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First Annual Private Target Mergers & Acquisitions Deal Points Study

**A Project of the Mergers & Acquisitions Market Trends Subcommittee
of the
Committee on Negotiated Acquisitions
of the
American Bar Association's Section of Business Law**

The Private Target M&A Deal Points Study

**A Project of the M&A Market Trends Subcommittee
of the Committee on Negotiated Acquisitions
of the American Bar Association's Section of Business Law**

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DISCLAIMERS

The findings presented in this Study do not necessarily reflect the personal views of the Working Group members or the views of their respective firms. In addition, the acquisition agreement provisions that form the basis of this Study are drafted in many different ways and do not always fit precisely into particular "data point" categories. Therefore, Working Group members have had to make various judgment calls regarding, for example, how to categorize the nature or effect of the provisions. As a result, the conclusions presented in this Study may be subject to important qualifications that are not expressly articulated in this Study.

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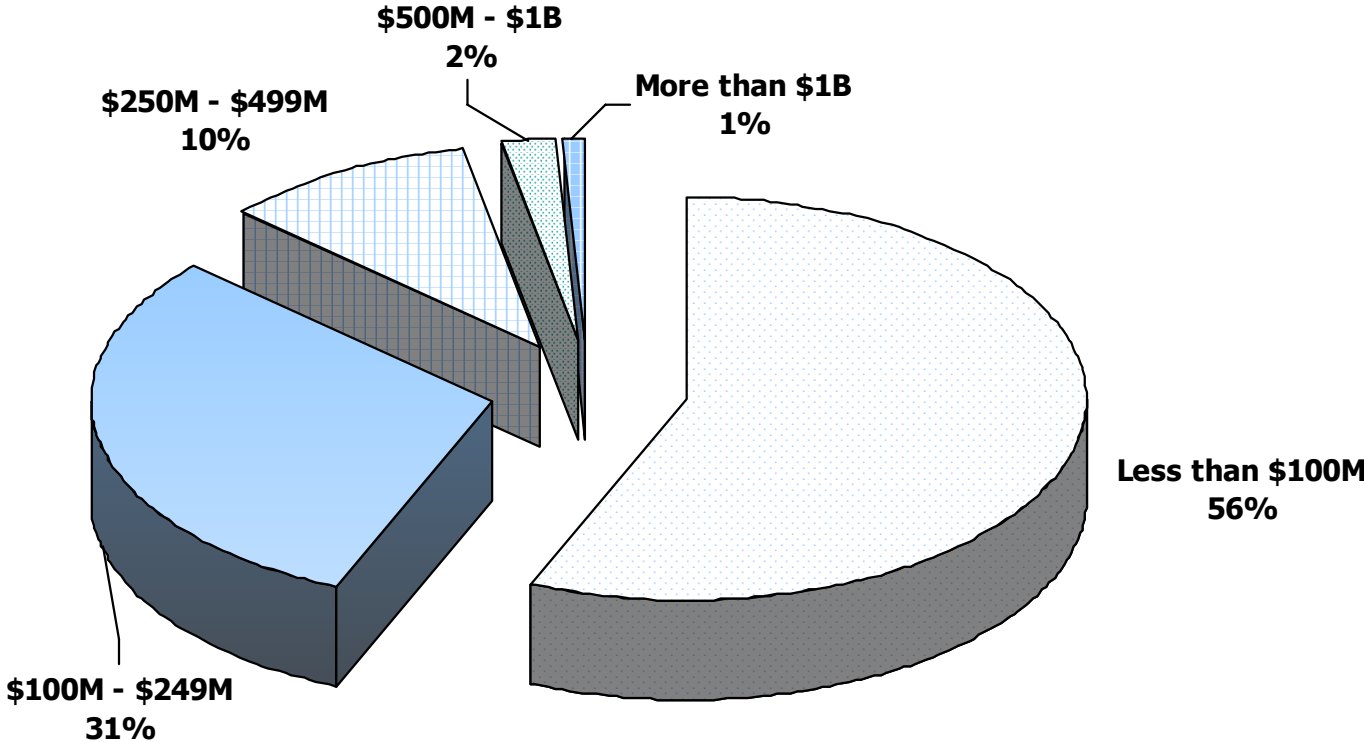
Craig McCrohon
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Study Sample Overview

- ◆ This Study analyzes publicly available acquisition agreements for transactions completed in 2004 that involved private targets being acquired by public companies.
- ◆ The Study sample was obtained from www.LivEdgar.com
 - ◆ The final Study sample of 128 acquisition agreements (out of an initial yield of 223 agreements) excludes agreements relating to transactions in which the Target's representations and warranties did not survive the closing, transactions in which the Target was in bankruptcy, reverse mergers and transactions otherwise deemed inappropriate for inclusion in the Study sample.

Transaction Value Range	# of Deals	Consideration			Closing	
		<i>All Cash</i>	<i>All Stock</i>	<i>Mixed</i>	<i>Deferred</i>	<i>Simultaneous Sign-and-Close</i>
\$25M - \$2.5B	128	59%	11%	30%	84%	16%

Study Sample Overview (by transaction value)



Contents

- I. Target's Representations and Warranties
 - A. SOX-influenced Representations
 - ◆ Financial Statements – “Fair Presentation”
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 - C. “Full Disclosure”
- II. Conditions to Closing
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 - B. No Material Adverse Change
 - C. Legal Opinions
- III. Knowledge
- IV. Indemnification
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 - B. Survival of Representations and Warranties
 - C. Baskets
 - D. Caps
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Target's Representations and Warranties

“Fair Presentation” Representation

(“fairly presents” is GAAP qualified)

“Such financial statements fairly present (and the financial statements delivered pursuant to Section 5.8 will fairly present) the financial condition and the results of operations, changes in shareholders’ equity and cash flows of [Target] as at the respective dates of and for the periods referred to in such financial statements, **all in accordance with GAAP.**”

(ABA Model Asset Purchase Agreement)

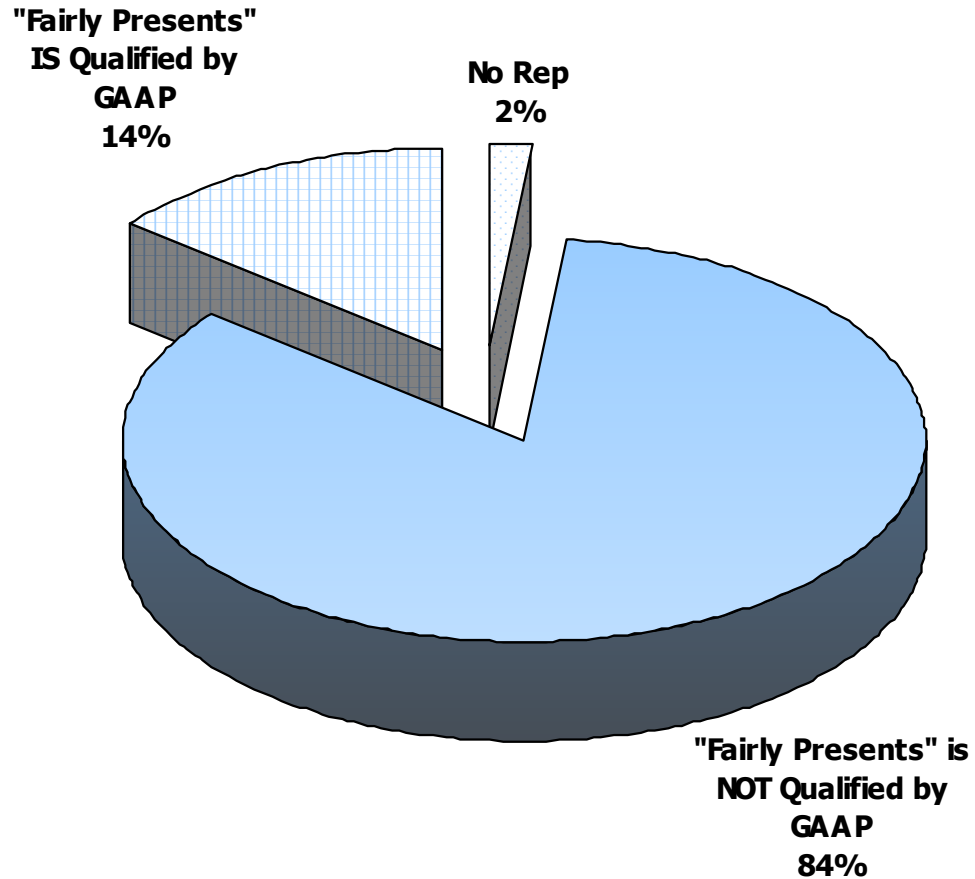
“Fair Presentation” Representation

(“fairly presents” is not qualified by GAAP)

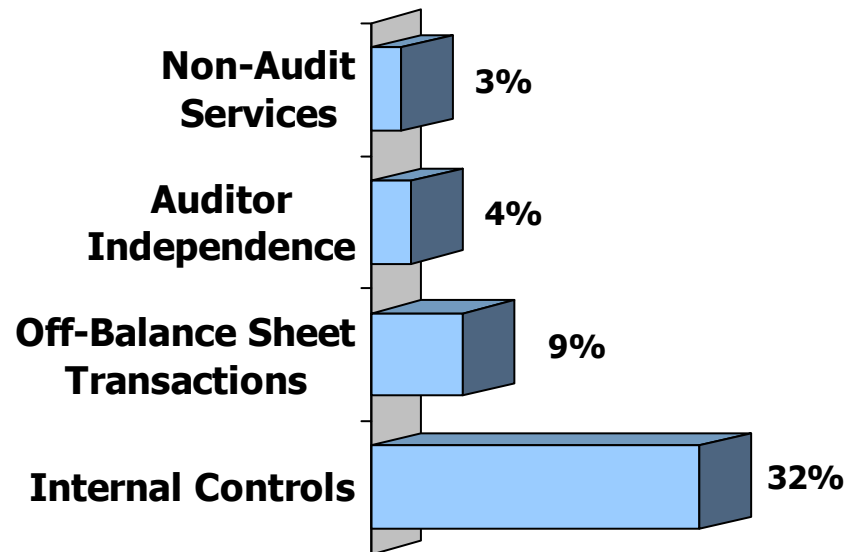
The [Target] Financial Statements are accurate and complete in all material respects and fairly present in all material respects the financial position of [Target] and its consolidated Subsidiaries as of the respective dates thereof and the results of operations and cash flows of [Target] and its consolidated Subsidiaries for the periods covered thereby. The [Target] Financial Statements have been prepared in accordance with GAAP applied on a consistent basis throughout the periods covered (except that the financial statements referred to in Section 2.4(a)(ii) do not contain footnotes).

(Target: Aelita Software Corporation / Buyer: Quest Software Inc.)

"Fair Presentation" Representation



Other SOX-Influenced Representations



Buyer-Favorable “No Undisclosed Liabilities” Representation

“***No Undisclosed Liabilities***. Except as set forth in Part 3.13 [of the Disclosure Letter], [Target] has no Liability except for Liabilities reflected or reserved against in the Balance Sheet or the Interim Balance Sheet and current liabilities incurred in the Ordinary Course of Business of [Target] since the date of the Interim Balance Sheet.”

“***Liability***”--with respect to any Person, any liability or obligation of such Person of any kind, character or description, whether known or unknown, absolute or contingent, accrued or unaccrued, disputed or undisputed, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, vested or unvested, executory, determined, determinable or otherwise, and whether or not the same is required to be accrued on the financial statements of such Person.

