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M&A and Private Equity Update

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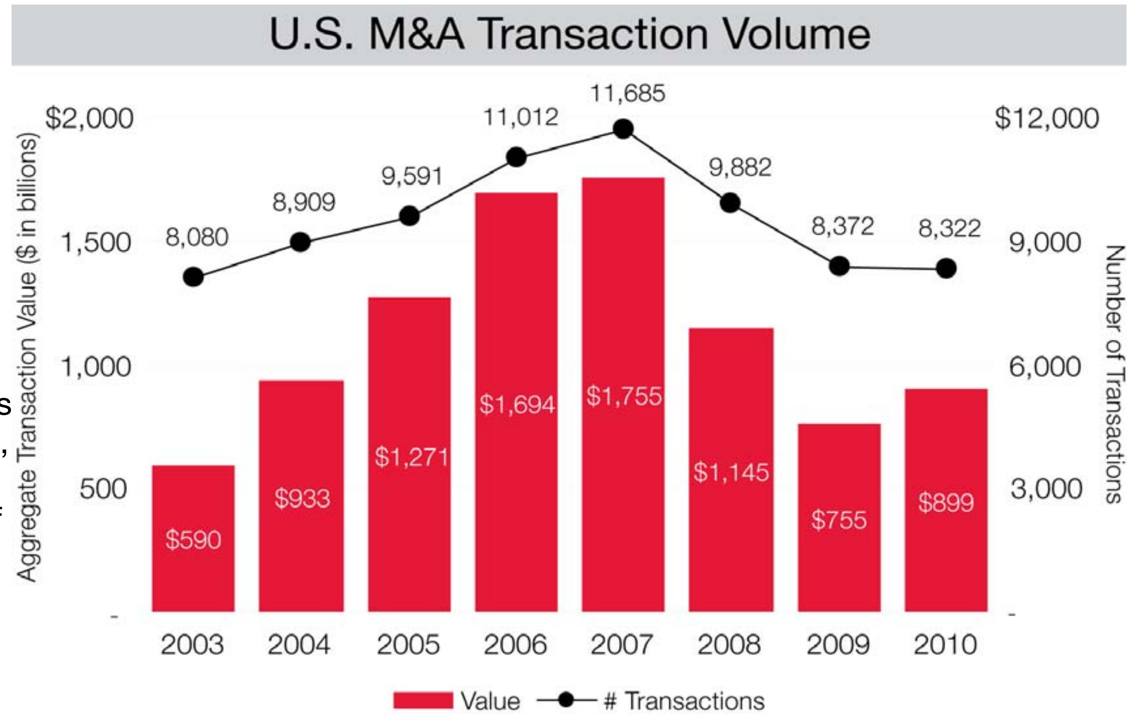
I. Current Market Conditions

While the level of U.S. M&A activity has decreased substantially since the 2007 peak, the aggregate transaction value increased by almost 20% for 2010 as compared to 2009, and the number of transactions during 2009 and 2010 was virtually unchanged. Key drivers of this increase included, among other things, increased confidence in the economic outlook, an increase in the availability of debt financing, the return of financial buyers to the market, 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.



Source: Thomson Reuters SDC Platinum – Middle Market transactions include targets with less than $750 million in enterprise value at announcement, where disclosed

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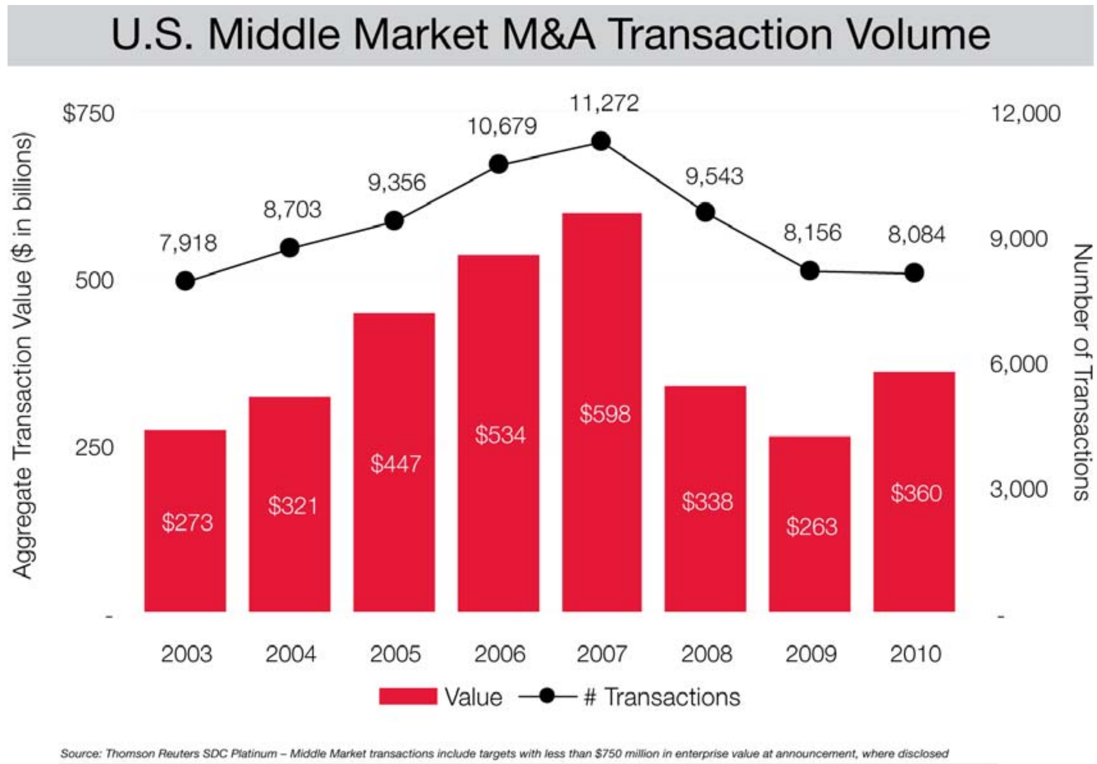
I. Current Market Conditions

