



Best Practices in Drafting and Negotiating Contracts and Agreements

11th Annual Mergers and Acquisitions
Insight Conference
December 5-6, 2013
Calgary, Alberta

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Overview

- Avoiding uncertainty in deal terms
- Trends in M&A deal terms

Avoiding Uncertainty

- Six sources of uncertainty in deal terms (K. Adams)
 - Ambiguity
 - Undue generality
 - Inconsistency
 - Redundancy
 - Conflict
 - Vagueness

Avoiding Uncertainty – cont'd.

- “Gaps” also are a common source of ambiguity
 - Missing details
 - Change in circumstances
 - Agreements to agree
- It’s all about the words
 - Important to review carefully
 - More eyes are better

Trends in M&A Deal Terms

- ABA 2012 Canadian Private Target M&A Deal Points Study
 - Sourced agreements from SEDAR
 - ❑ Deals closed in 2010 and 2011
 - 350+ deals identified
 - Removed agreements for deals involving public targets, deals with purchase price <\$5 million and “non-traditional” deals
 - ❑ Bankruptcy, non-arm's length, governing law not Canadian
 - Resulting pool:
 - ❑ 64 deals having value ranging from \$5 million to \$2.25 billion

Trends in M&A Deal Terms – cont'd.

- Study Methodology
 - Agreements reviewed in detail
 - ❑ 9 principal areas of review
 - ❑ Divided amongst six working groups
 - ❑ Completed worksheet for each issue, each agreement
 - modeled on US forms
 - QC check of worksheets
 - “Issue group leaders”
 - ❑ Collated data
 - ❑ Further QC
 - Checked data used to complete study

Trends in M&A Deal Terms – cont'd.

- Study Results
 - 100+ substantive slides
 - Study reports on
 - ❑ Statistic (frequency of use of certain terms)
 - ❑ Comparisons to ABA model agreement provisions
 - ❑ Comparisons to 2008 and 2010 Canadian Studies
 - ❑ Comparisons to US Private Target Studies

Available at:

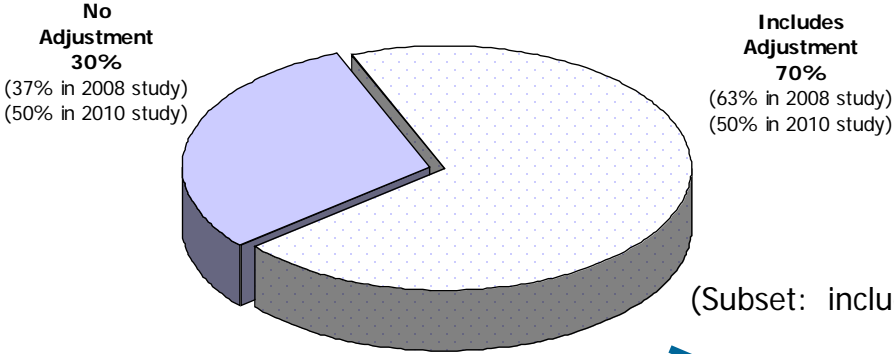
<https://apps.americanbar.org/dch/committee.cfm?com=CL560003>

Select Study Slides

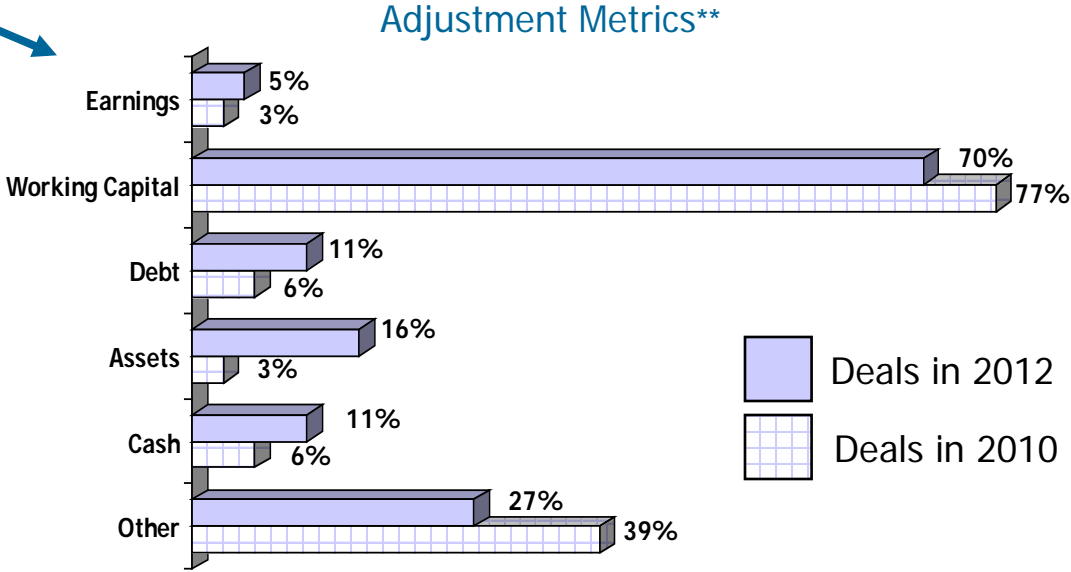
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Post-Closing Purchase Price Adjustments*





