

# Insurance Claims & Coverage W&I – a practical perspective on a growing product

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# Introduction

- 1. International perspective on insurance coverage and claims issues**

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- 2. Today's focus: W&I insurance**

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- 3. A practical guide to the complexities that arise in handling and resolving W&I claims**

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# Your speakers today



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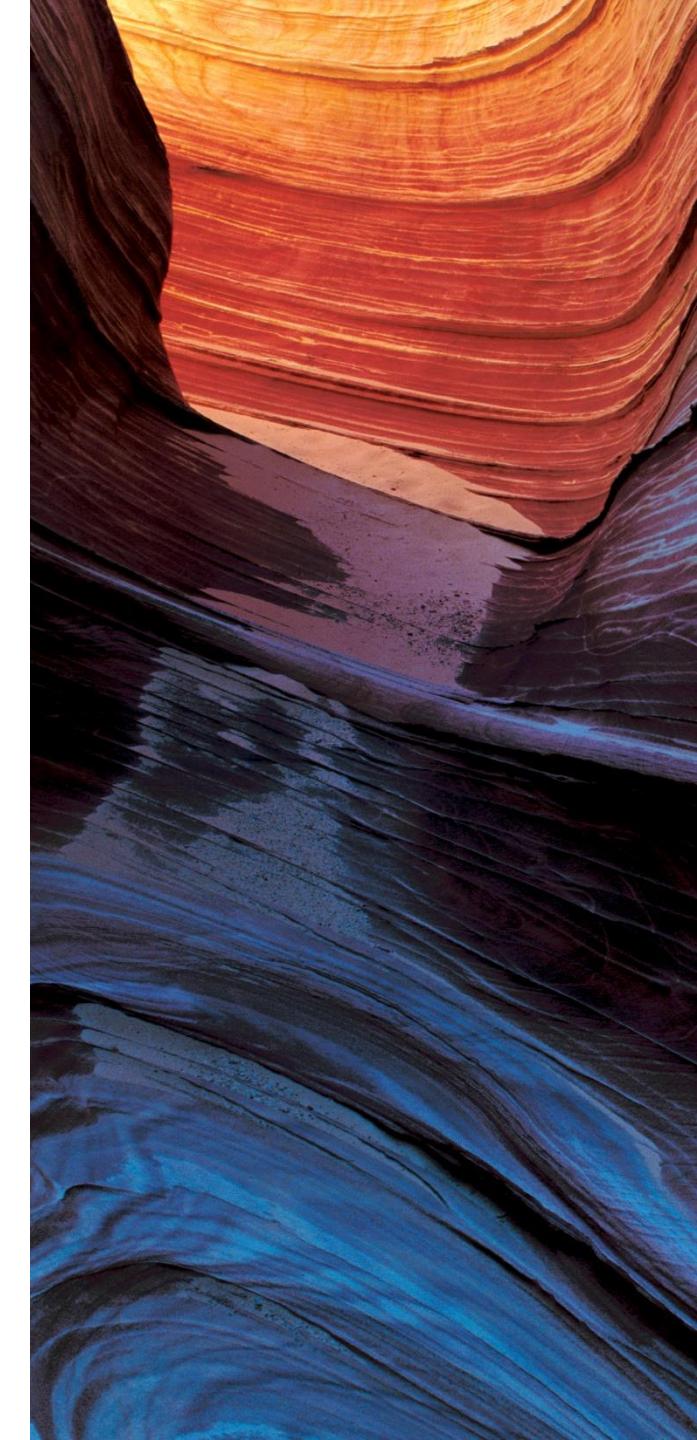
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# The role of W&I insurance in an M&A transaction

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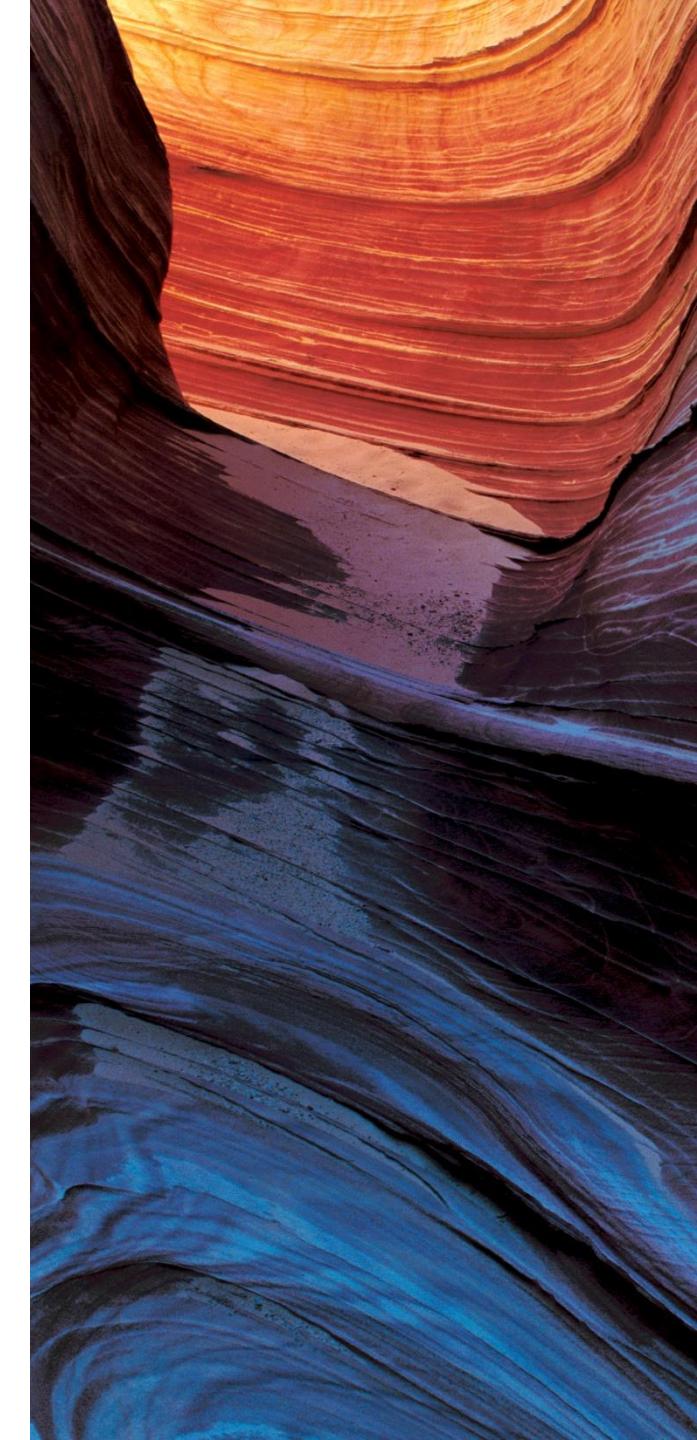
- Warranties help elicit information about target and provide buyer with contractual right to claim against seller
- W&I insurance transfers risks and liabilities associated with breach of seller's warranties to insurer
- Facilitates clean exit for seller, and avoids need for buyer to pursue claims against seller