Consistent with data for all U.S. M&A transactions, the number of U.S. middle market transactions during 2010 was substantially lower than in 2007 and virtually unchanged from 2009; however, the aggregate transaction value increased by more than 35% for 2010 as compared to 2009.



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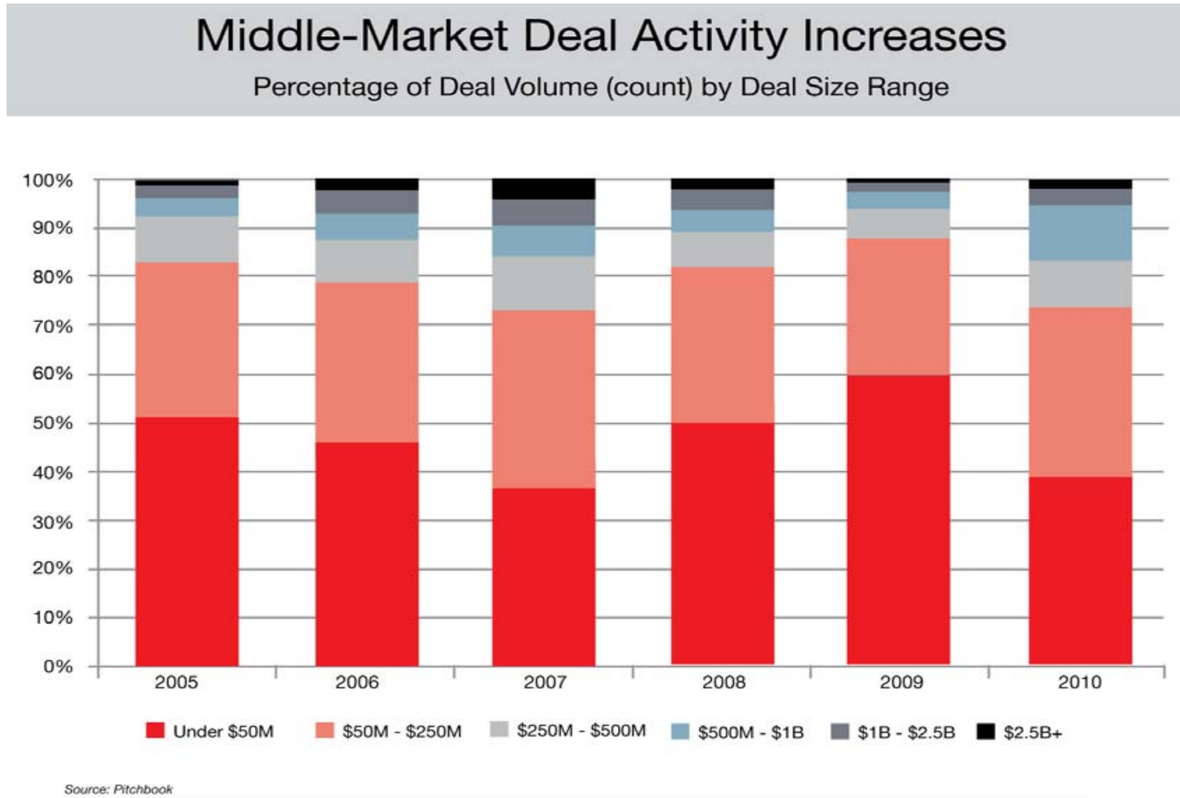
I. Current Market Conditions

Middle market transactions, which were less adversely affected by the downturn than larger transactions, continued to dominate deal flow during 2010. As the availability of debt improved in 2010, transactions valued at less than $250 million accounted for just over 70% of all transactions as compared to almost 90% of all transactions in 2009.