(Subset: includes adjustment)



* Excludes one deal where information was redacted.

** 22.5% of the post-closing purchase price adjustments were based on more than one metric.

Private Target M&A Deals North American Comparisons

	US 2011 Deal Points Study 	Canadian 2012 Deal Points Study 
Deals with Post-Closing Adjustments	82% (68% in 2007 US study*) (79% in 2009 US study*)	70% (63% in 2008 study) (50% in 2010 study)
Working Capital as Adjustment Metric	79% (69% in 2007 US study) (77% in 2009 US study)	70% (55% in 2008 study) (77% in 2010 study)
Buyer Prepares First Draft of Closing Balance Sheet	86% (79% in 2007 US study) (83% in 2009 US study)	52% (36% in 2008 study) (29% in 2010 study)
Methodology – GAAP consistent with past practice	42% (72% in 2007 US study) (39% in 2009 US study)	41% (48% in 2008 study) (19% in 2010 study)
Deals with Earnouts	38% (19% in 2007 US study) (29% in 2009 US study)	21% (10% in 2008 study) (3% in 2010 study)

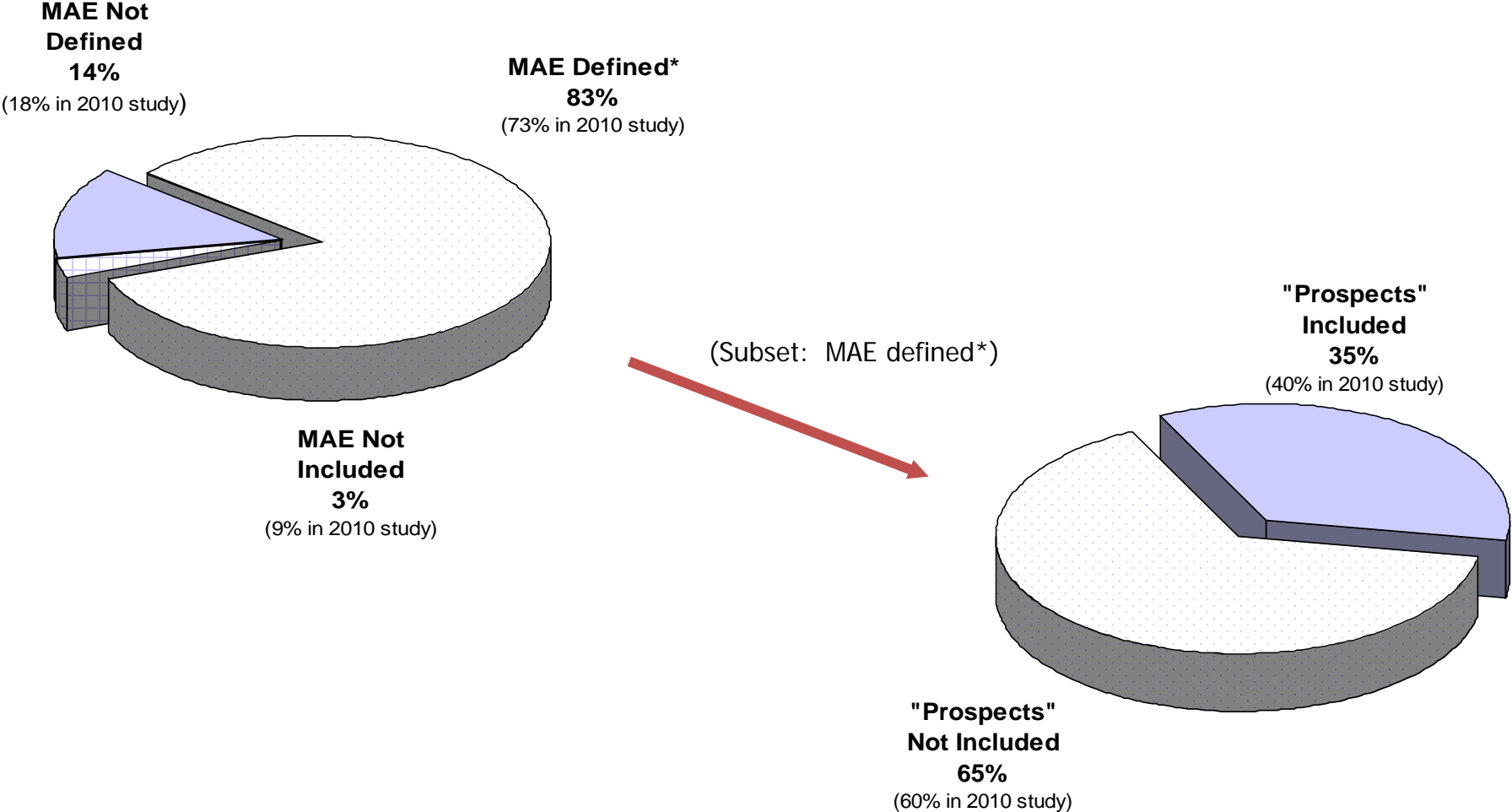
* The “2007 US study” refers to the 2007 Private Target Mergers & Acquisitions Deal Points Study released by the ABA Mergers & Acquisitions Committee on October 8, 2008. The “2009 US study” refers to the 2009 Private Target Mergers & Acquisitions Deal Points Study released by the ABA Mergers & Acquisitions Committee on December 13, 2009.

