

Merger and Acquisition (M&A) activity continues to increase at a rapid pace. In 2010, the value of all announced M&A deals in the United States increased by 25% over the prior year (from \$548.4 billion to \$689.3 billion) according to international financial analysis firm Factset Research Systems, Inc. The number of deals in America increased as well, growing from 7,110 in 2009 to 9,073 in 2010.

At the same time, lawsuits involving M&A situations have been multiplying at an alarming rate. Because the merger or acquisition of one company by or with another involves large sums of money and the combination of groups of people with different motives, there are often disputes to resolve. "Traditional" securities litigation has decreased in frequency over the past few years and as a result, plaintiffs' lawyers are turning their attention to other money-making opportunities such as M&A transactions. It is a perfect situation for a plaintiff attorney. There is plenty of money on the table and there is a merger document with a multitude of disclosures to challenge.

M&A lawsuits are on the rise. There were 341 M&A-related lawsuits filed in 2010, according to Securities Class Action Services, representing a 78.5% increase from 2009 and an astonishing 847% increase over 2008's number. Already in 2011, as of July 7th, there have been 182 M&A cases filed in the United States.

According to a number of observers, M&A lawsuits are very attractive to plaintiffs' lawyers because they can be filed within hours of a deal being announced, and they don't require prolonged research, discovery and motion practice before reaching a settlement. In essence, they are a "quick strike" revenue producer.

"I'm trying to think of an M&A transaction that I've been involved in over the past two or three years where there hasn't been a suit, and I'm not sure I can name one," says Stephen Alexander, a partner in the Los Angeles office of international law firm Bingham McCutchen LLP. In his view, dealing with these lawsuits has "become a cost of doing business."

There are typically two types of allegations. One is that the selling company didn't make adequate disclosures to the buyer and the second is that the selling company's management sold the company too cheaply. The plaintiff will allege that the seller did not conduct reasonable due-diligence in searching for other potential buyers before agreeing to the deal that was announced. In that situation, plaintiffs will often file a suit demanding that the purchase price gets increased to a higher value. Many Directors' and Officers' Liability Insurance ("D&O") policies have exclusions for this type of claim, yet the insurers are dragged into a settlement to make the litigation go away.

One jurist, Vice Chancellor Travis Laster of the Delaware Court of Chancery, a major forum for corporate litigation in America, recently observed with respect to the rise of M&A lawsuits that "a lot of these sue-on-every-deal cases," are "worthless" and "all a bunch of movement for nothing." Nonetheless, these claims are proliferating and every company involved in an M&A situation should be concerned about them.

So how can you help clients who are going through a merger or acquisition?

Obviously, advising them on the purchase of adequate run-off insurance is critical. (See [Essential Considerations When Buying D&O Run-Off Coverage](#) in the May issue of the [AmWINS Client Update](#).) Another potential solution involves the purchase of M&A insurance, a market-tested product that has been around for a number of years but is enjoying a resurgence in popularity. This type of policy is often called a Representations and Warranties policy.

Insurers can be very flexible in helping brokers and their clients address a wide variety of representations during an acquisition or merger. Among the insurable risks are unforeseen tax liabilities, environmental issues, employee benefit obligations, legal compliance and even generic undisclosed liabilities.

For example, depending upon how a specific policy is drafted, M&A insurance may cover the clean-up costs of an environmental problem that was not adequately disclosed at the time of the deal's closing.

To learn more about how AmWINS can help you place M&A coverage for your clients, reach out to your local AmWINS broker or marketing@amwins.com.

If you do not have a contact at AmWINS to help with your financial services risks, [click here for a list of brokers on our website](#).

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CLIENT ADVISORY

M&A Insurance: A Unique Solution for Helping Clients Through a Merger or Acquisition

Available limits depend upon what is needed in a specific situation to get a deal done, but generally speaking, through the use of layered programs and reinsurance (where necessary), most insureds can obtain a meaningful limit for their particular transaction in today's market.

There are currently about six to eight carriers who write M&A insurance in the United States. The premiums have been coming down, which has helped make the product more attractive. Premiums for a typical deal were about 4% to 6% of the limit purchased a few years ago, but the price has declined to about 2.5% to 4% of the total limit today.

As for retentions, with respect to deals where the seller has agreed to provide some indemnity for contingent liabilities (i.e. he has "some skin in the game") carriers will generally look to obtain a retention of 1% to 3% of the deal's overall value. Where there is no indemnity agreement from the seller, retentions can run as high as 3% to 5% of the deal's value, typically.

Either the seller or the buyer of the company can purchase the M&A insurance; there is no one standard protocol. In some cases the buyer will mandate that prior to closing, the seller will have to buy the insurance (on terms acceptable to the seller, of course). In other cases, the buyer will want to control the terms of the policy and purchase it on their own to protect their interests.

The presence of M&A insurance can sometimes make the difference in getting a deal done that would otherwise have too much uncertainty to be consummated. As with most types of commercial insurance, however, it is highly customized and not easily explained in a brief article. For more information on this potentially valuable solution to your clients' risk management needs, please contact your AmWINS Financial Services broker.

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