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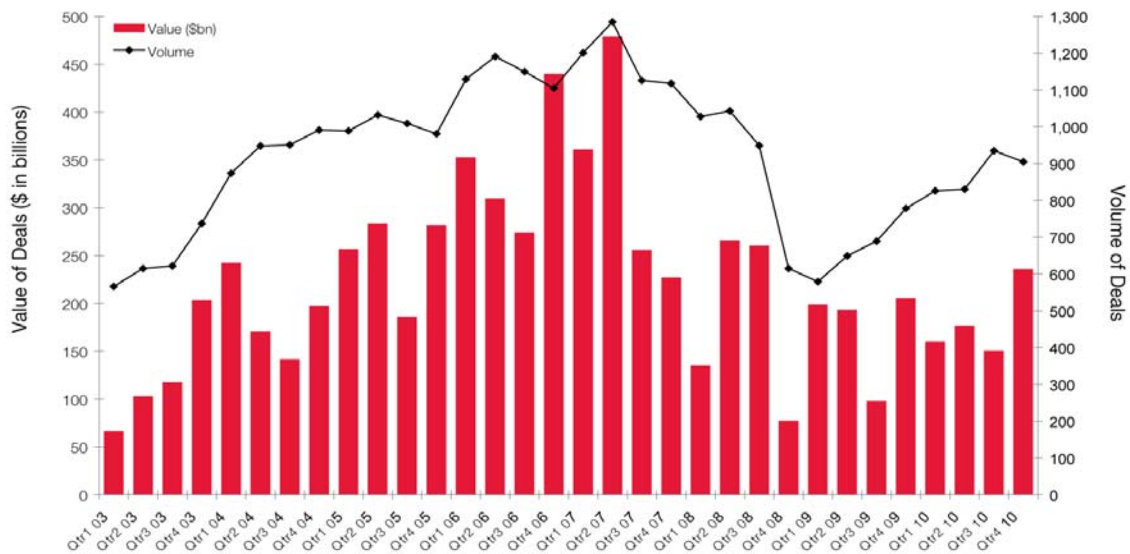
I. Current Market Conditions

Annual quarter over quarter transaction value and volume continued to increase during 2010. Aggregate transaction volume increased in 4Q 2010 over the prior quarter. During the same timeframe, however, despite improving credit conditions and the incentive of private equity funds to deploy their dry powder, the number of transactions decreased slightly. Whether this decrease is an aberration or a trend remains to be seen. Market participants indicate that buyers and sellers remain too far apart in valuation expectations for the market to pick up more dramatically.

U.S. M&A Activity - Quarterly



Source: Press Release: mergermarket League Tables of Legal Advisers for Year End 2010

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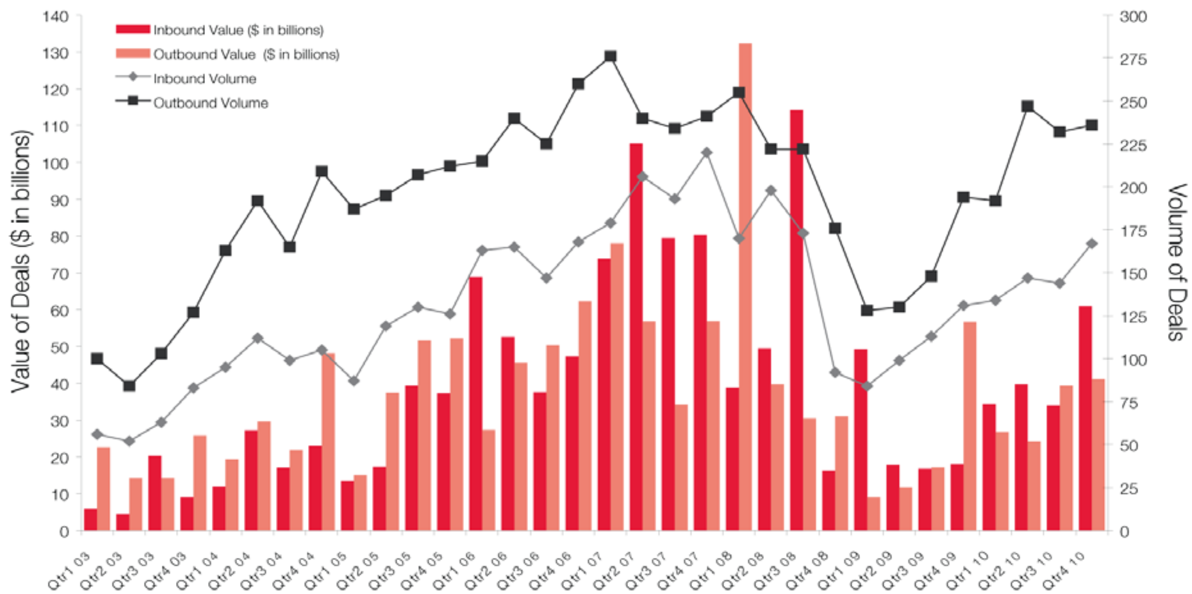
I. Current Market Conditions

Inbound and outbound M&A continued to recover in 2010; however, aggregate transaction volume increased much more sharply than aggregate transaction value.