Definition of "Material Adverse Effect"

"Material Adverse Effect" means any result, occurrence, fact, change, event or effect that has a materially adverse effect on the business, assets, liabilities, capitalization, condition (financial or other), results of operations or prospects of Target.

(ABA Model Stock Purchase Agreement, Second Edition)

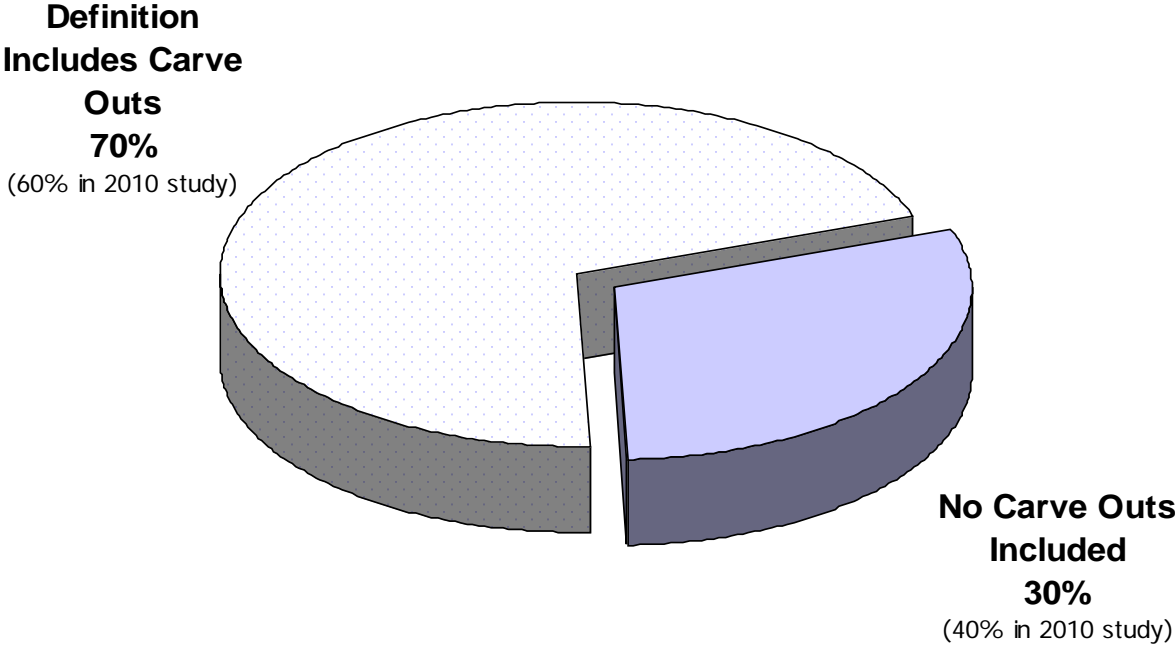
Definition of "Material Adverse Effect"



*Excludes two deals where information was redacted.

