost profits, etc. related to the delayed opening of the hotel. An LBI policy was underwritten by a domestic insurer for a specified limit above the expected liability. Under the policy, the insurer was ceded full control for handling the case (both affirmative and defensive claims) and all litigation expenses were covered. This policy allowed the insured to disclose to its (public) shareholders that the litigation was effectively removed from the Company’s balance sheet. In addition, a financing transaction being held up by the litigation was allowed to move forward. The Company realized the further economic benefit of reduced bonding costs due to the insurer’s strong credit rating.

**Securities Litigation.** A company was forced to restate its quarterly financial results after its auditors discovered accounting irregularities during an annual audit. The adverse disclosure caused a major decline in the company’s stock price and triggered over a dozen shareholder lawsuits. The insurance company provided an LBI policy to insure the client against liability arising out of the pending securities litigation not covered by its primary insurance carrier. The company was then able to negotiate an agreement with its primary carrier satisfactory to all parties. Public announcement of the company’s insurance helped to eliminate uncertainty in the marketplace over the company’s financial condition and the company’s share price rose 12%.

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For assistance with the Transactional Insurance Programs described above, please contact:

Gary P. Blitz, Managing Director, Aon Financial Solutions Group at (212) 441-1106, gary_blitz@aon.com

Michael Schoenbach, Managing Director, Aon Financial Solutions Group at (212) 441-2337, michael_schoenbach@aon.com

The descriptions of insurance products are for discussion purposes only. They are not offers of insurance. The products offered by a particular insurer may change and may differ from these descriptions in material respects.