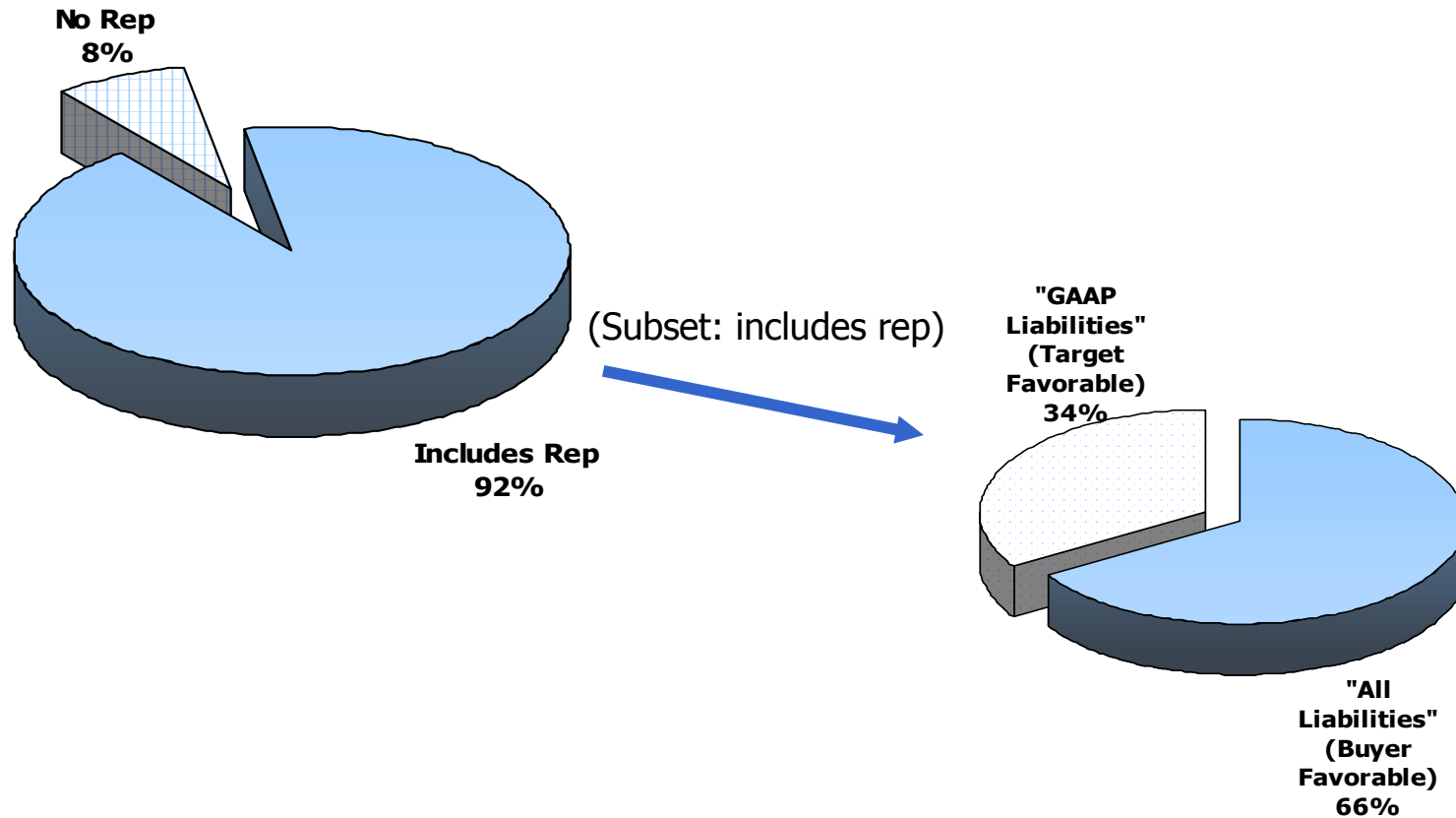
(ABA Model Asset Purchase Agreement)

Target-Favorable “No Undisclosed Liabilities” Representation

“No Undisclosed Liabilities. Except as set forth in Part 3.13 [of the Disclosure Letter], [Target] has no liability ***of the nature required to be disclosed in the liabilities column of a balance sheet prepared in accordance with GAAP*** except for

...

"No Undisclosed Liabilities" Representation

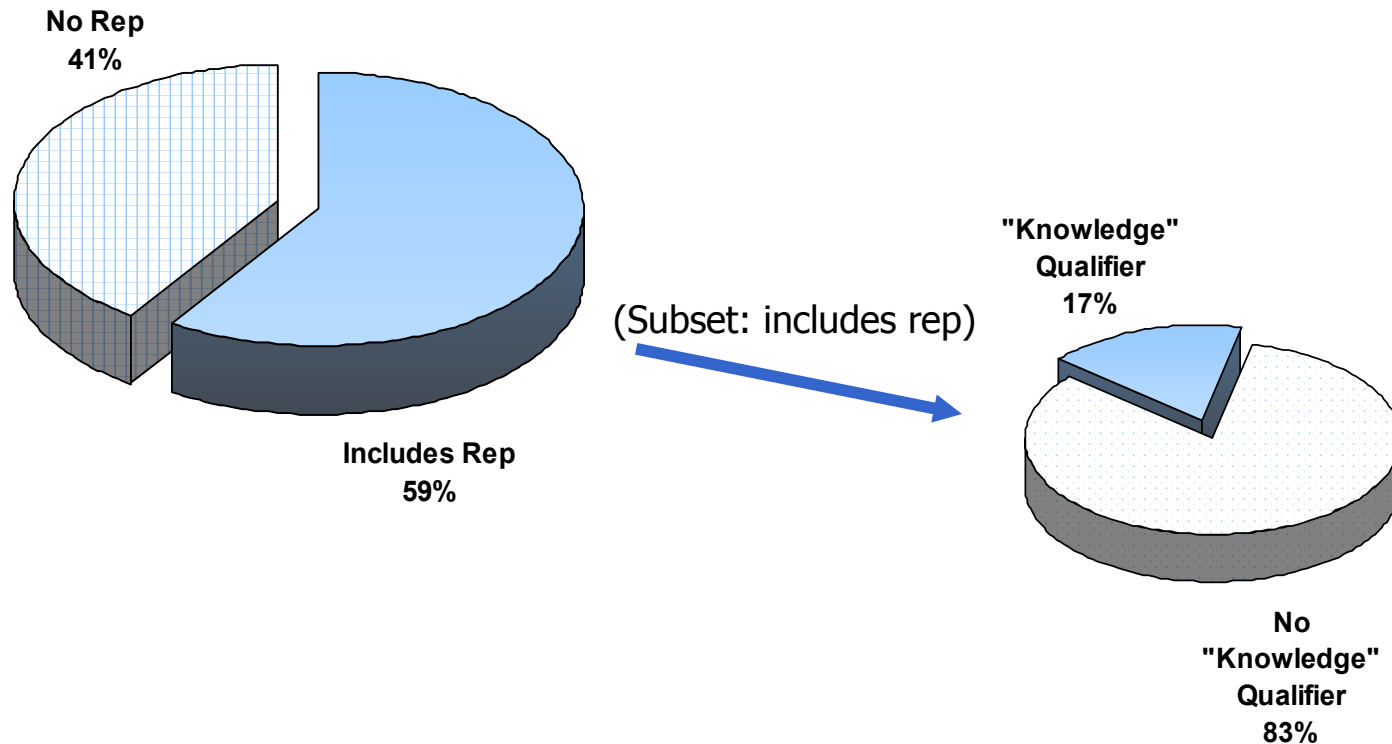


“Full Disclosure” Representation

“Full Disclosure. No representation or warranty or other statement made by [Target or any Target Shareholder] in this Agreement, the Disclosure Letter, any supplement to the Disclosure Letter, the certificates delivered pursuant to Section 2.7(a) or otherwise in connection with the Contemplated Transactions contains any untrue statement or omits to state a material fact necessary to make any of them, in light of the circumstances in which it was made, not misleading.”

(ABA Model Asset Purchase Agreement)

"Full Disclosure" Representation



Conditions to Closing*

*** Disregards the Study sample's 16% of deals that are "simultaneous sign-and-close"**

Accuracy of Target's Representations – When Must They Be Accurate?

(single point in time: at closing)

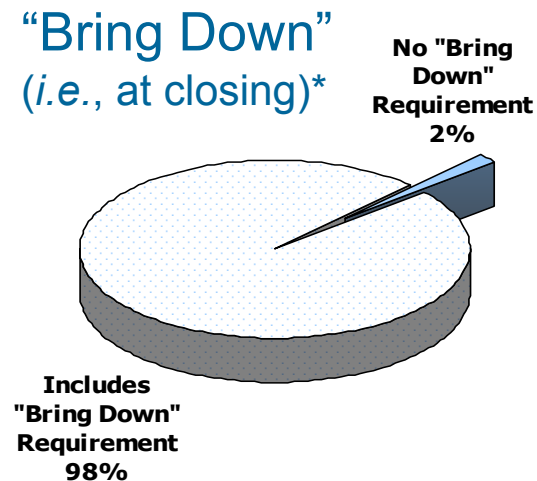
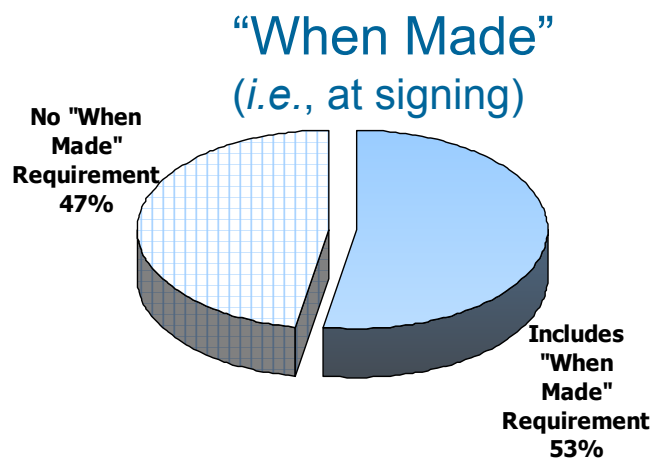
“Accuracy of Representations and Warranties. Each of the representations and warranties made by the Target in this Agreement shall have been accurate in all respects **as of the Closing Date** as if made on the Closing Date.”

Accuracy of Target's Representations – When Must They Be Accurate?

(two points in time: at signing and at closing)

“Accuracy of Representations and Warranties. Each of the representations and warranties made by the Target in this Agreement shall have been accurate in all respects **as of the date of this Agreement**, and shall be accurate in all respects **as of the Closing Date** as if made on the Closing Date.”

Accuracy of Target's Representations – When Must They Be Accurate?



* Includes deals with both “when made” and “bring down” requirements and deals solely with a “bring down” requirement

Accuracy of Target's Representations – How Accurate Must They Be?

("accurate in all respects")

"Accuracy of Representations and Warranties. Each of the representations and warranties made by the Target in this Agreement shall have been accurate **in all respects** as of the Closing Date as if made on the Closing Date."

Accuracy of Target's Representations – How Accurate Must They Be?

("accurate in all material respects")

"Accuracy of Representations and Warranties. Each of the representations and warranties made by the Target in this Agreement shall have been accurate in **all material respects** as of the Closing Date as if made on the Closing Date."

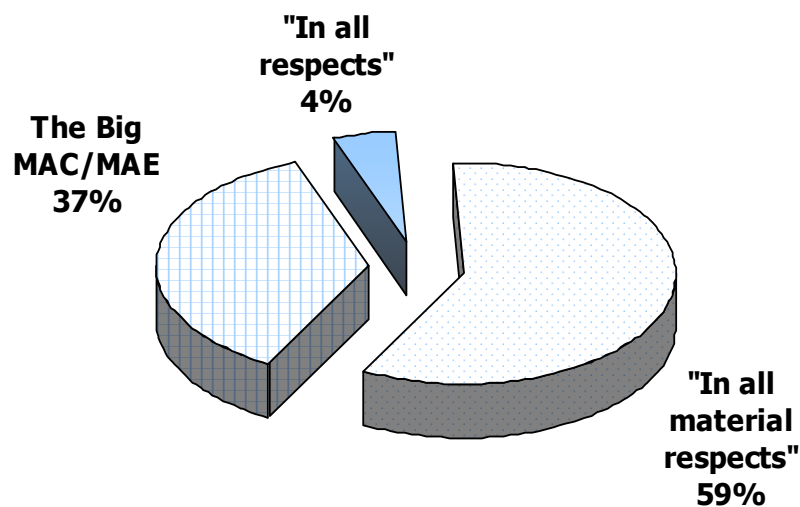
Accuracy of Target's Representations – How Accurate Must They Be?