# Handling W&I claims - overview

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- Familiarity with transactional documents is important
- Documentation can be extensive – e.g. data room
- Determining breach may involve legal issues of contractual interpretation
- Even where breach is established, quantifying the claim may be a hurdle to resolving the claim
- Majority of policies written are ‘buy-side’



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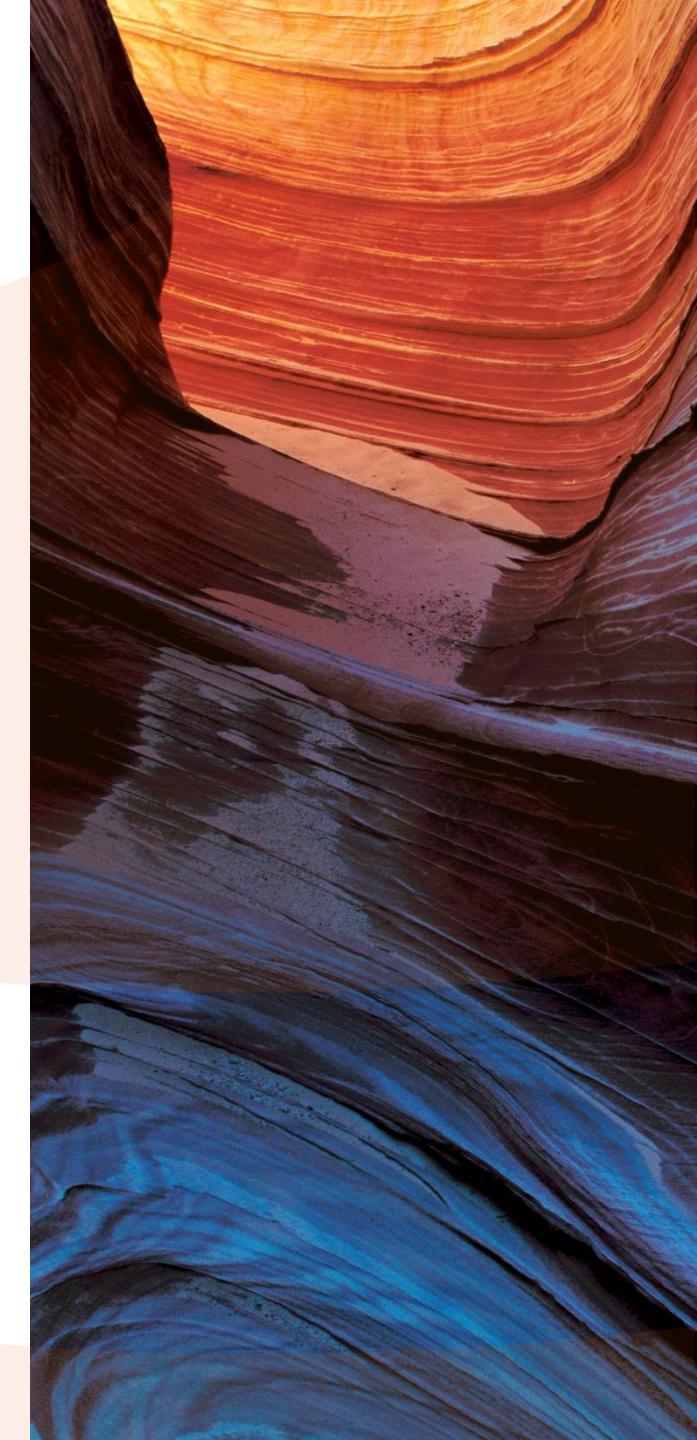
# Interpretation of the SPA and W&I Policy

# Marrying up SPA and Policy

Breach of covered warranty?

- Under SPA?
- Covered under the Policy?

Warranty Number	Warranty Content	Status	Comments
15.2		Cover	
15.3		Cover	
16	<b>Litigation</b>	Cover	
17	<b>Compliance with laws</b>		
17.1		Cover	
17.2		Partial cover	For the purpose of the Policy, this warranty is qualified by Seller's Knowledge.

