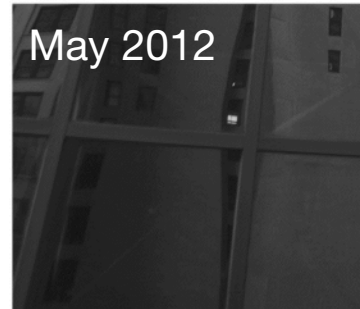


# 2012 M&A, Private Equity, and Capital Markets Update





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Nate Balint's practice has focused on both the purchase and sale sides of merger, acquisition, and leveraged buyout transactions, including the equity and debt arrangements associated with such deals. He has represented private equity funds, strategic acquirors and sellers, and entrepreneurs while working on transactions in a broad range of industries, including online and traditional retail, health care, education, business services and energy. Nate has represented venture capital funds in the completion of early and growth stage equity investments. He has also worked on general corporate representations and employment and governance matters, often on behalf of private equity portfolio companies.



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Martin Burkett serves as Co-Chair of Akerman's Mergers & Acquisitions and Private Equity Practice. Martin represents public and private companies and private equity funds in a variety of corporate transactions, with a particular focus on mergers and acquisitions. Martin's practice also includes structuring and negotiating complex business transactions, mergers and acquisitions, leveraged buyouts, recapitalizations, going private transactions, venture and growth capital investments, debt and equity financings, and securities offerings. He regularly represents portfolio companies of private equity clients and other companies with respect to all of their corporate transactions, and effectively serves as their outside general counsel. Martin regularly represents investors and companies in a broad variety of distressed corporate situations, including distressed acquisitions.





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David Doney's practice is concentrated in the corporate and securities law areas and principally involves mergers and acquisitions, public and private securities financings, corporate governance, Securities Exchange Act reporting and compliance matters, and other business transactions. David has focused his efforts on providing efficient and sophisticated legal services to established public companies, privately held companies with significant growth potential, and sources of capital.



**Carl D. Roston, Shareholder**  
**Co-Chair, Mergers & Acquisitions and Private Equity Practice**

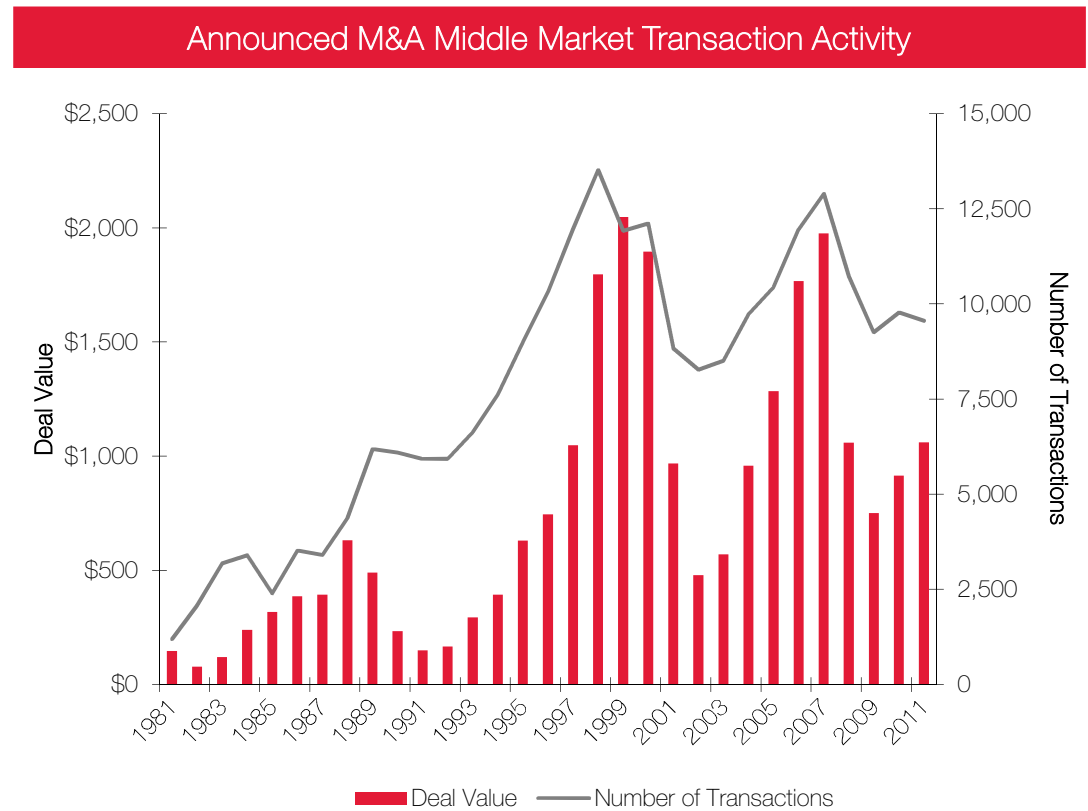
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Carl Roston represents private equity funds and public and private companies in a variety of domestic and cross-border M&A, corporate, and securities transactions. He serves as co-chair of the Akerman M&A and Private Equity Practice, co-leading the team that is recognized nationally by U.S. News - Best Lawyers for its work in Private Equity Law and by Chambers USA as #1 for Corporate/M&A & Private Equity in Florida. Carl concentrates his practice on structuring and negotiating complex business transactions, including mergers and acquisitions, leveraged buyouts, recapitalizations, going private transactions, venture and growth capital investments, debt and equity financings, and securities offerings. He regularly represents portfolio companies of private equity clients and other companies with respect to all of their corporate transactions, and effectively serves as their outside general counsel. Carl regularly represents investors and companies in a broad variety of distressed corporate situations, including distressed acquisitions.



# I. Current Market Conditions

While the level of U.S. M&A activity has decreased since the 2007 peak, overall the number and value of U.S. M&A transactions were at a post financial crisis high in 2011 with transaction levels slightly higher than 2010. Key drivers of this year-over-year increase included, among other things, stabilized and continued (albeit tepid) growth of the economy, improvement of the equity markets, a rebound in leverage for quality credits, improved valuations, the pent-up supply of sellers, record cash on the balance sheets of strategic buyers and hundreds of billions of dollars of dry powder raised by financial buyers which has not been deployed. However, transaction activity slowed markedly during the second half of 2011.



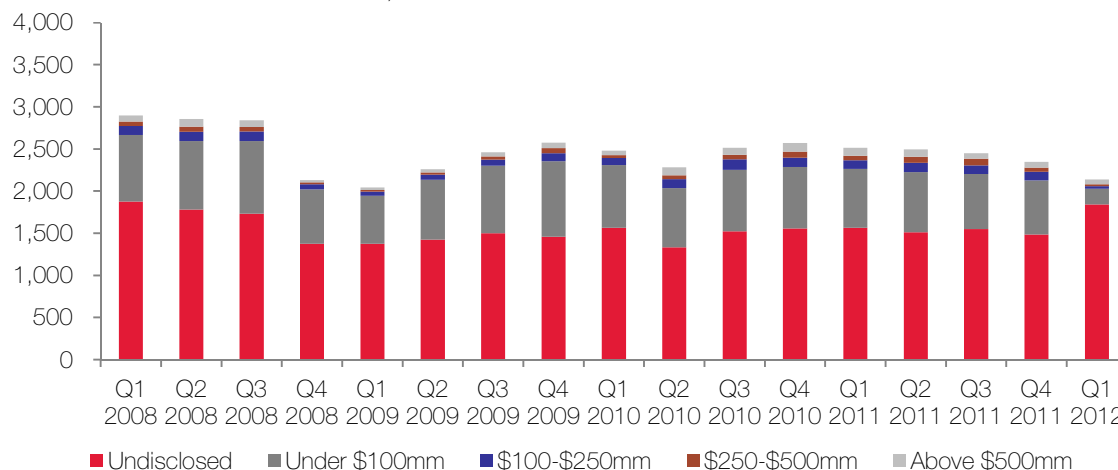
# I. Current Market Conditions

The number and value of U.S. M&A transactions continually decreased in the second half of 2011 and first quarter of 2012 as compared to early 2011. Macro uncertainties (including the European debt crisis and tax and policy uncertainties) set the stage for this decline. However, many market participants expect deal activity to improve throughout the remainder of 2012 due in large part to improving economic conditions, increasingly accommodative credit markets and the record amount of cash available to financial and strategic buyers to pursue acquisitions.



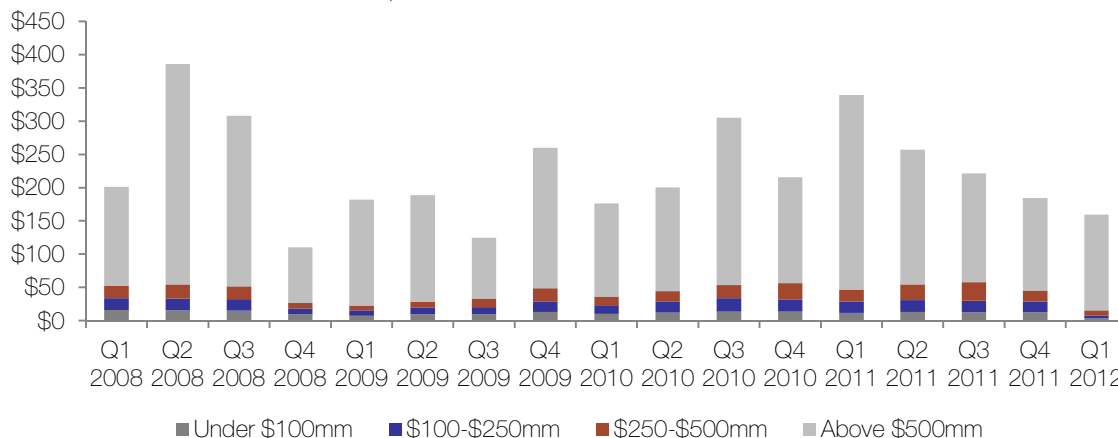
## Announced Quarterly M&A Middle Market Transaction Activity