(the "Big MAC/MAE" qualification)

“Accuracy of Representations and Warranties. Each of the representations and warranties made by the Target in this Agreement shall be accurate in all respects as of the Closing Date as if made on the Closing Date, ***except for inaccuracies of representations or warranties the circumstances giving rise to which, individually or in the aggregate, do not constitute and could not reasonably be expected to have a Material Adverse Effect.***”

Accuracy of Target's Representations – How Accurate Must They Be?*

(inclusion of materiality qualifiers)



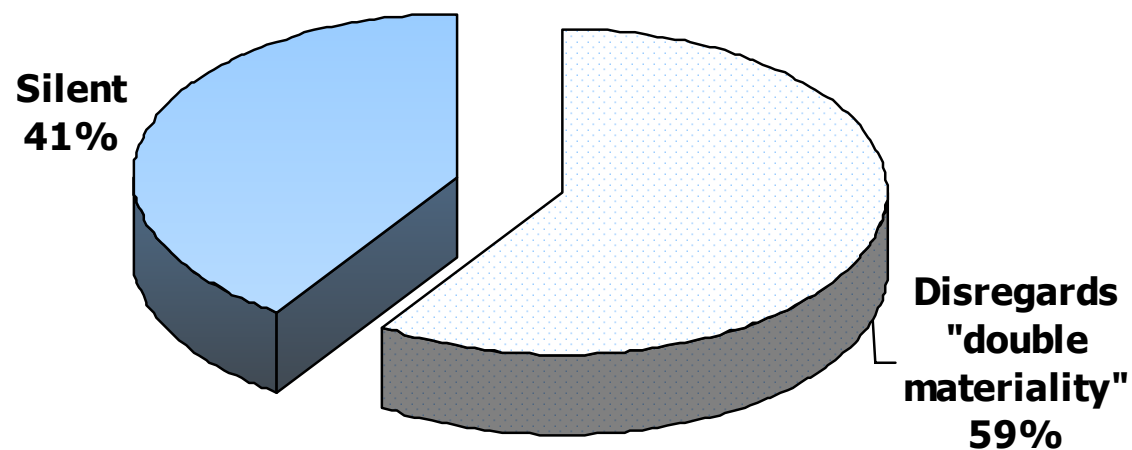
* Subset: Deals with "bring down" condition

Accuracy of Target's Representations – How Accurate Must They Be?

("double materiality" carveout)

“Accuracy of Representations and Warranties. Each of the representations and warranties made by the Target in this Agreement shall be accurate in all respects as of the Closing Date as if made on the Closing Date, except for inaccuracies of representations or warranties the circumstances giving rise to which, individually or in the aggregate, do not constitute and could not reasonably be expected to have a Material Adverse Effect ***(it being understood that, for purposes of determining the accuracy of such representations and warranties, all "Material Adverse Effect" qualifications and other materiality qualifications and similar qualifications contained in such representations and warranties shall be disregarded).***”

Accuracy of Target's Representations* ("double materiality")



* Subset: "Bring down" deals with materiality (including MAE) qualifiers

MAC Condition

Stand-Alone:

“No Material Adverse Change. Since the date of this Agreement, there has not been any Target Material Adverse Change.”

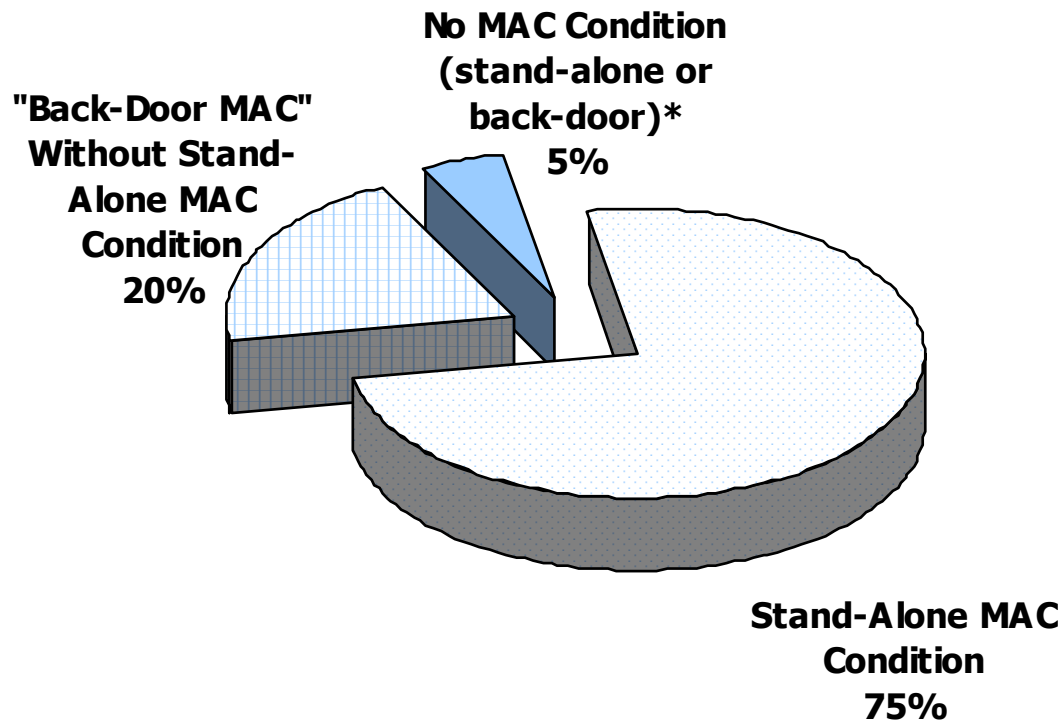
“Back-Door”:

“Absences of Changes” representation (“Since the Balance Sheet Date, there has not been any Target Material Adverse Change.”)

plus

“Bring Down” formulation of “Accuracy of Representations” condition

Buyer's MAC Condition



*Includes one deal with a MAC termination right

Buyer's MAC Condition

(various formulations – quantified MAC)

“Material Adverse Effect” means any change or effect that is or would reasonably be expected to be materially adverse to the assets, properties, Business, operations, liabilities, results of operation or financial condition of [Target] and its Subsidiaries, taken as a whole; **including, without limitation, the occurrence prior to Closing of any single event, or any series of related events, or set of related circumstances, which could reasonably be expected to cause an actual, direct net decrease in EBITDA for either the 12 month period ending January 31, 2004 or EBITDA for any 12 month periods ending after the Closing Date but prior to the first anniversary of the Closing Date, in excess of [****] (after giving effect to any other offsetting increases or decreases affecting EBITDA); [****]**

(Global Imaging Systems acquisition of Imagine Technology Group)

Buyer's MAC Condition

(various formulations – quantified MAC)

"Material Adverse Effect" means, (a) with respect to [Target] or the Shareholders, any breach of a representation or warranty hereunder or a covenant to be performed by [Target] or the Shareholders the effect of which is **likely to cause [Target] (or the Surviving Company) to pay or become liable to pay more than Five Hundred Thousand (\$500,000) Dollars to remedy any single such event, violation, breach, default or termination (as the case may be) or more than One Million (\$1,000,000) Dollars** in the aggregate for all such events, violations, breaches, or defaults or terminations (as the case may be), and (b) with respect to Parent, any breach of a representation or warranty hereunder or a covenant to be performed by the Parent or Acquisition Subsidiary the effect of which is likely to cause the Parent (or the Surviving Company) to pay or become liable to pay more than Five Hundred Thousand (\$500,000) Dollars to remedy any single such event, violation, breach, default or termination (as the case may be) or more than One Million (\$1,000,000) Dollars in the aggregate for all such events, violations, breaches, or defaults or terminations (as the case may be).

(Starcraft Corp acquisition of Wheel-to-Wheel Inc.)

Buyer's MAC Condition

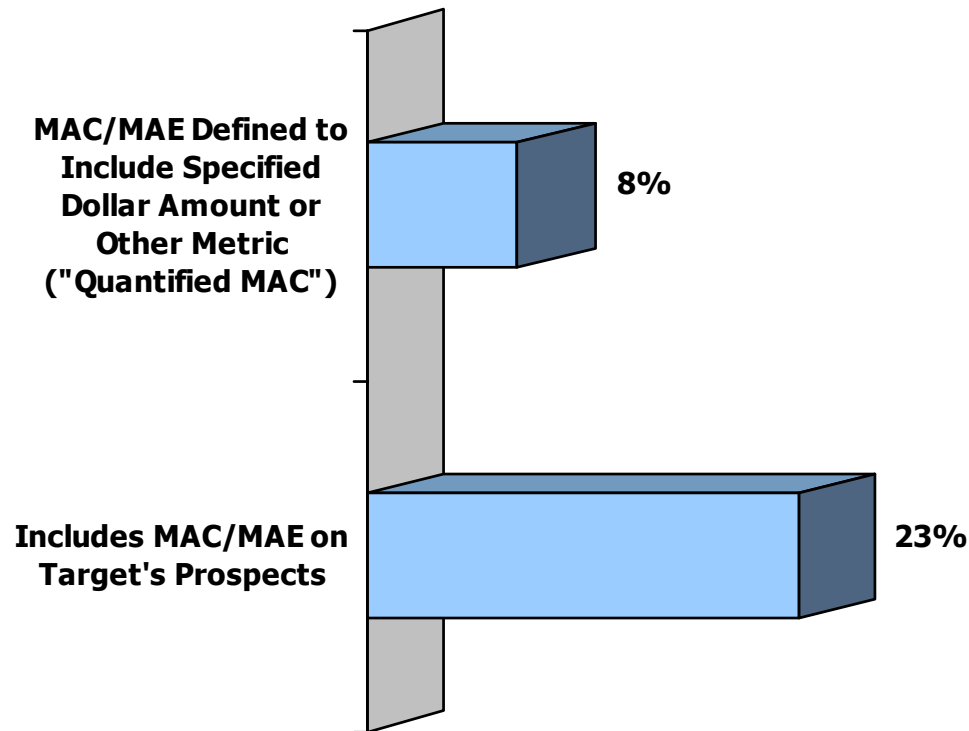
(various formulations – prospects)

“[Target] Material Adverse Effect” shall mean any change, event, occurrence or condition which has had, or could reasonably be expected to have, individually or in the aggregate, a material adverse effect on the business, assets, liabilities, financial condition, results of operations or prospects of the [Target], taken as a whole ...

(CNET Networks Inc. Inc acquisition of Twofolds Photos Inc..)

Buyer's MAC Condition (various formulations –quantified MACs and prospects)

(All deals with stand-alone or backdoor MAC condition)



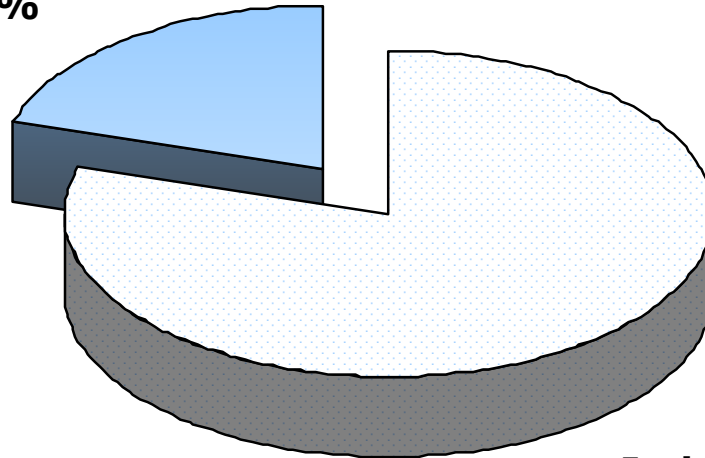
MAC/MAE Carveouts

"MATERIAL ADVERSE [CHANGE/] EFFECT" means, when used in connection with a Person, any change, event, violation, inaccuracy, circumstance or effect that is materially adverse to the business, assets, liabilities, financial condition, results of operations or prospects of such Person taken as a whole, **other than as a result of (i) changes generally adversely affecting the United States economy (so long as such Target is not disproportionately affected thereby) (ii) performance by such Person of its obligations under this Agreement or, with respect to [Target] only, the failure of Target to consent to actions reasonably requested by [Target] pursuant to Section 4.1 of this Agreement, (iii) the announcement or pendency of the transactions contemplated by this Agreement, or (iv) war or the outbreak of hostilities ...**

MAC/MAE Carveouts

(All deferred closing deals)