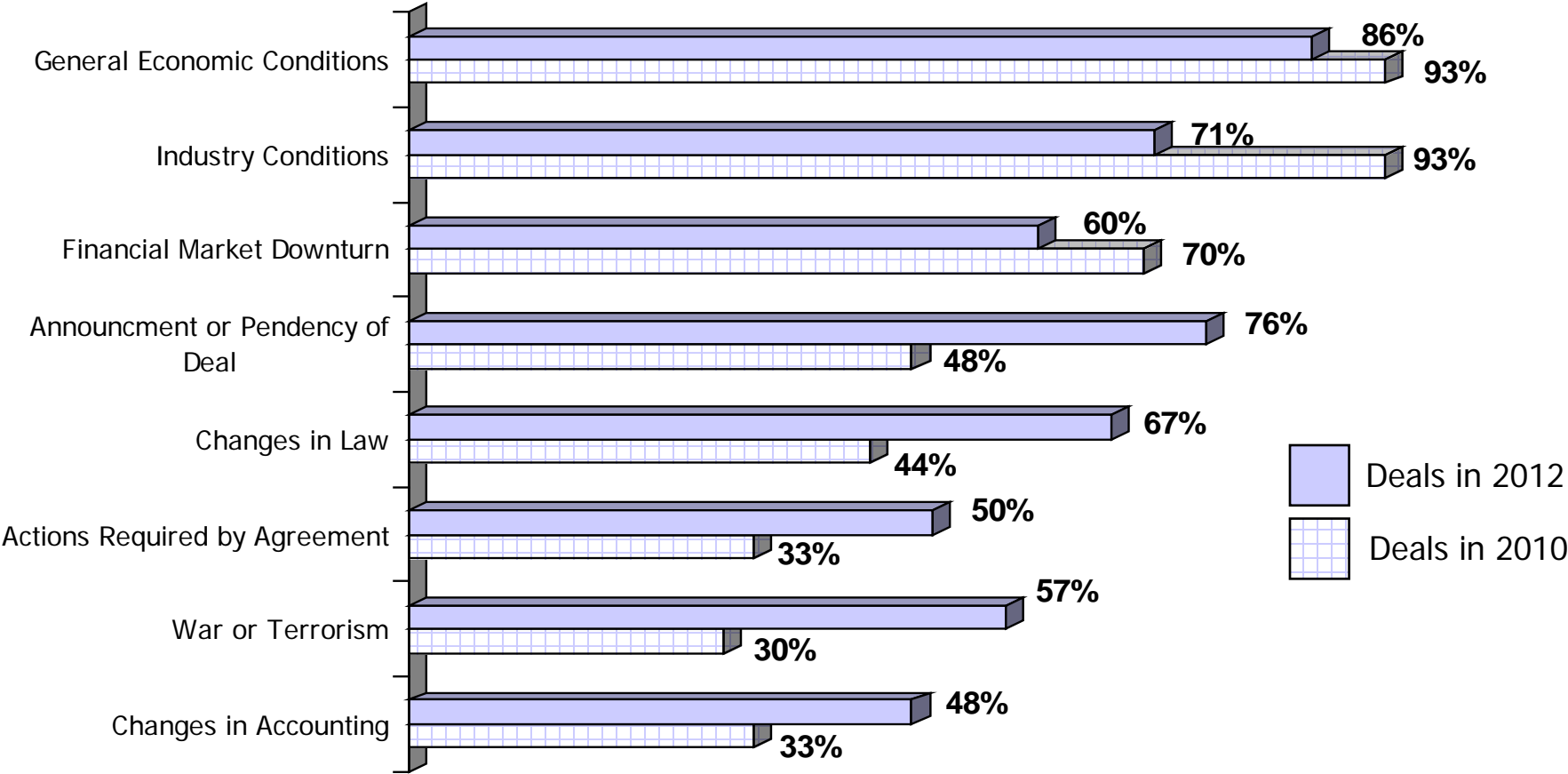
Definition of "Material Adverse Effect" – Carve Outs

