**Committee Forum – Negotiated Acquisitions Committee of the Business Law Section**

**American Bar Association**

**The Increasing Uncertainties of Successor Liability – Are They Insurable?**

**4:00 p.m. August 12, 2007**

**San Francisco, California**

Speakers

Jon T. Hirschoff, Chair, is a partner with Finn Dixon & Herling LLP, Stamford, Connecticut. He advises clients on all aspects of business acquisitions. A member of the Negotiated Acquisitions Committee since 1996, he is Chair of its Working Group on the Annual Survey of Mergers and Acquisitions published annually in The Business Lawyer, and was a Reporter for the Model Asset Purchase Agreement with Commentary (2001). Mr. Hirschoff will teach Negotiated Mergers and Acquisitions as a Visiting Lecturer at Yale Law School in the fall, 2007 semester. He received his A.B. degree with distinction from Stanford University and his LL.B. from Yale Law School. He clerked for Hon. J. Joseph Smith, U.S. Court of Appeals for the Second Circuit.

Mary McDougall Duffy is Managing Director, Aon Private Equity & Transaction Solutions, Aon Financial Services Group, Inc. in Philadelphia. She advises clients in the areas of Representations & Warranty Insurance, Tax Indemnities and other transaction related coverages. Prior to joining Aon FSG in 1996, she was an associate with Morgan, Lewis & Bockius, LLP in Philadelphia, where she specialized in mergers and acquisitions, securities laws and general corporate law. She received her B.A. *cum laude* from Juniata College and a J.D. *magna cum laude* from Georgetown University Law Center.

Jeffrey M. Brown is a Vice President with Chubb Group of Insurance Companies. He is Chubb's Western Zone Excess Casualty and Multinational Manager, based in Seattle. He also oversees Chubb's Mergers and Acquisitions product, called Continuum, focusing on successor liability, trigger conversion, discontinued products and retroactive limits of liability. Mr. Brown is a graduate of Temple University.

Vincent F. Garrity, Jr., is of counsel with Duane Morris LLP in Philadelphia. He is a former chair of the Negotiated Acquisitions Committee of the Business Law Section of the American Bar Association and is co-chairman of the Title 15 Task Force of the Pennsylvania Bar Association which sponsored, drafted, and regularly updates the Pennsylvania Business Corporation Law of 1988. He has previously served as a member of the Committee on Corporate Laws of the Business Law Section of the American Bar Association, which is responsible for the Model Business Corporation Act, as well as chairman of the Section on Corporation, Banking and Business Law of the Pennsylvania Bar Association. He is a frequent speaker on business acquisitions, takeovers, and corporate governance matters and a member of the American Law Institute. He has been an Adjunct Professor of Law at Temple University

School of Law since 1996 to the present and has been a Lecturer-in-Law at the University of Pennsylvania Law School since 2000 to the present. He was the Distinguished Practitioner in Residence at Cornell Law School during the Spring Semester, 2001, an Adjunct Professor of Law at the University of Virginia Law School during the Spring Semester 2004 and a Visiting Professor on the Eotvos Lorand University Faculty of Law, Budapest, Hungary during the Spring Semester 2006. He is a graduate of the College of the Holy Cross and Harvard Law School.

Christine M. Leas is an attorney at Sive, Paget & Riesel, P.C. in New York City. She specializes in environmental regulatory and transactional law and environmental insurance, counseling clients on environmental aspects of mergers, acquisitions and divestitures, as well as complex brownfield and contaminated site redevelopments. Christine has over ten years of experience negotiating manuscript environmental insurance policies during her work at Sive, Paget & Riesel, in the Hartford, CT office of LeBoeuf, Lamb, Greene & McRae LLP and with Aon Risk Services in its San Francisco and New York offices. She received her B.A., with honors, from the University of Wisconsin – Madison, and her J.D. from the University of California, Hastings College of the Law.

## A. Introduction

In any asset acquisition, "buyer and its counsel need to consider . . . that, as a matter of law, and notwithstanding any allocation of a seller's liabilities contained in an asset purchase agreement, the buyer may . . . find itself responsible for liabilities of the seller . . . explicitly retained by the seller in the agreement." Model Asset Purchase Agreement With Commentary (2001), Appendix A, "Successor Liability", at p. 143 (hereinafter "MAPA Appendix A".) This possibility arises under one or more of the nine theories of successor liability identified in MAPA Appendix A. See also The M & A Process (2005), pp. 162-64, and Carney, Materials on Mergers and Acquisitions (2d ed., 2007), pp. 127-66.

Courts have thus saddled buyers with a variety of liabilities they did not contractually assume, including: products liability, environmental liabilities, labor, employment and benefits liabilities, liabilities to trade creditors, and even liabilities arising under seller's agreements not assumed by the buyer. A number of recent cases discussing issues relevant to successor liability are discussed in Section C below.

Although it is possible to counsel one's buyer client as to actions that will reduce the chances successor liability will be imposed (see MAPA Appendix A at pp. 153-55; and The M & A Process, at p. 164), it is frequently very difficult to meaningfully quantify the risk of successor liability. There are several reasons for this difficulty.

