

TURNING THE TABLE ON TRANSACTION RISK - FIVE THINGS EVERY RISK MANAGER SHOULD KNOW ABOUT REPRESENTATIONS AND WARRANTIES INSURANCE

October 13, 2022



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LEARNING OBJECTIVES

At the end of this session, you will:

- **Know how to prepare for the purchase of a representations and warranties insurance (RWI) policy.**
 - Know what RWI is and what it covers.
 - Understand the RWI market and the underwriting process.
 - Understand key RWI policy provisions.
- **Understand how to strategically manage RWI claims.**
 - Understand how the claims process works
 - Know how to set expectations on the process and the timeline.

WHAT IS RWI?

STOCK PURCHASE AGREEMENT

by and between

DEUTSCHE TELEKOM AG

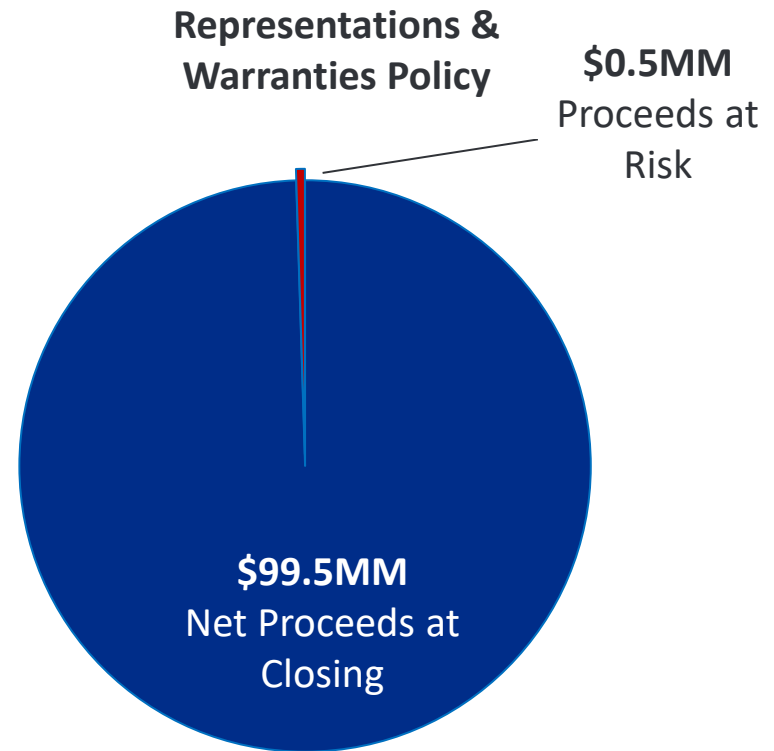
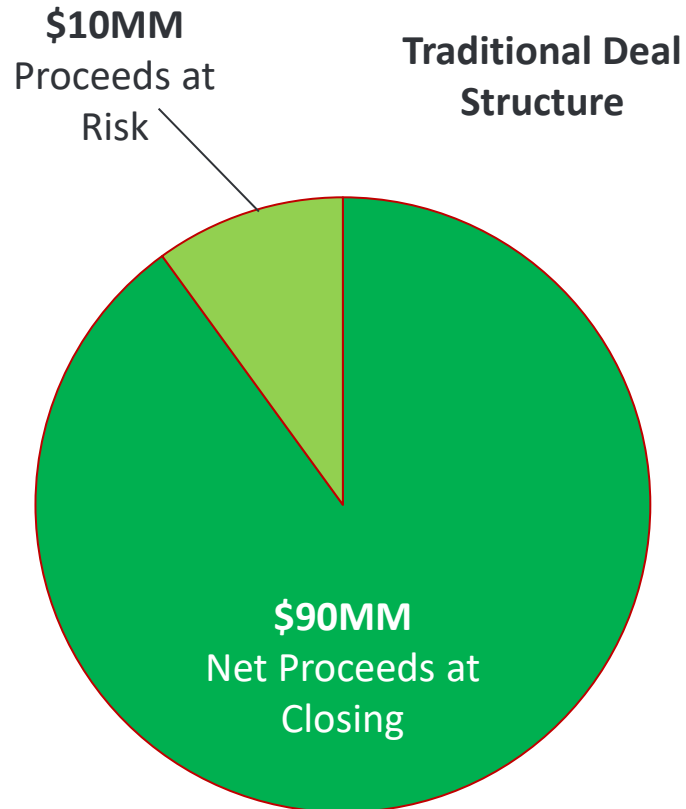
and

