



## Lowenstein Sandler's In the Know Series Video 5 – Do R&W Insurers Still Pay Claims? Following Up on Lowenstein's 2020 Survey

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### Eric Jesse:

Hi, I'm Eric Jesse, Partner in Lowenstein Sandler's Insurance Recovery Group. Welcome to "In the Know."

For many years now, reps and warranty insurance has been a critical and also useful component of an ever-increasing amount of mergers and acquisitions. When our buyer clients evaluated R&W insurance quotes and carriers previously, they often asked the question—and rightly so—do R&W insurers pay claims? We were able to get our clients comfortable with R&W insurance with anecdotal examples of claim payments, and by advising clients that R&W insurers really needed to pay claims if they wanted the popularity of this product to continue.

Here at Lowenstein we also wanted to be able to provide our clients with hard data as well. And so about two and a half years ago, right before COVID changed everything, we conducted a survey of nearly 150 market participants—buyers, brokers, and insurers—to find out if our instincts were correct. Were R&W insurers paying claims?

We published our results in August 2020, and the answer was "yes, but." The results confirmed that by far most claims fall within the policy retention, which is the amount of the loss that the buyer must bear under the policy. For claims that exceeded the retention, the results were encouraging: 87% of respondents reported that R&W insurers did pay claims. The "but" is that the buyers really had to work hard for it. Insurers tended to initially deny coverage or assert coverage defenses, and buyers had to work to overcome those denials and defenses. Buyers had to also assemble a team of advisors to counter the insurers' team, so they had to rely on coverage counsel, deal counsel, experts, and their brokers. But likely, because this is a product born out of dealmakers, policyholders were able to negotiate claim payments from the insurers. And those negotiations usually yielded payments from the insurers that were greater than 50% of the loss alleged.

But as we all know too well, the world has changed so much, and so has the R&W insurance market. The carriers particularly last year faced huge demand for their product. As R&W insurance has taken off, insurers report increased claim experience, and increased severity, putting added pressure on their bottom line. And so it's time to ask the question again.

Our survey is currently underway to see if and how the changes in the world and in the R&W market are impacting claim payments. This survey will also explore newer types of transactions and issues we've seen during the past two years. Given the popularity of SPACs—special purpose acquisition company transactions—and the increase in companies becoming ESG—that's environmental, social, and governance—focused or driven, we are asking about R&W claim experience with those types of companies and transactions. And as insurers experience increased claim severity, we want to know how insurers are challenging buyers' loss determinations if they're keeping their claim payments down. And of course, we want to know the extent that COVID has had on R&W claims both with respect to the process and particularly given COVID-related exclusions found in many R&W policies these days.

So stay tuned. We look forward to sharing our results in the fall, and if you'd like to participate in the survey or make sure you receive a copy of our report, please email us at [RWIsurvey@lowenstein.com](mailto:RWIsurvey@lowenstein.com).

Thank you for joining us on "[In the Know](#)."