W&I INSURANCE IN NIGERIAN M&A AND PE EXITS: MARKET PRACTICE, COVERAGE GAPS AND BARRIERS TO ACCESS

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1. Introduction

Warranty and Indemnity (**W&I**) insurance has become a fundamental feature of modern M&A practice. It enables the transfer of risk from transaction parties to insurers, thus facilitating clean exits, pricing certainty, and reduced post-closing disputes. In most developed jurisdictions, W&I insurance is now embedded in private equity (PE) exits and competitive auction processes.

In Nigeria, however, while the M&A market has witnessed increasing sophistication - driven by private capital inflows, regulatory reform and cross-border structuring - W&I insurance has seen limited adoption and remains constrained by policy hurdles. In many Nigerian transactions, it is usual still for parties to rely on traditional risk allocation mechanisms.

This article interrogates the practical reality of W&I insurance in Nigerian private capital exits, considering the risks that underwriters are willing to cover and typical exclusions, the due diligence standards required, how Nigerian-law deals are treated differently from English-law deals, and what practical solutions exist where W&I insurance cannot fully bridge the risk allocation gap.

2. W&I Insurance in the Global and African Contexts

Globally, W&I insurance has become a standard tool in private M&A transactions, particularly in mid to large cap private equity exits and competitive auction processes. Across Africa, however, the adoption of W&I insurance has grown unevenly. South Africa leads the continent, with relatively mature usage in mid and large-cap transactions, while other jurisdictions, including North Africa, Kenya and Nigeria are still emerging.

Policies across both developed and developing jurisdictions typically cover losses resulting from breaches of contractual warranties, with coverage limits often ranging between 20% and 30% of the purchase price. However, while premiums are typically below 1% of the transaction value in mature markets and about 1% in South Africa, they rise up to two per cent or higher for deals in Nigeria and other African countries.[1]

3. The Reality of the Nigerian Market

In Nigeria, W&I insurance penetration remains low relative to deal volume with international insurers typically focusing on transactions above circa US$10 million. Also, for most deals, W&I is often introduced late in the process and treated as transaction-enhancement rather than baseline risk allocation - a major divergence from the practice in developed markets and a key constraint to widespread adoption. The product has been adopted mostly in cross-border transactions in financial services and fintech, manufacturing and FMCG, infrastructure, and to some extent, deals in oil and gas, health and pharmaceuticals.

However, market penetration is still low due to limited underwriting appetite, smaller transaction sizes, pricing considerations and lack of familiarity with the product among domestic deal participants. As W&I insurance is not always available, Nigerian transactions tend to rely heavily on contractual deal structures such as escrow arrangements, purchase price holdbacks, seller indemnities and earn-out structures. This reflects a structural gap between global insurance-enabled risk allocation and local deal practice.

4. Scope of Coverage and Typical Exclusions

4.1 Scope of Coverage

As elsewhere, a W&I policy in Nigeria is designed to cover representations and warranties, and any tax indemnity given by the seller to the buyer in the transaction documents.

4.2 The Central Role of Exclusions

W&I policies typically include extensive exclusions intended to bring the policy in line with the scope of coverage that W&I insurance is designed to provide. Standard W&I policy exclusions fall into the following categories: (i) general exclusions, (ii) deal-specific exclusions, and (iii) warranty carve-outs and qualifications.[2]

General exclusions are exclusions which apply across the W&I insurance market and typically address matters that cannot be covered because they fall within the knowledge of the deal team including matters disclosed in the data room, during due diligence, in a disclosure letter or in public searches. Other typical exclusions are fraud of the insured, purchase price adjustments, fines and sanctions that are uninsurable by law, etc.

Deal-specific exclusions are those arising from certain features of the transaction, including areas of lack or insufficient due diligence, jurisdiction-specific issues such as anti-bribery and corruption matters, industry-specific risks, and areas that should more properly be covered by existing insurance policies.

It is also typical to have warranty carve-outs and qualifications where the insurer is not comfortable with providing cover for a warranty as drafted in the transaction document. The insurer's preferred amended warranty form will usually be set out in the W&I policy or warranty spreadsheet. Typical warranty amendments range from removal of forward-looking warranties, estimates or forecasts, to inserting seller knowledge qualifiers. There may be wholesale exclusion of a warranty where an insurer takes the view that it cannot be covered even with amendments.[3]

5. Due Diligence as the Prerequisite for Insurability

W&I insurance is fundamentally a diligence-driven product. Insurers rely on the adequacy and completeness of due diligence to evaluate the transaction and determine the scope of coverage and the insurance premium.[4] Accordingly, underwriters require comprehensive due diligence covering legal, financial, tax and commercial/operational matters. Also, conclusions in the due diligence reports must be supported by adequate documentation. Underwriters are likely to challenge findings in the due diligence reports that are not supported by evidence or which are based only on management representations. Fundamentally, gaps in due diligence translate into exclusions in the policy.[5]

With respect to the legal due diligence report, underwriters would want to see a full scope due diligence report covering corporate and regulatory compliance status, a detailed review of material contracts and financing arrangements, ownership of intellectual property, status of real estate and other assets, employment and labour law compliance, and litigation and contingent liability. As regards the financial due diligence, underwriters are typically concerned, inter alia, about the quality of the earnings report, working capital analysis and revenue recognition analysis and a review of related party transactions. Regarding the tax due diligence, matters of interest to insurers include any uncertain tax positions, analysis of all open tax years, VAT and indirect tax review and transfer pricing documentation and compliance.[6] In a particular W&I insurance negotiation, the cover offered for tax liability was very limited as the tax due diligence related only to a few years, leaving the buyer without cover for other open tax years.

