



## Representations and Warranties

Representations and warranties (“R&Ws”) are the primary contractual mechanism to

1. Identify potential liability associated with the seller’s dental practice.
2. Allocate risk between the buyer and seller.

R&Ws are statements of fact made in the purchase agreement by the buyer to the seller and the seller to the buyer at a particular point in time. R&Ws create a "snapshot" of facts that are important to the buyer’s and the seller’s decision to enter into the purchase agreement. If a party’s R&W is not true, then the other party having indemnification rights (i.e., the right to receive money) under the purchase agreement. The failure of a party’s representations to be true will result in the other party having rights and remedies under the contract.

Imagine a dentist who is buying a dental practice. The buyer will want to know whether the dental practice is properly licensed with the State. The buyer may have done due diligence providing a moderate degree of comfort that there are no licensing issues. However, it’s possible there is a licensing issue that was not discovered in the due diligence. If, after the closing, the State’s regulatory agency assesses penalties and fines to the dental practice, then the new owner will suffer the financial loss. This risk would be addressed by requiring the seller to make a representation in the purchase agreement regarding compliance with State licensing laws and regulations. If the buyer discovers before the closing that the representation is untrue, the buyer will have the right to terminate the contract and walk away from the deal. Alternatively, if the licensing issue is discovered after the closing, the buyer will have an indemnification claim against the seller for breach of representation.

The purpose of negotiating representations is to discover factual issues that might not otherwise be disclosed. The problem is that parties are under no legal obligation to make any disclosure when negotiating a purchase agreement. A party counteracts this problem by requiring disclosure of facts that may be relevant to its decision to enter into the contract. This is accomplished through the other party’s representations.

Going back to the example above, the buyer will ask the seller to make the following representation: Seller has all governmental or other permits, licenses, approvals, certificates of inspection, filings, franchises, and other authorizations that are necessary to operate and operate the dental practice and has not received notice alleging that any other governmental or other permits, licenses, approvals, certificates of inspection, filings, franchises, or other authorizations are required.

If the seller refuses to make the representation, then the buyer will conclude that the dental practice has licensing issues. The seller could give the representation "to the best of its knowledge," so that the representation is breached only if the seller fails to disclose relevant facts actually known to it. The seller could also make a complete disclosure of all licensing issues in order to avoid liability. The disclosures may give rise to additional demands on the representing party, such as the buyer may require the seller to resolve any licensing issues before the closing or reduce the purchase



price to compensate the buyer for having to pay for the remediation itself. The buyer may also walk away from the purchase agreement.

Representations allocate risk between parties to the purchase agreement. The party making a representation assumes the risk that if the representation is untrue, the other party will have a claim against it or some other remedy under the contract.