

# Preserve the asset value

## A look at how to preserve insurance assets in a corporate transaction

Liability insurance is an important component of risk management for most businesses, but insurance policies are often overlooked in the sale of a business. Both the current liability policies in place at the time of the transaction, as well as the historical policies issued for prior time periods are valuable assets. Steps should be taken to preserve these assets, whether for the seller if it will remain a viable entity going forward, or the acquiring company.

*Smart Business* spoke with Keven Drummond Eiber, Attorney at Law, OSBA Certified Specialist — Insurance Coverage Law, at Brouse McDowell, about preserving valuable insurance assets.

### How does a merger or acquisition affect the preservation of insurance assets?

When a company is acquired in a stock purchase, no change of corporate form occurs. The acquired corporation remains the same entity, but with different owners, or shareholders. It is neither a successor nor a predecessor of the company that acquired its stock and it will continue to have all of its rights to coverage under its current and past liability policies.

When a merger takes place, typically, the acquired corporation is merged into its new owner. The surviving corporation will be considered the ‘successor’ and, pursuant to state statute, will inherit all of the rights and obligations, including rights to insurance policies, of the merged company.

The real challenge to preserving insurance assets, particularly from the standpoint of the acquiring company, arises in the context of an asset purchase. When an asset purchase takes place, some or all of the assets of a company are sold or transferred. Liabilities may or may not be transferred as well. The new owner of the

assets is not a ‘successor’ of the company from which the assets were acquired.

### How does the acquiring company identify all of the insurance assets?

The first step is to obtain all of the necessary information about the target company’s insurance program. The search should not be limited to the current liability policies, because prior policies can provide valuable coverage for future claims, especially for so-called long tail claims. Obtain actual complete copies of the policies because they will contain provisions that will be important to analyze and understand in order to ensure they remain available going forward. The due diligence period prior to closing affords the best, and perhaps the only opportunity to obtain this information.

The second step is to analyze and understand the insurance policies. Are they claims-made policies or occurrence-based policies? Do they define the ‘insured’ to include subsidiaries? Do they contain anti-assignment provisions? Do they require that the insurer be given notice of certain corporate transactions or other events, such as a sale of substantially all of the assets of the company? Are there historical claims? Have the limits been eroded by payment of claims? Are the insurers still in existence?

In Ohio, when a covered occurrence under an insurance policy occurs before liability



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is transferred to an acquiring company, coverage does not also transfer to that company automatically just because the liability was assumed. However, Ohio law does generally permit a party to affirmatively assign its right to be indemnified by insurance for past occurrences, regardless of the consent of the insurer. Otherwise, Ohio law will give effect to an anti-assignment provision in a policy, particularly when the nature of the insurer’s risk that it bargained for is altered by the transaction.

### So what can the parties do to preserve the continued availability of liability insurance?

Include specific provisions in the transaction documents related to the retention or assumption of liabilities and indemnification with insurance in mind. Explicitly transfer the right to insurance proceeds for pre-acquisition occurrences (a ‘chase in action’), whether or not known, as an identified asset in the transaction. Assign all past liability insurance policies, not just the ones for the current policy period. Provide notice of the assignments to insurance companies. To the greatest extent possible, obtain the insurers’ consent to the assignments. If the seller is retaining all rights to insurance, obtain endorsements to reflect any company name changes going forward. And, work with your broker who can serve as a valuable resource throughout the process. ●