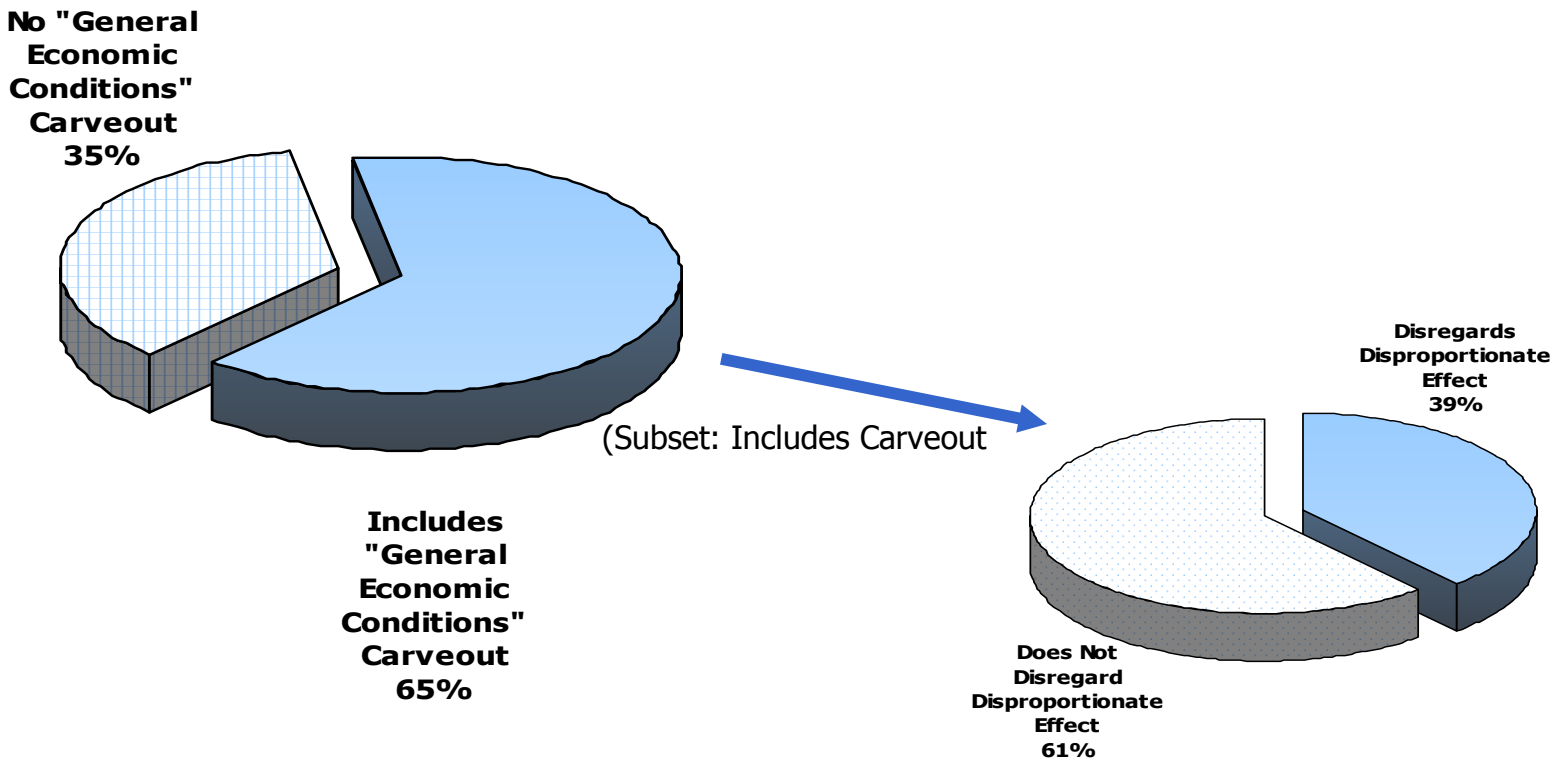
**No MAC/MAE
Carveouts
20%**



**Includes
MAC/MAE
Carveouts
80%**

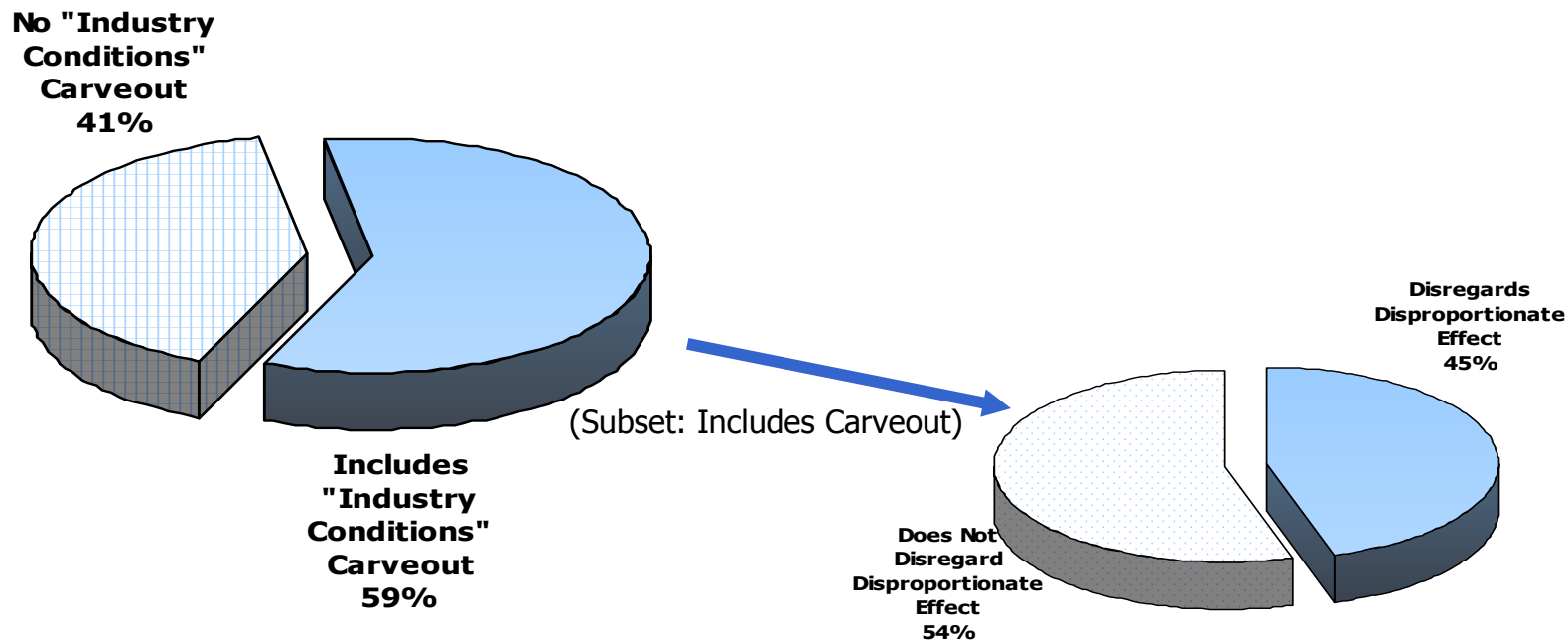
MAC/MAE Carveouts – General Economic Conditions

(All deferred closing deals)



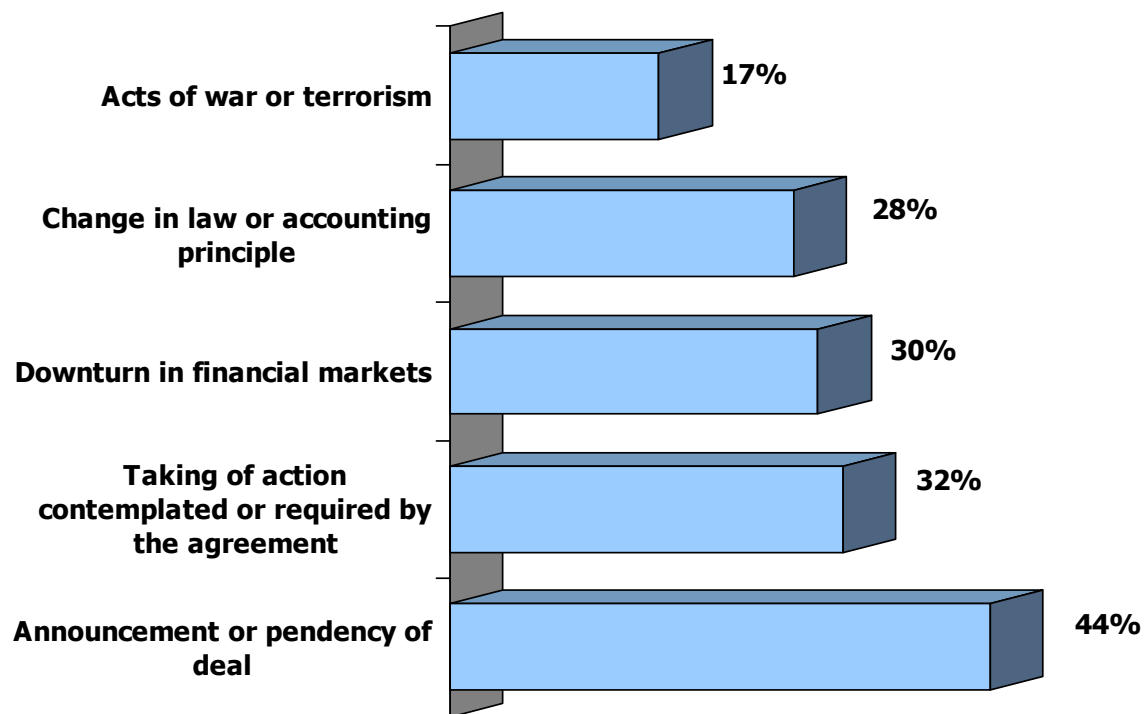
MAC/MAE Carveouts – Industry Conditions

(All deferred closing deals regardless of existence of MAC condition)



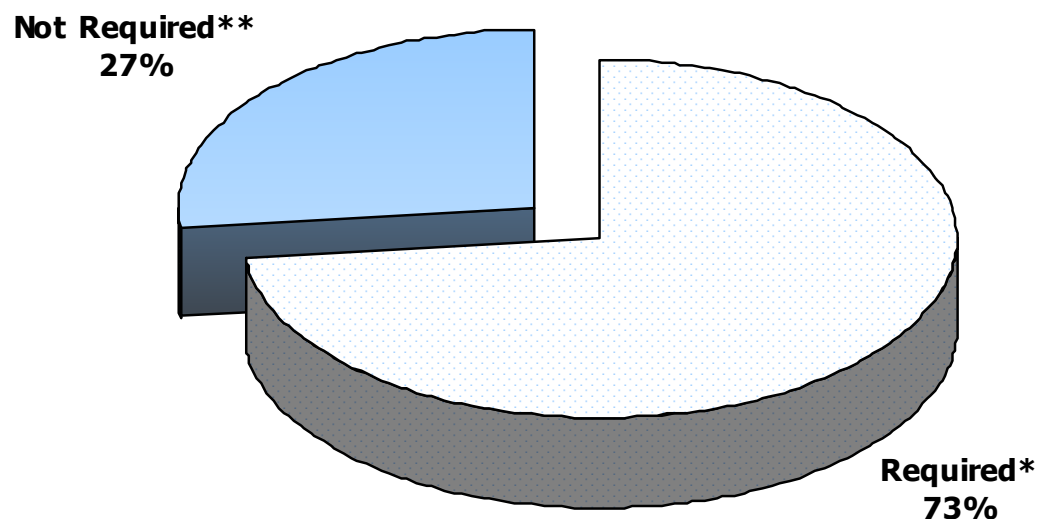
Other Popular MAC/MAE Carveouts

(All deferred closing deals)



Opinion (Non-Tax) of Target's Counsel

(All deals: includes simultaneous sign-and-close deals)



* Typically as a condition to closing, but including opinions required in a “Closing Deliveries” covenant

**Does not account for opinions that may have been required or delivered outside of the express terms of the agreement

Knowledge

Knowledge Investigation Standards

(no investigation requirement - actual knowledge)

“Knowledge of [Target]” or “[Target’s] Knowledge” means the actual knowledge of [Target’s] Chief Executive Officer, Chief Financial Officer or Chief Technology Officer.

(Ciena Corporation acquisition of Internet Photonics, Inc.)

“Knowledge” means (a) with respect to [Target], the actual knowledge of the Acquired Companies’ chief executive officer, Vice President of Finance and Administration senior vice presidents, vice presidents, Richard Katz, Sanjay Anand, and officers having responsibility for such matter, and (b) with respect to Parent, the actual knowledge of Parent’s chief executive officer, chief financial officer and other officers and employees having responsibility for such matter.

