Morgan Lewis

SECONDARY AND LIQUIDITY SOLUTIONS WEBINAR SERIES

Summary of Key Terms for RWI Insurance

For US Audiences

April 9, 2025

© 2025 Morgan, Lewis & Bockius LLP

Presenters



John D. Cleaver
Partner, Morgan Lewis



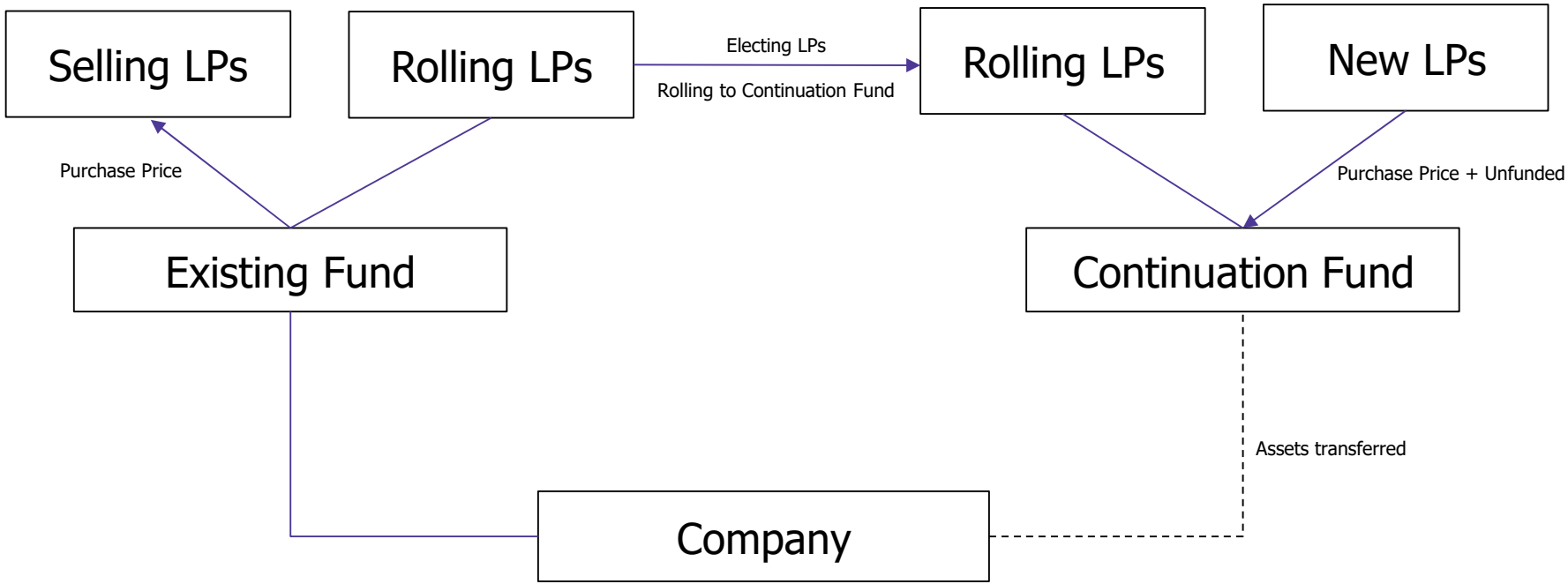
Joseph D. Zargari
Partner, Morgan Lewis



Matthew Heinz
Partner, Lockton Companies

Morgan Lewis

Continuation Funds: Simple Structure



*This structure chart is simplified for illustrative purposes only and does not show any tax steps or structuring

Continuation Funds

Conflicts of Interest

- Fiduciary duties to existing (selling) fund vs. new (buying) fund
- Sponsor incentive to generate additional carried interest and fees with the new fund
- Sponsor negotiation of the purchase and sale (or contribution) agreement
- Does an independent fairness opinion support the price?
- Transparency and disclosure issues
- Are LPs presented with a status quo option? *(SEC concern that LPs are provided two bad options)*
- Selection of intermediary and buyer

Mitigation

- Auction Process
- LPAC Consents
- **Representation and Warranty Insurance**
- Valuation or Fairness Opinion
- Disclosure in the Confidential Information Memorandum
- Lead Investor Role (Negotiation and Enforcement of Transaction Agreement for Continuation Fund)

How R&W Insurance Helps Facilitate a Deal

A buy-side R&W policy can enhance or replace seller indemnification under the purchase agreement.