First, the existence of so many theories of successor liability provides plaintiffs' counsel with ample opportunities for creativity. It is arguable, for example, that liability to a seller's contract creditors under contracts not assumed by the buyer should be limited to instances of fraud, or fraudulent conveyance under an applicable statute. Yet cases can be found in which contract creditor plaintiffs have successfully pleaded successor liability under theories such as "de facto merger" or "mere continuation", arguably more appropriate for tort creditors. *See, e.g., Cargill*, summarized in Section C below.

Second, some of these theories are multi-factor tests that render prediction difficult. And the relative significance of the various factors is unclear at best. For example, continued investment by sellers in equity of the buyer was once assumed to be a prerequisite for "de facto merger", but in recent years plaintiffs in search of a deep pocket have sometimes persuaded courts that if the other three requirements for the application of that test have been met, this one can be dropped or substantially watered down. Moreover, despite a general recognition that successor liability is an equitable doctrine, a plaintiff seeking damages is likely to be held to have a right to have the issue of successor liability decided by a jury. See, e.g., *In re* G-I Holdings, Inc., 380 F.Supp.2d 469 (D. N.J. 2005).

Third, it is exceedingly difficult to predict not only what theory of successor liability might be imposed, but what state's laws might be applicable to a successor liability claim. Counsel should not assume that the choice of law provision in the asset purchase agreement will be relevant to the choice of law in a successor liability case. *Berg Chilling Systems, Inc. v. Hull Corp.*, 435 F.3d 455 (3rd Cir., 2006) (contractual choice of law provision inapplicable to successor liability claim, the majority reasoning that the *de facto* merger doctrine, by its very nature, looks beyond the form of the contract to its substance and that a claimant not a party to the contract should not be bound by its choice of law provision); *see also Ruiz v. Blentech Corp.*, 89 F.3d 320 (7th Cir., 1996) (in a products liability case, the law of the state wherein the injured party resides governs the successor liability analysis).

For these reasons, some mergers and acquisitions lawyers counsel their buyer clients, at an early stage of certain asset acquisition transactions, that successor liability is an unavoidable risk, to be insured against to the extent possible and cost effective. The purpose of this program is to discuss the extent to which, and the circumstances under which, the risk of successor liability is insurable. We will consider the application of various insurance policies set forth or summarized in Section D below to the hypothetical asset acquisition described in section B.

## B. Hypothetical Asset Acquisition

Our client, Buyer, is a publicly held company that has agreed to purchase the Hazards 'R Us division of Sellco. An Asset Purchase Agreement (the "APA") has been negotiated, providing for the acquisition by Buyer of substantially all of the assets of Sellco used or usable in the business of the division, including trade names and other intellectual property and the real estate on which the principal manufacturing plant is located, and the assumption by Buyer of specified liabilities estimated to be $10 million (the "Assumed Liabilities") of the division's business. The consideration, in addition to the Assumed Liabilities, will be $40 million in cash, a $10 million note of Buyer due two years from closing, and common stock of Buyer with a market value of approximately $50 million, representing approximately 1.5% of the issued and outstanding common stock of Buyer. The business of the division will be operated by Buyer at the same location and with the same employees, although with new managers. Sellco has four active divisions, of which Hazards 'R Us is the largest.

In its due diligence, Buyer has determined that the division's business has had a significant but apparently acceptable level of product liability claims, and that its record keeping practices with respect to the disposal of hazardous waste have unfortunately not always been complete. And from 2002 to 2005, there were a number of sexual harassment claims made

against Sellco with respect to the conduct of several supervisory employees in the division's principal plant, none of whom is still employed by Sellco.

Buyer was able to get MAPA style, buyer friendly representations and warranties in the APA, most of which will survive for two years from closing, although some, such as the environmental representations, will survive until the expiration of the applicable statute of limitations. The APA provides that Sellco will retain product liability exposure with respect to all products manufactured before closing, regardless of when sold. Sellco also retains all liability for environmental matters arising in whole or in part from pre-closing operations or asset ownership. Buyer assumes, among other carefully specified liabilities, obligations arising post-closing under scheduled purchase orders and other scheduled contracts the benefit of which is being assigned to Buyer. All liabilities arising out of pre-closing operations or asset ownership and not specifically assumed by Buyer, including without limitation the products and environmental liabilities specified above, are Retained Liabilities. Sellco will indemnify Buyer for breaches of representations and warranties, and for all Retained Liabilities, subject to a $100,000 basket and a $10 million cap.

C. Some Recent Cases Discussing Successor Liability Issues

*New York v. National Services Industries, Inc.*, 352 F. 3d 201 (2d Cir. 2006) – Supreme Court's ruling in *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998) requires application of common law rules to successor liability under CERCLA, so that "substantial continuity" test for CERCLA successor liability formerly applied by Second Circuit no longer applicable, because not a common law test.

*United States v. Davis*, 261 F.3d 1 (1st Cir. 2001) – state law of successor liability applicable in CERCLA context as long as it supports federal policy interests underlying CERCLA.

*United States v. General Battery Corporation, Inc.*, 423 F.3d 294 (3d Cir. 2005) – cites *EEOC v. Vucitech*, 842 F. 2d 936, 944 (7th Cir. 1988) for the proposition that "the entire issue of successor liability . . . is dreadfully tangled, reflecting the difficulty of striking the right balance between the competing interests at stake", citing in FN 4 and FN 5 numerous cases to demonstrate the proposition.