(United Online, Inc. acquisition of Classmates Online, Inc)

Knowledge Investigation Standards

(with investigation requirement – constructive knowledge)

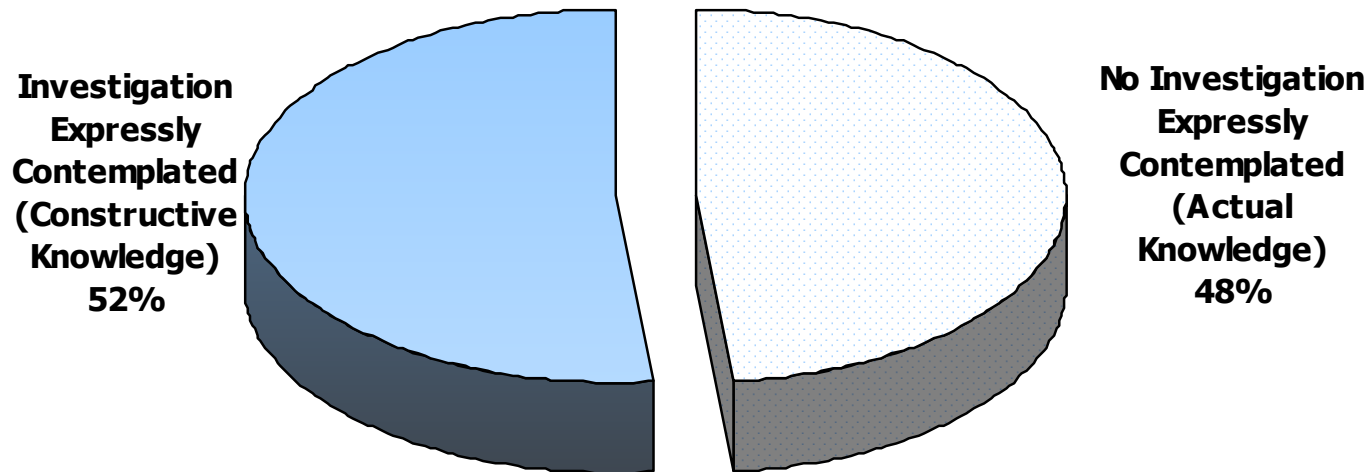
“Knowledge” means, when referring to the “Knowledge” of [Target], or any similar phrase or qualification based on knowledge or awareness with respect to [Target], (i) the actual knowledge of any of [named individuals], and (ii) the knowledge that any such Person referenced in (i) above, as a prudent business person, would have obtained in the conduct of his or her business.

(Epiq Systems Inc. acquisition of Poorman Douglas Corporation)

“[k]nowledge” means (i) with respect to any natural person, the actual knowledge, of such person, or (ii) with respect to any corporation or entity, the actual knowledge of such party's officers provided that such persons shall have made due and diligent inquiry of those employees and directors of such party whom such officers reasonably believe would have actual knowledge of the matters represented.

(Tumbleweed Communications Corp acquisition of Corvigo Inc.)

Knowledge Investigation Standards

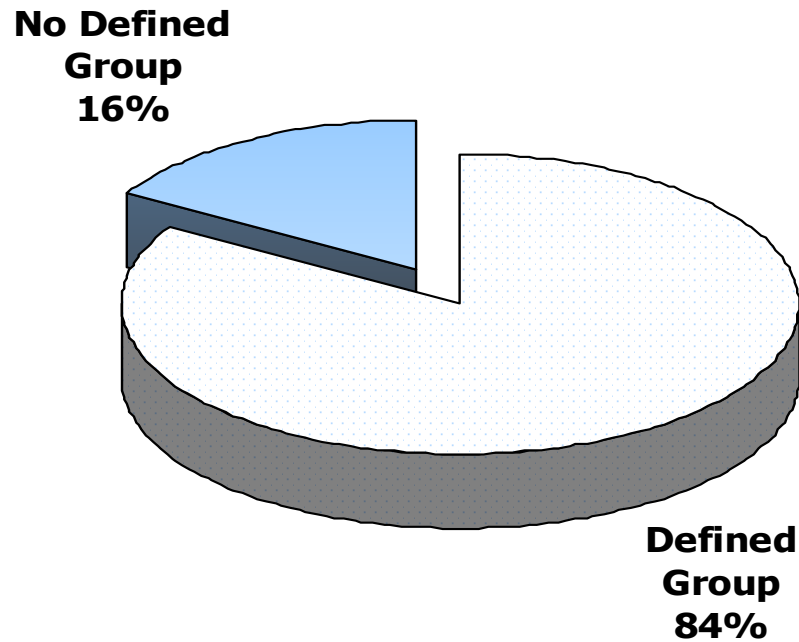


Whose Knowledge? ("Knowledge Groups")

"known" or "knowledge" means, with respect to any party, the actual knowledge of such party's executive officers and senior management and such knowledge as would be reasonably expected to be known by such executive officers in the ordinary and usual course of the performance of their professional responsibilities to such party.

(Outdoor Channel Holdings Inc acquisition of The Outdoor Channel Inc)

Whose Knowledge? ("Knowledge Groups")



Indemnification

“Sandbagging”

(“pro-sandbagging” clauses, *i.e.*, no limitation on Buyer’s remedies based on Buyer’s pre-existing knowledge of an inaccuracy or breach)

“The right to indemnification, reimbursement or other remedy based upon such representations, warranties, covenants and obligations **shall not be affected by any investigation** (including any environmental investigation or assessment) conducted with respect to, or **any Knowledge acquired (or capable of being acquired) at any time**, whether before or after the execution and delivery of this Agreement or the Closing Date, with respect to the accuracy or inaccuracy of or compliance with any such representation, warranty, covenant or obligation.”

(ABA Model Asset Purchase Agreement)

“Sandbagging”

(“anti-sandbagging” clauses, *i.e.*, express limitation on Buyer’s remedies based on Buyer’s pre-existing knowledge of an inaccuracy or breach)

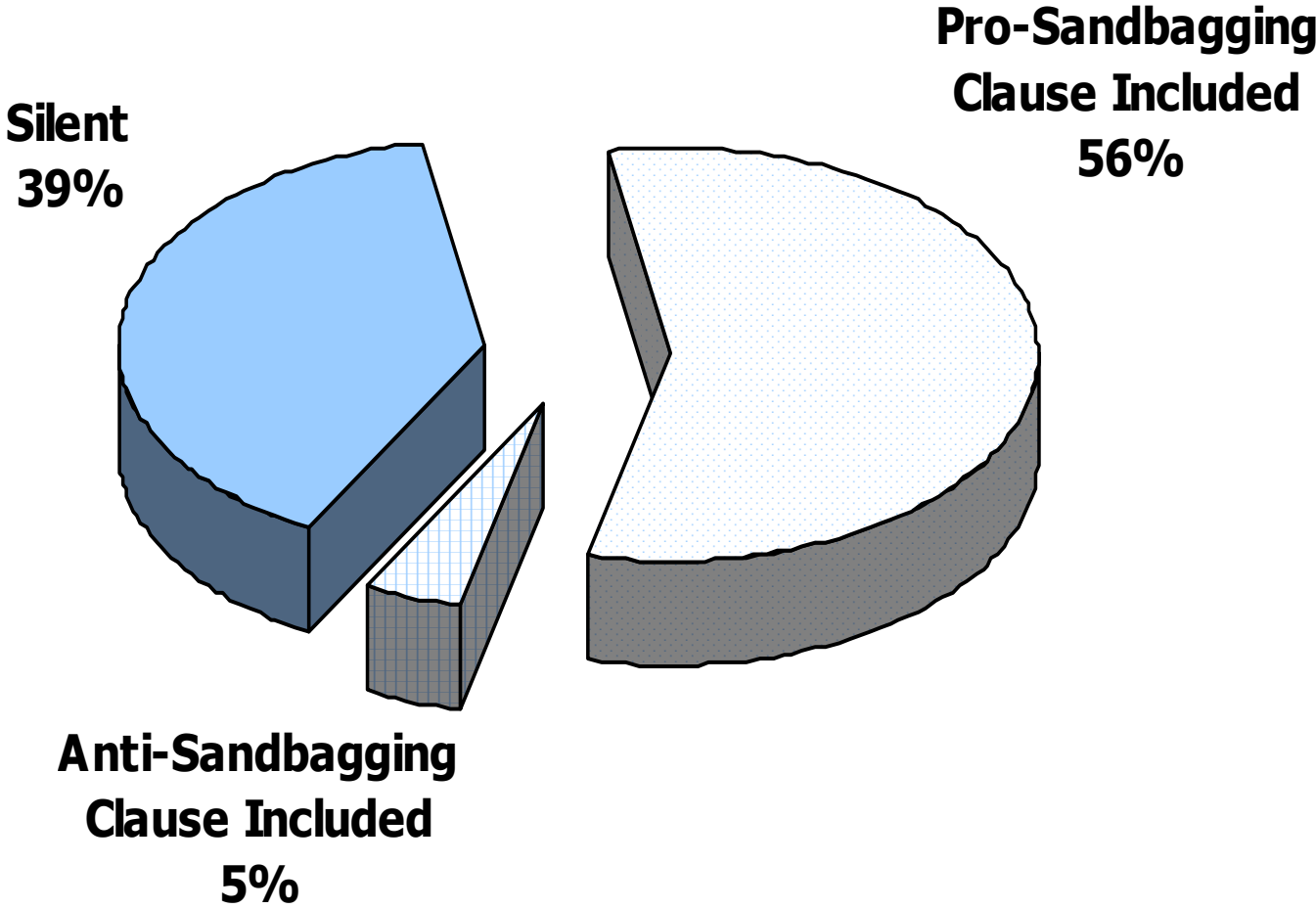
No claim for indemnity for a breach of a particular representation, warranty or covenant shall be made after the Closing **if the Buyer had Knowledge (including by virtue of any Disclosure Schedule) of such breach as of the Closing**, except for claims with respect to any Events Outside of the Ordinary Course.

(Jarden Corp acquisition of United States Playing Card Company)

No representation or warranty of [Target] contained in this Agreement shall be affected or deemed waived or otherwise impaired or limited by reason of any investigation or due diligence conducted by Purchaser or its representatives, **except to the extent that on or before the Closing Date Purchaser obtains Actual Knowledge of any facts, events or circumstances that would cause the particular representation or warranty of [Target] in question to be untrue.**

(Cash America International, Inc. acquisition of CAMCO, Inc. dba Superpaw)

Buyer's Right to "Sandbag"



Survival/Time to Assert Claims

10.1 SURVIVAL...

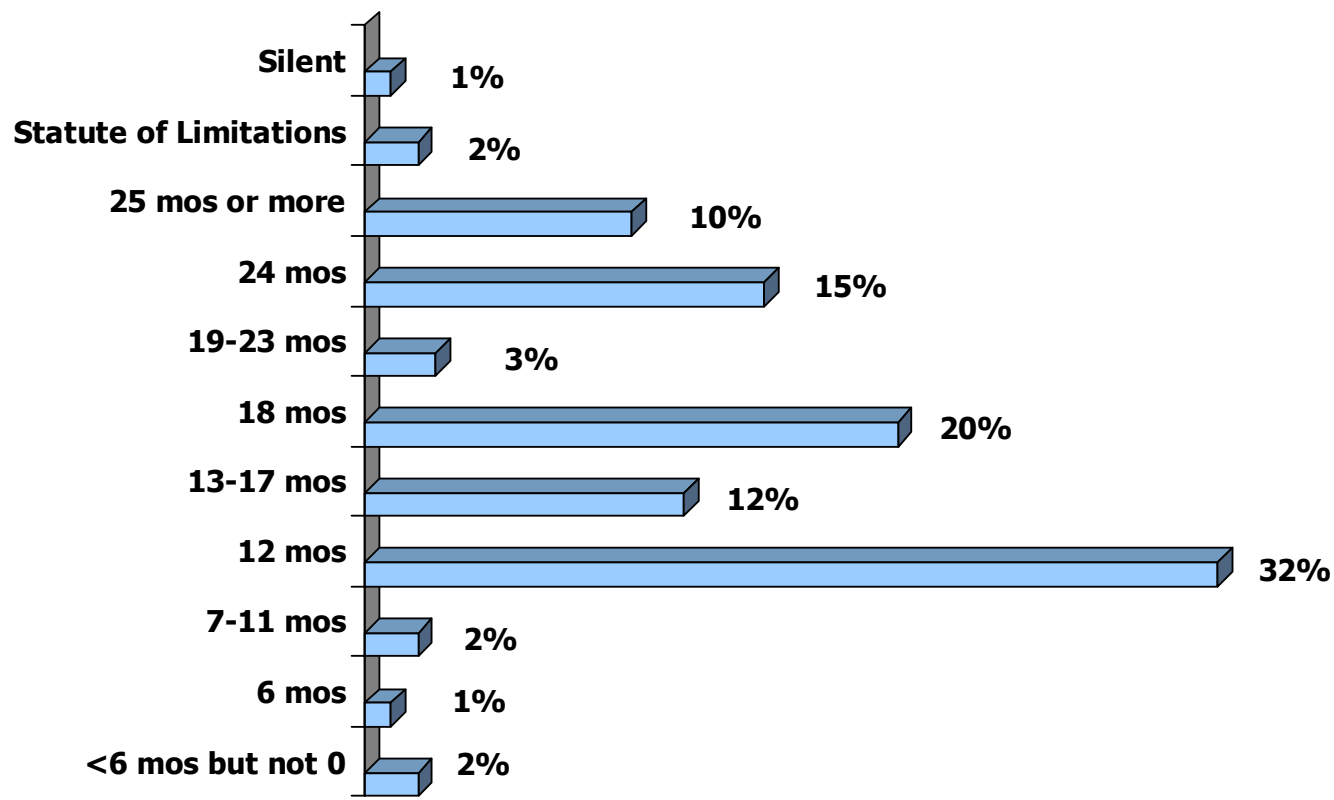
All representations, warranties ... in this Agreement, the Disclosure Letter, the supplements to the Disclosure Letter, the certificate delivered pursuant to Section 2.4(a)(v), and any other certificate or document delivered pursuant to this Agreement will survive the Closing...

