



# PUTTING A LID ON LITIGATION LIABILITY

In today's M&A market, buyers can be picky, and deals can go "pencils down" simply because the parties cannot agree on how to allocate or value a distracting litigation risk. Buyers are typically unwilling to bear the cost of a worst-case outcome (no matter how remote), while sellers are often unwilling to fully indemnify or to escrow enough cash to resolve buyer concerns.

**Adverse Judgment Insurance** solves this problem – sellers can improve the marketability and value of the business by insuring against adverse outcomes in potential or pending litigation. This unlocks value by opening the sale process to more bidders; limiting the need for purchase price reductions, indemnities, or escrows; and allowing buyers to focus on the core merits of the target. Atlantic Global Risk is a specialist insurance broker: we can work with you to obtain an Adverse Judgment Insurance policy fitting your commercial needs.

- **Timing** – obtaining this insurance can take 4-8 weeks, so sellers should proactively engage with Atlantic at an early stage of the sale process.
- **Merits of defense** – we will need to show insurers that the defendant is likely to prevail if the claim is brought.
- **Damages** – we will also need to demonstrate the likely range of damages if the company is ultimately found liable.
- **Stage of development** – the best stage to obtain insurance is before a case has been filed. If litigation has commenced, we will need to point to positive developments or a clear path forward based on persuasive factual or legal arguments. Insurance is unlikely to be available for a pre-filing dispute hinging on uncertain facts, or for an active case that has progressed unfavorably.
- **Advisors** – the party obtaining insurance should be represented by counsel with a strong track record and a well-founded grasp of the facts and merits. This type of insurance is therefore best arranged from the seller-side, even if the ultimate insured is the buyer/target.

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## Policy Details

- **Cost** – Adverse Judgment Insurance involves paying a one-off, up-front premium, which typically falls in the 5% to 12% range (though 20%+ is possible for the riskiest insurable cases). Atlantic's fees are fully contingent and paid by the insurer only if a policy is purchased, so there is no cost to explore availability and pricing for a specific case.
- **Policy limit** – as little as \$5 million and up to \$1.5 billion for a single risk.
- **Diligence** – we will often ask for seller's counsel to prepare a memo (to be shared on non-reliance terms) describing the background and merits of the case and how it might unfold. Counsel will also need to participate in an "underwriting call" with the insurers to answer any remaining questions.

## Case Studies

- **Wage & hour risk** – where Atlantic's financial sponsor client sought to acquire a company with potential civil liability for improper categorization and payment of employees, Atlantic arranged a policy capping that liability.
- **Antitrust risk** – Atlantic secured a policy to cover any diminution in the value of an acquisition target in the event the European Commission accepted a referral to review the underlying acquisition for antitrust violations.
- **Breach of contract risk** – Atlantic procured a policy for our client acquiring a real estate asset to cover damages and defense costs arising out of a claim by a prior owner asserting an anti-flip provision in the underlying property purchase agreement.
- **Piercing the corporate veil risk** – Atlantic negotiated a policy protecting a PE fund for potential losses arising out of attempts by former noteholders of its portfolio company to pierce the corporate veil and impose liability on the fund for alleged improper strict foreclosure.

## Atlantic's Team

Atlantic is experienced in securing insurance over legal risks as part of an active M&A process. In addition to our Structured Solutions team, which includes experienced commercial litigators and structuring professionals, Atlantic has 60+ M&A advisors who support hundreds of transactions each year – we are well positioned to fit into the deal process, resolve litigation issues, and help you complete the transaction on schedule and on the best possible terms.