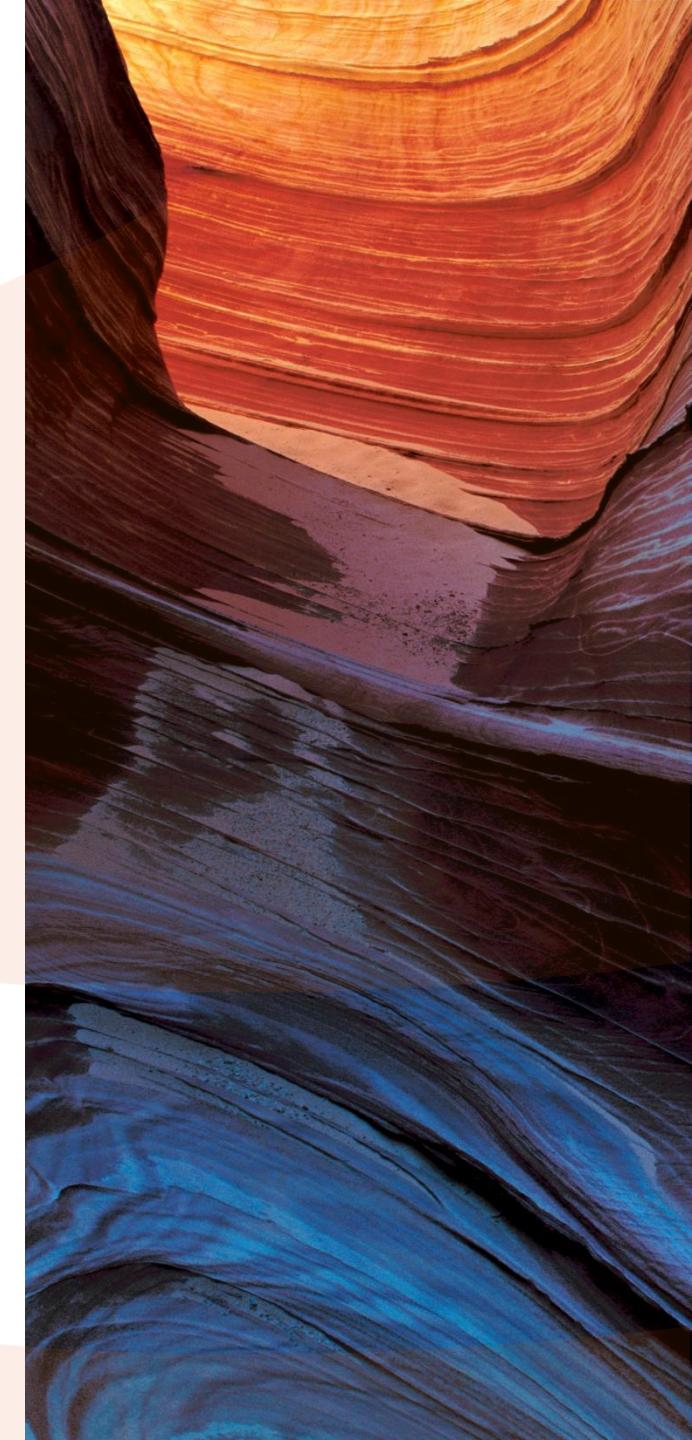


# Marrying up SPA and Policy

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## Careful assessment of clauses in SPA and Policy

- Interpretation
- Definition of loss
- Exclusions?