10.5 TIME LIMITATIONS

If the Closing occurs, Sellers will have no liability (for indemnification or otherwise) with respect to any representation or warranty... unless on or before _____ Buyer notifies Sellers of a claim specifying the factual basis of that claim in reasonable detail to the extent then known by Buyer...

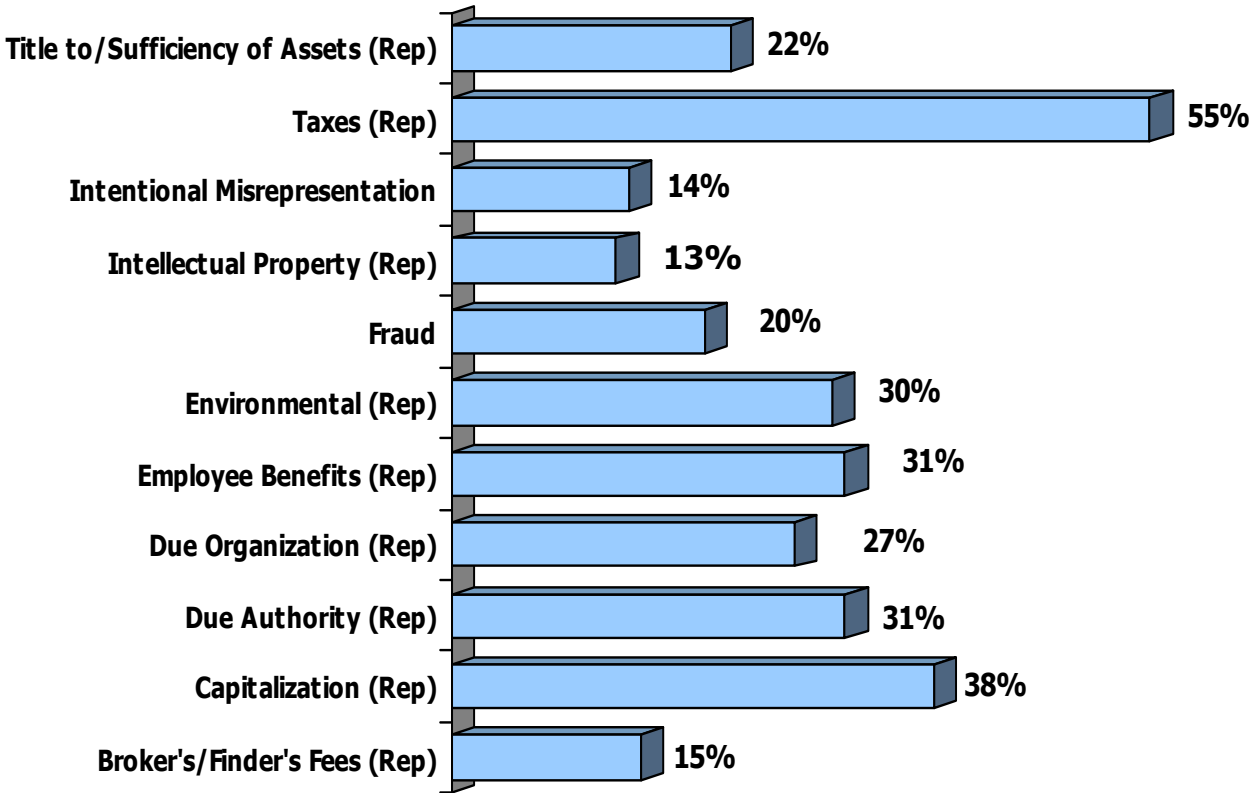
(ABA Model Stock Purchase Agreement)

Survival/Time to Assert Claims*



* Time periods that apply to representations on a general basis; does not take into account longer periods that may be assigned to specific representations (see "Carveouts Survival Limitations")

Carveouts to Survival Limitations*



* Matters subject to carveouts typically survive longer than time periods applicable to representations on a general basis; statistics shown are limited to carveouts that appear at least 10% of the time

Baskets - Deductible

The Indemnifying Party will have no liability (for indemnification or otherwise) with respect to claims under Section 11.4(a) until the total of all Damages with respect to such matters exceeds _____ dollars (\$_____) and then only for the amount by which such Damages exceed _____ dollars (\$_____).

Baskets – First Dollar

An Indemnifying Party shall not be liable for any claim for indemnification pursuant to Section 7.02(a) or 7.03(a), unless and until the aggregate amount of indemnifiable Losses that may be recovered from the Indemnifying Party equals or exceeds \$12,000,000 (the "Aggregate Threshold") in which case the Indemnifying Party shall be liable for all such Losses...

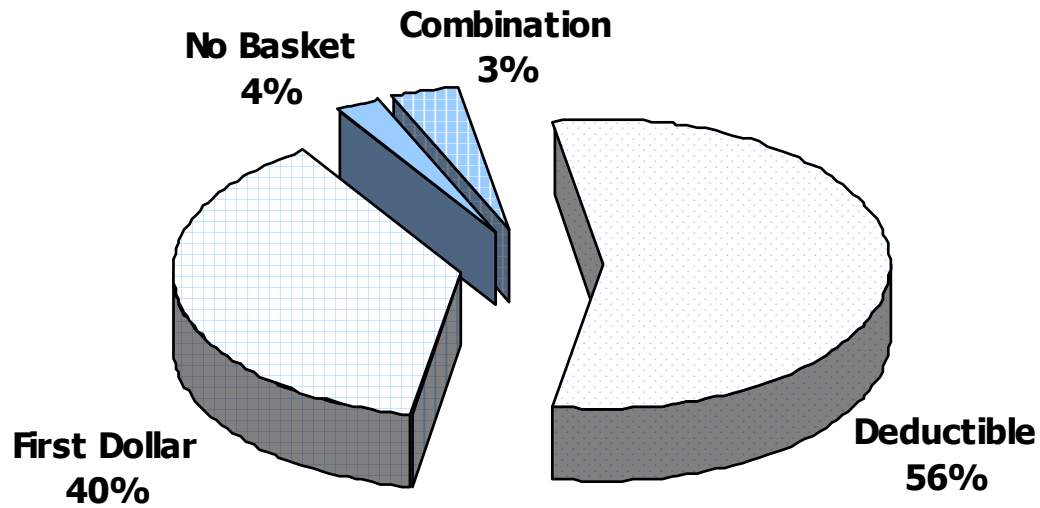
(Boston Scientific Corp acquisition of Advanced Bionics Corporation)

Baskets – Combination

No Indemnified Parties shall be entitled to indemnification pursuant to Section 8.2.1(a) for any Damages until the aggregate amount of all Damages under all claims of all Indemnified Parties for all such breaches shall exceed the Threshold, at which time the full amount of Damages incurred (minus a deductible of \$500,000) shall be subject to indemnification hereunder. The “Threshold” shall be \$1,000,000.

(CMGI Inc acquisition of Modus Media Inc)

Baskets*



* Does not include two deals with redacted indemnification terms

Baskets as % of Deal Value

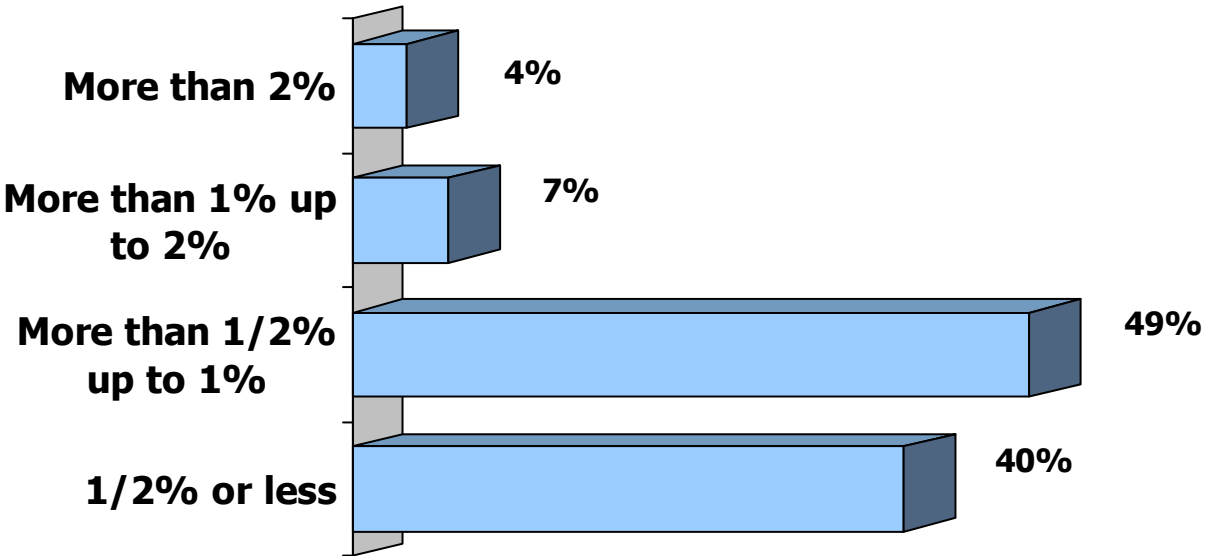
(Subset: deals with baskets)

STATISTICAL SUMMARY				
Basket Type	Mean	Median	Minimum	Maximum
All Baskets	.69%	.60%	.01%	3.13%
Deductible*	.77%	.62%	.01%	3.13%
First Dollar*	.60%	.47%	.08%	2.00%

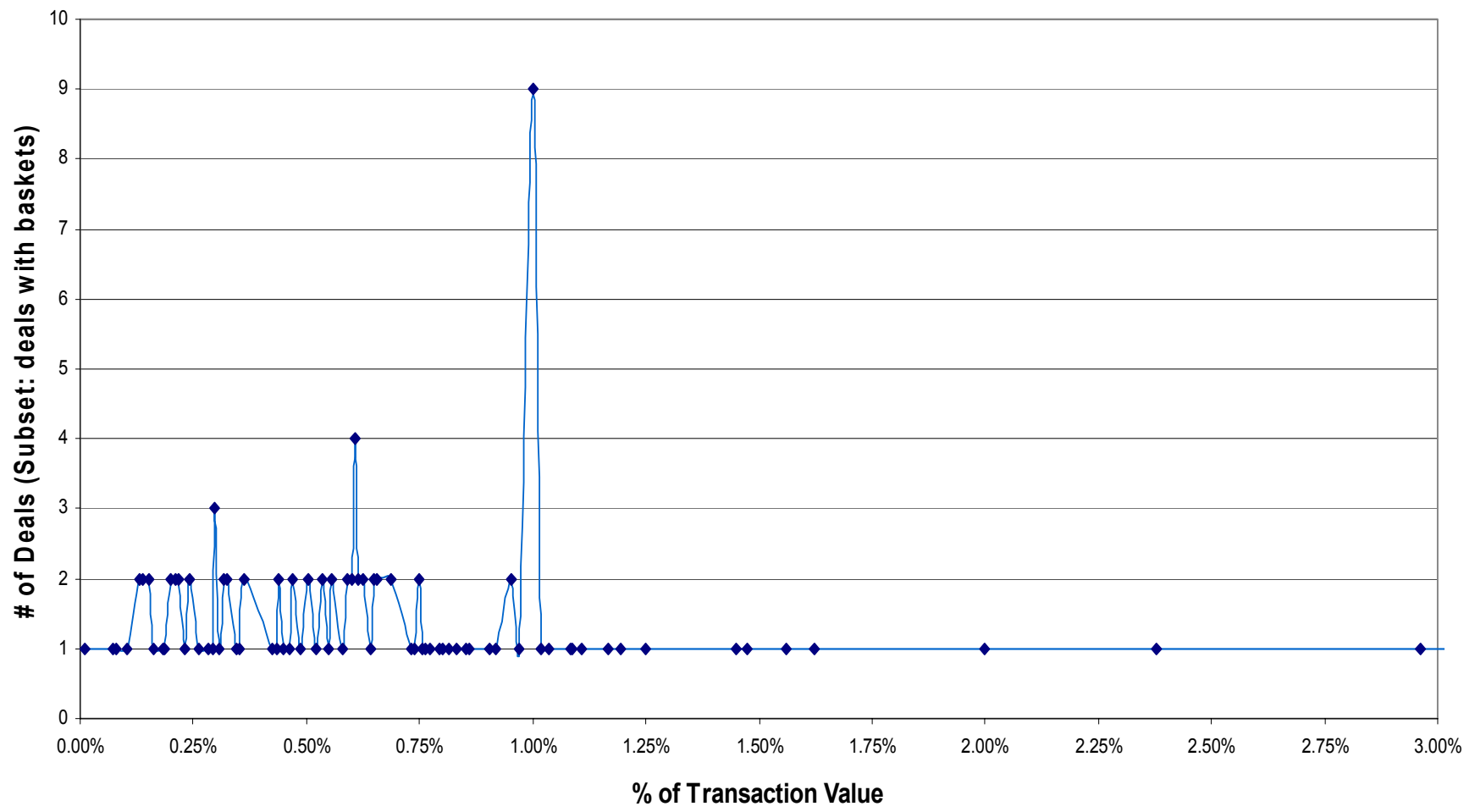
* Does not include combination baskets

Baskets as % of Deal Value

(Subset: deals with baskets)