AT&T INC.

Dated as of March 20, 2011

- Preamble and Recitals
- Article 1: Definitions
- Article 2: The Transaction
- **Article 3: Seller Representations and Warranties**
- Article 4: Buyer Representations and Warranties
- Article 5: Covenants
- Article 6: Closing Conditions
- **Article 7: Indemnification**
- Article 8: Termination
- Article 9: General Provisions

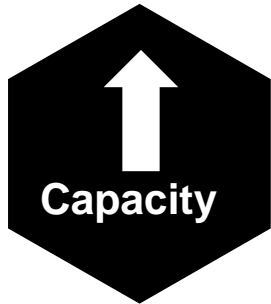
WHAT IS RWI?



WHAT IS THE MARKET FOR RWI?

- Twice as many insurance companies in market now than in 2014
- In general,
 - Limits: 10-15% of purchase price
 - Retention: 0.75-2.0% of purchase price
 - Premiums: 3% of limits or less
 - Underwriting fee
- Retention: limited or no seller indemnity
- Usually underwritten 1-2 weeks prior to closing

MARKET SNAPSHOT



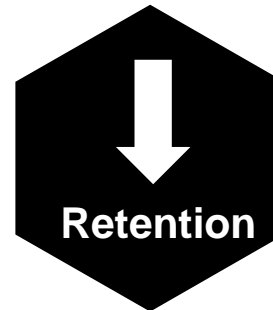
Capacity is continuing to grow with 3 new carriers entering the market in 2018



