

FEBRUARY 2023

# M&A INSURANCE SPECIALISTS

Mind the Gap: Split Sign and Close



L I V A

# INTRODUCTION

Under a warranty and indemnity policy (“**W&I Policy**”) there is an important distinction between when a breach occurs and when the insured under the W&I Policy (the “**Insured**”) obtains actual knowledge of any such breach. This can have a significant impact on the recourse available to the Insured under the W&I Policy.

This is relevant where there is a split signing and closing, where warranties are given at signing (“**Signing Warranties**”) and then repeated at closing (“**Closing Warranties**”)

Where there is a split signing and closing, in normal circumstances, the Insured is obliged to provide a signing no claims declaration (“**Signing NCD**”) which should state that the Insured does not have actual knowledge of any breach(es) at signing.

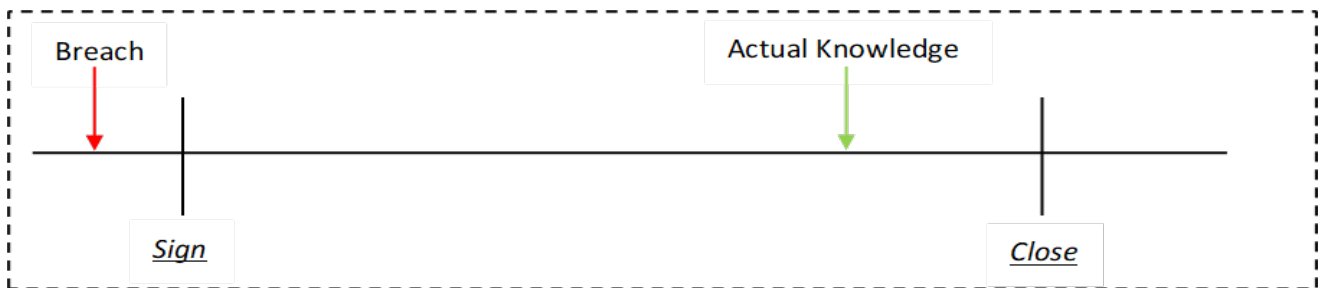
The Insured is – usually – also required to provide a closing no claims declaration (“**Closing NCD**”), which, like the Signing NCD, states that the Insured does not have actual knowledge of any breach(es) at closing, which may have occurred in the interim period.

## SCENARIO 1

**Breach Occurs : Pre-signing**

**Breach Discovered: Post-signing, but pre-closing**

**W&I Insurance: COVERED (breach of Signing Warranties)**



After signing but before closing, the Insured obtains actual knowledge of a breach which occurred pre-signing.

This is a breach of the Signing Warranties. The Insured decides to proceed to closing and confirms actual knowledge of the breach, which occurred before signing, in the Closing NCD against the Closing Warranties only.

After closing, the Insured can claim for a breach of the Signing Warranties under the W&I Policy, but not against the Closing Warranties, as actual knowledge of the breach was confirmed by the Insured against the Closing Warranties in the Closing NCD.

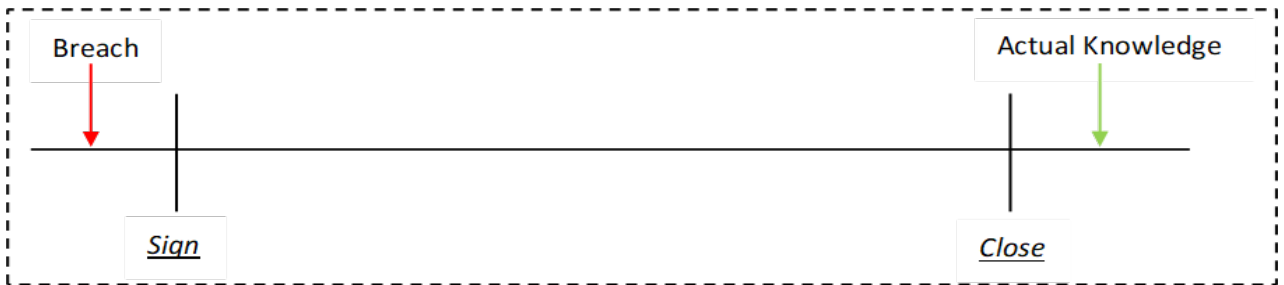
This is where the W&I Policy incepted at signing will provide recourse for covered loss that the Insured might not otherwise have.