Baskets as % of Deal Value



“Double Materiality” (materiality qualification disregarded for indemnification purposes)

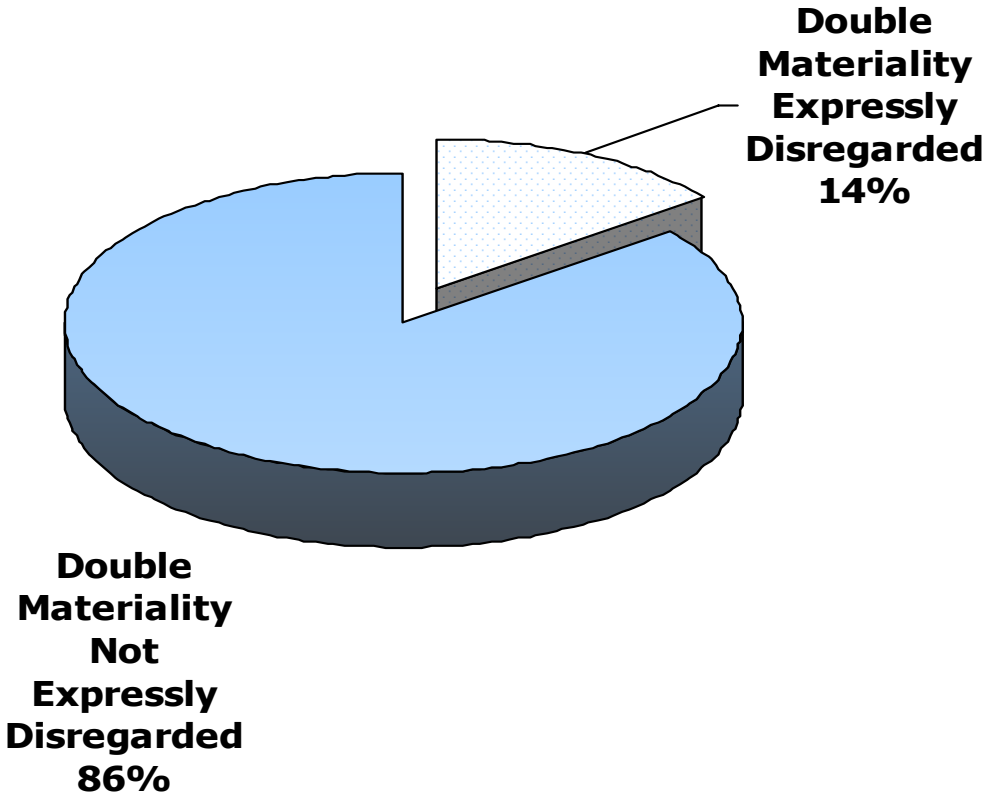
[t]he Indemnitees shall be entitled to be held harmless and indemnified from the Escrow Fund ... from and against any inaccuracy in or breach of any representation or warranty set forth in Section 2 as of the date of this Agreement (without giving effect to ... any “Material Adverse Effect” or other materiality qualification contained in such representation or warranty...

(Quest Software Inc. acquisition of Aelita Software Corporation)

“Double Materiality”

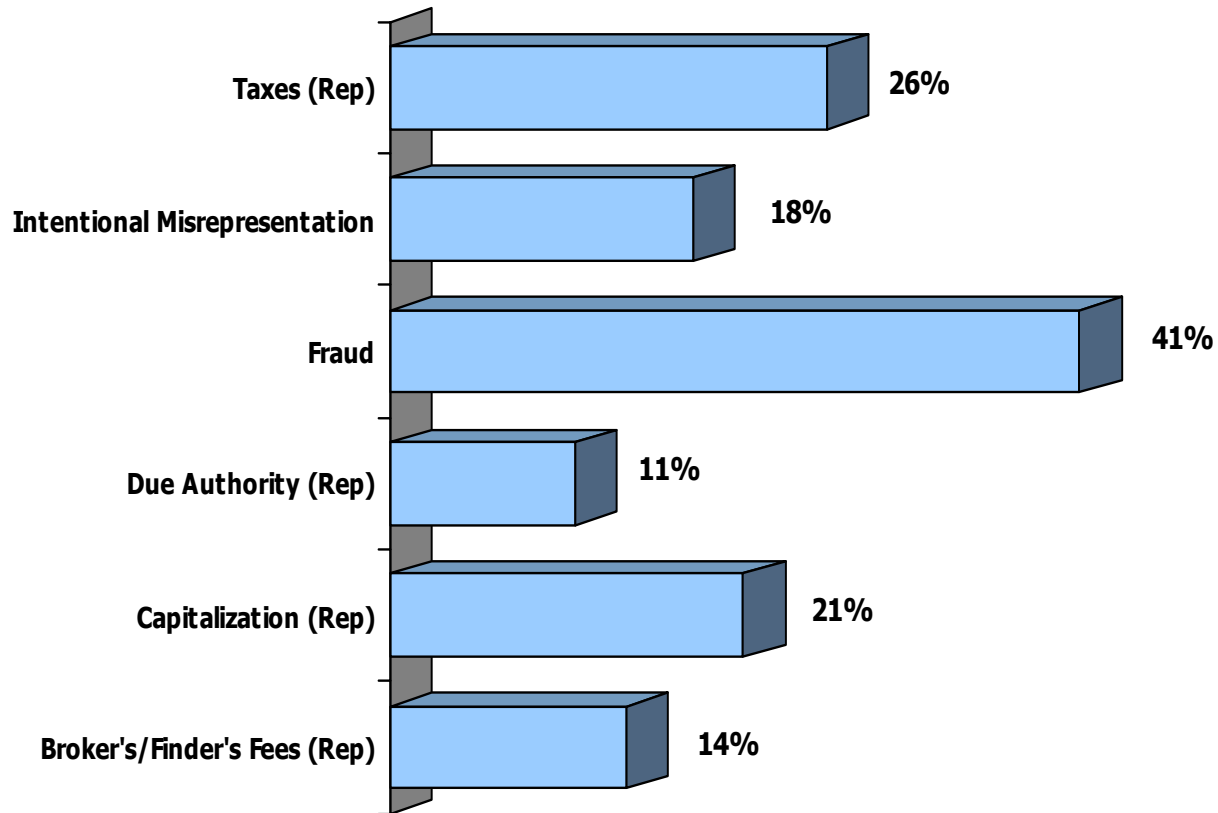
(materiality qualification disregarded for indemnification purposes)

(Subset: deals with baskets)



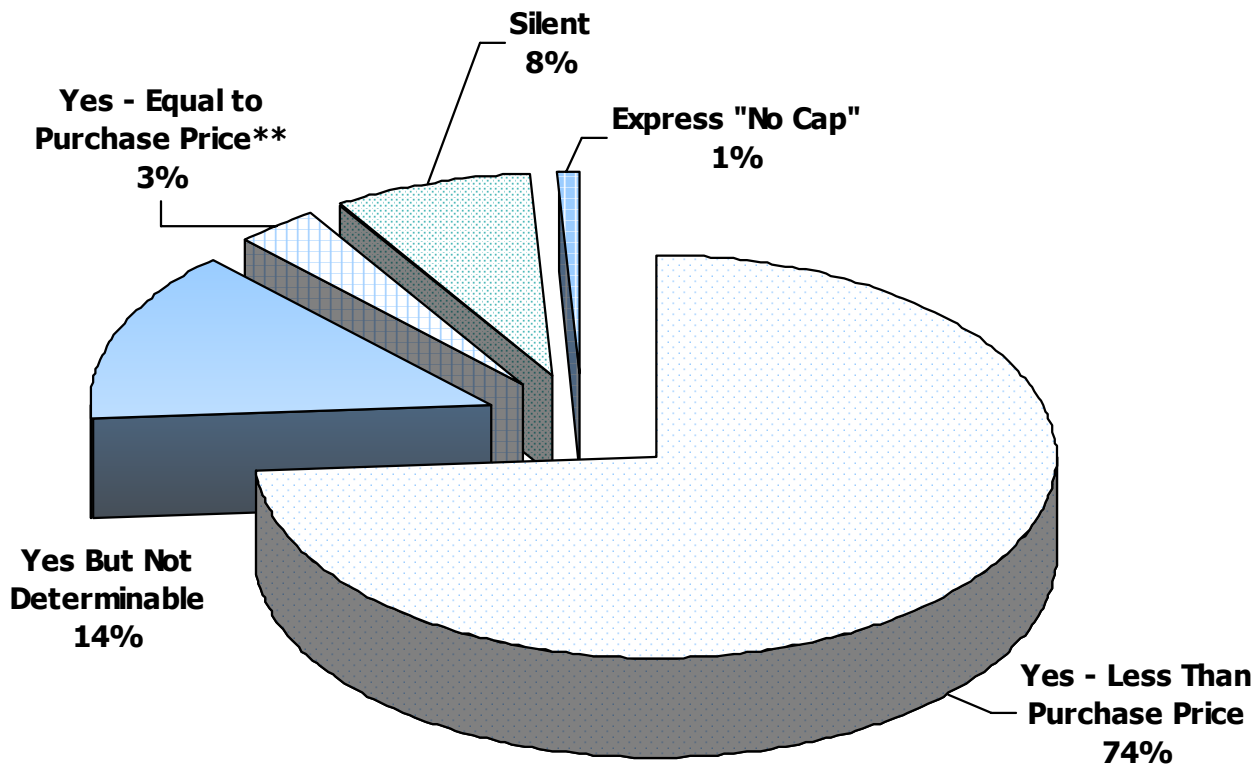
Basket Carveouts*

(Subset: deals with baskets)



* Statistics shown are limited to carveouts that appear at least 10% of the time

Caps*

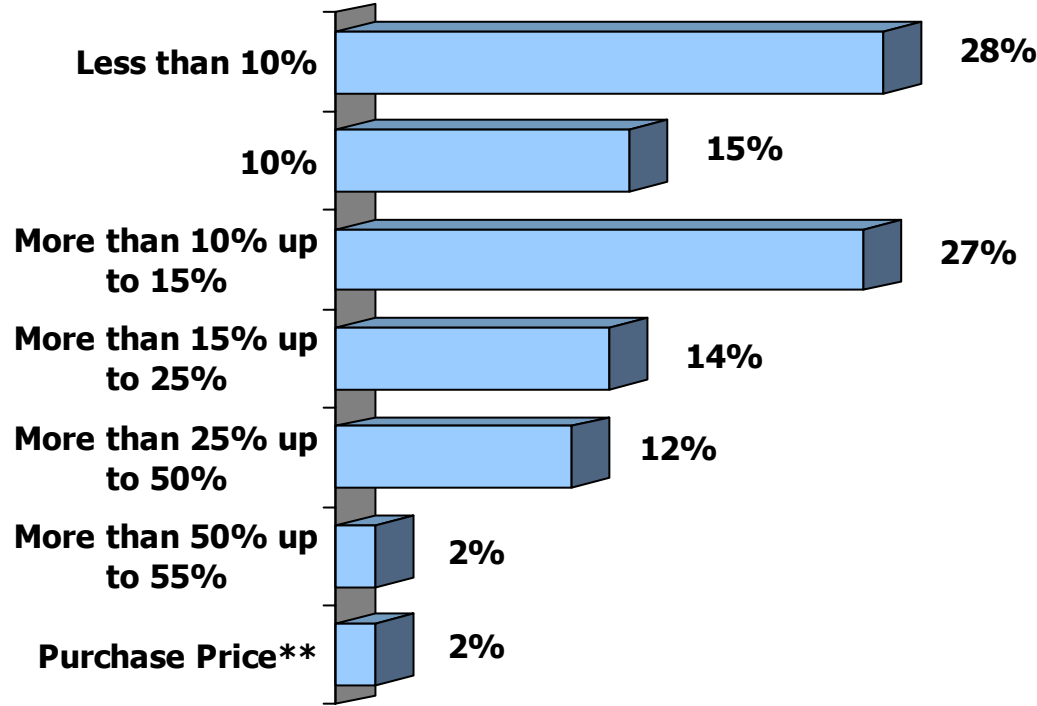


* Caps generally applicable to contractual indemnification obligations; does not take into account different caps for specific items (see "Cap Carveouts"); This slide excludes two deals with redacted indemnification terms