U.S. Inbound/Outbound M&A



Source: Press Release: mergermarket League Tables of Legal Advisers for Year End 2010

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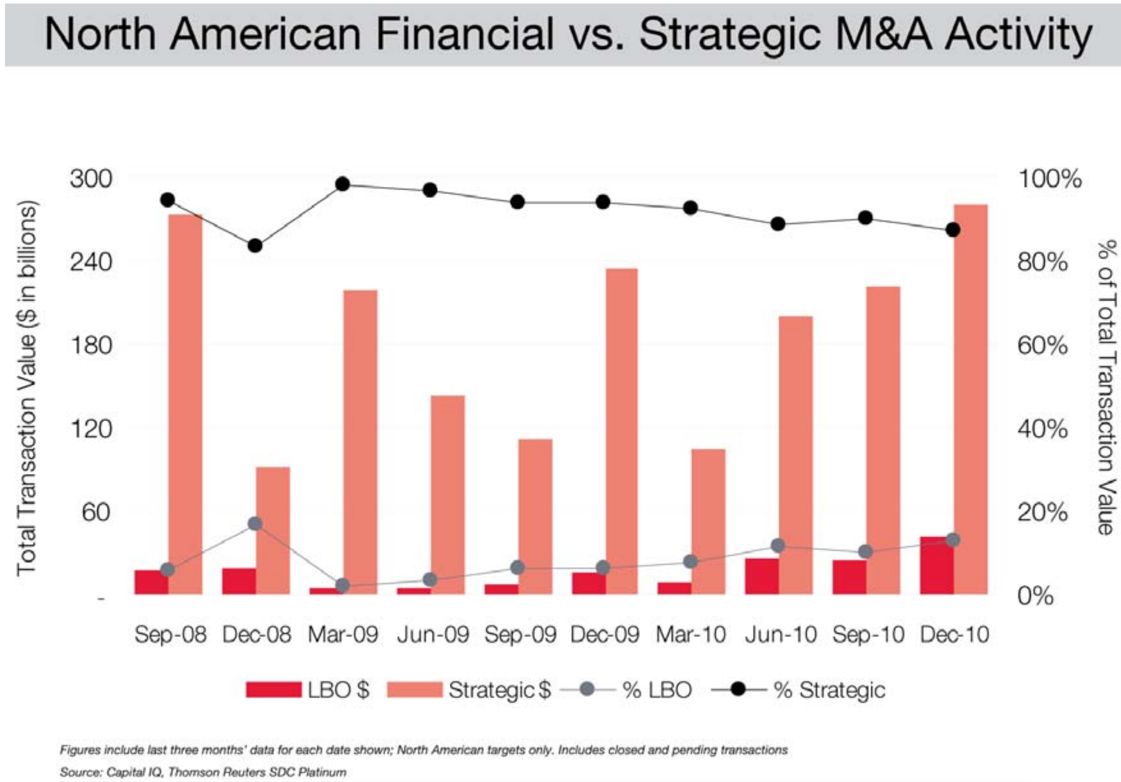
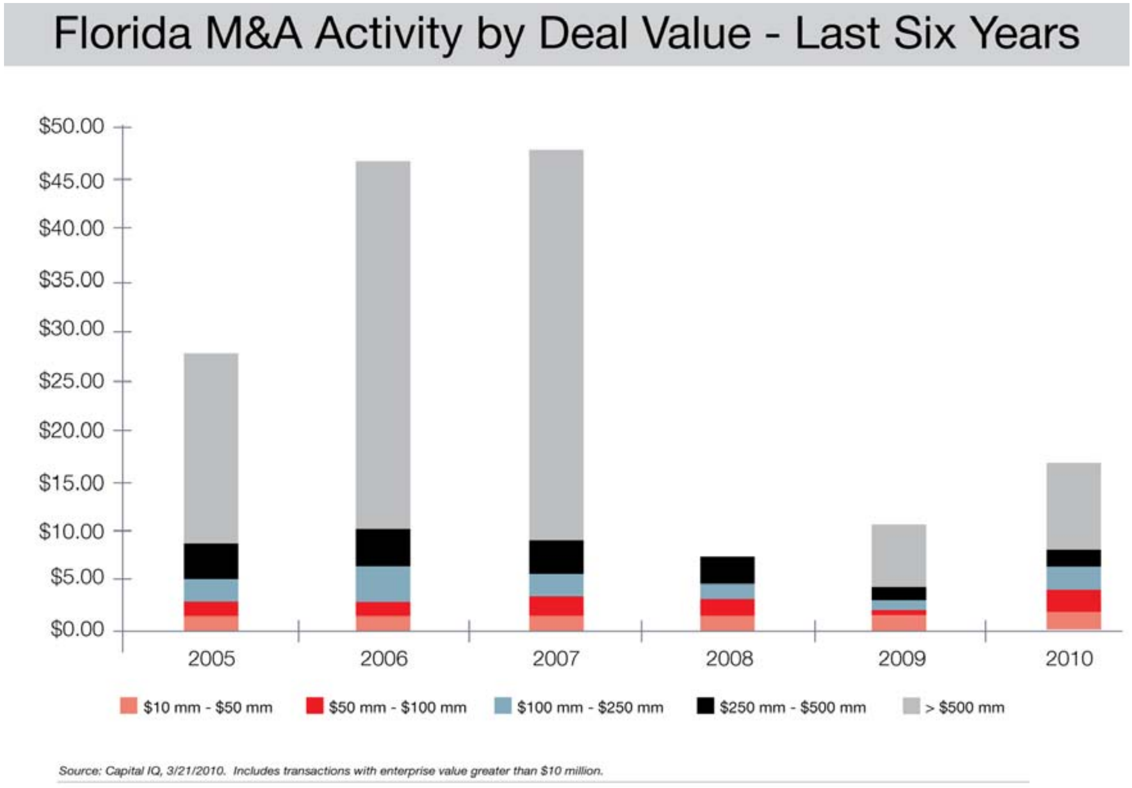
I. Current Market Conditions

While strategic buyers continue to dominate financial buyers in both aggregate transaction value and volume in North America, as the debt markets recovered during 2010 the proportion of transactions by financial buyers vis-à-vis strategic buyers has increased.