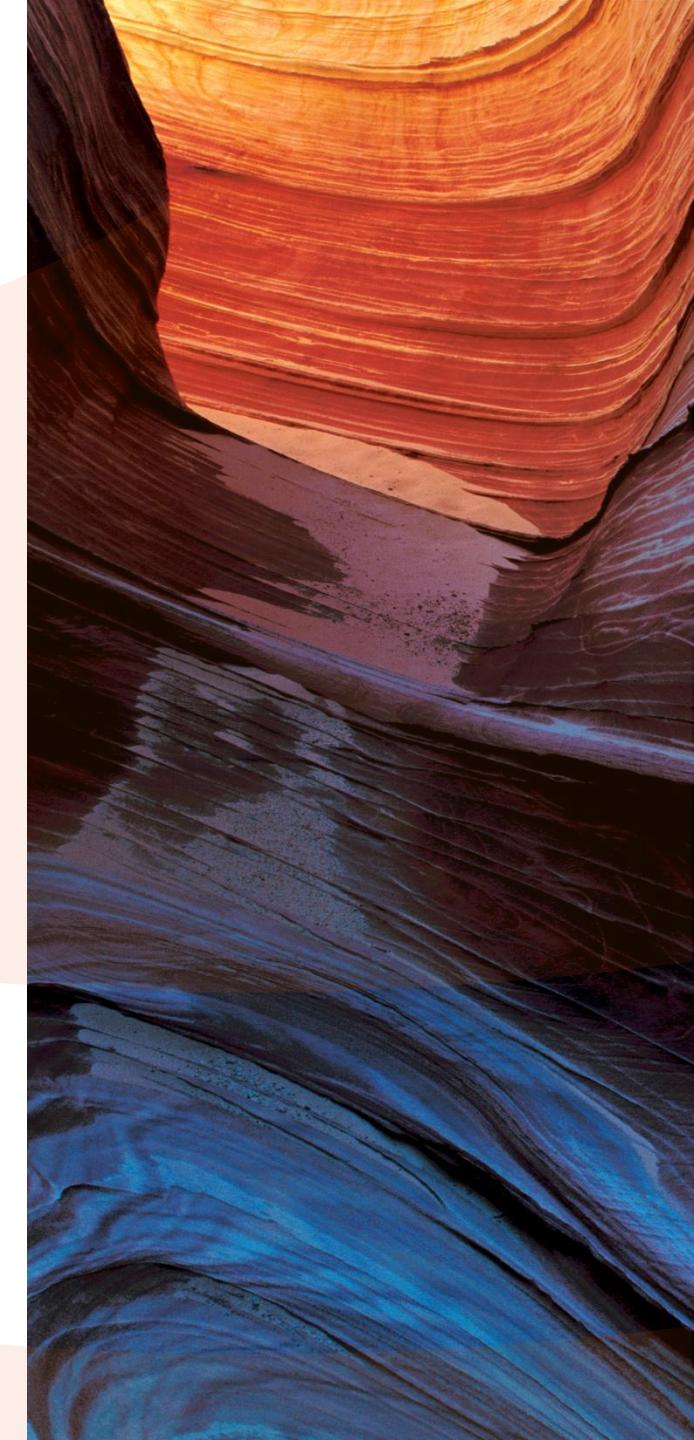
# Marrying up SPA and Policy

## Provisions and definitions aligned?

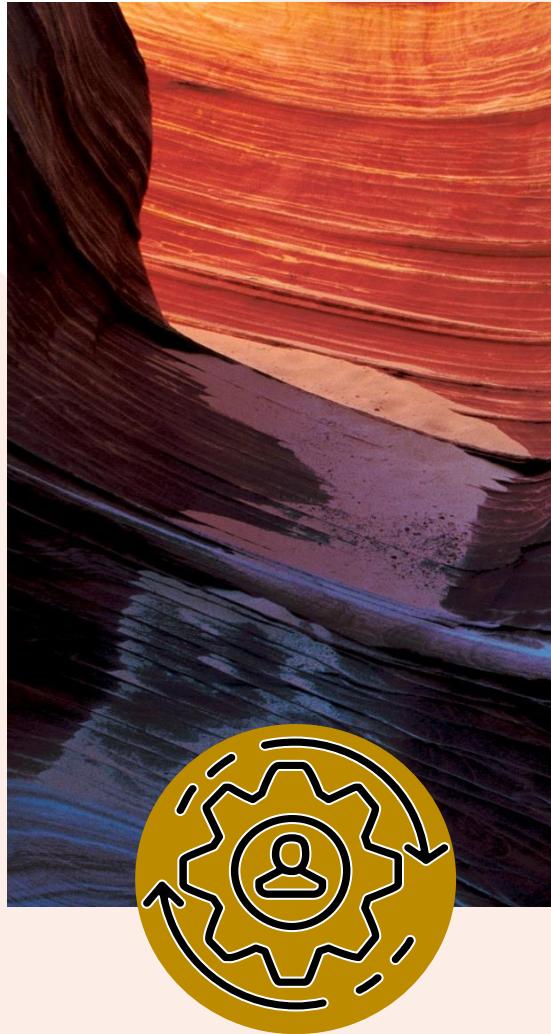
- Interpretation
- Different governing laws?

“Fairly Disclosed” has the meaning given to it in the Acquisition Agreement.

**Disclosed** means disclosed in such a manner so that on a review of the document and without having to review information not included in the Disclosed Information, a reasonable buyer would be aware of the specific fact, matter or other information and be in a position to make a reasonable informed assessment of the fact, matter or other information .



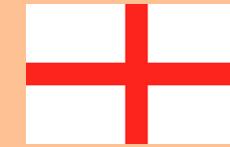
# Interpretation – Dutch law vs English law



- Haviltex standard
- Objective interpretation?
- UW file!
- London market usage



- Ordinary language
- Ambiguity? Other facts
- Importance specific wording



# Two examples

## **Material agreements**

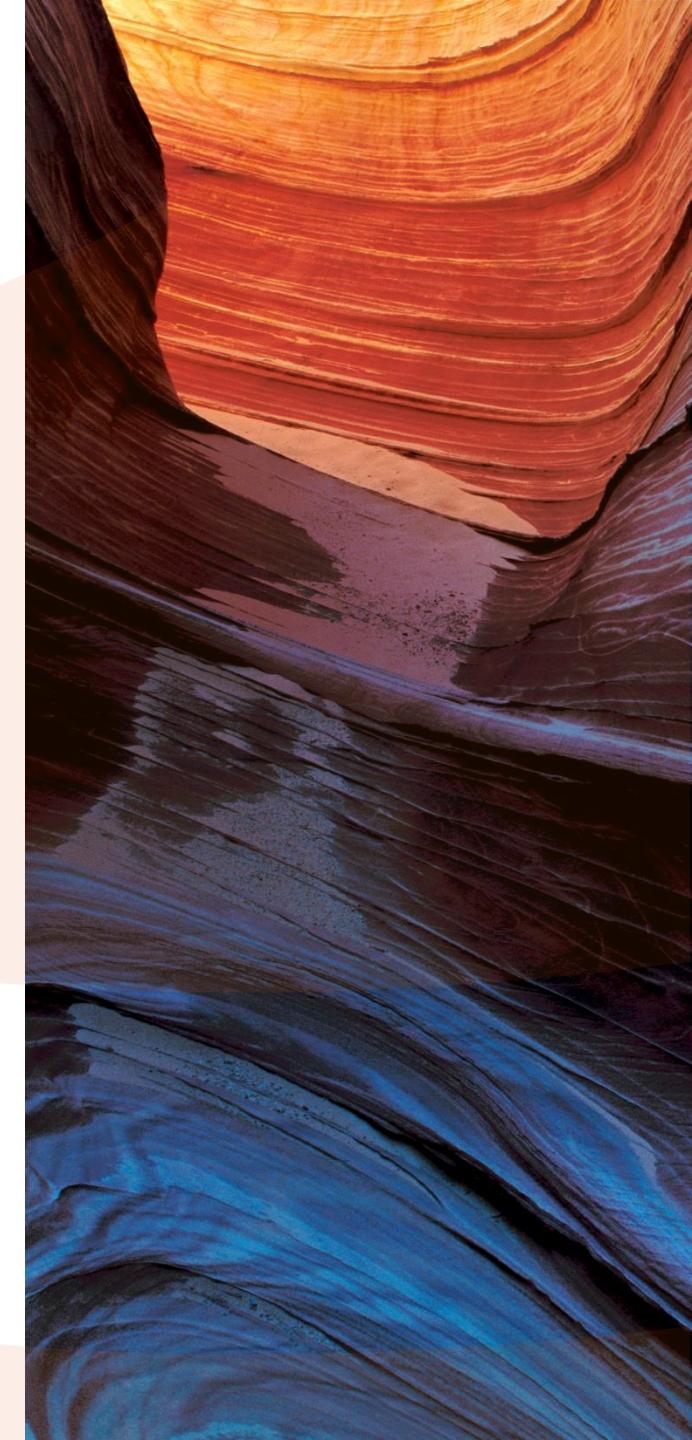
12.1.1. The Disclosed Information contains all agreements or outstanding offers by which any Group Company is bound and that:

- (A) are of material importance to each of the Group Companies; or
- (B) cannot be terminated by the relevant Group Company on less than 3 months' notice without incurring any expenditure or liability;

## The Financial Statements:

5.5.1. have been drawn up and adopted in accordance with the applicable rules, policies and law;

5.5.2. are complete and correct and show a true and fair view of the financial position, assets, liabilities and results of each Group Company for the accounting reference period ending on the Accounts Date; and