For the Quarters Ended March 31, 2008 – 2012



## Announced Quarterly M&A Middle Market Transaction Volume

For the Quarters Ended March 31, 2008 – 2012

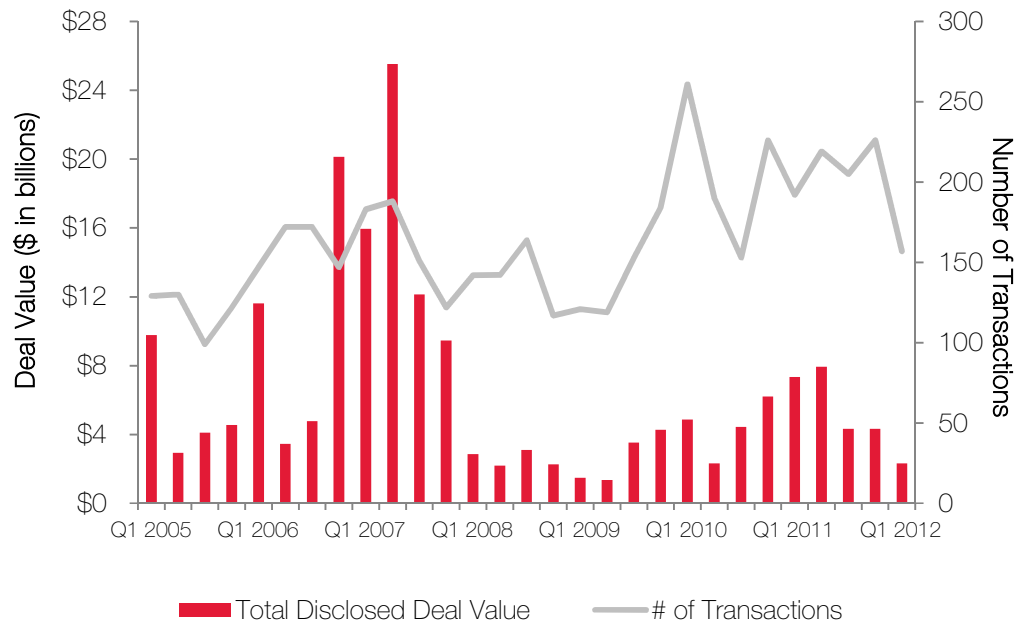


# I. Current Market Conditions

Aggregate 2011 Florida transaction volume and value followed the national trend, with 2011 seeing marginally higher activity levels than 2010. Florida transaction value and volume contracted more sharply during the first quarter of 2012 than was the case nationally.

## Florida M&A Trends (Acquisition Targets Only)

For the Quarters Ended March 31, 2005 – 2012



Source: Thomson SDC, CapitalIQ.

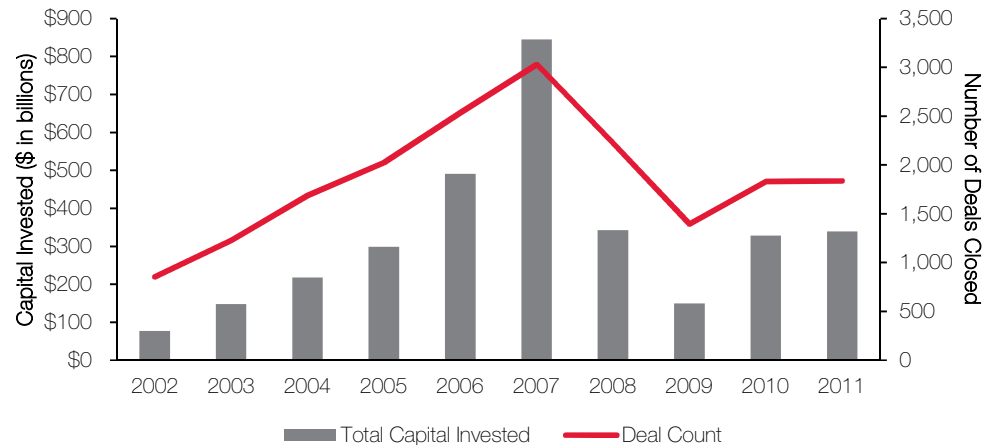


# I. Current Market Conditions

U.S. private equity investment in 2011 declined as the year progressed. Private equity activity faced the same headwinds during recent quarters as did the broader M&A market. First quarter 2012 private equity investment activity contracted more severely than did investment activity by strategic buyers. Nonetheless, many market participants expect a rebound as 2012 continues.

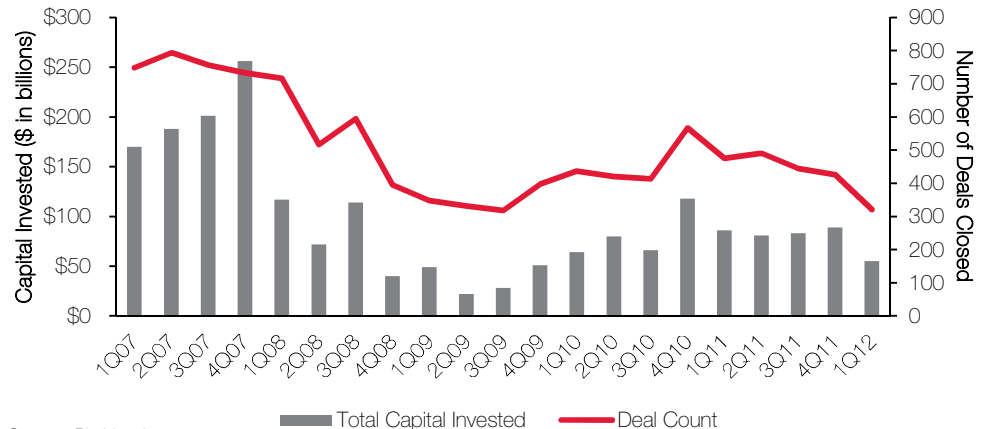
U.S. Private Equity Deal Flow by Year

For Years Ended December 31, 2001 – 2011



U.S. Private Equity Deal Flow by Quarter

For the Quarters Ended March 31, 2007 – 2012



Source: Pitchbook.

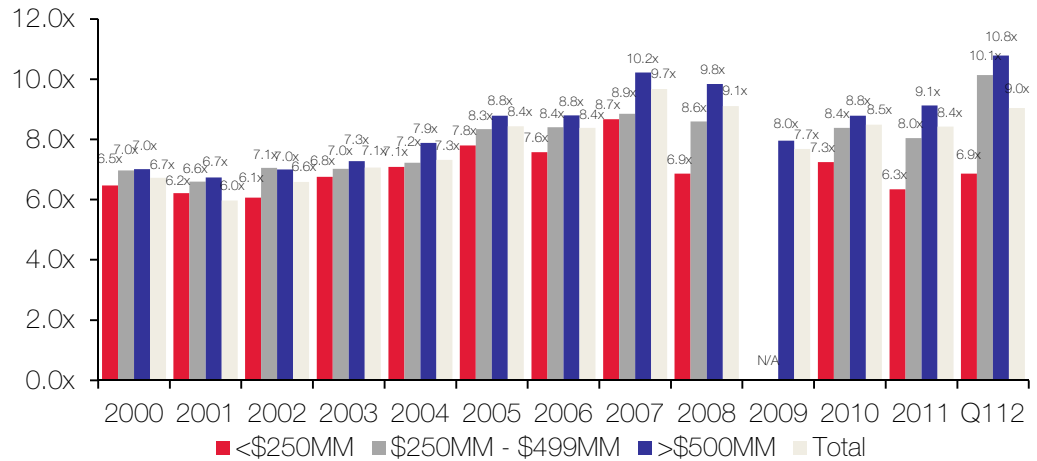


# I. Current Market Conditions

EBITDA multiples during the first quarter of 2012 recovered and returned to pre-financial crisis levels. As with 2011, the premium for larger and higher quality companies continued. Private equity buyout multiples increased in 2011 compared to 2010, which increase is partially attributable to the increase in the proportion of deals valued at over \$500 million.

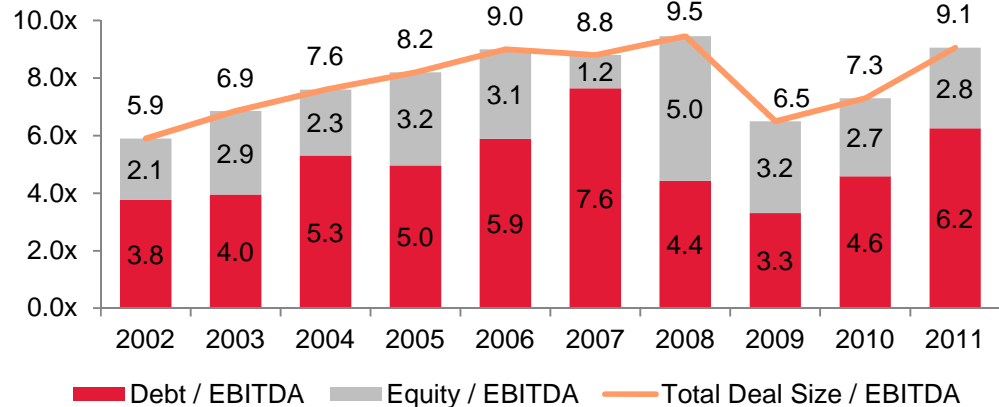
## Median EBITDA Multiples by Transaction Size

For Years Ended December 31, 2000 – 2011



## Private Equity Buyout Purchase Price Multiples (EV / EBITDA)

For the Years Ended December 31, 2002 – 2011



Source: Standard & Poor's.