Coverage continues to improve with fewer broad exclusions



Increase in number of claims being submitted and losses being paid



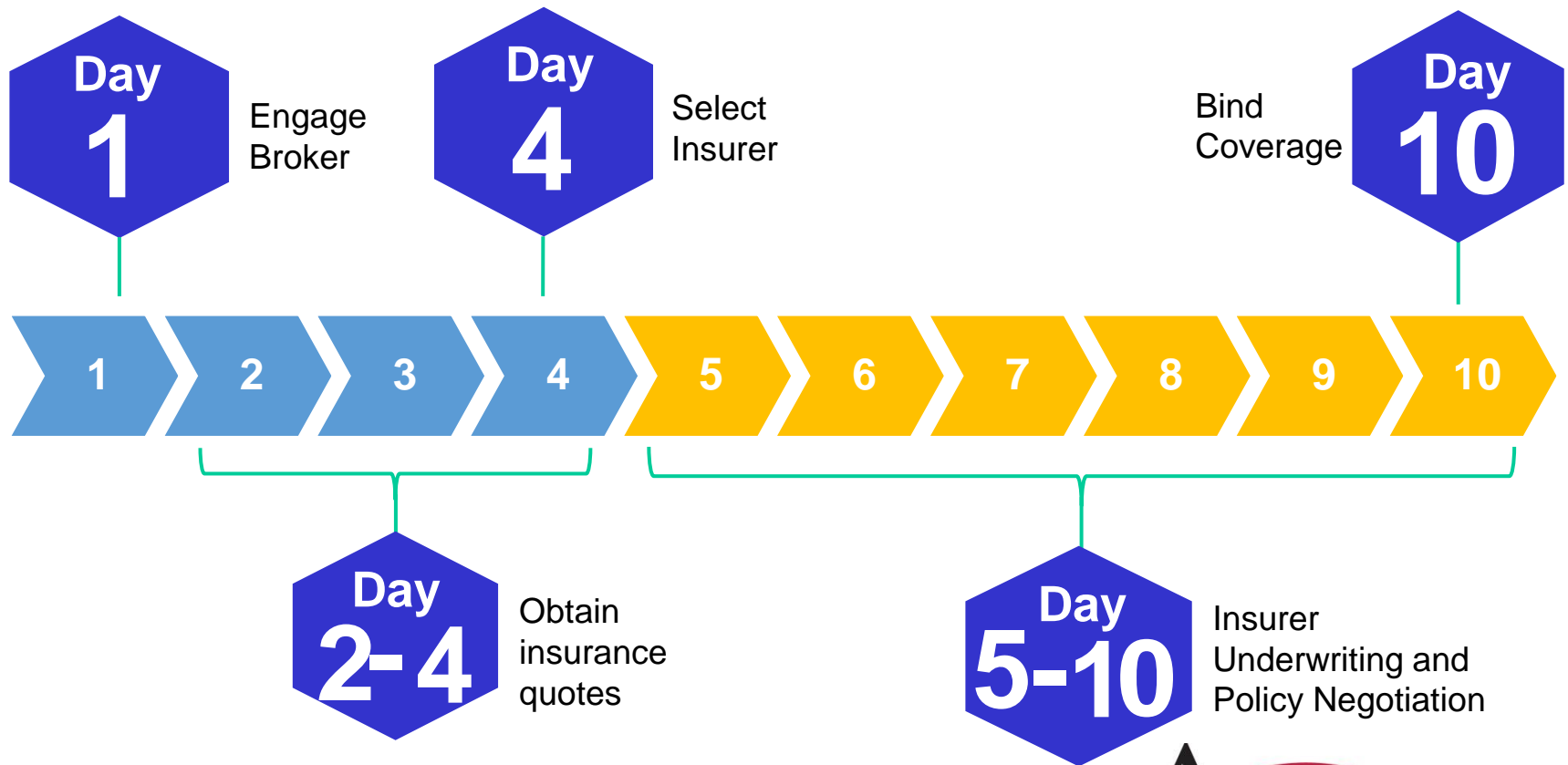
Retentions decreasing for both limited seller and no seller indemnity deals



Increased competition driving sub-3% premiums on competitive deals

***Note:** This is a general summary and could vary based on client industry and size*

REPRESENTATIONS AND WARRANTIES INSURANCE: PROCESS AND TIMING



WHAT ARE KEY POLICY PROVISIONS?

- Policy period
- Seller-side versus Buyer-side Coverage
- Liability Coverage
- Common exclusions
- Arbitration
- Choice of law



EXAMPLE: BUYER-SIDE COVERAGE

II. **INSURING** **AGREEMENT B:** *Buyer's Coverage*

If you are identified in ITEM 4 of the Declarations as the Addressee of the **Insured Representations and Warranties**, and if you discover a **Misstatement** in the **Insured Representations and Warranties**, we will pay you the **Value Discrepancy** directly and specifically attributable to that **Misstatement**, provided that (i) you discovered the **Misstatement** only after consummating the transaction contemplated in the **Agreement**, (ii) you discovered the **Misstatement** during the **Policy Period**, (iii) you gave us written notice of your discovery of the **Misstatement** as soon as practicable, (iv) we received such written notice within thirty days after you first became aware of the **Misstatement**, and (v) we received such written notice during the **Policy Period**.

EXAMPLE: BUYER-SIDE (THIRD PARTY) (CONT'D)

(A) **"Third Party Proceeding"** means a civil action or arbitration proceeding that is instituted against you (after the consummation of the transaction contemplated in the **Agreement**) by a non-party to the **Agreement**, where:

- (i) the commencement of the action or proceeding, or
- (ii) allegations made against you in the action or proceeding

cause you reasonably to conclude that a **Misstatement** exists in the **Insured Representations and Warranties**.