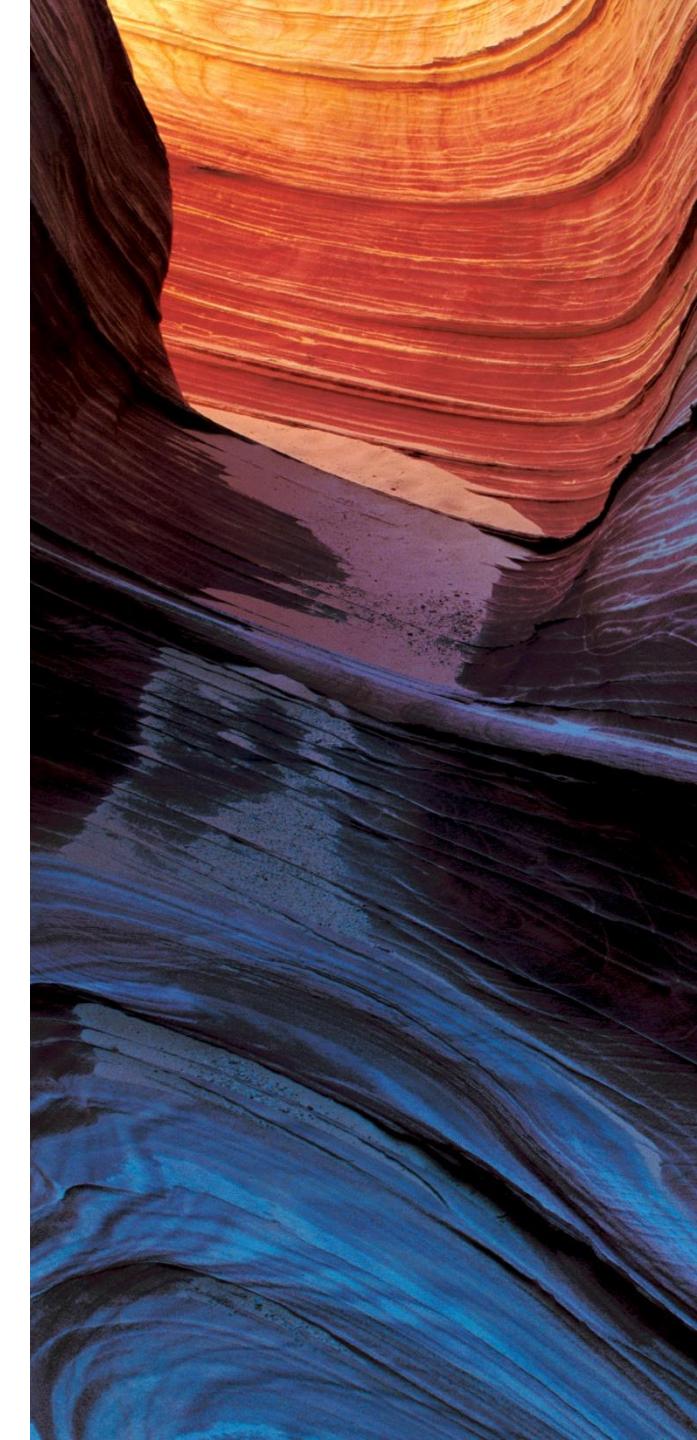
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The importance of disclosure in relation  
to claims under a W&I policy

# Key issues related to the disclosure of information

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- Disclosure and the seller's liability
- Disclosure and insurance coverage

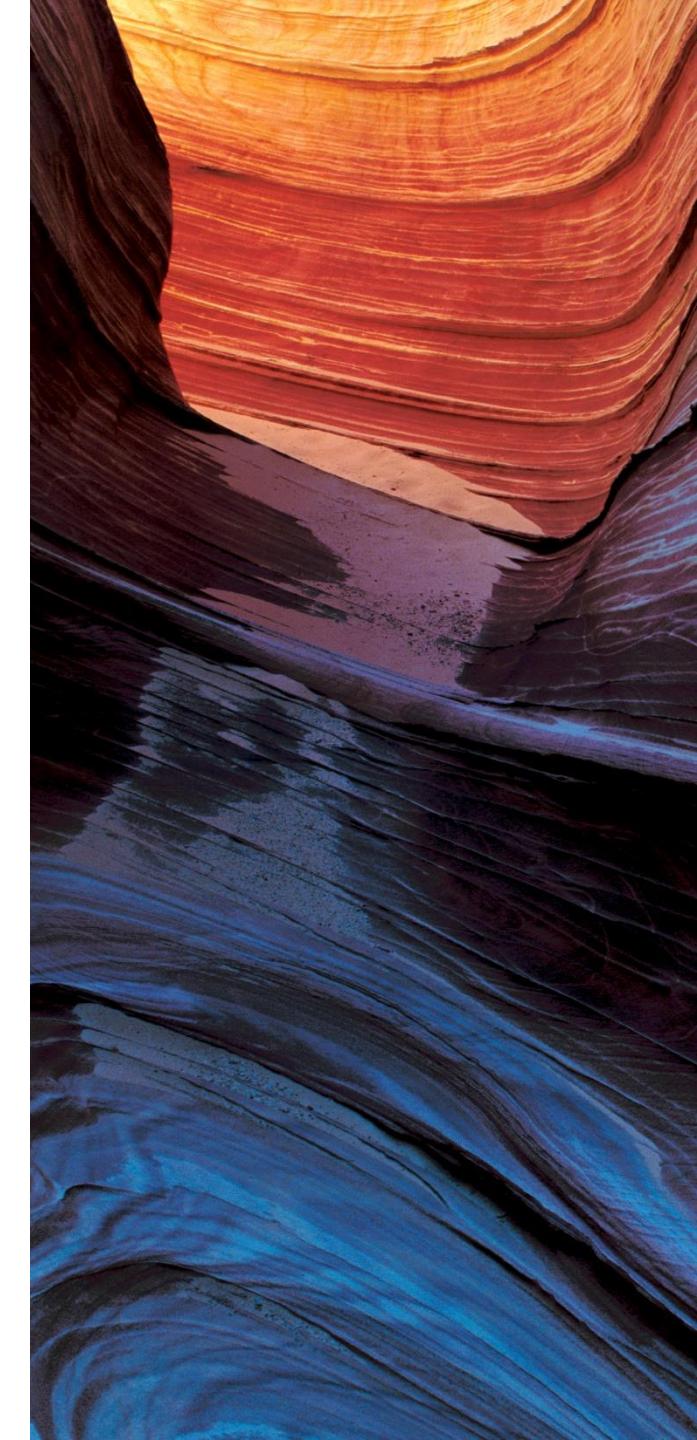


# Disclosure and seller's liability

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## **Was there a breach of warranty?**

- What information was disclosed by the seller to the buyer?
- How was this information disclosed to the buyer?