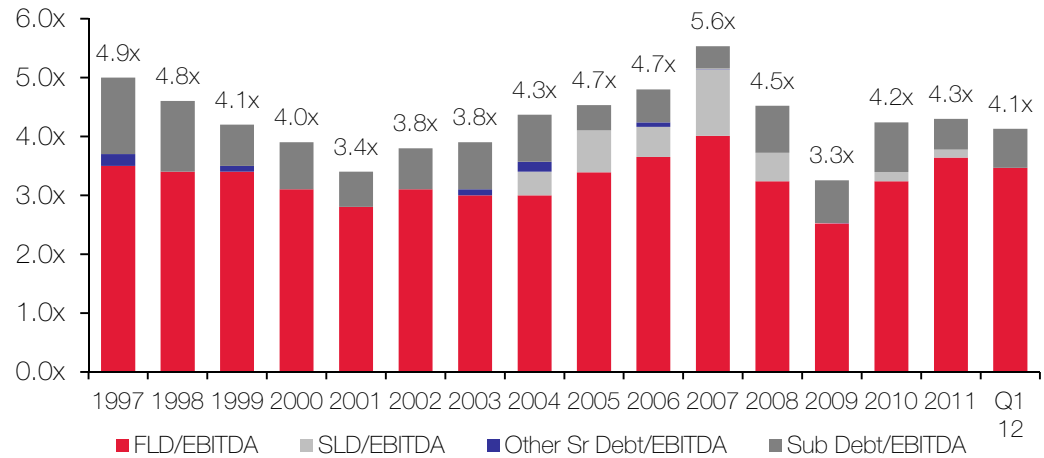


# I. Current Market Conditions

Leverage levels for LBOs have remained reasonably consistent following the 2009 low. During the first quarter of 2012, a trend has emerged of senior lenders providing all of the financing in LBOs. Consistent with historical trends, more leverage is available for larger transactions.

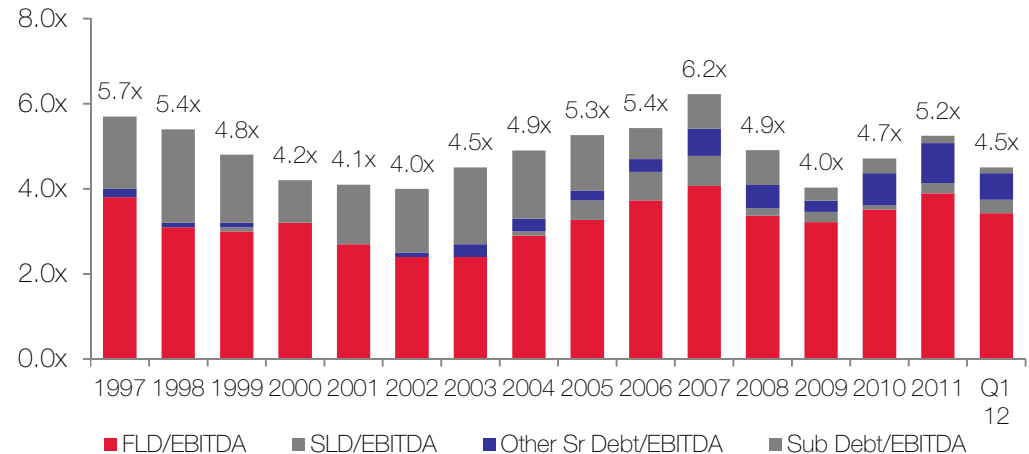
## Average Debt Multiples of Middle Market LBO Loans

For Years Ended December 31, 1997 – 2011 and 1Q 2012



## Average Debt Multiples for Large Corporate LBO Loans

For Years Ended December 31, 1997 – 2011 and 1Q 2012

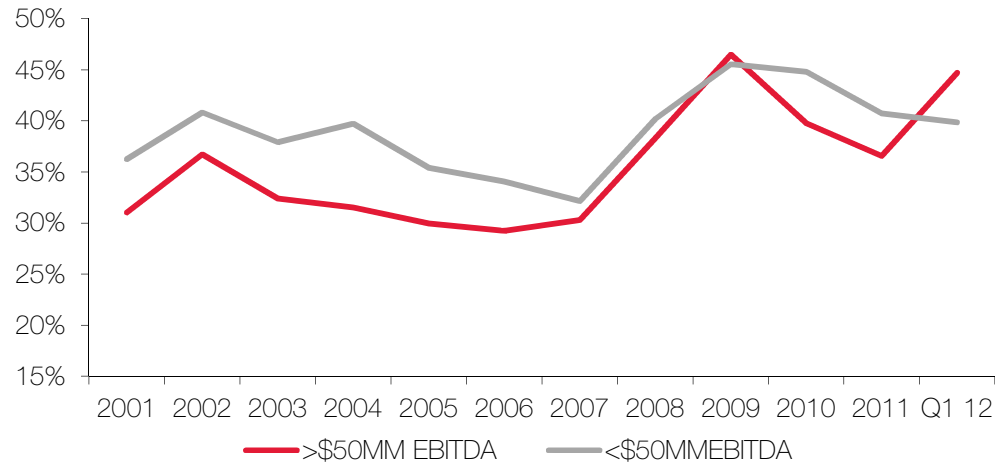


# I. Current Market Conditions

As debt markets have recovered, the proportion of equity contributed to LBOs showed some signs of returning towards pre-recession levels.

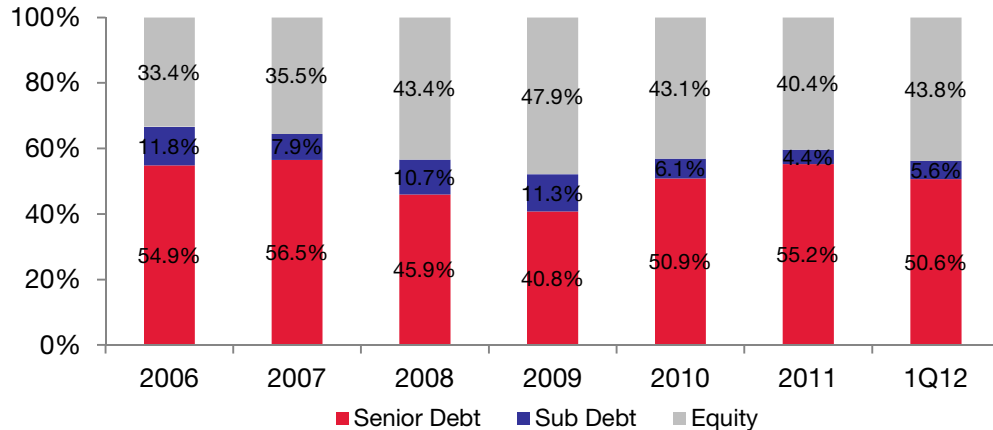
## Equity Contribution

For Years Ended December 31, 2001 – 2011 and Q1 2012



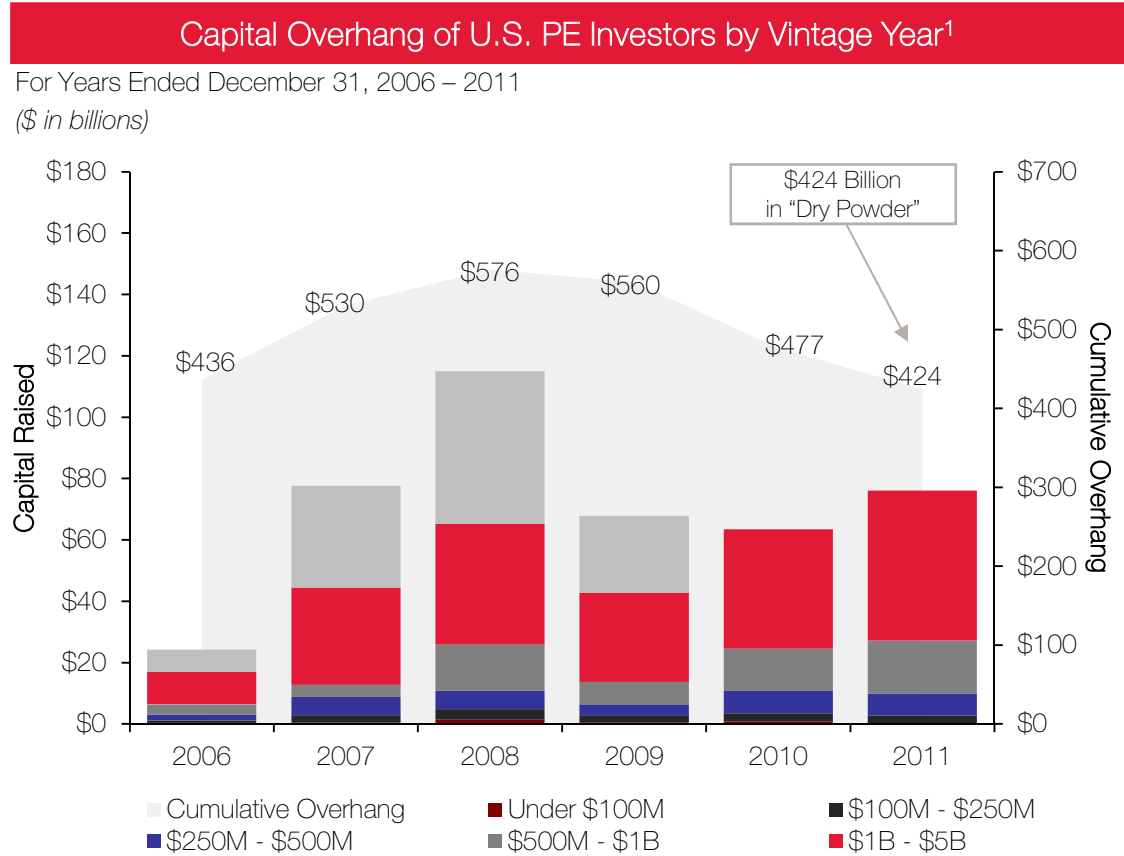
## Equity & Debt Contributions for Middle Market Transactions

For Years Ended December 31, 2001 – 2011



# I. Current Market Conditions

At the end of 2011, private equity funds were sitting on \$424 billion of dry powder. As this capital must be deployed or not called, it will likely drive LBO activity levels in upcoming years.



(1) Estimated buying power calculated as the cumulative overhang divided by the three-year average equity contribution to LBO transactions.

Source: Pitchbook.