*Laborers' Pension Fund v. Lay-Com, Inc.*, 455 F.Supp. 2d 773 (N.D. Ill., 2006) – federal substantive law supplants state common law in the ERISA context, and successor liability applies so long as there is substantial continuity in the operation of the business before and after the sale and the successor had notice of the claim prior to acquisition.

*Mickowski v. Visi-Trak Worldwide, LLC*, 415 F.3d 501 (6th Cir. 2005) – in judgment creditor's action against buyer of debtor's assets in sale approved by bankruptcy court, state common law test for successor liability (mere continuation) applied instead of broader federal common law test (substantial continuity).

*Equal Employment Opportunity Commission v. SWP, Inc.*, 153 F.Supp.2d 911 (N.D. Ind. 2001) – three factors determine whether purchaser liable for employment discrimination claims against seller: (1) did purchaser have prior notice? (2) is predecessor able to supply the relief? (3)

is there “sufficient” continuity in business operations?  - the third factor has several sub-factors: (a) same plant? (b) substantially the same workforce? (c) substantially the same supervisors? (d) same jobs under substantially the same working conditions?  (e) same machinery, equipment and methods of production? (f) same product?

*Cargill, Incorporated v. Beaver Coal & Oil Co., Inc.*, 424 Mass. 356, 676 N.E.2d 815 (1997) – successor liable for seller’s trade debt under de facto merger where sole shareholder of seller acqauired a 12.5% interest in buyer.

*Carter Enterprises, Inc. v. Shland Specialty Co., Inc.*, 257 B.R. 797 (S.D.W.Va. 2001) – corporation held liable as successor for debt of predecessor sole proprietorship under “implicit assumption” and “mere continuation” theories.

*Semenetz v. Sherling & Walden, Inc.*, 851 N.E. 2d 1170 (NY 2006) – New York Court of Appeals declines to adopt “product line” theory.

*Cargo Partners AG v. Albatrans*, 352 F. 3d41 (2d Cir. 2003) – under New York law, continuity of ownership required for de facto merger.

D. Specimen Insurance Policy

**AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY[1]**
**A CAPITAL STOCK INSURANCE COMPANY**
**70 PINE STREET**
**NEW YORK, NEW YORK 10270**

**POLICY NUMBER: ______**

**BUYER-SIDE REPRESENTATIONS AND WARRANTIES INSURANCE POLICY**

**[INSERT STATE-SPECIFIC REGULATORY LEGENDS]**

**NOTICE: THIS INSURANCE POLICY IS WRITTEN BY AN INSURER NOT LICENSED BY THE STATE OF NEW YORK, NOT SUBJECT TO ITS SUPERVISION, AND NOT PROTECTED, IN THE EVENT OF THE INSOLVENCY OF THE INSURER, BY THE NEW YORK STATE SECURITY FUNDS. THE POLICY MAY NOT BE SUBJECT TO ALL OF THE REGULATIONS OF THE INSURANCE DEPARTMENT PERTAINING TO POLICY FORMS.**

**NOTICE: THIS IS A CLAIMS MADE AND REPORTED POLICY. SUBJECT TO THE TERMS AND CONDITIONS OF THIS POLICY, COVERAGE IS LIMITED TO LOSS THAT THE NAMED INSURED REPORTS TO THE INSURER DURING THE POLICY PERIOD. PLEASE READ THIS POLICY CAREFULLY AND DISCUSS IT WITH YOUR INSURANCE AGENT OR BROKER.**

**NOTICE: DEFENSE COSTS COVERED UNDER THIS POLICY ARE PART OF LOSS AND AS SUCH ARE SUBJECT TO THE RETENTION AND THE LIMIT OF LIABILITY.**

**NOTICE: THE INSURER DOES NOT ASSUME ANY DUTY TO DEFEND. NOTWITHSTANDING THE FOREGOING, IF THE RETENTION HAS BEEN COMPLETELY EXHAUSTED, THEN, IN ACCORDANCE WITH AND SUBJECT TO THE TERMS AND CONDITIONS OF THIS POLICY, THE INSURER SHALL REIMBURSE THE INSUREDS FOR DEFENSE COSTS COVERED UNDER THIS POLICY.**

**DECLARATIONS**

All capitalized terms used but not defined in this Policy shall have the respective meanings assigned thereto in the Acquisition Agreement.

Item 1. Named Insured: [Name]
[Address]

[Additional Insured(s): [__________].