(Subset: deals with MAE definition)



Definition of "Material Adverse Effect" – Carve Outs*

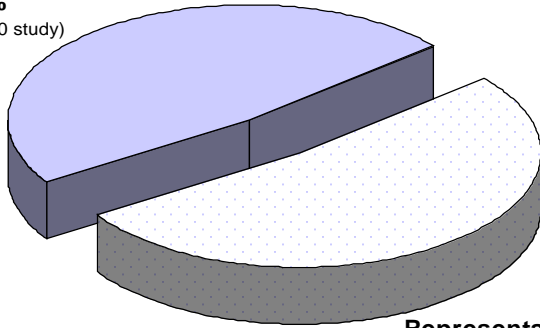
(Subset: deals with MAE definition with carve-outs)



*Definitions may include more than one carve out.

Full Disclosure Representation

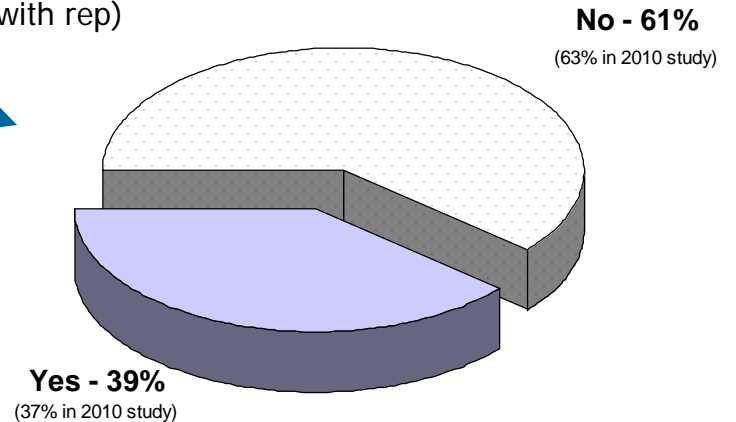
**Representation
Not Included**
48%
(44% in 2010 study)



**Representation
Included**
52%
(56% in 2010 study)

(Subset: deals with rep)