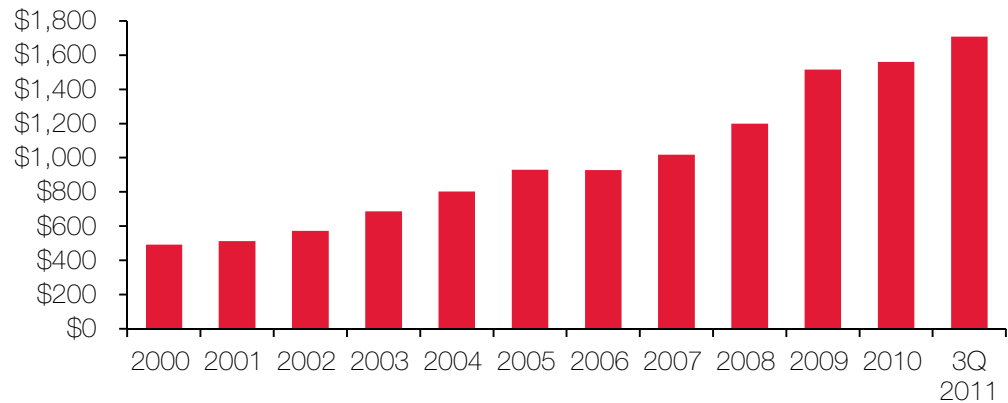


# I. Current Market Conditions

Corporate cash reserves built up during and since the economic downturn are driving increased corporate appetite for M&A. U.S. corporate cash balances as a percentage of total enterprise value remain near record levels and are driving interest in strategic M&A, especially for firms which need to grow via acquisitions to deliver above-market growth to investors.

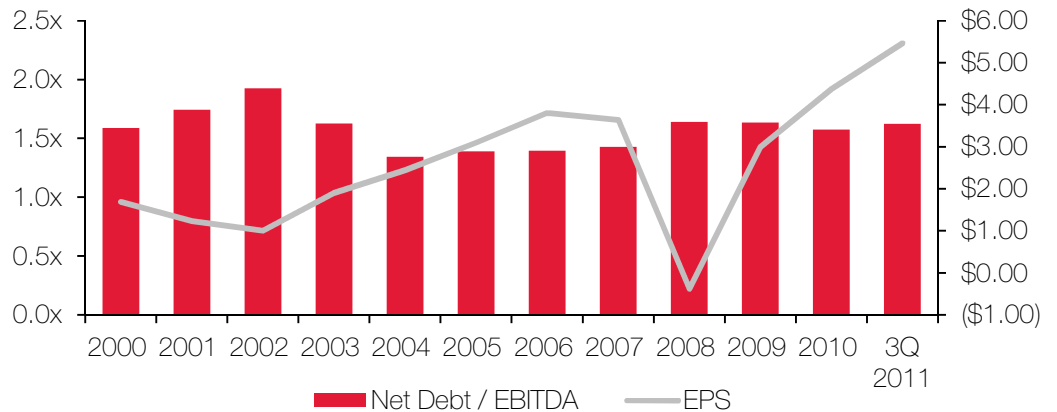
## S&P 500 – Aggregate Corporate Cash Balances

For Years Ended December 31, 2000 – 2010, and September 30, 2011



## S&P 500 – Debt and Earnings Levels

For Years Ended December 31, 2000 – 2010, and September 30, 2011



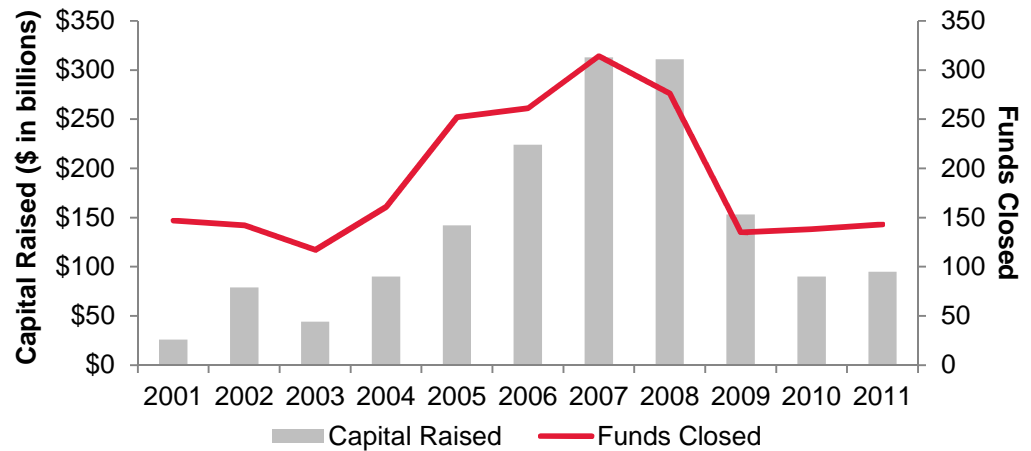
Source: CapitalIQ.

# I. Current Market Conditions

Private equity fundraising stabilized in 2011 compared to 2010, albeit at a fraction of 2007 levels. While the first quarter of 2012 showed an increase in capital raised, it was raised by a smaller number of funds. Fundraising continues to take much longer. It is increasingly difficult for private equity firms to raise capital without a history of superior returns to investors.

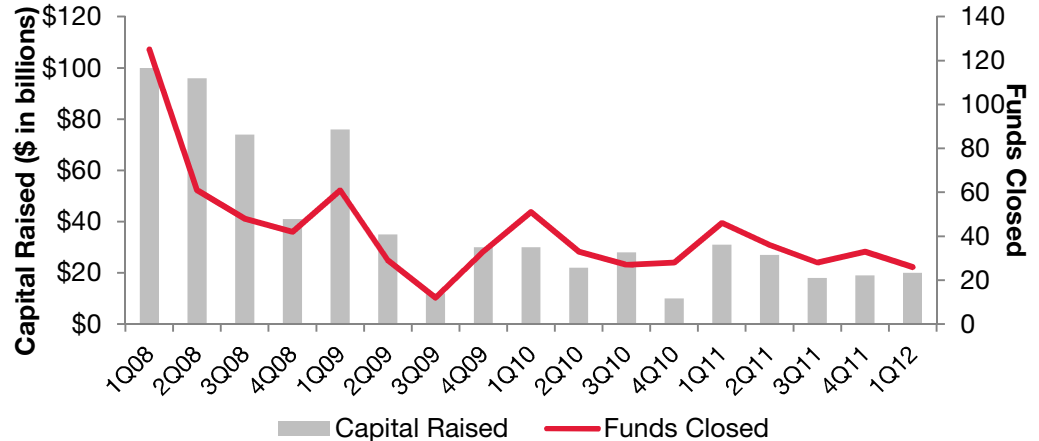
## U.S. Private Equity Fundraising by Year

For Years Ended December 31, 2001 – 2011



## U.S. Private Equity Fundraising by Quarter

For the Quarters Ended March 31, 2008 – 2012



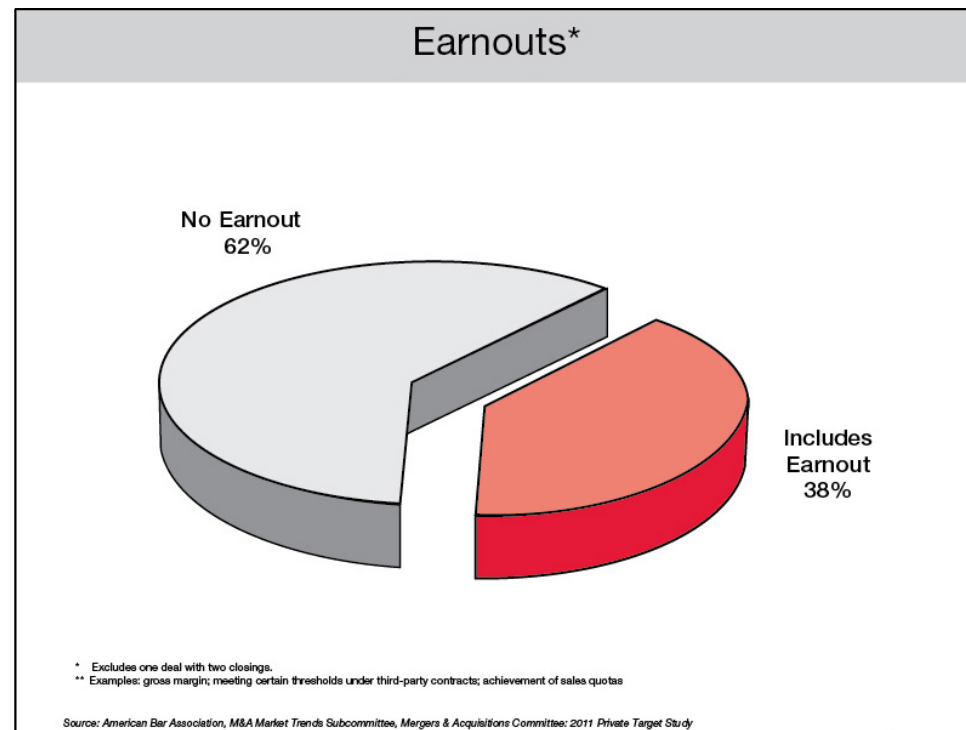
Source: Pitchbook.



## II. What's Market in Legal Trends

### A. Structure

In transactions involving private targets, there is an increased use of alternative financing structures, including seller notes (in low-yield environments, some sellers are less averse to high-coupon alternatives to mezzanine financing), equity rollovers and earnouts (tax and implied covenants to maximize earnouts are a focus).