I. Current Market Conditions

Florida M&A activity has continued to grow steadily over the past three years, although it is still at levels which are a fraction of those of 2007.



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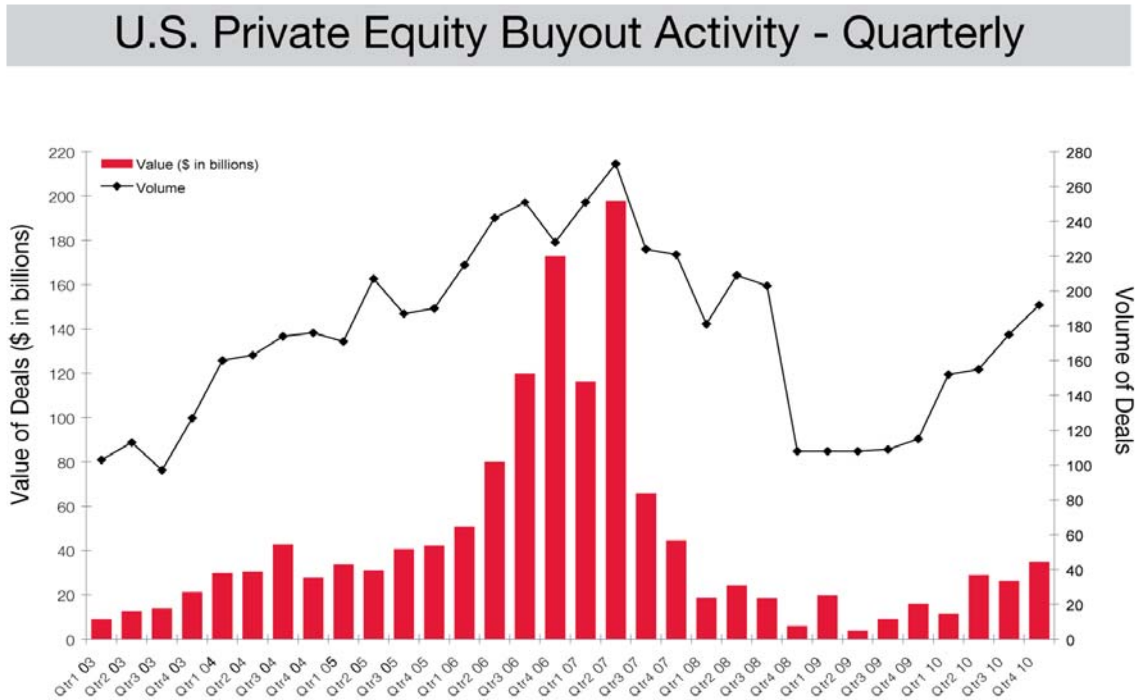
I. Current Market Conditions

The aggregate value and volume of private equity buyout activity continued to improve throughout 2010 and on an annual quarter over quarter basis compared to 2009; however, activity levels are at a fraction of what they were at the 2007 peak and resemble pre-peak levels.



Source: Press Release: mergermarket League Tables of Legal Advisers for Year End 2010

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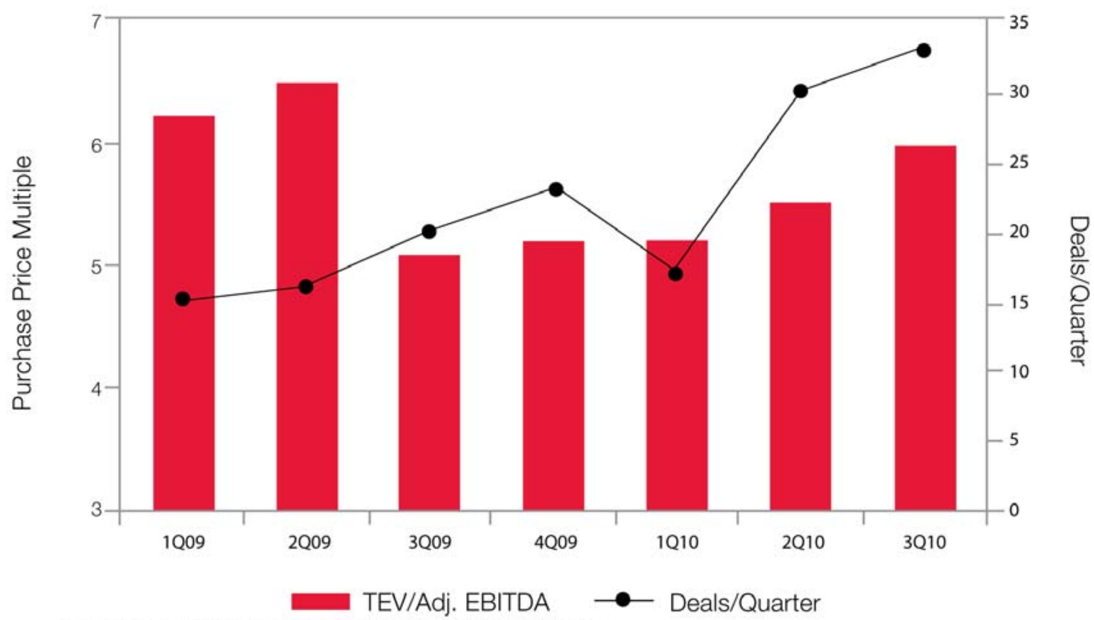
I. Current Market Conditions

According to GF Data Resources LLC, average purchase price multiples and transaction volume continued to increase for U.S. M&A transactions with an enterprise value of $10 million to $250 million. Not surprisingly, purchase price multiples for smaller transactions remain lower than for larger transactions.