[1] Change references throughout to Lexington Insurance Company for policies issued in New Jersey or Alaska.

| | | |
|---|---|---|
| | | Collectively, the Named Insured and the Additional Insured(s) are referred to herein as the "Insureds".] |
| Item 2. | Acquisition Agreement: | |
| Item 3. | Policy Period: | From [__________] ("Inception") until [__________] (the "Expiry Date")[; provided that the Expiry Date with respect to the representations and warranties set forth in Sections [__] of the Acquisition Agreement shall be [_________].] |
| Item 4. | Limit of Liability: | $[_______], in the aggregate. |
| Item 5. | Retention: | $[_______], in the aggregate. |
| Item 6. | Premium: | Non–Terrorism Portion: $<br>Terrorism Portion: $<br>Premium: $ |
| Item 7. | Brokerage Commission: | The Premium is inclusive of a [__]% insurance brokerage commission. |
| Item 8. | Taxes: | [The Premium is exclusive of any applicable surplus lines or premium tax and any other applicable tax, fee or surcharge. It is the Insureds' responsibility to pay any applicable surplus lines or premium tax and any other applicable tax, fee or surcharge.] |
| Item 9. | Insurance Broker: | [Name]<br>[Address] |

[ DRAFT – NOT FOR EXECUTION ]
Authorized Representative

POLICYHOLDER DISCLOSURE STATEMENT
UNDER
TERRORISM RISK INSURANCE ACT OF 2002
AND
TERRORISM RISK INSURANCE EXTENSION ACT OF 2005

You are hereby notified that under the Terrorism Risk Insurance Act of 2002 and its extension, the Terrorism Risk Insurance Extension Act of 2005 (collectively, the "Act"), insurance coverage is available for losses resulting from an act of terrorism, which is defined in the Act as any act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States (i) to be an act of terrorism, (ii) to be a violent act or an act that is dangerous to (A) human life; (B) property or (C) infrastructure, (iii) to have resulted in damage within the United States, or outside of the United States in the case of an air carrier or vessel (as described in the Act) or the premises of a United States mission and (iv) to have been committed by an individual or individuals acting on behalf of any foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion. The decision to certify or not to certify an act as an act of terrorism is final and not subject to judicial review. You should read the Act for a complete description of its coverage.

For your information, coverage provided by this policy for losses resulting from an act of terrorism may be partially reimbursed by the United States Government under a formula established by the Act. Under this formula the United States Government generally pays 90% (85% in 2007) of terrorism losses covered by the Act exceeding a statutorily established deductible that must be met by the insurer. There is a $100 billion dollar annual cap on all losses resulting from acts of terrorism above which no coverage will be provided under this policy or under the Act unless Congress makes some other determination.

Coverage under the Act is already included in your current policy, subject to your policy's terms, conditions and exclusions. The portion of your annual premium that is attributable to such coverage is $0.

POLICYHOLDER NOTICE

Thank you for purchasing insurance from a member company of American International Group, Inc. (AIG). The AIG member companies generally pay compensation to brokers and independent agents, and may have paid compensation in connection with your policy. You can review and obtain information about the nature and range of compensation paid by AIG member companies to brokers and independent agents in the United States by visiting our websites at www.aigproducercompensation.com or by calling AIG at 1-800-706-3102.

**AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY**

**BUYER-SIDE REPRESENTATIONS AND WARRANTIES INSURANCE POLICY**

**This Buyer-Side Representations and Warranties Insurance Policy** (including any Declarations, exhibits, attachments or endorsements attached hereto, collectively, this "Policy") is issued by the Insurer to the Insureds and represents the complete agreement between the Insurer and the Insureds concerning the coverage provided hereunder.

**WHEREAS,** the Insureds or certain of them have entered into the Acquisition Agreement;

**WHEREAS,** the Insureds, pursuant to certain sections of the Acquisition Agreement, may be entitled to indemnification from certain persons or entities for certain damages resulting from Breaches; and

**WHEREAS,** the Insureds desire to purchase insurance to insure them against Loss, and the Insurer desires to provide such insurance subject to the terms and conditions of this Policy.

**NOW, THEREFORE,** in consideration of the payment of the Premium, the Insurer and, by accepting this Policy, the Insureds agree as follows:

## SECTION 1. DEFINITIONS

(a) "Acquisition" means the acquisition, merger, consolidation, exchange or other combination contemplated by the Acquisition Agreement.

(b) "Acquisition Agreement" means the agreement set forth in Item 2 of the Declarations, including any exhibits, schedules or other attachments thereto (as such agreement may be amended from time to time in accordance with the terms and conditions of this Policy), an executed copy of which is attached hereto as Exhibit A.

(c) ["Additional Insureds" shall have the meaning set forth in Item 1 of the Declarations.]

(d) "Affiliate" of any person or entity means any person or entity that directly or indirectly controls, is controlled by or is under common control with, such person or entity.

(e) "Application" means the executed application submitted by the Insureds in connection with the underwriting of this Policy, an executed copy of which is attached hereto as Exhibit B.

(f) "Breach" means any breach of, or inaccuracy in, the representations and warranties set forth in Article [__] of the Acquisition Agreement.

(g) "Claim Notice" means a claim notice in the form attached hereto as Exhibit C.

(h) "Deal Team Members" means those individuals whose names are set forth on Exhibit D attached hereto.[2]

(i) "Declarations" means, collectively, those items set forth as Item 1 through Item 7 on the pages labeled as "Declarations."

(j) "Defense Costs" means that part of Loss that constitutes reasonable fees, costs and expenses consented to by the Insurer in writing and incurred by the Insureds (including premiums for any appeal bond, attachment bond or similar bond, but without any obligation to apply for or furnish any such bond) in the investigation, adjustment, defense or appeal of a Third Party Demand. Defense Costs do not include any salaries, benefits or other compensation for officers, employees or consultants of any of the Insureds (other than consultants specifically retained in connection with the investigation, adjustment, defense or appeal of such Third Party Demand).