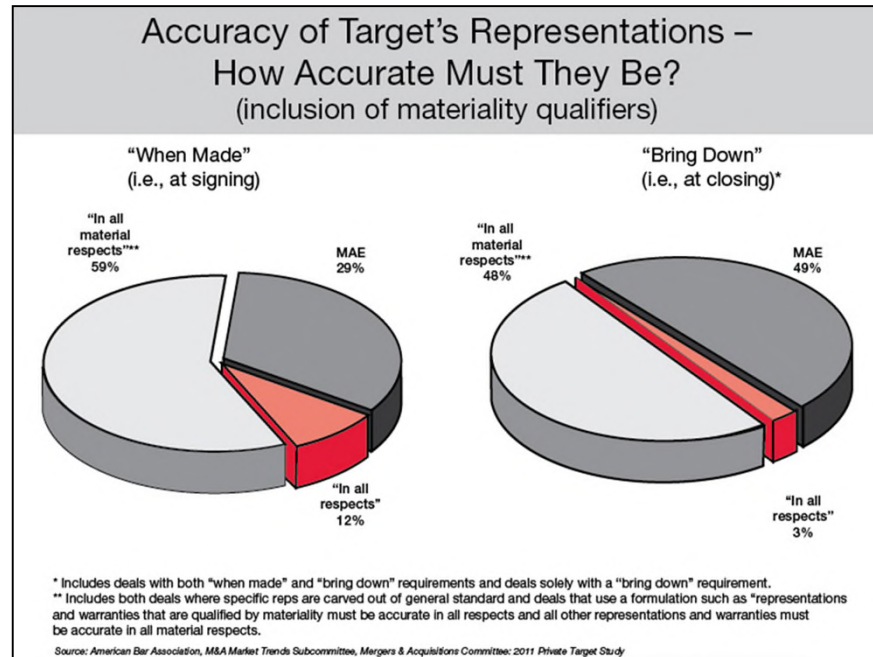


## II. What's Market in Legal Trends

### B. Evolution of Conditions to Closing and Remedies through M&A Boom, Crisis and Today

#### i. MAC Conditions

The extent to which a target's representations and warranties must be accurate (e.g., in all respects, in all material respects or to an MAE standard) continues to be a focus of attention during negotiations. MAE or materiality qualifiers continue to be included in the vast majority of acquisition agreements. Under Delaware case law, MAE provisions have become extremely difficult to enforce.

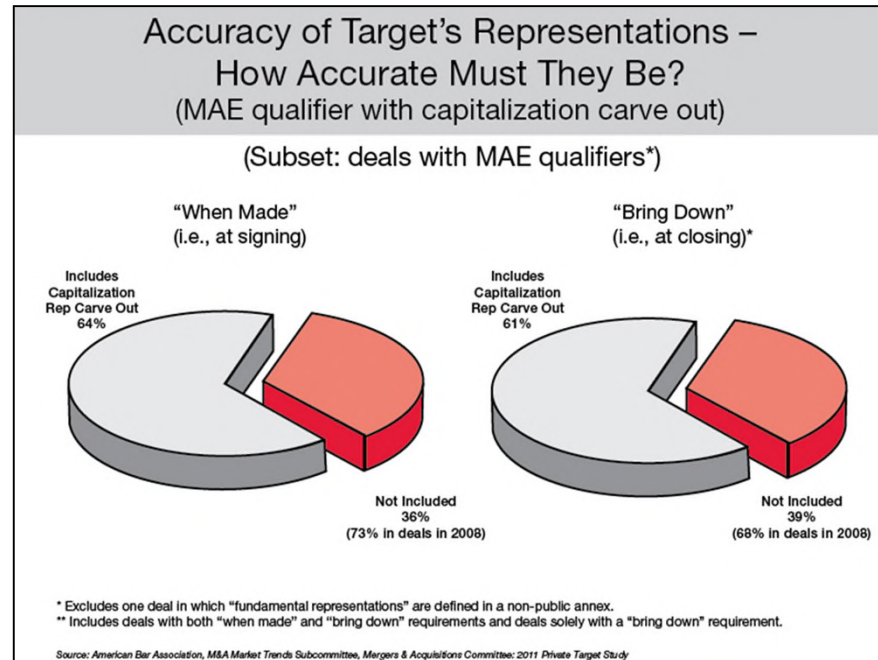


## II. What's Market in Legal Trends

### B. Evolution of Conditions to Closing and Remedies through M&A Boom, Crisis and Today

i. MAC Conditions

It is still common in private transactions for the capitalization representation to be carved out.



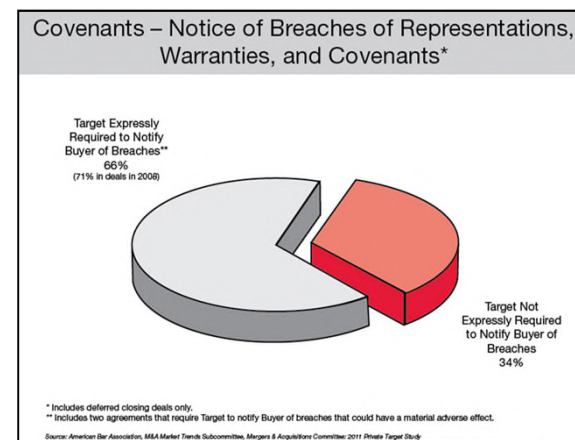
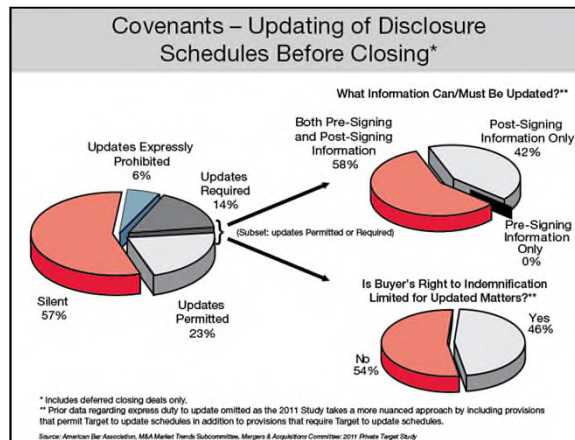


## II. What's Market in Legal Trends

### B. Evolution of Conditions to Closing and Remedies through M&A Boom, Crisis and Today

#### i. MAC Conditions

Less than 40% of private deals require or permit the target to update the disclosure schedules and only 66% of agreements require a target to expressly notify a buyer of a breach. There continues to be an emphasis on these provisions as they dictate the allocation of risk between signing and closing.



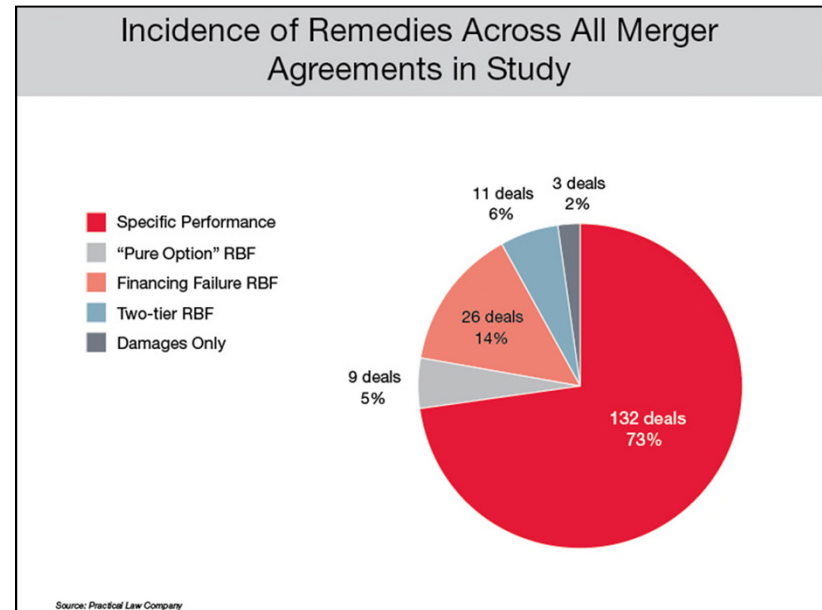
## II. What's Market in Legal Trends

### B. Evolution of Conditions to Closing and Remedies through M&A Boom, Crisis and Today

#### ii. Seller Remedies

Target remedies for buyer breaches and the failure of the financing condition generally evolved into five categories:

- (i) "Specific performance" provides the target company with a remedy to enforce all of buyer's obligations under all circumstances;
- (ii) A "pure option" reverse break-up fee ("RBF") is payable by the buyer as the exclusive remedy if the buyer's breach (for any reason) is the cause of the transaction not closing (with specific performance not available as a remedy);
- (iii) A "RBF for financing failure" serves as a cap on damages for some or all breaches, yet (with few exceptions) the target retains some form of specific performance remedy;
- (iv) With a "two-tier RBF" the buyer pays a lower RBF for non willful breaches or financing failure (or both) and a higher fee for willful breaches or when financing is available;
- (v) With "damages only" the buyer is not subject to specific performance but does not pay a RBF; damages are uncapped.



## II. What's Market in Legal Trends

### B. Evolution of Conditions to Closing and

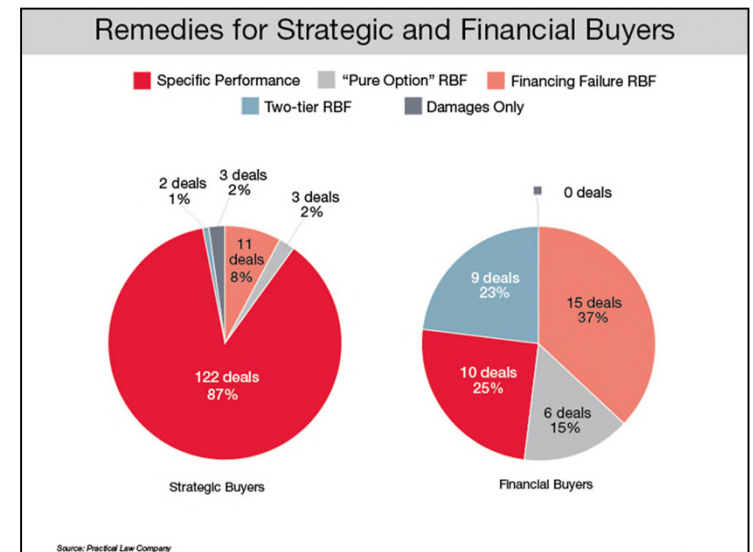
### Remedies through M&A Boom, Crisis and Today

#### ii. Seller Remedies

Targets are increasingly focused on certainty of closing and are less willing to agree to financing conditions. Buyers remain reticent to agree to specific performance as a remedy if unable to obtain financing or unwilling/unable to close. RBFs bridge the gap by providing targets meaningful remedies and buyers certainty of maximum exposure.

Specific performance continues to be the prevalent remedy across all transactions. However, in debt-financed transactions, financial buyers rarely agree to the specific performance remedy and are insistent on a Pure Option RBF, a Financing Failure RBF or Two-tier RBF as the exclusive remedy. While this data is in the context of public company targets, the rationale is applicable for private company targets as well.

In transactions in which the buyer is a shell company owned by a financial sponsor, guarantees or equity commitment letters from the financial sponsor remain common.