In Nigeria, due diligence is often constrained by inconsistent regulatory filings by the target, limited due diligence scope and, in some cases, limited audit quality. These issues create gaps on the basis of which underwriters draft exclusions limiting the scope of the W&I policy.

6. Implications of Nigerian Law vs English Law Deals

Most of the transactions in this market that have featured W&I policies involve cross-border elements, thus making English law the prevalent governing law. Also, English-law-governed transactions are favoured because they offer an established jurisprudence on warranties and damages, and consequently, predictable legal interpretation. Also, insurers and reinsurers are more familiar with English-law transactions.

Nigerian-law-governed transactions involving W&I have been very few, possibly on account of issues such as uncertainty around the jurisprudence on warranty breaches and W&I insurance, a desire to avoid policy-SPA misalignment and perceived enforcement risks. However, interactions with practitioners within the market indicate that there is usually no major concern where the insurer is familiar with the market.

7. Why Nigerian PE Exits Struggle to Use W&I Insurance

We consider below some structural constraints which continue to limit W&I adoption in Nigeria.

(a) Deal Size and Economics
Many Nigerian transactions fall below global insurers' preferred thresholds (circa US$10m), making placement inefficient.

(b) Limited Local Underwriting Capacity
The Nigerian insurance market does not yet provide deep domestic W&I capacity. Accordingly, reliance remains mostly on the London market.

(c) Legal and Regulatory Uncertainty
There is perceived unpredictability in licensing regimes, enforcement risks through local courts and enforcement by tax authorities as well as uncertainty in the tax treatment of W&I insurance.

(d) Diligence Gaps
While local capacity in due diligence is well-developed, inconsistent documentation, weak record-keeping, and compressed diligence processes may reduce insurability.

(e) Exit Environment Constraints
African, and particularly, Nigerian PE exits face considerable liquidity challenges, require longer holding periods and have limited exit routes, thus reducing the standardisation pressure that typically drives W&I adoption in mature markets.

(f) Cost vs Value Trade-Off
Higher premiums combined with reduced coverage create a perception of low value for money. In many mid-sized deals, the cost of the W&I policy is considered prohibitive relative to the transaction value. Our interactions with legal practitioners in the market also indicate that a major reason for non-adoption of W&I is the reluctance of local buyers to undertake the cost of the W&I. In certain situations, parties agree to share the costs.

8. Practical Solutions When W&I is Unavailable

Where W&I insurance cannot be placed, or the available policy is considerably limited, it is typical for dealmakers to revert to contractual risk allocation tools or explore hybrid structures to facilitate a cleaner exit.

(a)Creative structuring
In the absence of comprehensive W&I

coverage, it is typical for parties to resort to contractual structures such as escrows, holdbacks, deferred consideration and liability caps. Also, buyers often negotiate targeted indemnities for specific risk areas such as tax or regulatory compliance, alongside pricing mechanisms that reflect identified exposure.

(b)Hybrid Risk Allocation Structures
Transaction parties may also consider hybrid structures such as partial W&I cover for "clean" aspects of a business, combined with bespoke protections (e.g. reduced escrow or holdbacks) for others. This would serve to balance cost and protection.

(c)Targeted Risk Insurance
Where W&I is inadequate, parties may also consider complementary insurance products to address discrete issues that fall outside the scope of traditional W&I cover, e.g. tax insurance or contingent risk insurance.

Trends in mature markets suggest that specialist underwriters are launching products designed to target smaller deals (valued below US$10m), by using technology to streamline the W&I process, synthetic warranties and standardised policy wording to underwrite more efficiently and at a lower cost. The trends indicate that W&I may become increasingly accessible for smaller transactions.

9. Conclusion

W&I insurance in Nigerian M&A transactions is a real and growing product, though structurally constrained. The reality within the market shows that W&I exists and is most effective for large, well-structured, cross-border deals. The cover may, in certain cases, be narrower and more conditional than in developed markets while pricing for local deals is higher. Greater adoption will depend not only on insurer appetite, but also on improvements in transaction readiness including earlier engagement with brokers and underwriters, and deal structuring that aligns more closely with established underwriting frameworks. Until these elements converge, W&I insurance may remain a valuable tool but one that is selectively deployed to enhance certain transactions, rather than a default exit mechanism. In the meantime, creative contractual structuring will continue to do much of the heavy lifting in Nigerian private capital exits.

[1] White & Case, Warranties and Indemnities Insurance take Center Stage in M&A Transactions in Africa (2024) available at https://www.whitecase.com/insight-our-thinking/africa-focus-summer-2024-warranties-and-indemnities.
[2] WTW, Navigating W&I Insurance Exclusions (2024) available at Navigating W&I insurance exclusions - WTW UK.
[3] Ibid. Practical Law Practice Notes on Warranty and Indemnity Insurance.
[4] ENS Africa, Maximising Benefits: The Importance Of Efficiently Leveraging W&I Insurance To Structure M&A Deals available at Maximising Benefits: The Importance Of Efficiently Leveraging W&I Insurance To Structure M&A Deals - Insurance Laws and Products - South Africa.
[5] Datapack, Representation and Warranty Insurance: Due Diligence Requirements for Deal Teams available at Representation and Warranty Insurance: Due Diligence Requirements for Deal Teams | Datapack.
[6] Ibid.

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