EXAMPLE: BUYER-SIDE (THIRD PARTY) (CONT'D)

*Value Discrepancy
Associated with a Third
Party Proceeding*

- (F) If your conclusion that a Misstatement exists in the Insured Representations and Warranties is based on the commencement of a Third Party Proceeding (or on allegations made against you in such Third Party Proceeding), the provisions of Sections VII.C and VII.D shall not apply for the purpose of determining the Value Discrepancy attributable to any such Misstatement. Rather, the Value Discrepancy attributable to any such Misstatement shall be determined in accordance with the following terms and conditions:
- 1) Except as otherwise provided in Section VII.F(2), if you conduct the defense of the Third Party Proceeding at your own expense the Value Discrepancy shall be the sum of (i) reasonable attorney fees and expenses that you actually incur in such defense (not including any wages, salaries, fees or expenses payable to you or your directors, officers or employees, and not including any overhead or benefit expenses that you may incur), and (ii) monetary damages that you are ordered to pay (by a court or an arbitrator) in the Third Party Proceeding or that you agree to pay in settlement of the Third Party Proceeding.

EXAMPLE: DEFINITION OF “MISSTATEMENT”

- (D) **“Misstatement”** means a misstatement, error, or misleading statement. In determining whether there is a **Misstatement** in the **Insured Representations and Warranties**, the following principles shall apply: (i) if the representation or warranty in question recites that certain facts or circumstances are “materially” as represented, a **Misstatement** exists only if the relevant facts or circumstances were not materially as represented when the representation was made; (ii) if the representation or warranty in question recites that the maker does not know, or is not aware, of the existence of certain facts or circumstances, a **Misstatement** exists only if the maker did in fact have such knowledge or awareness when the representation was made; (iii) if the representation or warranty in question recites that certain facts or circumstances will not have or lead to a “material adverse effect,” a **Misstatement** exists only if the relevant facts or circumstances have in fact had or led to such a material adverse effect; and (iv) the text of the **Insured Representations and Warranties**, including “materiality,” “knowledge,” and similar qualifiers, will control in determining whether a **Misstatement** exists for purposes of this policy, notwithstanding any provision of the **Agreement** that (as between or among the parties to the **Agreement**) might render the **Insured Representations and Warranties** actionable without regard to such materiality, knowledge or similar qualifiers.

EXAMPLE: “KNOWLEDGE EXCLUSION”

Known Misstatements

- (A) based on, directly or indirectly arising out of, resulting from, or in consequence of any **Misstatement** in the **Insured Representations and Warranties** that was known to you either (i) as of the Inception Date set forth in ITEM 5(a) of the Declarations or (ii) as of the date on which the transaction contemplated in the **Agreement** was consummated. For the purpose of determining the applicability of this Exclusion (A):
- 1) If you are a natural person, no knowledge or information possessed by any other natural person will be imputed to you; and
 - 2) If you are not a natural person, the knowledge and information possessed by any individual who is or has been your chief financial officer, in-house general counsel, chief executive officer, President or Chairman will be imputed to you.

EXAMPLE: “FRAUD EXCLUSION”

Fraud

- (D) based on, directly or indirectly arising out of, resulting from, or in consequence of any deliberately fraudulent act or omission or any willful violation of any statute or regulation committed alone or in collusion with others by you, by any of your partners, directors, trustees, officers, members, managers, or employees, by anyone performing acts coming within the scope of the usual duties of your employees, or by anyone authorized to act for you. However, this Exclusion (D) will not apply to any **Claim** for which coverage is sought under Insuring Agreement A unless it is established in fact that such **Claim** was brought about or contributed to by such deliberately fraudulent act or omission or willful violation of statute or regulation.