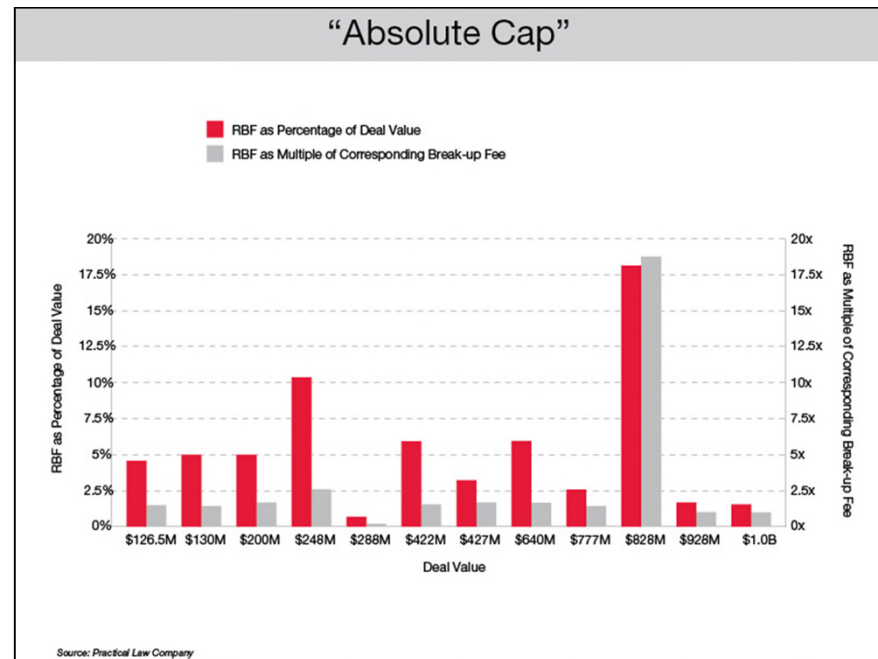


## II. What's Market in Legal Trends

### B. Evolution of Conditions to Closing and Remedies through M&A Boom, Crisis and Today

#### ii. Seller Remedies

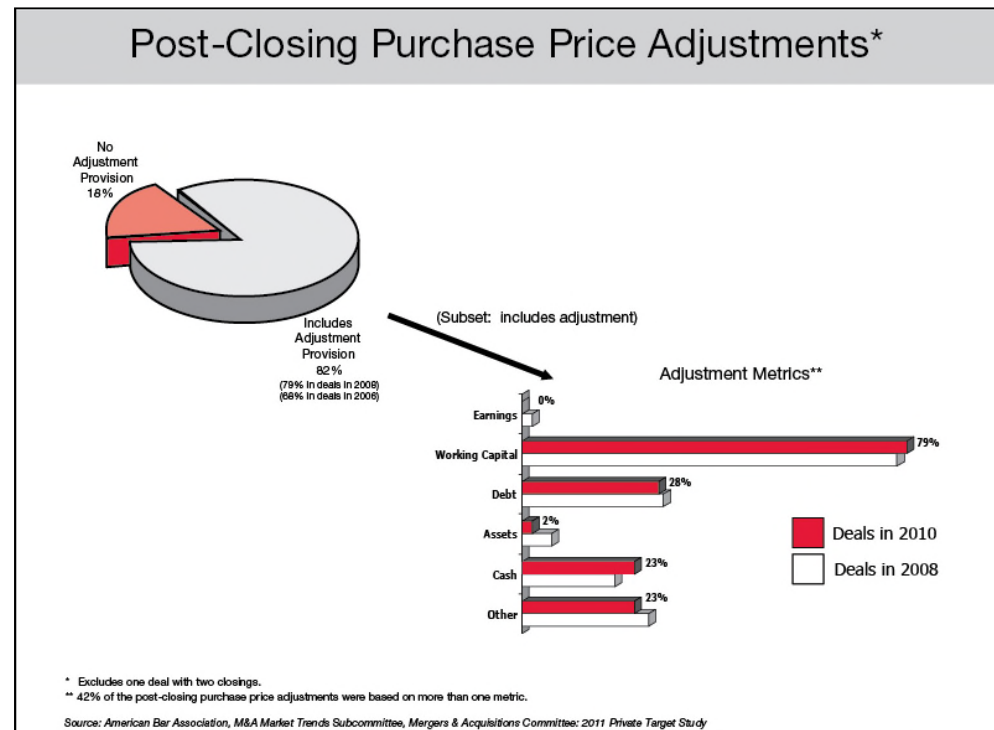
During 2011, RBFs for public company targets were in the range of 2% to 10% of enterprise value of the target. Half of deals with absolute cap RBFs are 5% or higher while 68% of deals with a cap for willful breach have RBFs of 5% or higher. Only 24% of deals with a cap for non-willful breach have RBFs of 5% or higher. These amounts are transaction specific and tend to be in greater ranges than traditional break-up fees.



## II. What's Market in Legal Trends

### C. Post-Closing Purchase Price Adjustments

The prevalence of post-closing purchase price adjustments continues to grow, especially in the context of private company acquisitions. These adjustments are used to make certain that the target is delivered to the buyer with a predetermined financial condition to avoid having the effective purchase price vary from the one that is negotiated. As such, these provisions are heavily negotiated and are ripe for post-closing disputes and litigation. Precise language in these provisions, particularly with respect to the measurement of balance sheet items, is required.



## II. What's Market in Legal Trends

### D. Key Indemnity Terms

#### i. Generally

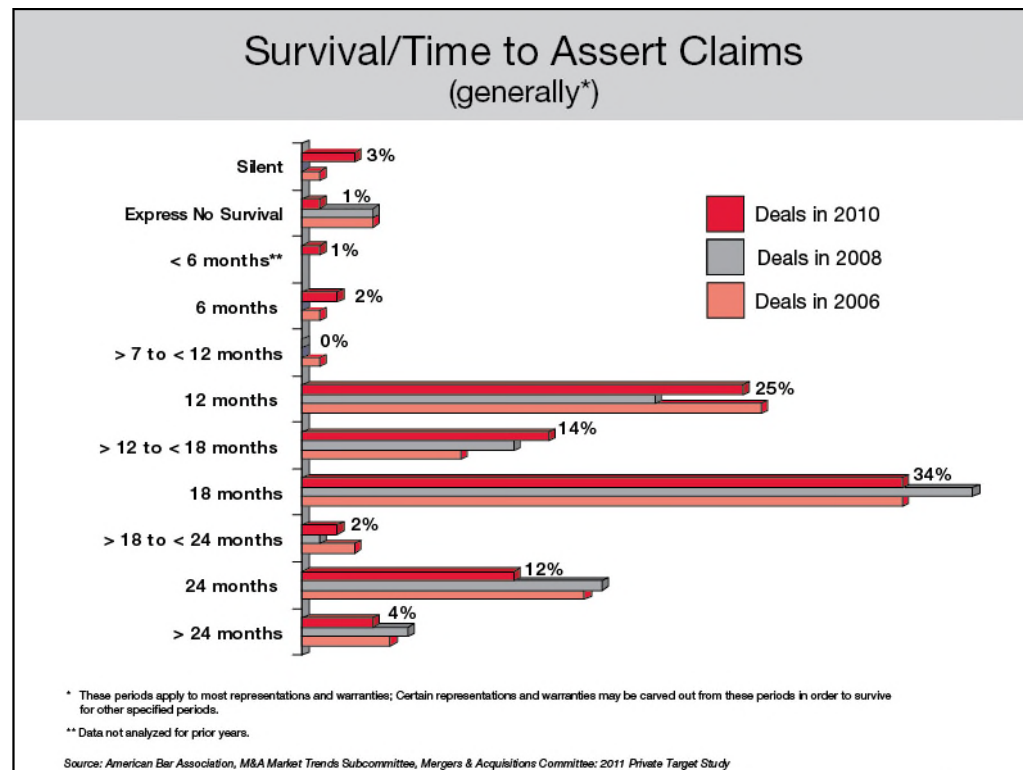
Indemnification terms continue to be the focus of a substantial amount of time and energy in negotiations. Not surprisingly, indemnification terms became generally more target friendly during the M&A boom and during the crisis leverage shifted somewhat to buyers. As markets have normalized, the newly-gained leverage of buyers has dissipated somewhat. The following is a summary of some of the more important indemnity features.

## II. What's Market in Legal Trends

### D. Key Indemnity Terms

#### ii. Survival Period

In 2011, survival periods for private company targets continued to be generally in the 12 to 18 month range. The most frequent carve-outs continue to be for taxes, ownership of shares and assets, capitalization, due organization and authority, broker's fees, no conflicts, covenants and fraud. It is also not uncommon for representations regarding ERISA and environmental matters to be carved-out of the survival period or subjected to a longer survival period.