** Includes one deal with cap in amount greater than purchase price

Cap Amounts*

(Subset: deals with determinable caps)

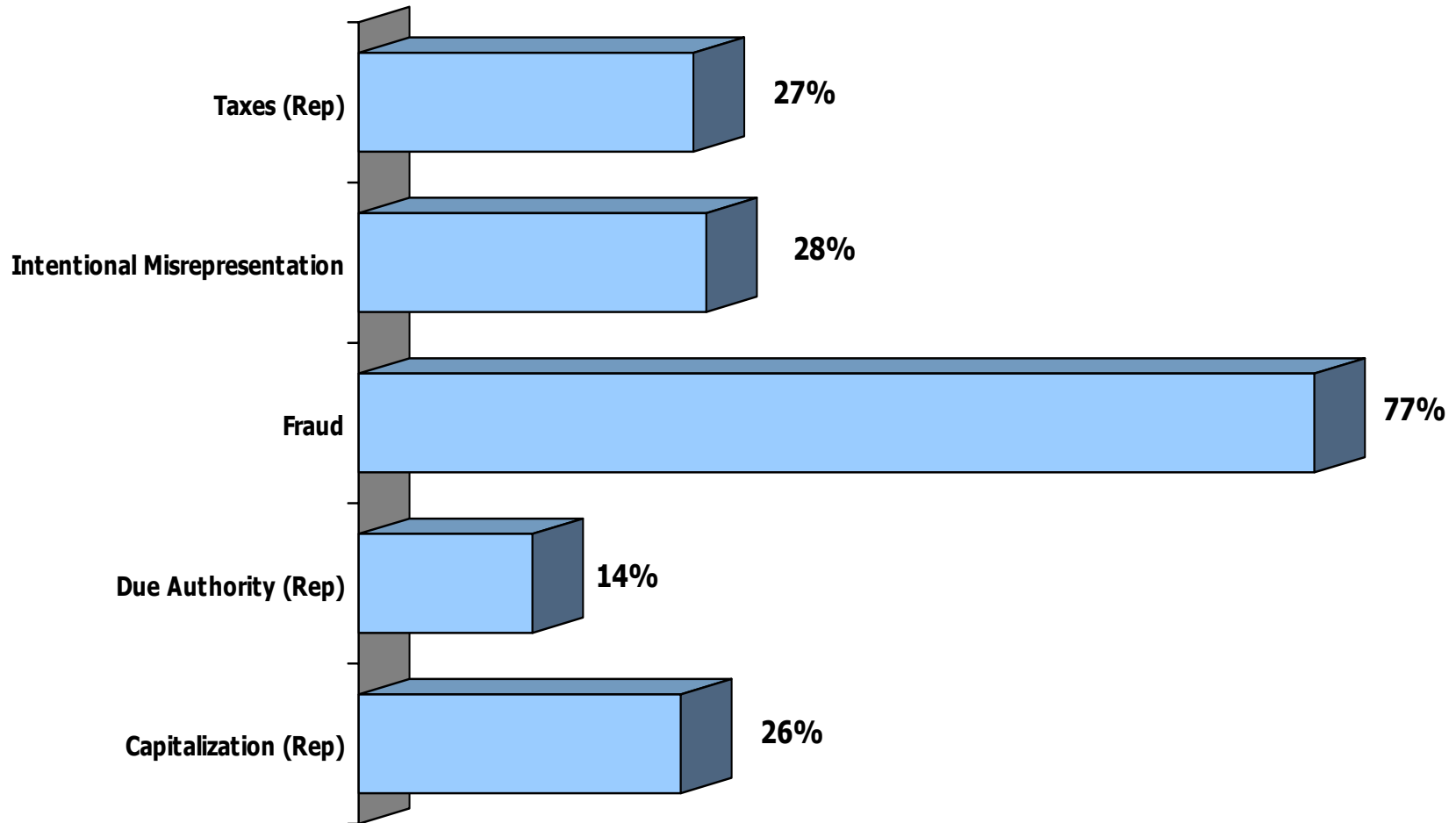


* Caps generally applicable to contractual indemnification obligations; does not take into account different caps for specific items (see “Cap Carveouts”); This slide excludes two deals with redacted indemnification terms

**Includes one deal with cap greater than purchase price

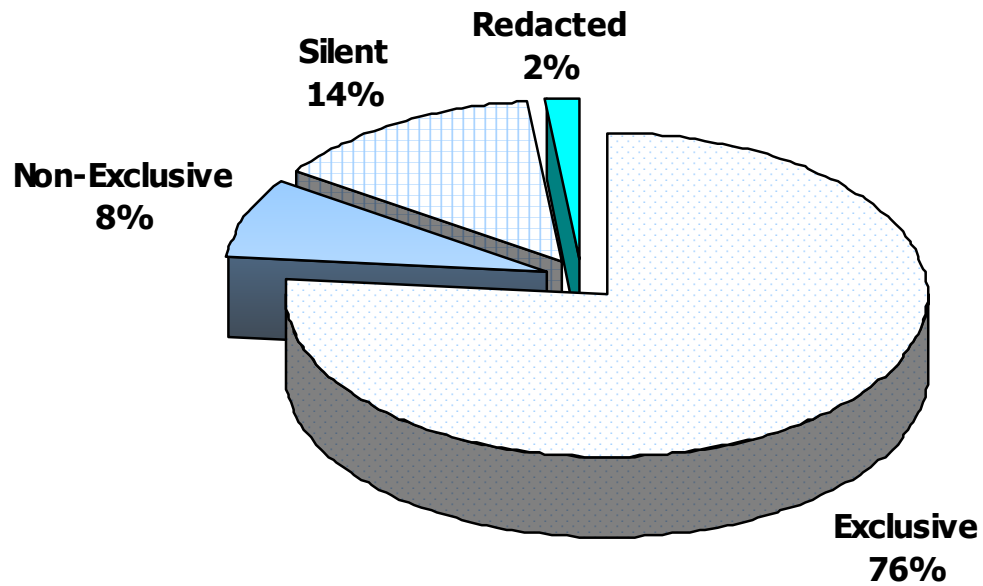
Cap Carveouts*

(Subset: deals with expressly stated cap)



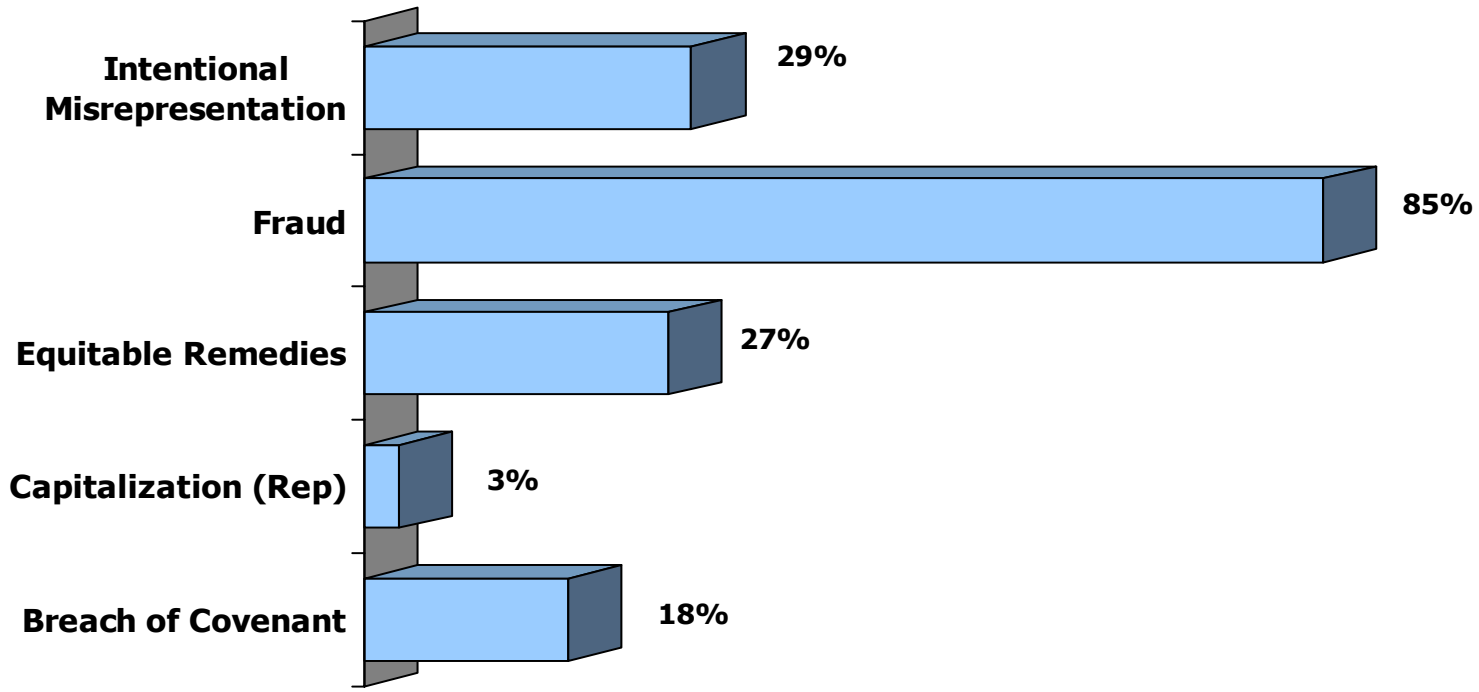
* Statistics shown are limited to carveouts that appear at least 10% of the time

Indemnification as Exclusive Remedy

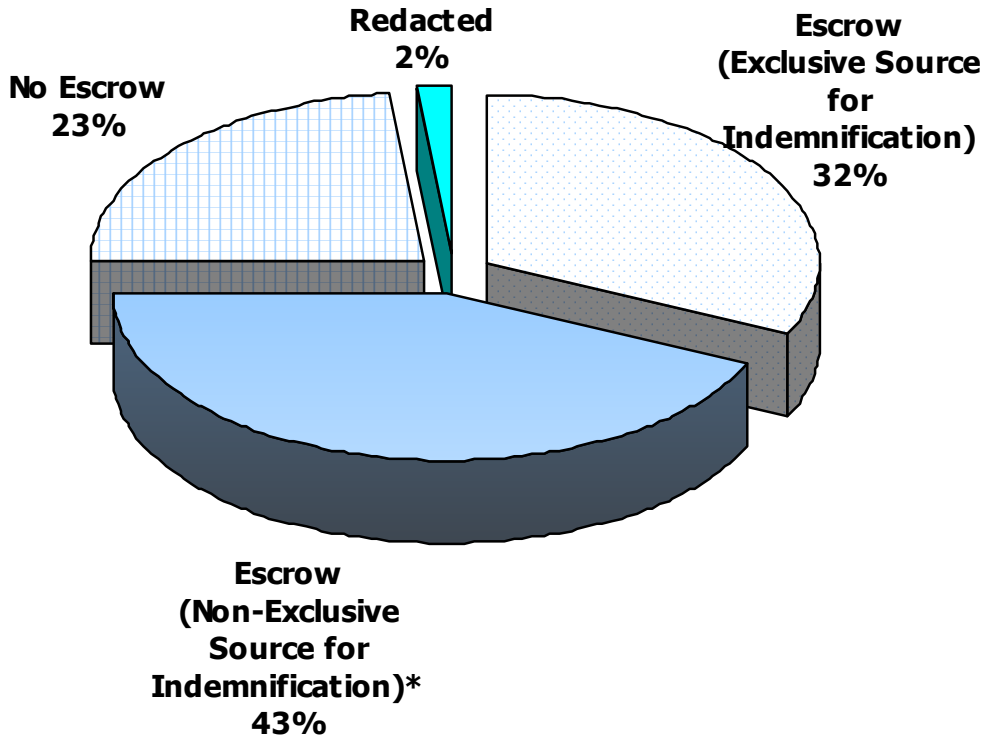


Indemnification as Exclusive Remedy - Carveouts

(Subset: deals with exclusive remedies)



Escrows



* Includes deals with carveouts to exclusivity except for deals where fraud or criminal activity were the sole carveouts