EXAMPLE: ARBITRATION PROVISION

Binding Arbitration

- (E) If we so elect, or if you disagree with a coverage determination we have made after the review described in Section VII.D, all unresolved issues concerning your entitlement to coverage under this policy and concerning the amount of coverage to which you are entitled will be referred to a panel of three arbitrators for final and binding arbitration under the commercial arbitration rules of the American Arbitration Association. In any arbitration proceeding commenced under this Section VII.E, you will select one arbitrator, we will select one arbitrator, and the two arbitrators so selected will select the third arbitrator. You and we may agree in writing to utilize a different arbitral tribunal or to proceed under a different set of arbitration rules. In any event, however, the award issued by the arbitrator or arbitrators in a proceeding under this Section VII.E will be final and binding, will be enforceable in any court of competent jurisdiction, and will not be subject to judicial review.

WHAT IS A TYPICAL CLAIM PROCESS?

- Typical claim timeline
- Determining the breach and damages
- Using financial experts
- Giving notice to the insurance company



EXAMPLE: NOTICE PROVISION

Notice of Misstatement

- (B) When you become aware of any **Misstatement** in the **Insured Representations and Warranties**, you must give us written notice as soon as practicable in order to preserve your right to seek coverage under Insuring Agreement B of this policy. We must receive such written notice within thirty days after you first become aware of the **Misstatement**, and we must receive such written notice during the **Policy Period**. This notice must summarize the factual basis for your conclusion that a **Misstatement** exists and must identify the particular **Insured Representations and Warranties** in which it appears. The notice must also report the date on which, and the manner in which, you first became aware of the **Misstatement**. Notice shall be sent to the address shown in Section V.J of this policy and shall be effective on the date of receipt by the Company at such address.

EXAMPLE: STATEMENT OF CLAIM

*Detailed Statement by
the Insured*

- (C) Within thirty days after our receipt of the written notice described in Section VII.B, we must also receive from you (at the same address) a detailed statement, signed before a notary public, setting forth with particularity:
- 1) the basis for your conclusion that a **Misstatement** exists (including all facts and circumstances supporting that conclusion) and a description of that **Misstatement**; and
 - 2) your calculation of the **Value Discrepancy** directly and specifically attributable to the **Misstatement** you have identified.

EXAMPLE: “VALUE DISCREPANCY”

- (B) **"Value Discrepancy"** means the difference between (i) what the consideration received by you under the **Agreement** would have been worth, as of the date on which the **Agreement** was fully executed, if the **Insured Representations and Warranties** pertaining to that consideration had been accurate, and (ii) what the consideration received by you under the **Agreement** was actually worth as of that date. If your conclusion that a **Misstatement** exists in the **Insured Representations and Warranties** is based on the commencement of a **Third Party Proceeding** (or on allegations made against you in such **Third Party Proceeding**), the **Value Discrepancy** attributable to any such **Misstatement** will be determined in accordance with Section VII.F of this policy. **Value Discrepancy** does not include:

EXAMPLE: “VALUE DISCREPANCY”(CONT'D)

- 1) any amount for which the **Agreement** does not require another person, entity or organization to indemnify or otherwise compensate you (except to the extent of the value, as of the date we make payment under this policy, of cash or readily marketable securities that were placed and that remain in an escrow account established under the **Agreement** to compensate you for **Misstatements** in the **Insured Representations and Warranties**); or
- 2) any amount that you (or any other party to the **Agreement**) are, were, or could have been required to repay or to forgo under a price adjustment provision in the **Agreement** (whether such adjustment provision is associated with a post-closing net worth calculation, with other balance sheet items, or with any other factors, and irrespective of how the price adjustment provision may be labeled or denominated).

HOW DO YOU SET EXPECTATIONS FOR THE CLAIM PROCESS?