	TYPICAL INDEMNIFICATION COVERAGE	TYPICAL POLICY COVERAGE
SURVIVAL OR POLICY PERIOD	• 12-18 months for general reps • SOL for fundamental reps	• Three years for general reps • Six years for tax and fundamental reps
INDEMNIFICATION CAP OR POLICY LIMIT	• 10%-20% of purchase price for general reps • Seller escrow of such amount typically required	• 10%-20% of purchase price (but may be able to insure up to 100%) • Seller only needs to escrow 0%-1% of proceeds
LOSS DEFINITION	Inclusion of consequential damages, DIV, multiplied damages and similar damages is heavily negotiated.	Insurers are willing to follow silence with silence as long as purchase agreement does not explicitly grant/exclude such damages.
MATERIALITY SCRAPE	Inclusion of single or double scrape and materiality qualifiers in reps is often heavily negotiated.	Policy will follow scrape agreed to in purchase agreement (and buyer typically can get a synthetic double scrape in NSI deals).
RECOURSE FOR BREACHES	Buyer's recourse is to proceed against the escrow, which may include proceeds owed to management/ rollover sellers.	After retention is satisfied, the policy will respond to all covered matters. Buyer has right (but not obligation) to proceed against the escrow to satisfy part of the retention.

Continuation Funds: Representation and Warranty Insurance

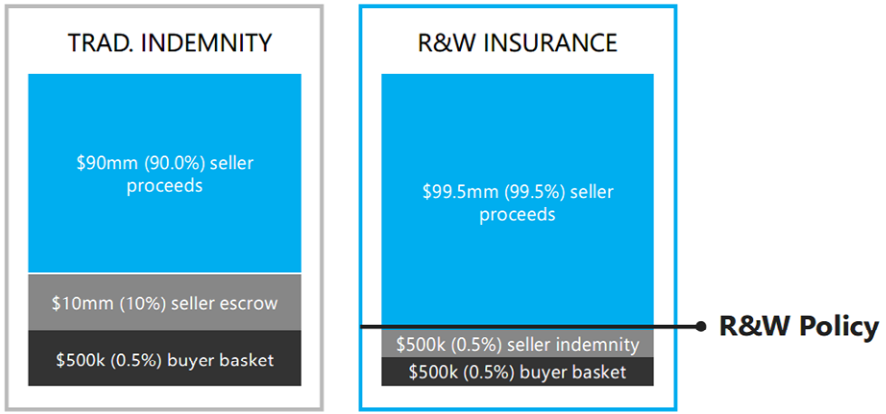
- Role of the Lead Investor in selecting and enforcing an RWI Policy
- Transaction Agreement: Indemnity vs. RWI Policy
- Expenses: Who bears the cost of an RWI Policy and enforcement of the policy
- Distribution of RWI Proceeds: Typically only allocated to New Limited Partners, but may be subject to carry (negotiable)

RWI in Continuation Funds: Differences from M&A

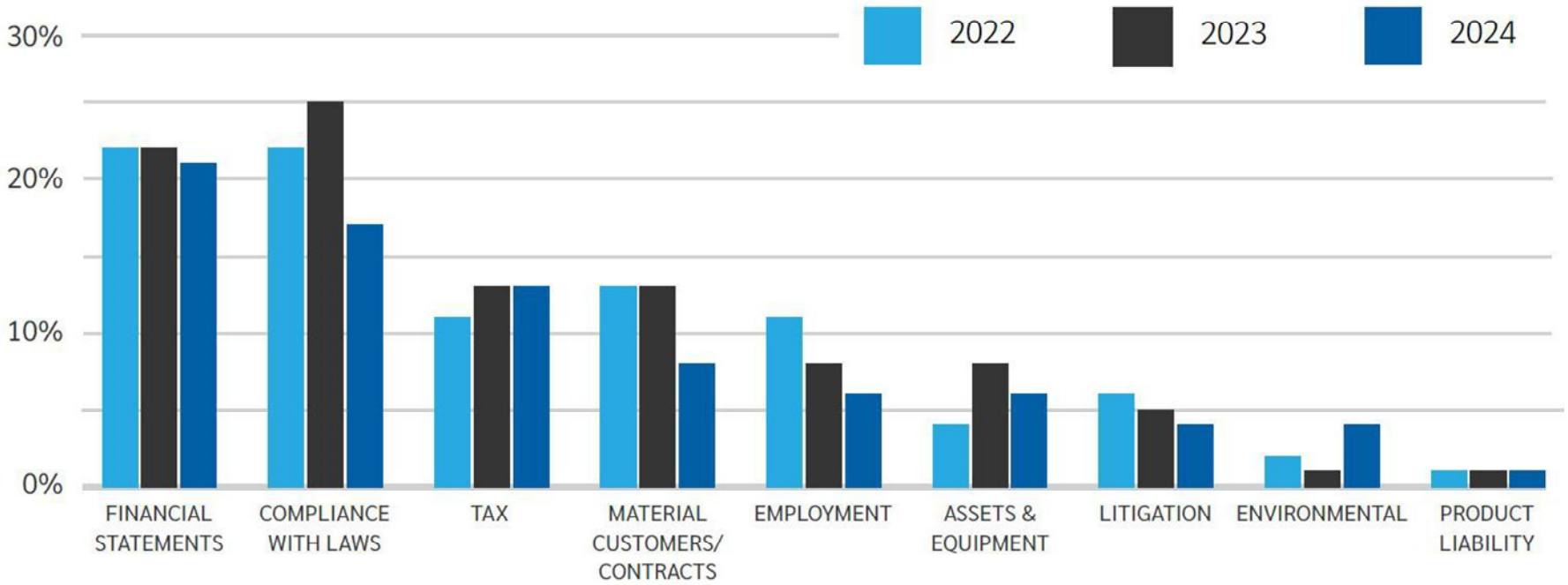
- GP on both sides of the deal
- Less diligence
- Policies cover less – knowledge and materiality qualifiers
- Cost less and faster to put together
- Claims submitted vs. claims paid