# SCENARIO 2

**Breach Occurs: Pre-signing**

**Breach Discovered: Post-closing**

**W&I Insurance: COVERED (breach of Signing & Closing Warranties)**



The Closing NCD is provided by the Insured and the Insured does not have actual knowledge of any breach(es).

After closing, the Insured obtains actual knowledge of a breach which occurred before signing. This is a breach of both the Signing Warranties and the Closing Warranties.

After closing, the Insured can claim for a breach of Signing Warranties and/or the Closing Warranties under the W&I Policy for covered loss.

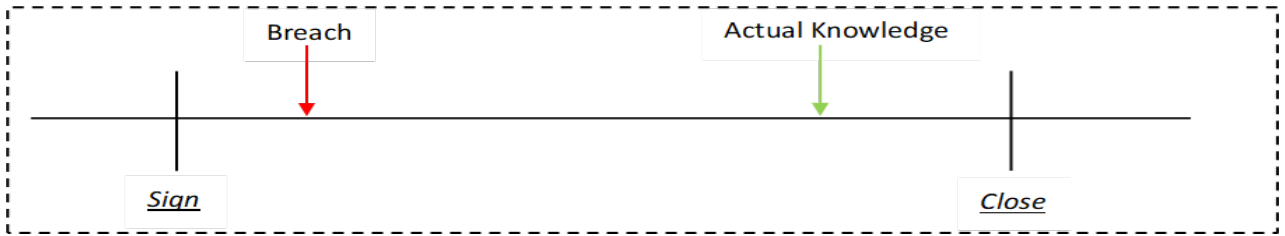


# SCENARIO 3

**Breach Occurs:** Post-signing, but pre-closing

**Breach Discovered:** Post-Signing, but pre-closing

**W&I Insurance:** **NOT COVERED (breach of Closing Warranties)**



After signing but before closing, the Insured obtains actual knowledge of a breach which occurred after signing.

This is not therefore a breach of the Signing Warranties. The Insured decides to proceed to closing and confirms actual knowledge of the breach, which occurred after signing in the Closing NCD against the Closing Warranties only.

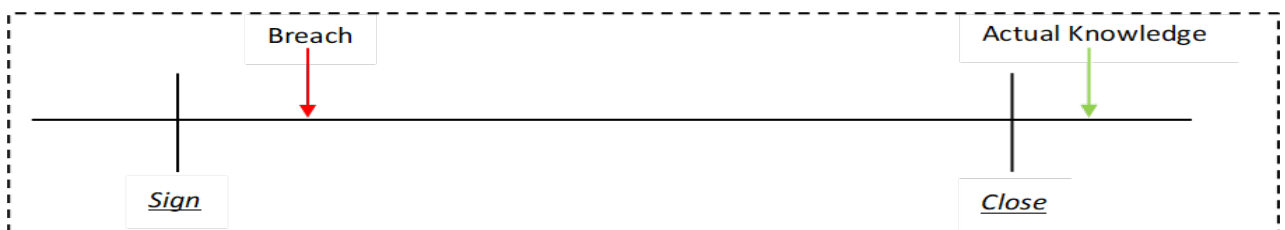
The Insured cannot claim for breach of the Signing Warranties (as it occurred after signing) and cannot claim for breach of Closing Warranties (as actual knowledge of the breach was confirmed by the Insured against the Closing Warranties in the Closing NCD).