(k) "Expiry Date" shall have the meaning set forth in Item 3 of the Declarations.

(l) "Inception" shall have the meaning set forth in Item 3 of the Declarations.

(m) "Insurance Broker" shall have the meaning set forth in Item 9 of the Declarations.

(n) "Insureds" shall have the meaning set forth in Item 1 of the Declarations.

(o) "Insurer" means American International Specialty Lines Insurance Company, a corporation incorporated under the laws of the State of Alaska.

(p) "Limit of Liability" shall have the meaning set forth in Item 4 of the Declarations.

(q) "Loss" means the amount to which the Insureds are contractually entitled in respect of a Breach pursuant to the terms of the Acquisition Agreement (including any related Defense Costs), without regard to the aggregate liability limitations set forth in Section [__] of the Acquisition Agreement or the survival limitations set forth in Section [__] of the Acquisition Agreement.

(r) "Named Insured" shall have the meaning set forth in Item 1 of the Declarations.

(s) "No Claims Declaration" means the No Claims Declaration executed and delivered to the Insurer in connection with the underwriting of this Policy, an executed copy of which is attached hereto as Exhibit E.

(t) "Policy" shall have the meaning set forth in the Preamble.

(u) "Policy Period" shall have the meaning set forth in Item 3 of the Declarations.

---

[2] Deal Team Members shall include the principal persons who (i) supervised, reviewed or conducted any due diligence, analysis or evaluation in connection with the Acquisition Agreement, and/or (ii) supervised, reviewed, prepared or negotiated the Acquisition Agreement.

(v) "Premium" shall have the meaning set forth in Item 6 of the Declarations.

(w) "Retention" shall have the meaning set forth in Item 5 of the Declarations.

(x) "Third Party Demand" means any demand made or legal action brought against any Insured by any person or entity (other than (i) an Affiliate of any of the Insureds, (ii) any other Insured or (iii) the Insurer) which, if successful, would result in Loss.

## SECTION 2. INSURING AGREEMENT

Subject to the terms and conditions of this Policy, the Insurer shall indemnify the Insureds for, or pay on their behalf, any Loss in excess of the Retention that is reported by the Named Insured to the Insurer during the Policy Period in accordance with Section 5 of this Policy.

## SECTION 3. LIMIT OF LIABILITY; RETENTION; PREMIUM; OFFSETTING RECOVERIES

(a) Limit of Liability. The Insurer's aggregate liability under this Policy shall not exceed the Limit of Liability.

(b) Retention. The Retention is an aggregate one. The Insurer shall only be liable for Loss in excess of the Retention. The Retention shall only be eroded by Loss for which the Insurer would be liable under this Policy but for the Retention.

(c) Premium. The Premium is non-refundable.

(d) Offsetting Recoveries. Loss shall be reduced by any offsetting recoveries (including recoveries from any other insurance policies or indemnities) or tax benefits due to any of the Insureds or any of their respective Affiliates.

## SECTION 4. EXCLUSIONS

The Insurer shall not be liable to pay any Loss arising out of, relating to or resulting from (or, with respect to clause (b) below, payable under):

(a) any (i) Breach of which any of the Deal Team Members had actual knowledge prior to Inception or (ii) material inaccuracy in the No Claims Declaration or the Application;

(b) any (i) purchase price, net worth or similar adjustment provisions of the Acquisition Agreement or (ii) indemnification provisions set forth in Sections [ *** insert specific indemnification provisions *** ] of the Acquisition Agreement;

(c) any consequential, special, indirect, multiplied (whether based on an alleged pricing multiple or otherwise), punitive or exemplary damages or criminal or civil fines or penalties (except, in each case, to the extent (i) insurable by applicable

law and (ii) awarded or assessed against the Insureds in connection with a Third Party Demand pursuant to (A) a final settlement consented to in writing by the Insurer in accordance with Section 6 of this Policy or (B) a final and non-appealable (x) order of a governmental or regulatory agency, (y) judgment of a court of competent jurisdiction or (z) award of an arbitrator, arbitration panel or similar adjudicative body);

(d) any injunctive, equitable or other non-monetary relief;

(e) any covenant (or breach thereof), estimate, projection or forward looking statement; or

(f) [ *** transaction specific, if applicable *** ].

**SECTION 5. CLAIM FILING PROCEDURE; PAYMENT OF LOSS; NOTICE PROVISIONS**

(a) Claim Notice. The Named Insured shall deliver a Claim Notice to the Insurer, signed by an authorized representative of the Named Insured, as soon as reasonably practicable after the Insureds become aware of any (i) Breach or matter that could reasonably be expected to give rise to a Breach, (ii) Third Party Demand and/or (iii) Loss. For the avoidance of doubt, the Named Insured shall deliver a Claim Notice in each such instance regardless of whether the matters described in such Claim Notice will, or are reasonably likely to, give rise to Loss that is within the Retention. Attached to the Claim Notice shall be a full description, after reasonable inquiry, of the facts, circumstances and issues leading up to the delivery of the Claim Notice, including a specific reference to the implicated representations and warranties. In no event may a Claim Notice be delivered to the Insurer later than the expiration of the Policy Period; provided, however, if a Claim Notice pursuant to clause (i) or (ii) of this Section 5(a) is delivered to the Insurer during the Policy Period, then any subsequent Loss directly arising out of the Breach, matter or Third Party Demand identified in such Claim Notice shall be deemed reported at the time such Claim Notice was received by the Insurer.