Qualified by Knowledge

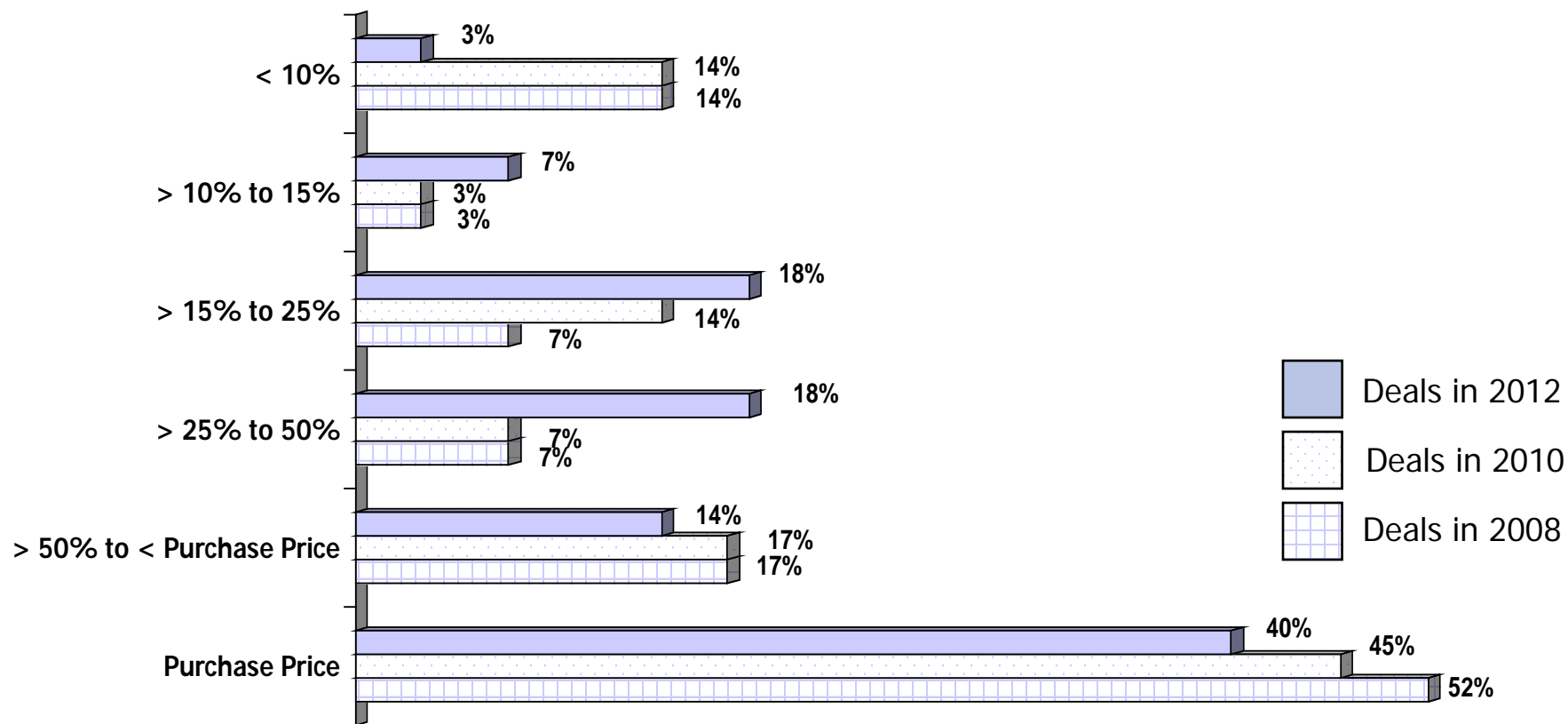


No - 61%
(63% in 2010 study)

Yes - 39%
(37% in 2010 study)

Cap Amounts as % of Transaction Value*

(Subset: deals with expressly stated cap)

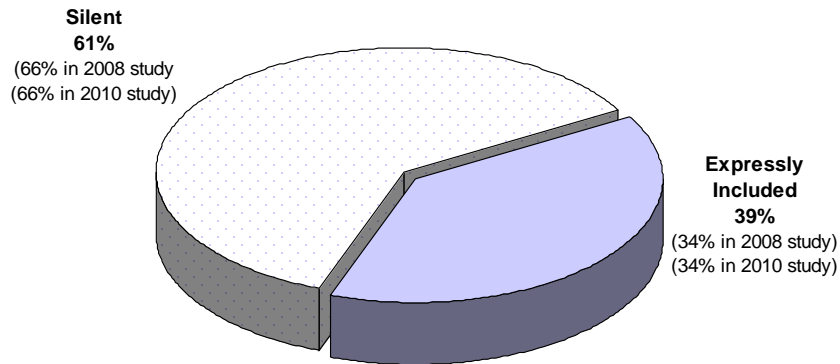


* Excludes 18 deals where cap amount is all or partially redacted or final purchase price is not determinable.

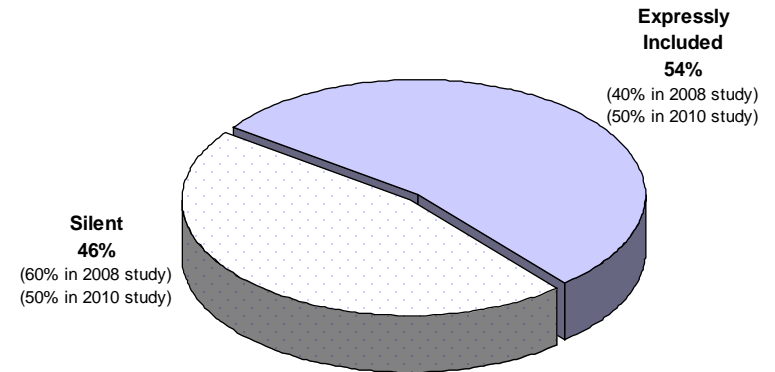
Reductions Against Buyer's Indemnification Claims

(Subset: deals with survival provisions)