Average Purchase Price Multiples and Deal Volume Continued to Improve for Smaller Transactions



Source: GF Data Resources LLC for U.S. M&A transactions with enterprise value of $10 - $250 Million

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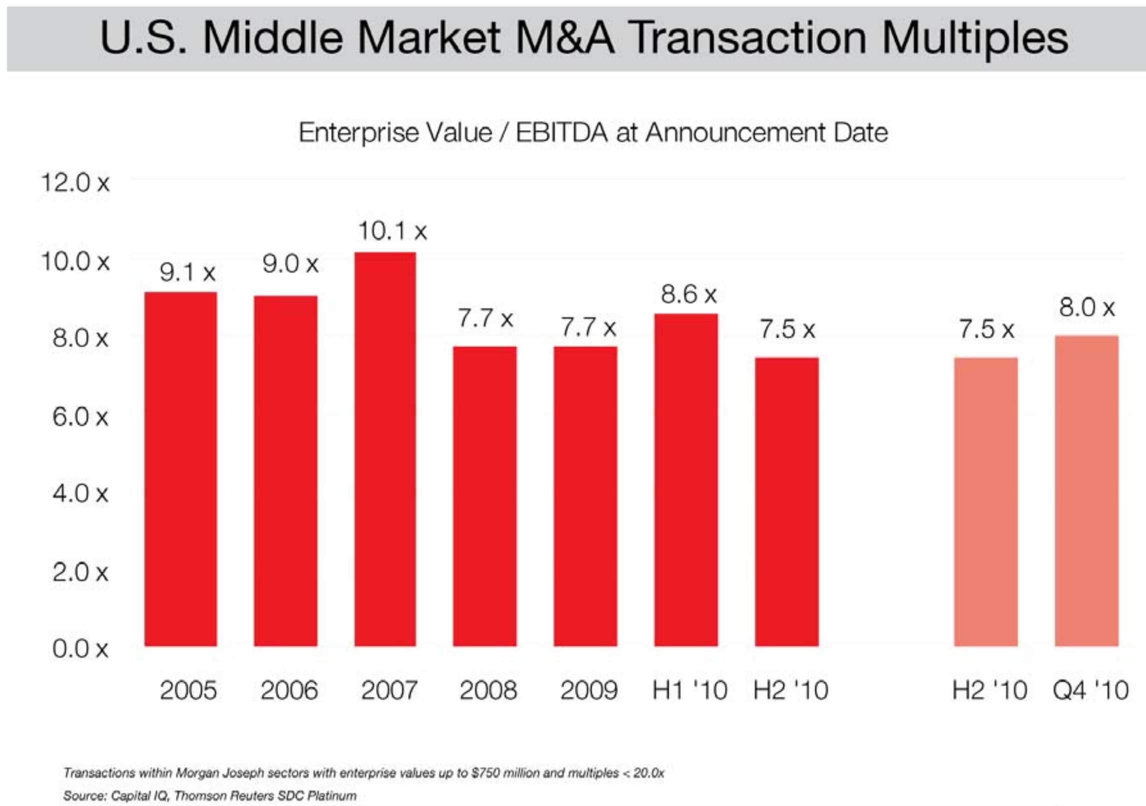
I. Current Market Conditions

Middle market transaction multiples for 4Q 2010 rose compared to 2009 but were lower than for first half 2010 and they remain the lowest in at least five years.



