

# 10 Reasons Why Investors are Turning to Warranty & Indemnity Insurance in Real Estate Acquisitions



"Warranties & Indemnities are the most dangerous clauses in a Sales & Purchase Agreement."

**A**s tolerance for risk in property acquisition has decreased, the use of Warranty & Indemnity Insurance has increased over the last five years. Also known as Reps & Warranties Insurance, it is a natural complement to Title Insurance, which has been around for decades.

W&I Insurance covers the transactional risk created by:

- Buyers requiring Sellers to make a broader array of Reps & Warranties, ranging from property title to finance, environment to tax.
- Questions about the Seller's ability to fulfill its obligations and pay potential damages.

This applies to individual properties, a portfolio of assets or M&A transactions.

Here are the **Top 10 reasons** for buying Warranty & Indemnity Insurance:

**10. Provides credit strength:** Reps & Warranties, however carefully negotiated and written, are only as good as the financial strength of the party indemnifying for breaches. W&I Insurance, underwritten by a highly-rated insurer, backs the Seller's Reps & Warranties, therefore providing credit strength where the Seller may not be willing – or able – to do so.

**9. When the Seller is an SPV:** W&I Insurance is used where the Seller is a Special Purpose Vehicle which intends or is required to distribute the sales proceeds, without recourse to its investors and without establishing an escrow to secure its indemnities.

**8. No need for disclosures on financial statements:** For public companies, W&I Insurance avoids disclosing contingent liabilities on their balance sheet. Companies will not have to provide explanatory footnotes that can raise questions among investors or analysts.

**7. In lieu of bank guarantees:** W&I Insurance eliminates the need for the company to provide bank guarantees that are expensive and will impair its debt capacity.

**6. Replaces Warranties & Indemnities:** In cases of sales out of a bankruptcy or liquidation, the trustee or administrator may refuse or be prohibited from providing any W&I.

**5. Protects Seller against potential litigation:** A Seller may want a W&I policy to protect itself against potential litigation arising out of its Reps & Warranties, thus shielding shareholders, investors or directors from risk. A Seller may assign its policy to the Buyer, thus reducing the Buyer's risk and facilitating the transaction.

**4. Covers "buy-side" transactional risk:** A Buyer can also arrange W&I Insurance to cover transactional risks. In a competitive situation, buy-side W&I policy may enhance the Buyer's bid by reducing the Seller's costs and its burden of Reps & Warranties.

**3. When dealing with an unfamiliar Seller or jurisdiction:** The expertise of the W&I insurer provides the Buyer with additional comfort when dealing with an unfamiliar Seller or when properties are in lesser-known jurisdictions.

**2. Extends limits for term and amount:** While Reps & Warranties are subject to limits on term and amount, W&I insurance can provide a Buyer with a higher limit or longer term than originally negotiated in the Reps & Warranties.

**1. Provides cover beyond the Reps & Warranties:** A W&I policy can also be combined with Title Insurance to defend the Buyer from 3rd-party claims against the property title, and to indemnify the Buyer for a loss of title throughout the period of the Buyer's ownership. This title policy feature can also cover planning, zoning and permitting representations.

Warranty & Indemnity Insurance gets the deal done. The Insurer's responsiveness to claims – and its ability to pay claims – can play a critical role in facilitating the transaction. Given its benefits, W&I Insurance can help win the bid for the Buyer, ease negotiations on Reps & Warranties between the Seller and the Buyer, and facilitate the successful completion of both single-asset sales and complex corporate real estate mergers and acquisitions, all on a cost-effective basis.

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