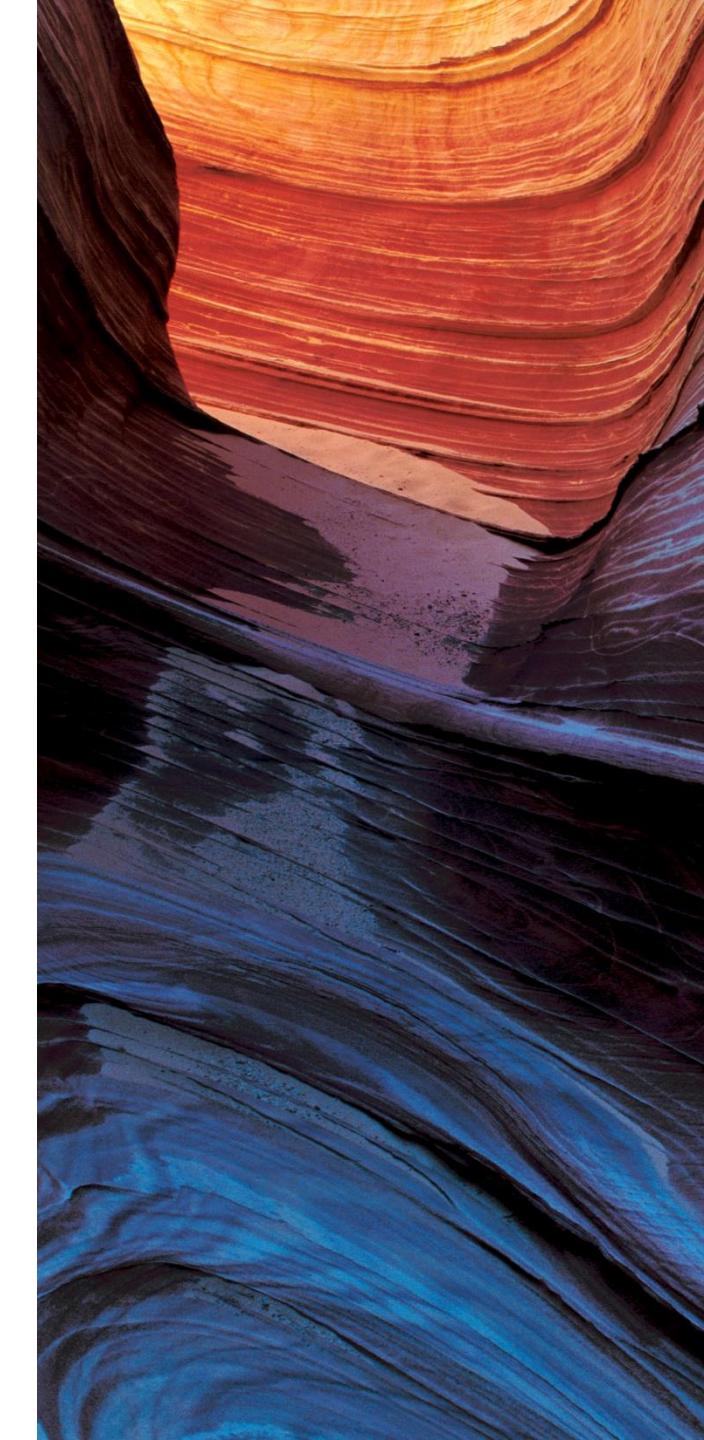


# Disclosure and insurance coverage

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## **Insured's duties of disclosure under Italian law:**

- **General principles under Italian law**
  - Article 1892 of Italian civil code
  - Article 1893 of Italian civil code
- **What happens in the event of reticent or inaccurate declarations by the insured?**
  - Annulment of the contract / Denial of coverage (fraud or gross negligence)
  - Termination of the contract/ Proportional reduction of the indemnity (no fraud nor gross negligence)
- **Who has the burden to prove the misrepresentation?**