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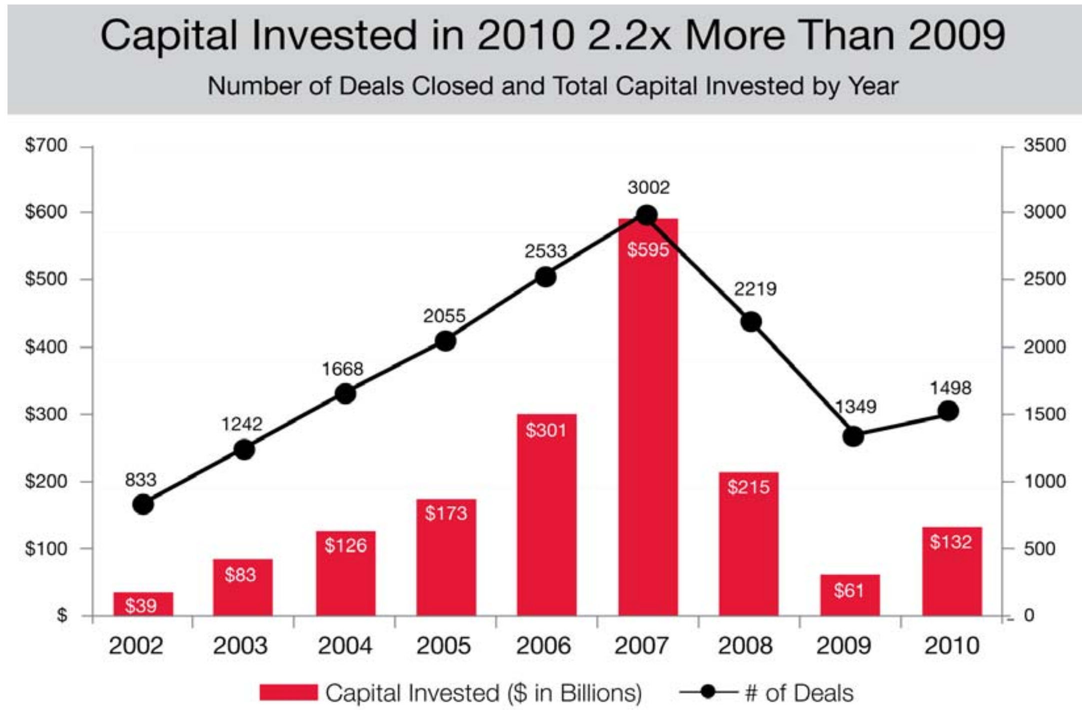
I. Current Market Conditions

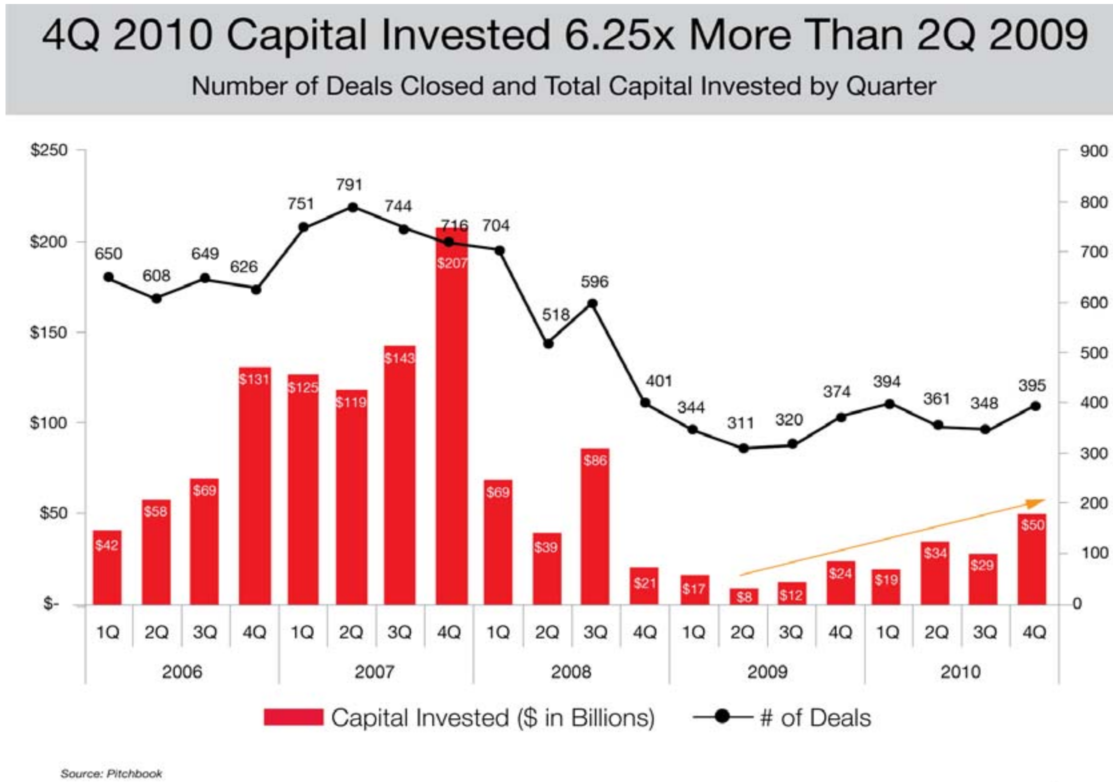
Although the current level of M&A activity has contracted substantially since the peak in 2007, both the level of capital investment and the number of transactions have increased substantially in 2010 compared to 2009.