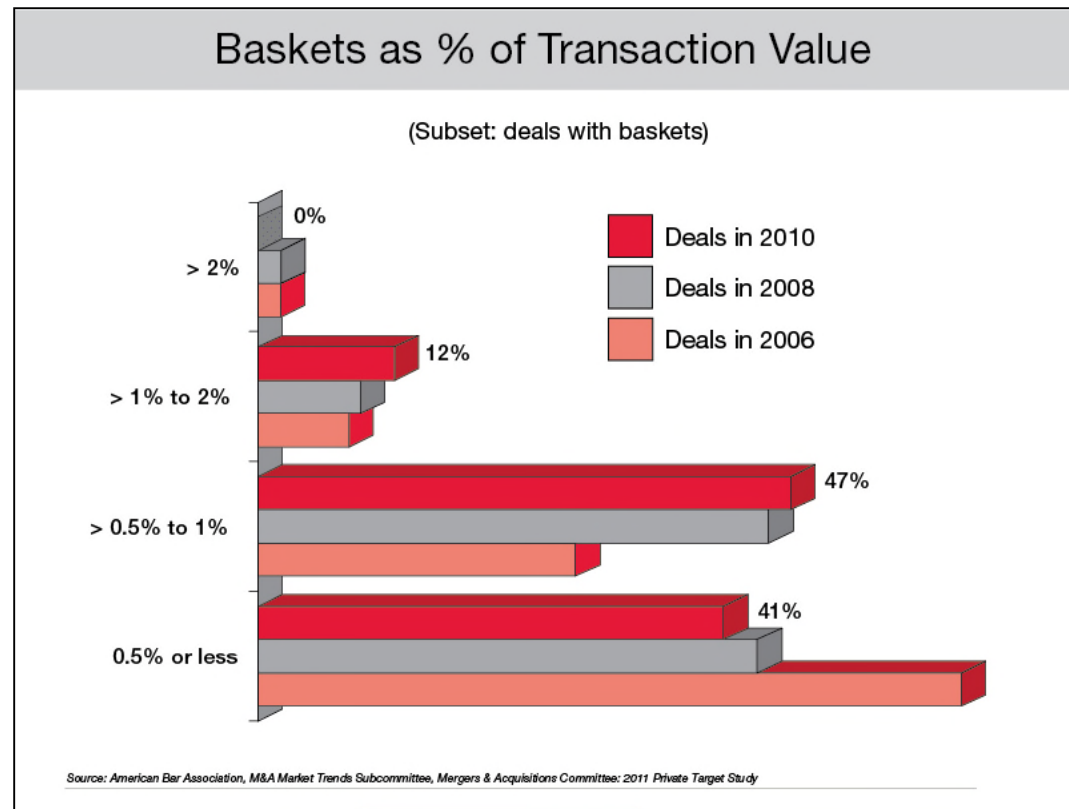


## II. What's Market in Legal Trends

### D. Key Indemnity Terms

#### iii. Baskets

Baskets for breaches by private company targets are most commonly under one percent of transaction value. Deductible baskets continue to be marginally more common than first dollar baskets. The most frequent carve-outs continue to be for representations regarding taxes, ownership of shares and assets, capitalization, due organization and authority, ERISA, environmental, broker's fees, and for fraud. Surprisingly, breaches of covenants are subject to baskets in a significant minority of transactions. Eligible claim thresholds (i.e., "mini-baskets") are also appearing in a significant minority of transactions.





## II. What's Market in Legal Trends

### D. Key Indemnity Terms

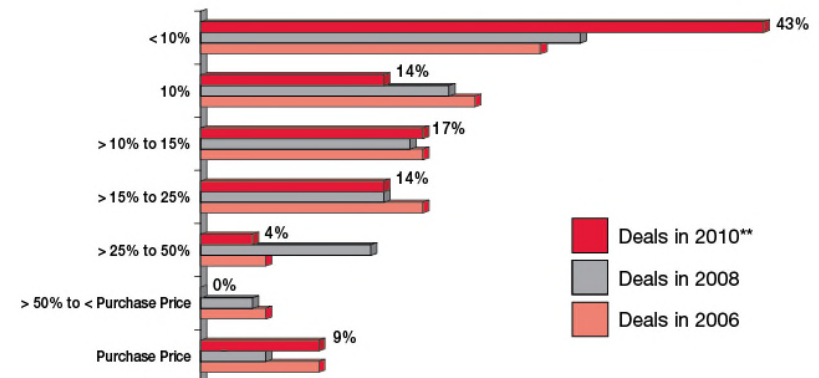
#### iv. Caps

Indemnity caps for breaches continue to be found in the vast majority of transactions involving private company targets. Most frequently, caps are less than 10% of enterprise value, although higher caps are not uncommon. Carve outs for caps continue to be the topic of extensive negotiations, with the most frequent carve-outs being for representations regarding taxes, ownership of shares and assets, capitalization, due organization and authority, ERISA, environmental and broker's fees.

#### Cap Amounts as % of Transaction Value

(Subset: deals with determinable caps)

	Mean	Median	Minimum	Maximum
Deals in 2010	18.88%	10.00%	0.46%	100%



\* Caps generally applicable to contractual indemnification obligations; does not take into account different caps for specific items (see "Cap Carve Outs").  
 \*\* 2010 percentages total 101% due to rounding.

Source: American Bar Association, M&A Market Trends Subcommittee, Mergers & Acquisitions Committee: 2011 Private Target Study

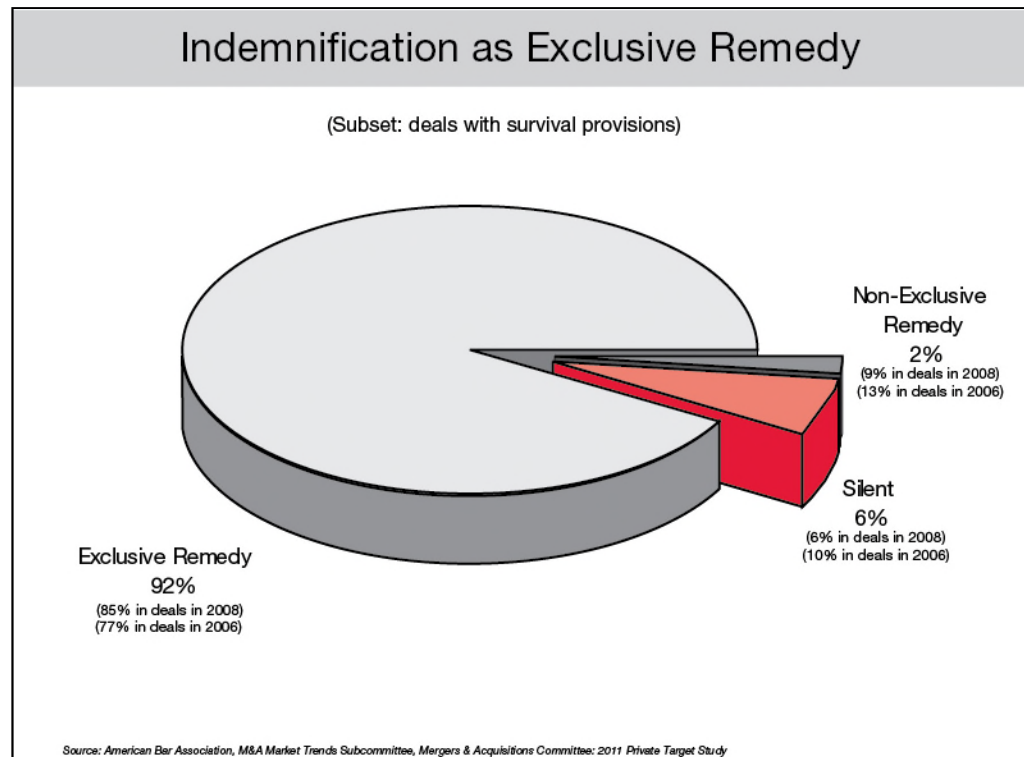


## II. What's Market in Legal Trends

### D. Key Indemnity Terms

#### v. Exclusive Remedy

In the vast majority of transactions involving private company targets, indemnification continues to be the exclusive remedy for breaches. The most common carve-outs are for fraud and intentional misrepresentations. Surprisingly, carve-outs for equitable remedies and breaches of covenants only appear in a minority of transactions.



## II. What's Market in Legal Trends

### D. Key Indemnity Terms

#### vi. Escrows and Holdbacks

Mean and median escrows and holdbacks in transactions involving private company targets continue to average approximately 10% of enterprise value, with the vast majority falling in the 5% to 15% range. Not surprisingly, smaller transactions generally have a larger percentage of consideration placed in escrow.



**Escrows/Holdbacks as % of Transaction Value**  
(statistical summary)

(Subset: deals with determinable escrows/holdbacks)

Deals in:	Mean	Median	Minimum	Maximum
2010	9.30%	9.19%	0.33%	27.34%
2008	10.51%	9.93%	1.23%	37.30%
2006	8.94%	8.95%	1.10%	25.00%

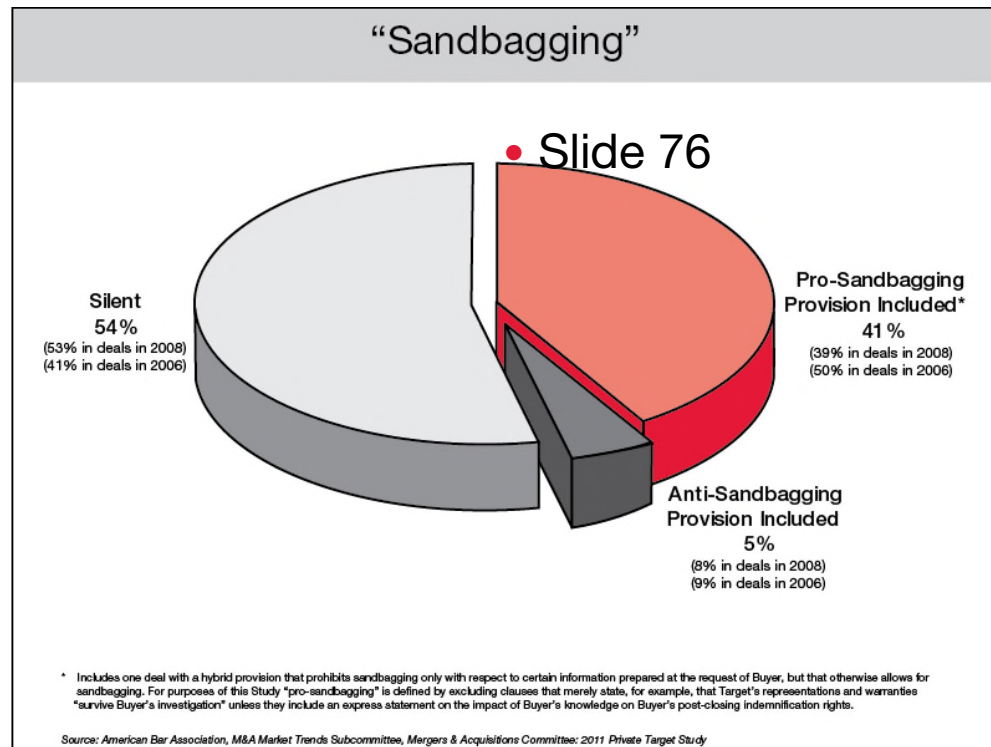
Source: American Bar Association, M&A Market Trends Subcommittee, Mergers & Acquisitions Committee 2011 Private Target Study

## II. What's Market in Legal Trends

### D. Key Indemnity Terms

#### vii. Sandbagging

Anti-sandbagging provisions for the benefit of private company targets remain the exception rather than the norm. Pro-sandbagging provisions are included in a substantial minority of transactions, while more than half of transactions are silent on this point. There is conflicting case law among the states where the operative documents are silent with respect to sandbagging.