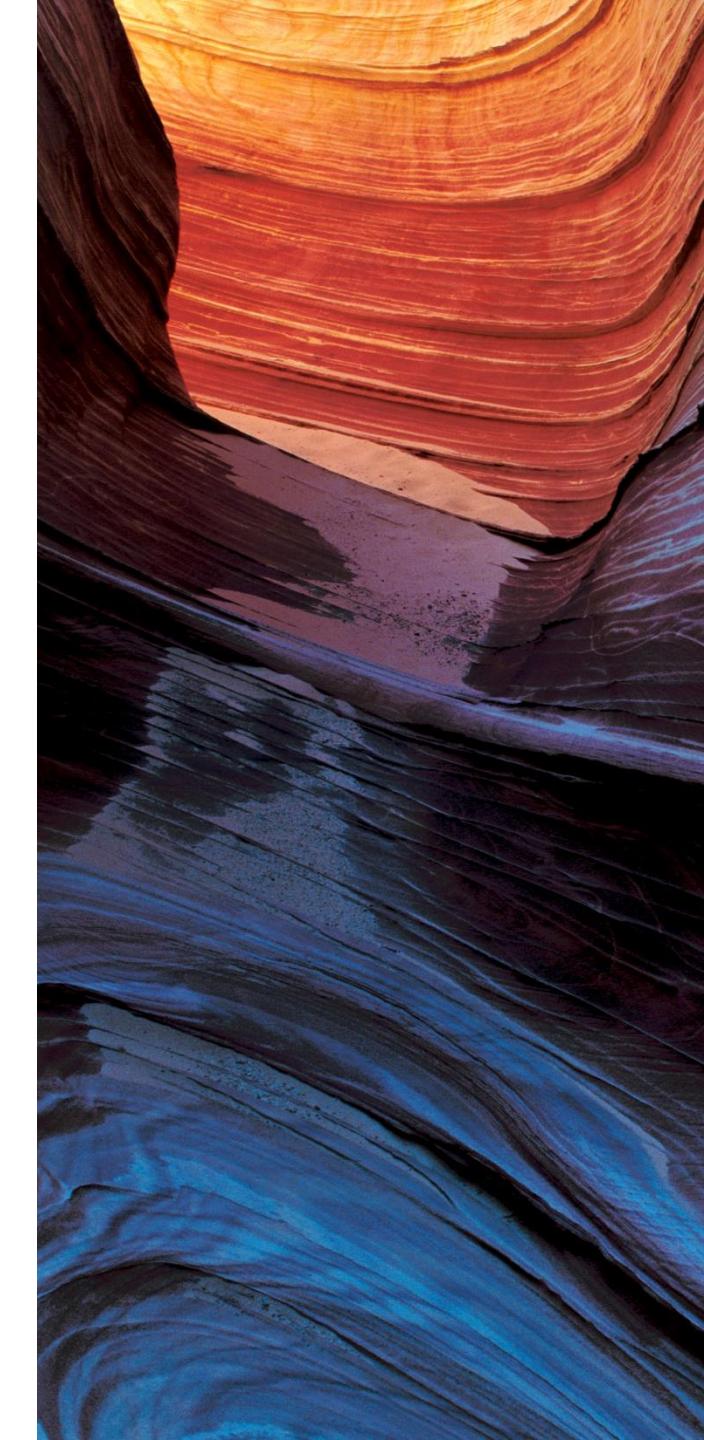
# Disclosure in W&I policies

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The insurer has to assess which reps and warranties should be covered under the policy.

The insured grants to the insurer:

- access to data room
- copy of the DD reports
- copy of the draft of the SPA



# Which breaches of R&W are not covered under the policy?

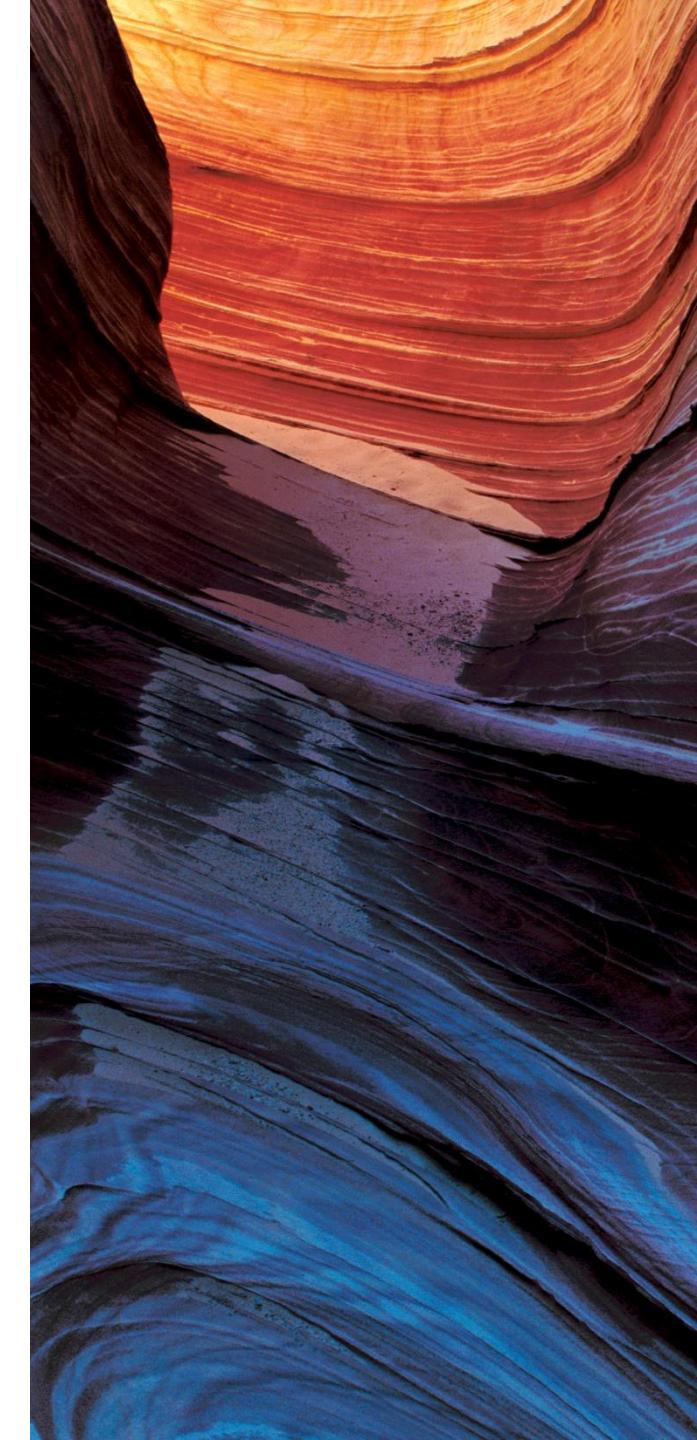
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## **Breaches related to known or disclosed matters**

- Article 1895 of Italian civil code: inexistence of the risk
- Specific exclusion provided by the policy wording

## **What should the insurer do when a claim occurs?**

- Compare documents in the data room and DD reports to assess if the claim arises from known issues



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The level of information an insured is required to provide to obtain cover

# The level of information that an insured is required to provide in order to obtain cover under a W&I policy

## Policy requirements

- Notification of claim promptly after (i) receipt of third-party claim or (ii) becoming aware of a loss
- Sufficient level of detail, about all relevant information that is available at the date of the claim notice
- Process for handling the claim

## Analysis of claim

- Claim notice often insufficient
- Experts for analysis of claim: legal, financial, environmental, tax, etc.
- Expert meetings
- Correspondence with questions

## Coverage position

- In case of denial of coverage: position will clarify reasons
- Litigation: last resort