(b) Correspondence. Subsequent to delivery of a Claim Notice, the Named Insured shall provide the Insurer with a copy of any correspondence between, and any pleading or other document delivered or filed by or on behalf of, any of the Insureds, or their respective representatives, and any other person or entity relating to such Claim Notice.

(c) Insurer's Response. The Insurer shall respond to a Claim Notice as soon as reasonably practicable after the Insurer receives a Claim Notice notifying it of a Breach, Third Party Demand or Loss.

(d) Payment of Loss. Any Loss paid by the Insurer pursuant to this Policy shall be paid to the Named Insured as representative of all the Insureds or to such other

person or entity as the Named Insured instructs the Insurer in writing pursuant to Section 5(e) of this Policy.

(e) Notice. Any notice (including a Claim Notice) or other communication concerning the subject matter of this Policy shall be made in writing and shall be effective upon receipt, and (i) if to any of the Insureds, shall be delivered to the Named Insured at its mailing address set forth in Item 1 of the Declarations, and (ii) if to the Insurer, shall be delivered to it at the following address:

American International Specialty Lines Insurance Company
c/o AIG Technical Services
P.O. Box 1000
New York, New York 10268

with a copy sent simultaneously to:

AIG Companies®
AIG Mergers & Acquisitions Insurance Group
175 Water Street, 10th Floor
New York, New York 10038
Attn: President

If the Named Insured so requests in writing to the Insurer, and for purposes of convenience only, and not as a condition precedent to any rights under this Policy, a copy of any such notice or other communication shall be sent simultaneously to the Insureds' Insurance Broker at its mailing address set forth in Item 9 of the Declarations.

## SECTION 6. DEFENSE COSTS; THIRD PARTY DEMANDS; SETTLEMENTS AND JUDGMENTS

(a) Defense Costs. Once the Retention is exhausted, and if the Named Insured requests in writing, the Insurer shall, after each calendar quarter, reimburse the Insureds for Defense Costs incurred during such calendar quarter. For the avoidance of doubt, Defense Costs are part of Loss and are subject to the Limit of Liability.

(b) Third Party Demands. The Insurer does not assume any duty to defend the Insureds with respect to any Third Party Demand or otherwise. The Insureds shall defend and contest any Third Party Demand with counsel consented to by the Insurer in writing (such consent not to be unreasonably withheld). The Insurer shall be entitled to effectively associate in the defense, prosecution, negotiation and settlement of any Third Party Demand.

(c) Settlements and Judgments. With respect to any Third Party Demand, only Loss resulting from settlements or stipulated judgments consented to by the Insurer in writing, or resulting from a final judgment by a court of competent jurisdiction or arbitral panel, shall deplete the Retention or be recoverable as Loss. With respect

to any Third Party Demand, if the Insureds do not, and to the extent possible do not cause their respective Affiliates to, consent to a monetary settlement or stipulated monetary judgment recommended by the Insurer in an aggregate amount less than the remaining Retention and the remaining Limit of Liability, and which otherwise would have been agreed to by the claimant under such Third Party Demand, then the Insurer's liability under this Policy in connection with such Third Party Demand shall not exceed the amount the Insurer would have paid if such settlement or stipulated judgment had been consented to as recommended by the Insurer.

## SECTION 7. CERTAIN COVENANTS OF THE INSUREDS

(a) Mitigation. With respect to any Loss or potential Loss, the Insureds shall, and to the extent possible shall cause their respective Affiliates to, take all commercially reasonable actions necessary or advisable to mitigate such Loss or potential Loss.

(b) Cooperation and Information. In addition to the obligations set forth in Section 5 of this Policy, the Insureds shall, and to the extent possible shall cause their respective Affiliates to, cooperate with the Insurer and, in a timely manner, provide the Insurer with complete and accurate information in connection with any Claim Notice or other matter relating to this Policy. Such cooperation shall include permitting the Insurer to examine, photocopy and/or take extracts from the books, records, data, files and information of the Insureds and their respective Affiliates and access to the Insureds' and their respective Affiliates' representatives for interviews and depositions under oath during normal business hours and at reasonable locations.

(c) Acquisition Agreement. The Insureds shall not, and to the extent possible shall cause their respective Affiliates not to, (i) amend, supplement or rescind the Acquisition Agreement (or enter into any agreement or arrangement that would have such an effect), (ii) give any consent or waiver thereunder or (iii) grant any authority to take any of the actions in clauses (i) or (ii) above, in each case, without the prior written consent of the Insurer if such amendment, supplement, rescission, agreement, arrangement, consent, waiver or grant would reasonably be expected to adversely affect the Insurer or its rights or liability under this Policy.

(d) Maintenance of Due Diligence Records. Until the later of 90 days after (i) the expiration of the Policy Period and (ii) the final resolution of all claims or disputes relating to this Policy, the Insureds shall, and to the extent possible shall cause their respective Affiliates to, maintain all of their respective materials relating to the due diligence conducted in connection with the Acquisition.