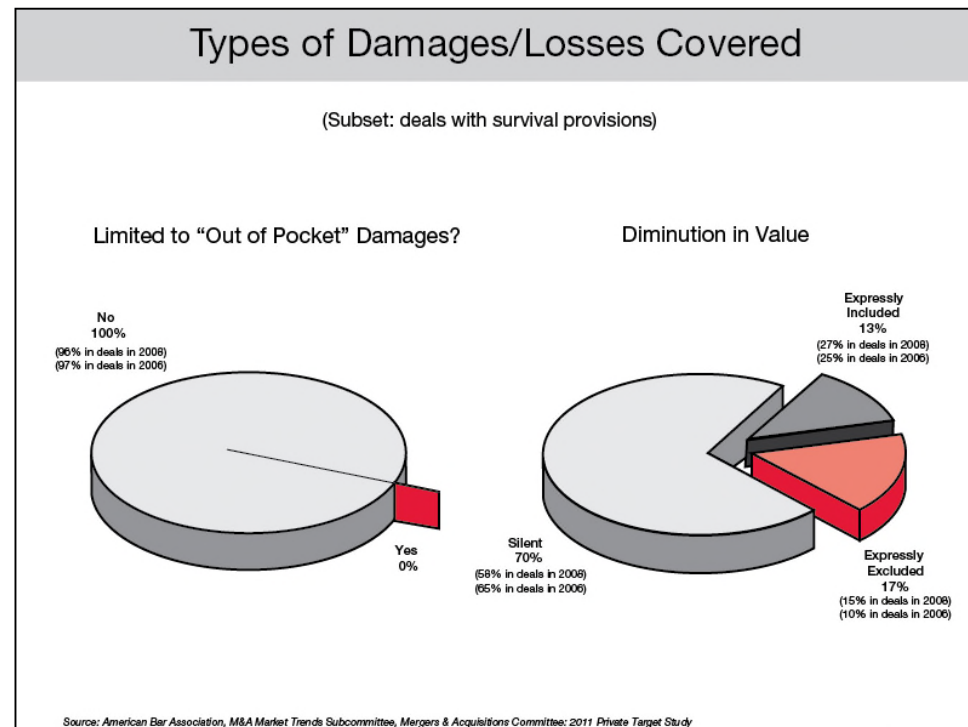


## II. What's Market in Legal Trends

### D. Key Indemnity Terms

#### viii. Types of Damages

Of the transactions surveyed, none of the private targets were successful in limiting indemnification solely to out of pocket damages. While a majority of transactions are silent as to whether damages may include a diminution of value, in 13% of transactions diminution in value is expressly included as a permitted type of damages, while in 17% of transactions it is expressly excluded. In a substantial minority of transactions other types of damages are expressly included (e.g., consequential and incidental).



## II. What's Market in Legal Trends

### E. Key Escrow Terms

The percentage of purchase price placed in escrow averages approximately 9%, with approximately 60% of escrow amounts falling in the range of 5% to 15% of the purchase price.

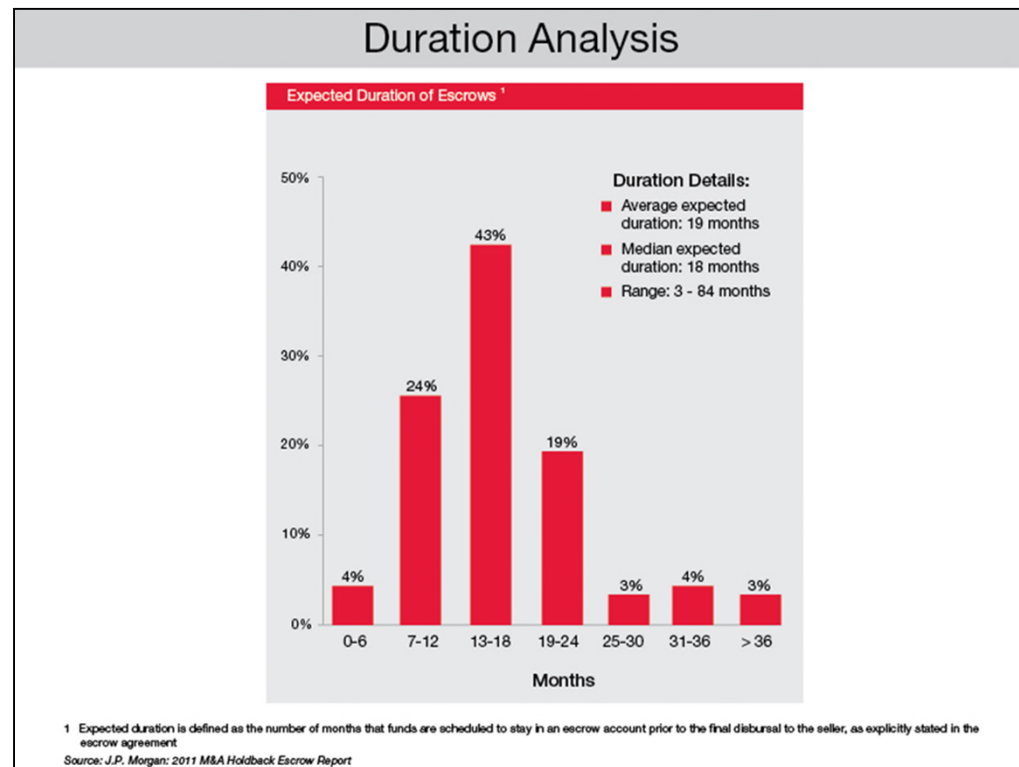


## II. What's Market in Legal Trends

### E. Key Escrow Terms

Escrow agreements provide that escrowed funds are scheduled to stay in escrow pending final disbursement to the seller for an average of 19 months. The shortest escrow duration identified was 3 months while the longest was 84 months.

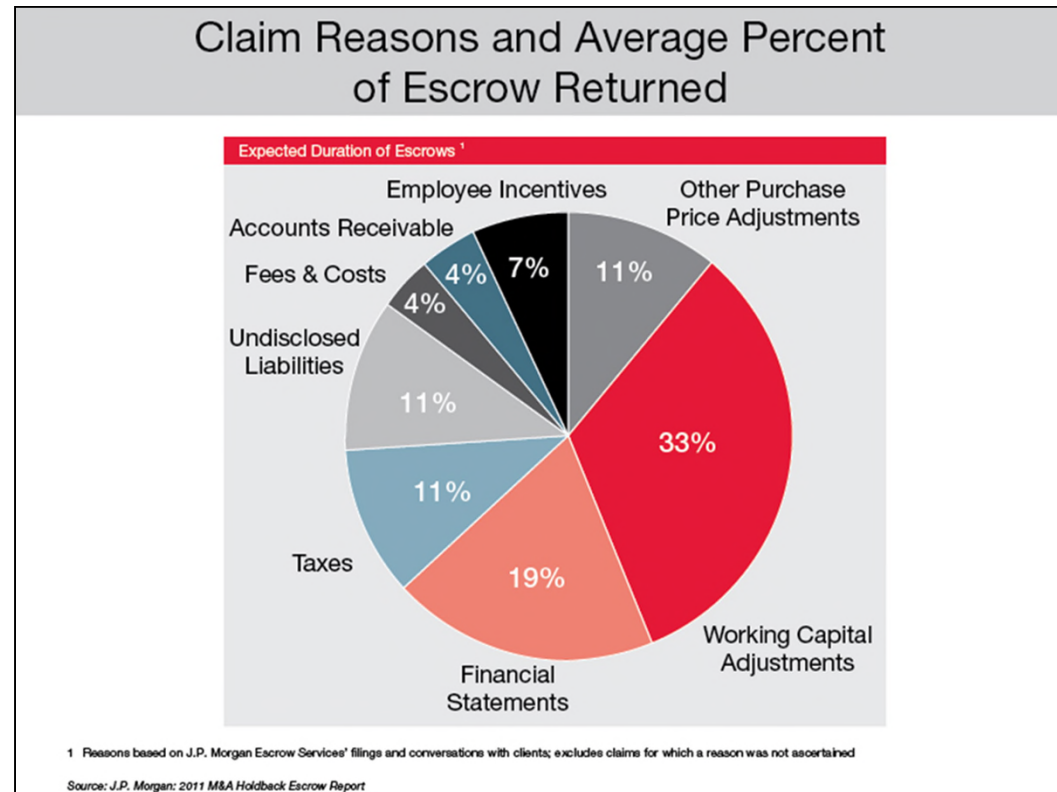
According to J.P. Morgan, 86% of escrow agreements specify a termination date (the most prevalent being 18 months) and 28% provide for at least one scheduled disbursement to the seller prior to the final disbursement. In deals with scheduled disbursements, the average expected duration of escrow jumps from 19 months to 25 months.



## II. What's Market in Legal Trends

### E. Key Escrow Terms

Purchase price, working capital adjustments, taxes and financial statements continue to account for the majority of all claims.





# About Akerman's M&A and Private Equity Practice

- *U.S. News - Best Lawyers*: Recognized in the National Corporate, Mergers & Acquisitions and Securities/Capital Markets Law categories in the U.S.
- *Chambers USA*: #1 Corporate practice in Florida; recognized as market leader since 2003 for Mergers & Acquisitions and Private Equity in Florida
- *The Legal 500*: Ranked as one of the leading Mergers, Acquisitions and Buyouts law firms for Middle-Market in the U.S.
- *Corporate Counsel* magazine: “Go To” law firm for corporate transactions/M&A
- Core group comprised of corporate, securities, tax, finance, benefits, creditors’ rights, intellectual property, information technology, real estate, litigation and regulatory lawyers
- Focus on middle-market transactions, including LBOs, take private transactions, growth equity investments, recapitalizations, distressed debt and other distressed investments, and exits through private sales, SPACs, and IPOs



## About Akerman

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