- The insurance company's claim investigation
- Cooperation
- Subrogation
- Preserving privilege

EXAMPLE: COOPERATION PROVISION

Review by the Company

- (D) During the thirty-day period immediately following our receipt of the detailed statement described in Section VII.C, we will conduct such review and investigation as we deem necessary for the purpose of determining whether, and in what amount, coverage is available under this policy on account of the matters set forth in the statement. You must cooperate with and assist in our review by making available to us, upon request, relevant sources of information including documentary materials and access to individuals with knowledge of the matters described in the statement. The thirty-day review period may be extended if you and we agree in writing to extend it. At the end of the review period we will notify you in writing of our coverage determination or, alternatively, of our election to have your entitlement to coverage (and the amount of coverage to which you are entitled) determined through binding arbitration as described in Section VII.E.

EXAMPLE: SUBROGATION PROVISION

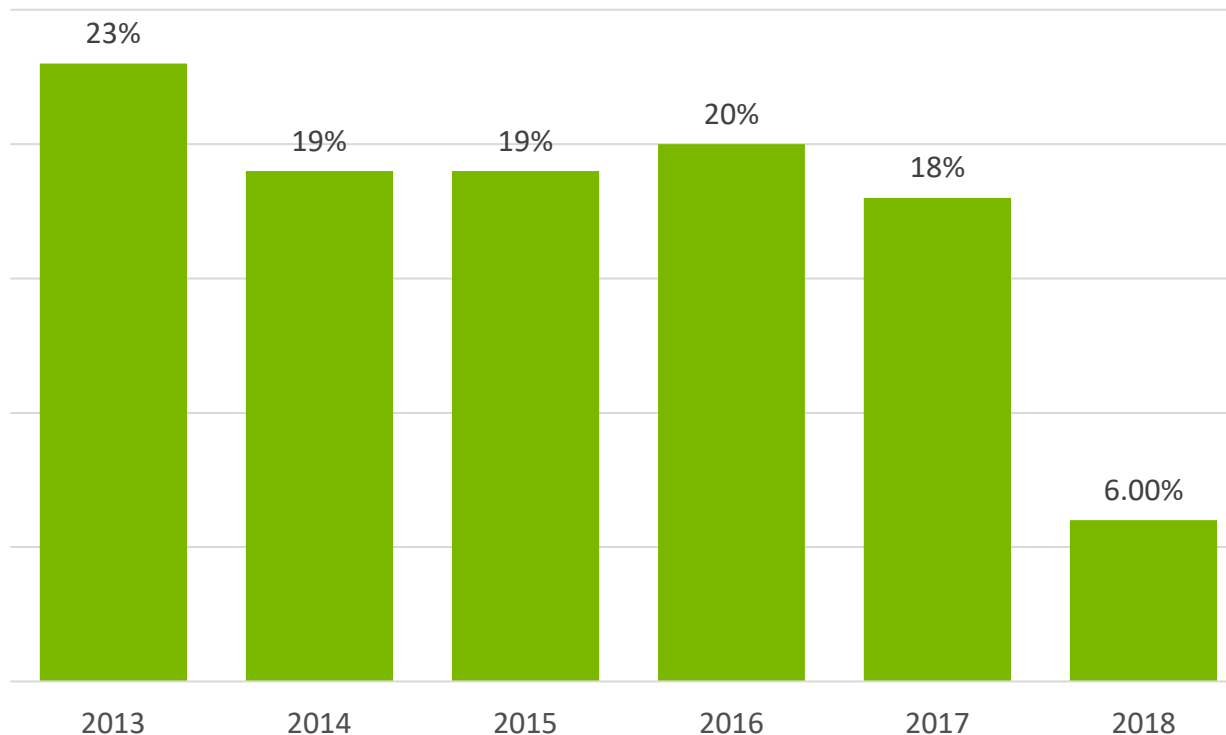
Subrogation

- (l) If we make a payment under this policy we will be subrogated, to the extent of that payment, to any rights of recovery that you may have against others. You must execute all papers and do everything that may be necessary to secure and preserve such rights, including execution of any documents necessary to enable us to effectively pursue and enforce those rights and to bring suit in your name.