(e) Other Insurance Coverage. The Insureds shall, or, if applicable, to the extent possible shall cause their respective Affiliates to, maintain or purchase insurance coverage for the acquired business in a commercially reasonable manner. The coverage provided under this Policy shall be excess coverage. The Named Insured shall investigate, and shall discuss with the Insurer, whether any bond,

indemnity or other insurance policy is applicable or available with respect to the matters described in any Claim Notice.

(f) Reimbursements. After any payment by the Insurer in connection with this Policy, (i) if it is determined pursuant to the procedures set forth in Section 9 of this Policy that all or any portion of the amount paid did not constitute Loss or is excluded from coverage under this Policy or (ii) if any of the Insureds or their respective Affiliates receive, directly or indirectly, amounts from any insurance, indemnification or other source which reduces the amount of Loss actually incurred, then the Insureds or such Affiliate shall promptly, and in no event later than 60 days after such determination or receipt, reimburse or refund to the Insurer the amount overpaid.

(g) Failure to Comply. Any failure of the Insureds to comply with any of the provisions of this Section 7 shall not relieve the Insurer of its obligations under this Policy except to the extent the Insurer is adversely affected thereby.

## SECTION 8. SUBROGATION

(a) The Insureds shall preserve any indemnification or other rights against any other person or entity for any Loss and preserve the Insurer's subrogation rights with respect thereto.

(b) In the event of any payment by the Insurer in connection with this Policy, the Insurer shall be subrogated to, and the Insureds shall assign to the Insurer, all of the Insureds' respective rights of recovery against any person or entity (other than the acquired business) based upon, arising out of or relating to such payment. If the Insureds are unable to assign such rights to the Insurer, or if the Insurer desires, then, instead of assigning such rights to the Insurer, the Insureds shall allow the Insurer to bring suit in their name. The Insureds shall, and to the extent possible shall cause their respective Affiliates to, execute all papers required and take all steps reasonable, necessary or advisable to secure and further such subrogation and assignment rights. In no event shall the Insureds or their respective Affiliates waive any rights that could adversely affect any such subrogation or assignment rights. Any amounts recovered by the Insurer in connection with the exercise of its subrogation or assignment rights shall be applied first to reimburse the Insurer for any Loss paid by the Insurer pursuant to this Policy and for any costs or expenses incurred in connection with such recovery and then the remainder of such recovered amounts shall be paid to the Insureds.

(c) The Insureds shall defend at their own expense, and satisfy any liability with respect to, any counterclaim or third party demand asserted in connection with any subrogation or assignment claim pursued by the Insurer.

## SECTION 9. ARBITRATION; CHOICE OF LAW; INTERPRETATION AND RULES OF CONSTRUCTION

(a) Any dispute between the Insurer and the Insureds hereunder shall be submitted to the American Arbitration Association in New York, New York for confidential, binding arbitration under and in accordance with its commercial arbitration rules then in effect. With regard to any specific arbitration, the parties thereto shall agree on whether there shall be one arbitrator or three arbitrators. If such parties cannot agree on the number of arbitrators, there shall be three arbitrators. The arbitrator(s) shall be disinterested, shall have knowledge of the legal, financial, corporate and insurance issues relevant to the matters in dispute and shall otherwise be chosen in the manner provided in such commercial arbitration rules. The arbitration dispute resolution mechanisms are intended to be the sole and exclusive dispute resolution mechanisms for any dispute arising between the Insurer and the Insureds hereunder and shall survive the cancellation or termination of this Policy and the exhaustion of the Limit of Liability.

(b) The construction, validity and performance of this Policy shall be interpreted under the laws of the State of New York, without reference to conflicts-of-laws principles that would require or allow for the application of the law of any other jurisdiction. For purposes of this Policy, the Acquisition Agreement shall be interpreted under the laws of the jurisdiction chosen therein or, where no jurisdiction is so chosen, by the laws of the State of New York, without reference to conflicts-of-laws principles that would require or allow for the application of the law of any other jurisdiction. In connection with any dispute hereunder, no award or judgment, including any award or judgment of expenses or costs, shall be entered or payable in an amount exceeding the remaining Limit of Liability.

(c) This Policy shall be construed in the manner most consistent with the relevant terms and conditions of this Policy without regard to authorship of language and without any presumption in favor of either party. The descriptions in the headings of this Policy are solely for convenience, and form no part of the interpretation or the terms and conditions of coverage. The words "include" or "including" in this Policy shall be deemed to be followed by the words "without limitation."

## SECTION 10. ACKNOWLEDGEMENTS AND REPRESENTATIONS

(a) By accepting this Policy, the Named Insured, on behalf of itself and each of the Additional Insureds, acknowledges that (i) the Insureds were represented by competent and experienced legal counsel of their choice in connection with this Policy, and (ii) the Insureds are purchasing the coverage described in this Policy with full knowledge and acceptance of its terms and conditions without any reliance on any representation, warranty, advice or other statement by the Insurer or any of its representatives or advisors regarding any legal, tax or accounting implications or requirements of the coverage described in this Policy.