R&W Insurance: How It Works

TRANSACTION VALUE	$100 million
ESCROW	$10 million – reduced to $500,000 due to policy
BUYER BASKET	$500,000
POLICY PLACEMENT	Buy-side R&W policy covering general reps for three years and fundamental/tax reps for six years
POLICY LIMIT	$10 million
POLICY RETENTION	$1 million first 12 months, then $500,000
PREMIUM	~$350,000 (3.5% of limit)

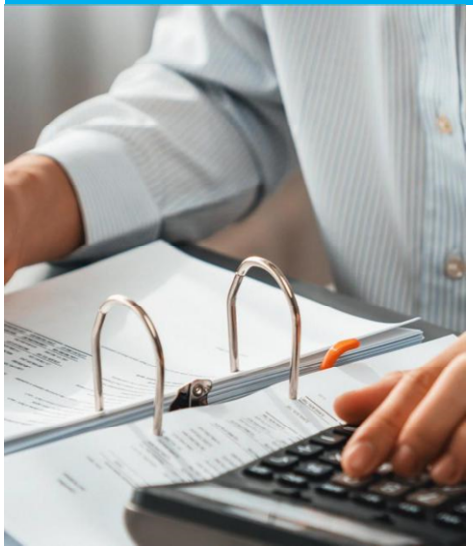


Percentage of Claims by Breach Type
2022 through Q3 2024



What is Tax Insurance?

Tax insurance provides certainty and removes the negative financial impact associated with a tax liability.



KEY BENEFITS

Offers a financial guarantee for a position where there is at least a "more likely than not" level of comfort

Can be used to replace or backstop an indemnity in transaction agreements for a specific tax risk

May be available without a formal tax opinion

May be a means to mitigate the financial statement impact of a FIN 48 (ASC 740-10) reserve

John D. Cleaver



Partner
Morgan Lewis
+1.212.309.6931
john.cleaver@morganlewis.com

John focuses his practice on the private investment fund industry, representing buyers, sellers, and managers in secondary transactions of all types, including single-interest transactions, portfolio sales, tender offers, and GP-led recapitalizations and restructurings. John also counsels investment banks, private investment funds, governmental and private pension plans, sovereign wealth plans, university endowments, family offices, and global institutional investors on their investments in domestic and international private investment vehicles, including hedge funds, private equity funds, co-investment vehicles, funds of one, and other private investment funds. John's practice also involves the structuring, formation, governance, and regulation of private funds, managed accounts, and other products.

Joseph D. Zargari



Partner
Morgan Lewis
+1.212.309.7020
joseph.zargari@morganlewis.com

Joe focuses on the private investment fund industry, including the structuring, formation, governance, and regulation of and investment in US and non-US hedge funds, private equity funds, venture capital funds, managed accounts, and other products. In addition, Joe has a significant practice representing buyers, sellers, and general partners in secondary transactions (including portfolio sales of fund interests and GP-led transactions). He also provides legal, regulatory, and transactional advice for investment managers and institutional investors. Joe is the practice group leader for the New York office investment management practice and co-head of the firm's secondary transaction practice.