TRANSACTION LIABILITY INSURANCE & CLAIMS POLICIES THAT INCEPTED BETWEEN 2013 – 2018

Aon has been notified of **249** R&W claims on policies placed beginning in 2013

Claim Percentages



Representation & Warranties Policies

Buy-side

- 229 Claims
- 14% policies

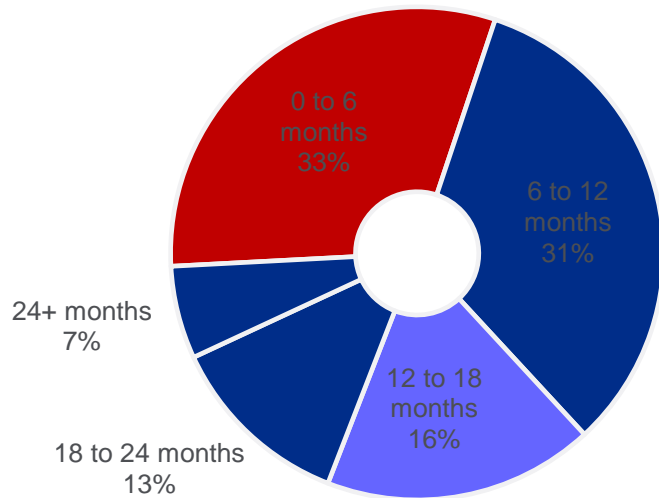
Sell-side

- 20 Claims
- 42% policies

Proprietary and Confidential

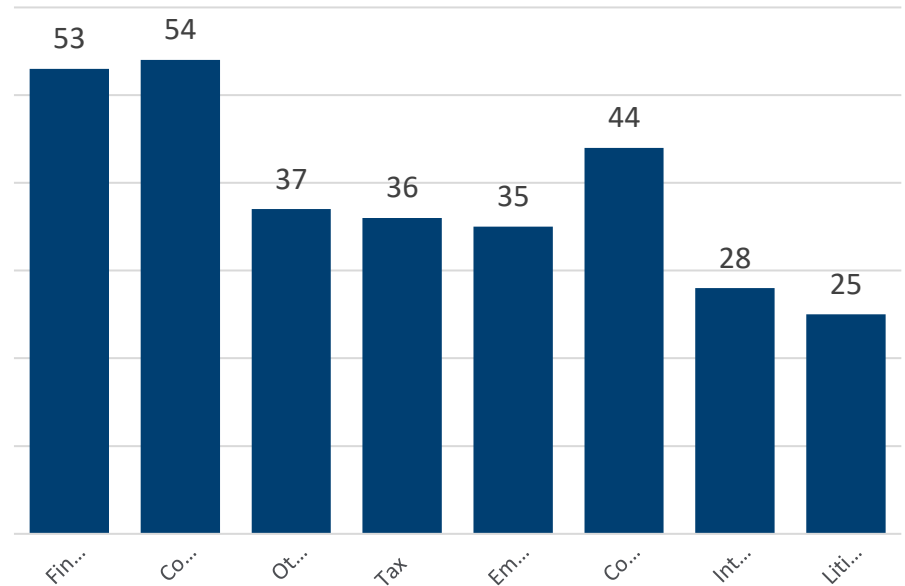
TRENDS IN CLAIMS

Trends in Claims: Closing to Claim Notice



Median: 15 Months
Mean: 10 Months
Range: 3 days - 53 months
Interim Claims: 10

Types of Breaches



Examples of "Other"

- Environmental: 8
- Product Liability/Recall/Warranty: 10
- Condition of Assets: 9
- Healthcare: 4

QUESTIONS.



THANK YOU.



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THANK YOU.



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