(b) By accepting this Policy, the Named Insured represents and warrants to the Insurer that each of the Additional Insureds has (i) irrevocably appointed the

Named Insured as its agent and attorney in fact to take any action required to be taken by it hereunder, (ii) agreed to be bound by any and all actions taken by the Named Insured on its behalf, (iii) acknowledged in writing that the Named Insured has an interest in the subject matter of this Policy and that the appointment of the Named Insured constitutes an irrevocable power-of-attorney coupled with an interest and (iv) acknowledged in writing that the Insurer shall be entitled to rely exclusively upon any written notice given by the Named Insured and that the Insurer shall not be liable in any manner for any action taken or not taken in reliance upon any notice given by the Named Insured.

## SECTION 11. SERVICE OF SUIT

**[ *** Mandatory legend for all states except Illinois, which has its own mandatory legend. *** ]**

(a) Subject to any provision in this Policy requiring or allowing for arbitration, in the event of failure of the Insurer to pay any amount claimed to be due hereunder, the Insurer, at the request of the Named Insured, will submit to the jurisdiction of a court of competent jurisdiction within the United States. Nothing in this Section 11 constitutes or should be understood to constitute a waiver of the Insurer's rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United States. It is further agreed that service of process in such suit may be made upon General Counsel, American International Specialty Lines Insurance Company, 70 Pine Street, New York, NY 10270, or his or her representative, and that in any suit instituted against the Insurer upon this Policy, the Insurer will abide by the final decision of such court or of any appellate court in the event of any appeal.

(b) Further, pursuant to any statute of any state, territory or district of the United States that makes provision therefor, the Insurer hereby designates the Superintendent, Commissioner, Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as its true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Insureds or any beneficiary hereunder arising out of this Policy, and hereby designates the above named General Counsel as the person to whom the said officer is authorized to mail such process or a true copy thereof.

## SECTION 12. OTHER MATTERS

(a) Renewal and Cancellation. This Policy is non-renewable. This Policy is non-cancelable, except in the event that the Insureds fail to pay the Premium within thirty (30) days of Inception.

(b) Waiver and Amendment. The terms of this Policy may not be waived or amended except pursuant to a written endorsement executed and issued by the Insurer and consented to by the Named Insured.

(c) Assignment. This Policy and the rights and obligations hereunder are not assignable by the Insureds without the prior written consent of the Insurer. The Insurer may assign this Policy to another insurer that is a member company of American International Group, Inc. without the consent of the Insureds provided such other insurer's financial strength rating (Moody's or Standard & Poor's) is equal to or better than that of the Insurer at the time of such assignment.

(d) Entire Agreement. This Policy constitutes the entire agreement and understanding concerning the subject matter of this Policy and supersedes any prior oral or written agreements, discussions or other communications entered into between the Insurer and/or its Affiliates (including their respective representatives), on the one hand, and the Insureds and/or their respective Affiliates (including their respective representatives), on the other hand, concerning the subject matter of this Policy.

(e) If coverage for a claim under this Policy is in violation of any United States of America economic or trade sanction, including sanctions administered and enforced by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC"), then coverage for that claim shall be null and void.

*[Signature Page Follows]*

By signing below, the President and Secretary of the Insurer agree on behalf of the Insurer to all the terms of this Policy.

**[ *** Cut and paste Insurer's double signature block here *** ]**

This Policy shall not be valid unless signed at the time of issuance by an authorized representative of the Insurer, either below or on the Declarations page of the Policy.

**Exhibit A**

**Acquisition Agreement**

[Attached]

**Exhibit B**

# Application

[Attached]

**Exhibit C**

**Form of Claim Notice**

Reference is hereby made to the Representations and Warranties Insurance Policy, Policy No. ___ ____________, issued by American International Specialty Lines Insurance Company to the Insureds (the "Policy"). All capitalized terms used but not defined in this Claim Notice shall have the respective meanings assigned thereto in the Policy.

Pursuant to the terms and conditions of the Policy, the undersigned Named Insured hereby reports that (check all that apply):

a) ______ Preliminary Notice. The Named Insured is aware of a Breach or a matter which could reasonably be expected to give rise to a Breach. Attached hereto is a full description, after reasonable inquiry, of such Breach or matter, including without limitation the representations and/or warranties which may have been breached, a description of such Breach or possible Breach, the date the Named Insured first learned of such Breach, fact or circumstance, and the amount of Loss which could reasonably be expected to result.

b) ______ Third Party Demand. The Named Insured is aware of a Third Party Demand that was asserted against _____________ by _________________ in the amount of $________________ on _______________. Attached hereto is a full description, after reasonable inquiry, of all material facts, circumstances and issues relating to such Third Party Demand, including without limitation the representations and/or warranties which allegedly contain a Breach, the facts alleged in the Third Party Demand, the date the Named Insured first learned of such Third Party Demand, and the amount of Loss which could reasonably be expected to result.

c) ______ Loss. A $__________ Loss occurred on _______________. Attached hereto is a full description, after reasonable inquiry, of all material facts, circumstances and issues relating to such Loss, including without limitation the representations and/or warranties which allegedly contain a Breach and the date the Named Insured first learned of such Loss.

[ *** Insert Name of Named Insured *** ]

By: ________________________________
Name:
Title:

**Exhibit D**

## Deal Team Members

- [To be determined]

**Exhibit E**

# No Claims Declaration

[Attached]