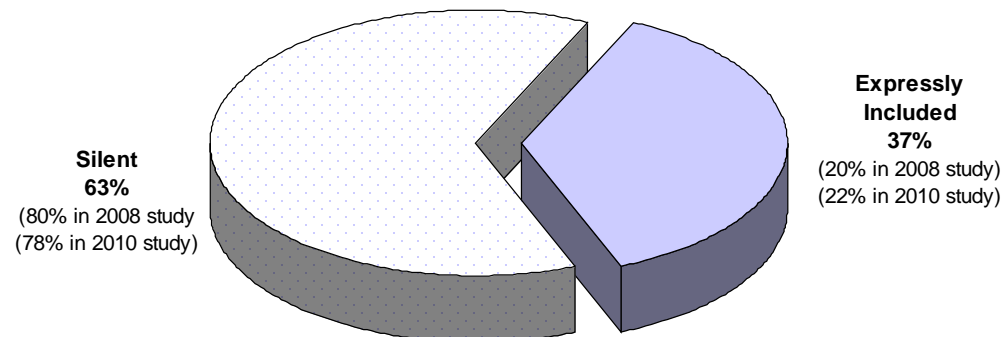
Reductions for Tax Benefits



Reductions for Insurance Benefits



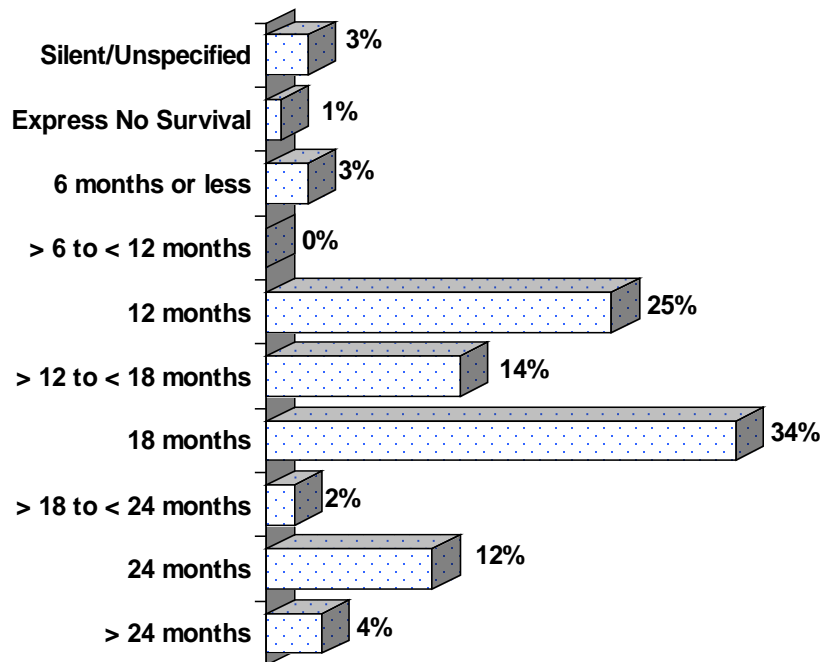
Requirement that Buyer Mitigate Losses



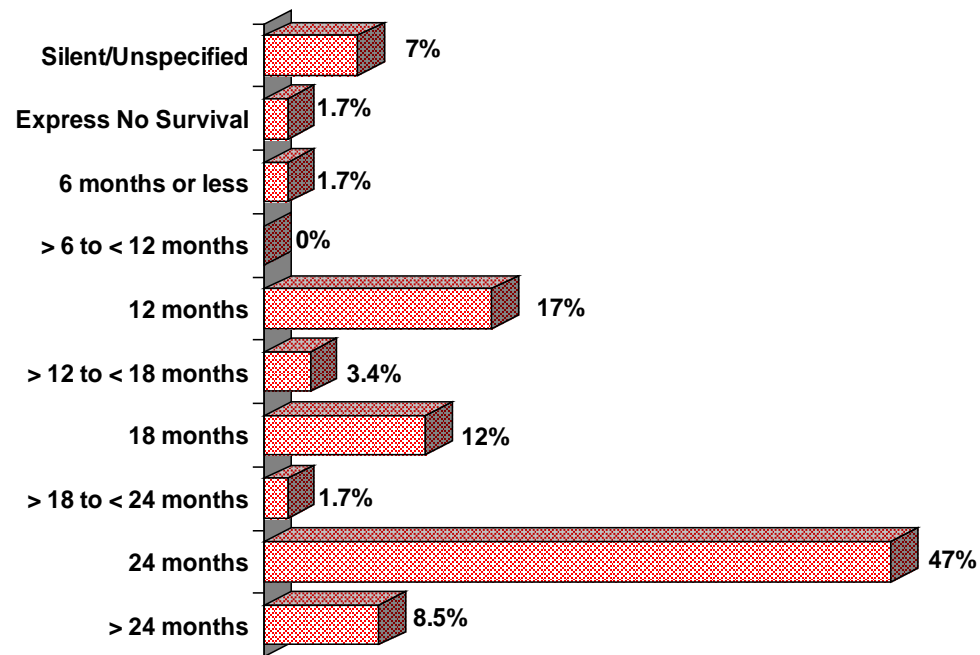
Private Target M&A Deals North American Comparisons