# SCENARIO 4

**Breach Occurs:** Post-Signing, but pre-Closing

**Breach Discovered:** Post-Closing

**W&I Insurance:** **COVERED (breach of Closing Warranties)**

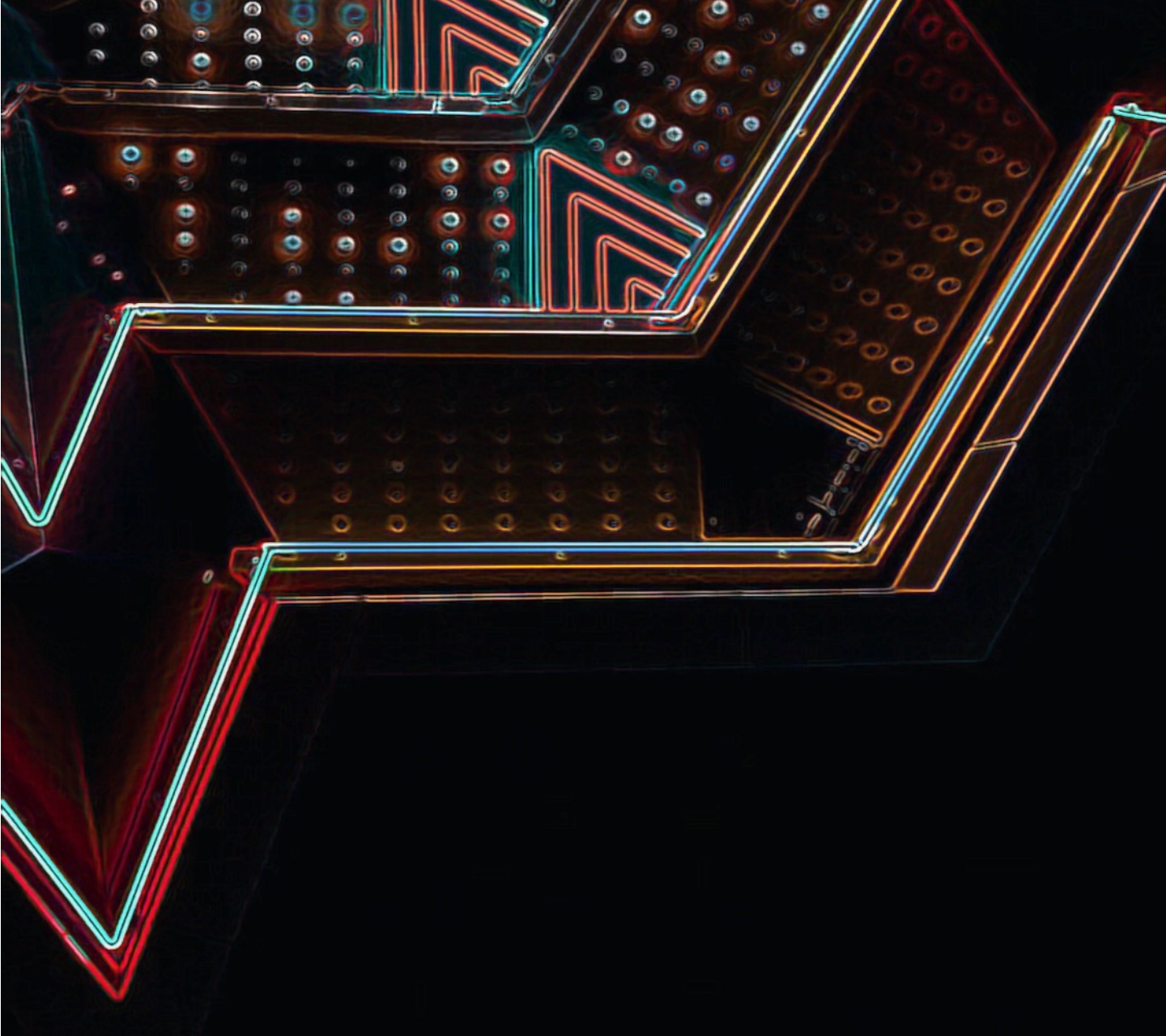


The Closing NCD is given and the Insured does not have actual knowledge of any breach(es).

After closing, the Insured obtains actual knowledge of a breach which occurred after signing but before closing. This would not be a breach of the Signing Warranties (as it occurred after signing) but would be a breach of the Closing Warranties.

The Insured can claim for a breach of the Closing Warranties under the W&I insurance policy for covered Loss.





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**London**

1 King Street, London EC2V 8AU

**Berlin**

LIVA GmbH & Co KG  
Kurfürstendamm 195, 10707 Berlin

**Frankfurt**

c/o Ecclesia Holding GmbH  
Lurgiallee 6-8, 60439 Frankfurt am  
Main

**Dusseldorf**

Am Wehrhahn 36, 40211 Düsseldorf

**Milan**

c/o Ecclesia GEAS Sanità S.r.l.  
Via Senato 18, 20121 Milano

**Rome**

c/o Ecclesia GEAS Sanità S.r.l.  
Via Cola di Rienzo 217, 00192 Roma

**Warsaw**

Fabryka Norblina, Żelazna 51/53,  
00-841 Warsaw

**Contact:** [info@liva.eu](mailto:info@liva.eu)  
**Phone** + 44 20 3713 1976