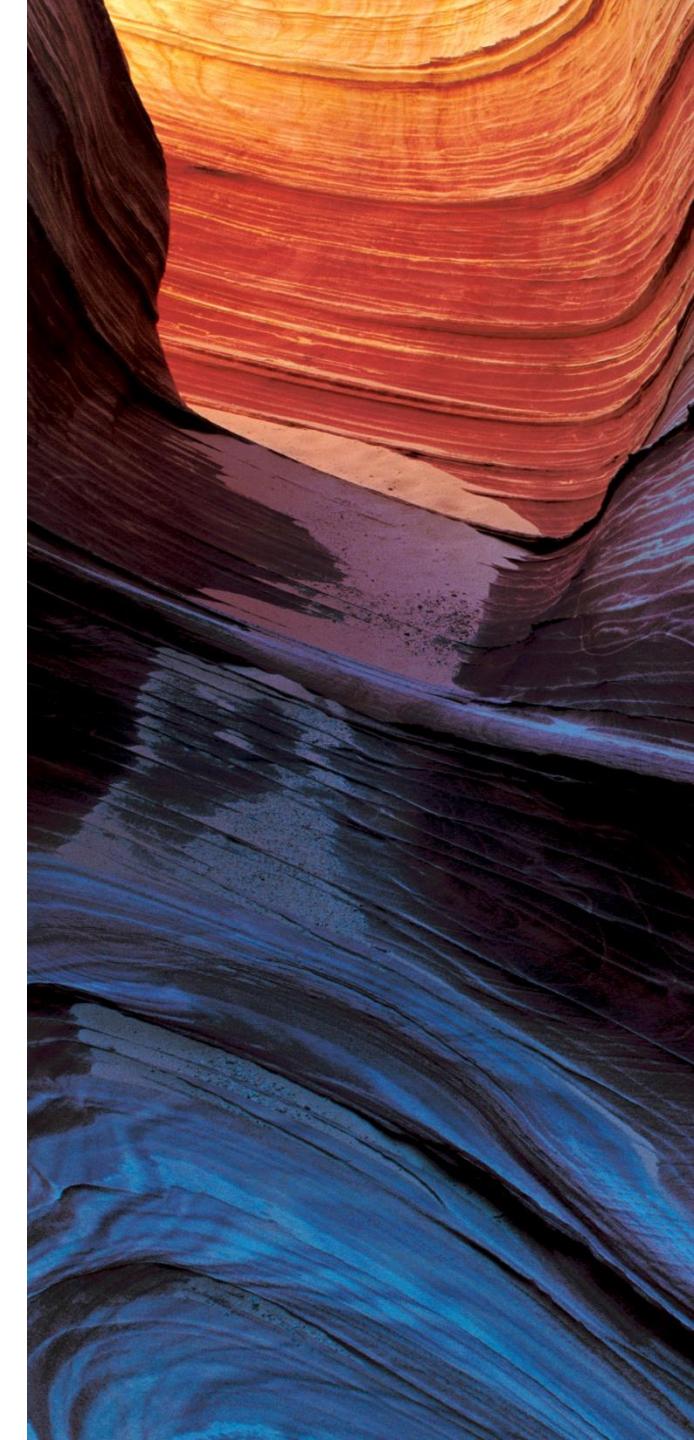
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## Valuing the claim

# Diminution in value in target shares

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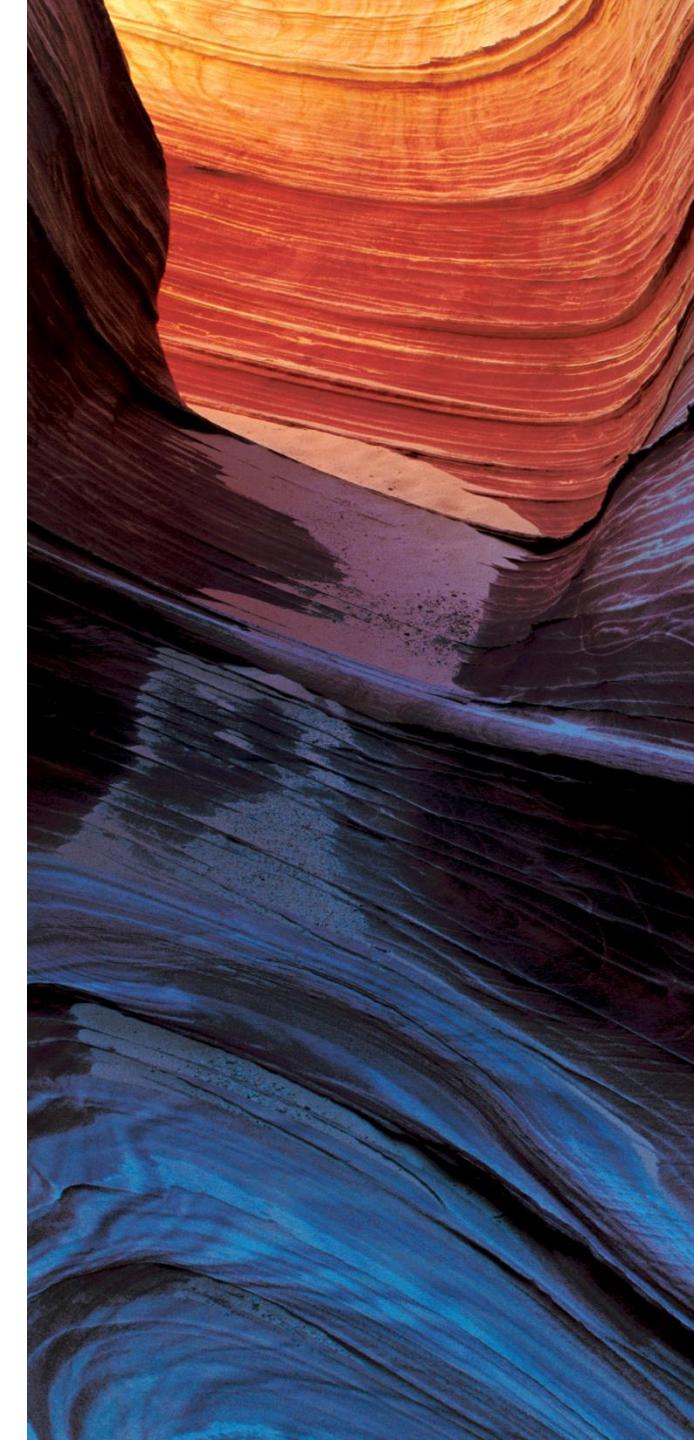
- ‘Warranty true, warranty false’
- Warranty of quality or warranty of process
- Value as warranted
  - depart from actual purchase price?
  - good or bad bargain
- True value
  - applicable methodolog(ies)
  - revised ‘inputs’
  - date at which loss is assessed



# Practical issues

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1. Address loss and quantum at an early stage
2. Insured should bear in mind the importance of providing contemporaneous valuation evidence
3. Insurers should consider what additional evidence / information they may require
4. Consider at an early stage what legal and expert input may be necessary
5. Consider the terms of the SPA and W&I policy



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