Survival Periods

US 2011 Deal Points Study



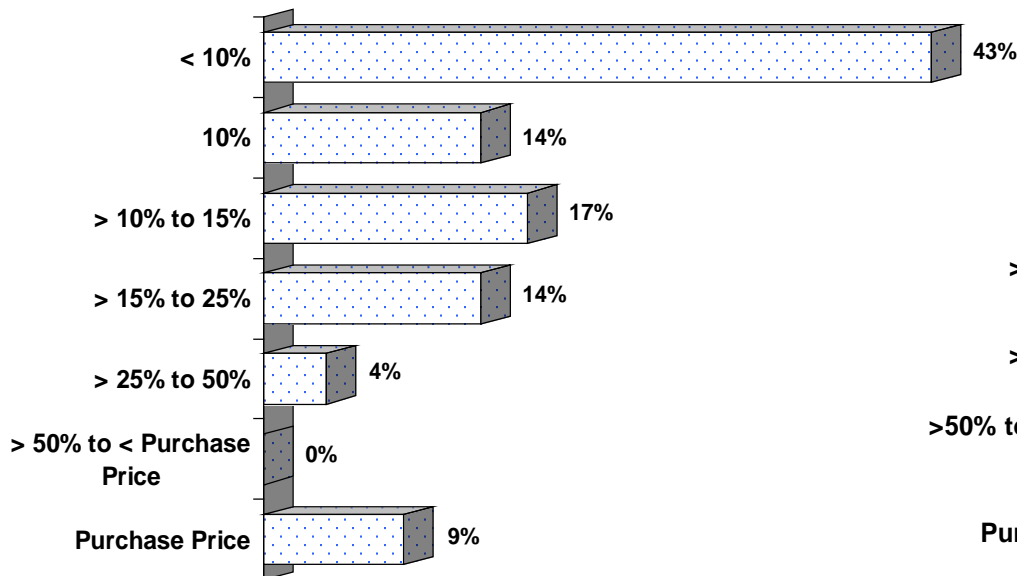
Canadian 2012 Deal Points Study



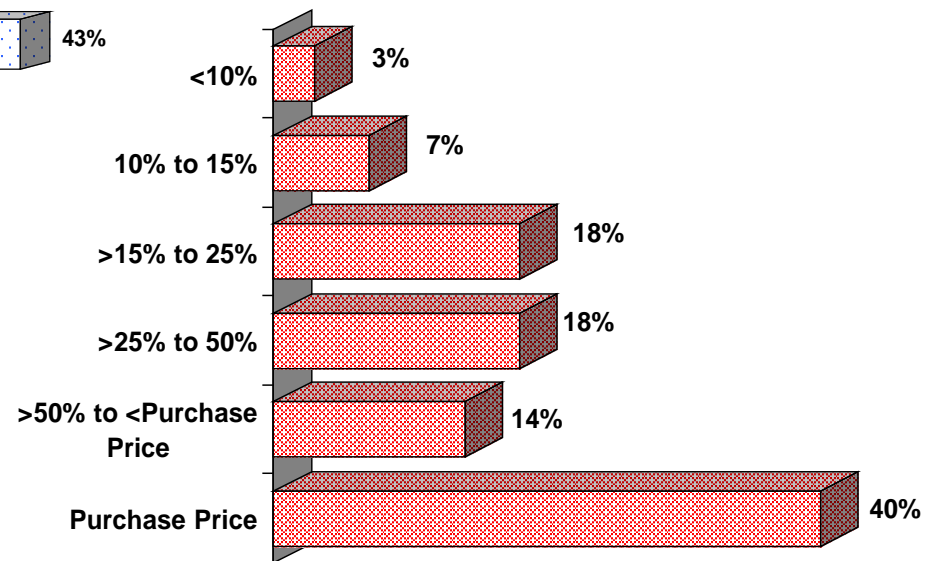
Private Target M&A Deals North American Comparisons

Cap Amounts as % of Transaction Value

US 2011 Deal Points Study



Canadian 2012 Deal Points Study





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