Matthew Heinz



Partner
Lockton Companies
mheinz@lockton.com

Matt, an industry-leading mergers and acquisitions (M&A) expert, co-leads the Transaction Liability practice at Lockton. He brings over a decade of transaction liability insurance experience, serving as both an underwriter and broker during his time in the industry.

Prior to joining Lockton, he served as a Senior Managing Director and Co-Practice Leader of Aon's North American transaction liability team, where he previously partnered with Halpern, Ziff and Sud in building out a practice that facilitated the widescale adoption of insurance products that augment M&A deals.

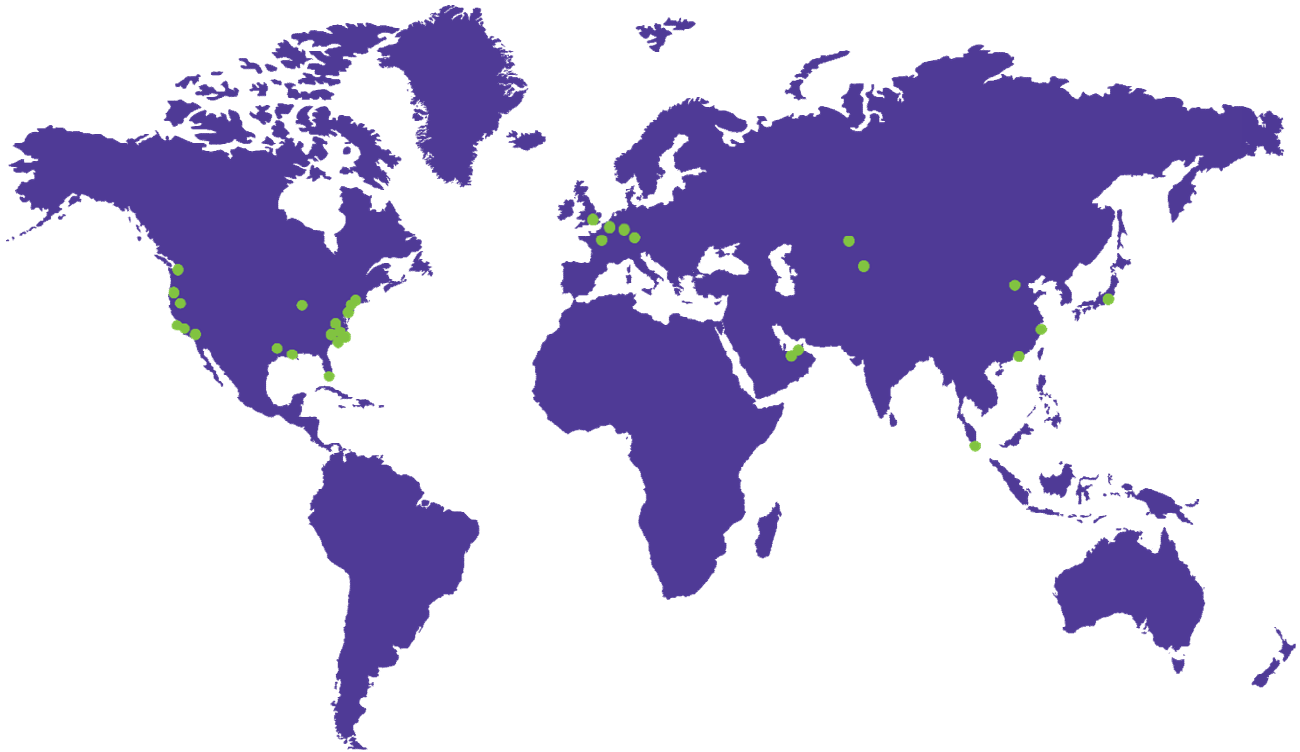
Prior to his career in insurance, Matt was a corporate attorney at Proskauer Rose.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Astana
Beijing
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong
Houston
London
Los Angeles
Miami
Munich
New York
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Seattle
Shanghai
Silicon Valley
Singapore
Tokyo
Washington, DC
Wilmington



Morgan Lewis

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

THANK YOU

© 2025 Morgan Lewis

Morgan, Lewis & Bockius LLP, a Pennsylvania limited liability partnership
Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.
Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.
Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP.
In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship.
Prior results do not guarantee similar outcomes. Attorney Advertising.