Source: Pitchbook

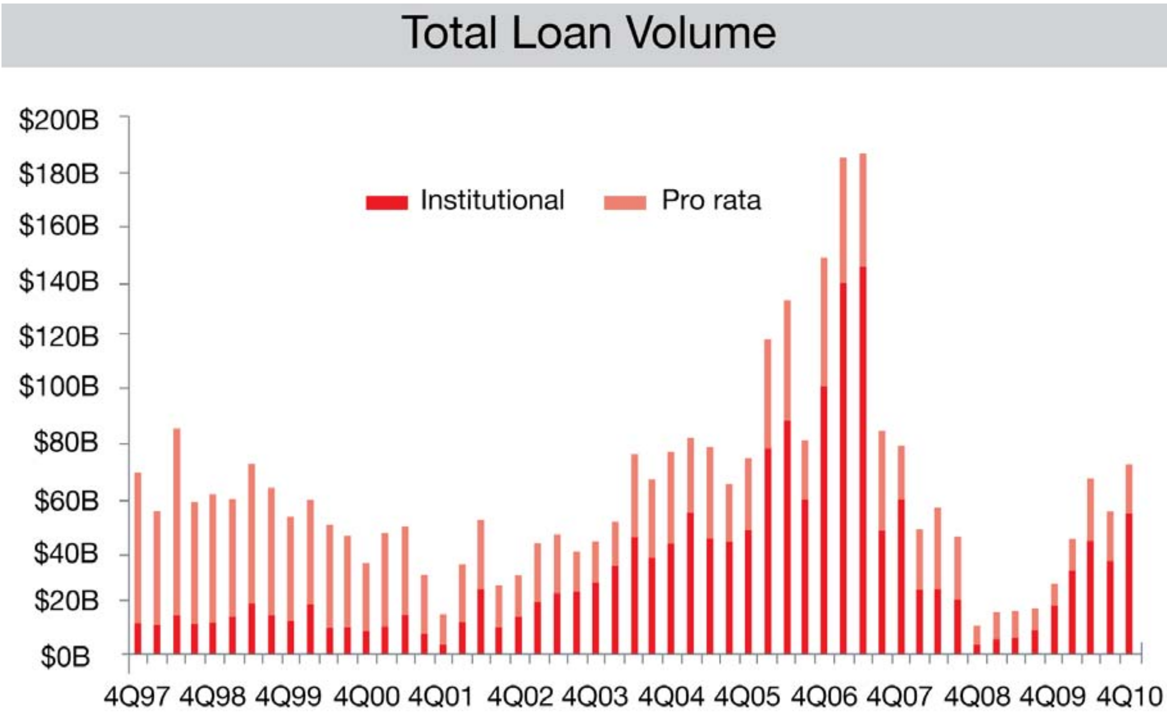
I. Current Market Conditions

Since the peak in 2007, both the number of transactions and the total capital invested hit their lowest point in 2Q 2009, only to rebound such that the amount of capital invested in 4Q 2010 was 6.25 times the total capital invested in 2Q 2009.



I. Current Market Conditions

Although total loan volume is down sharply compared to its peak in 2007, it has increased many fold since hitting bottom in 2008. 4Q loan volume was at a three-year high and doubled in 2010 compared to 2009.



Source: Standard & Poor's LCD

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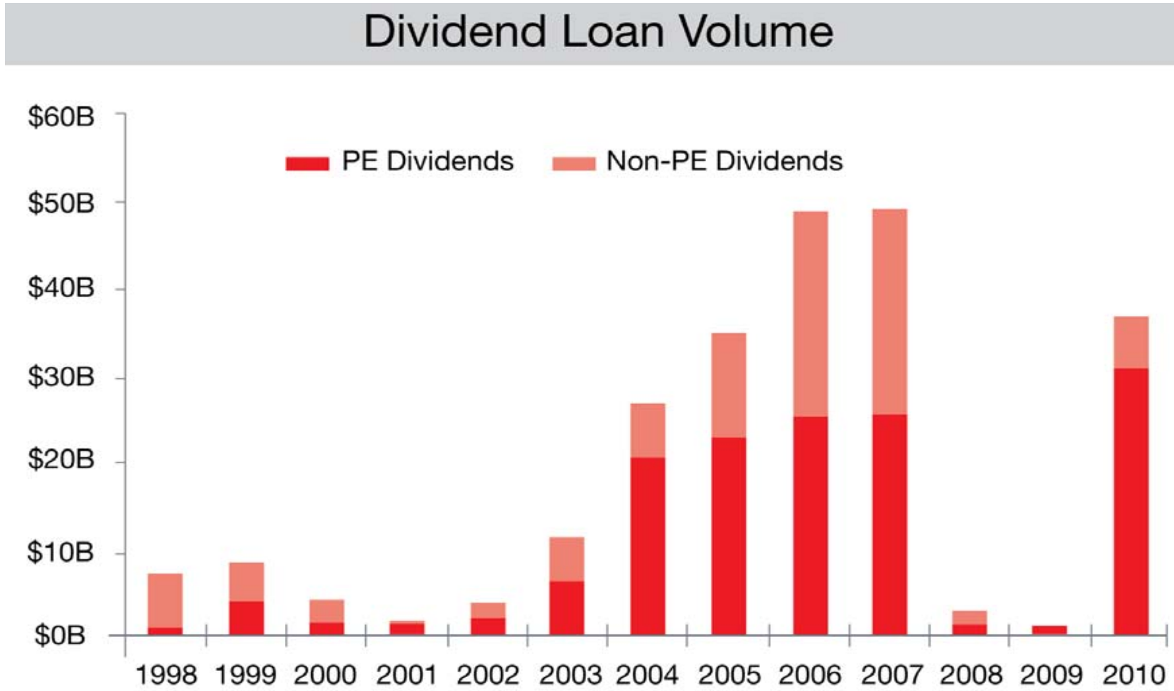
I. Current Market Conditions

Dividend loan volume has shown a dramatic rise since 2009. Dividend recaps were front and center in 4Q 2010, as the total volume of private equity loan dividends in 2010 was the highest it has been in at least a dozen years. Deals largely involved issuers that had deleveraged during the downturn. According to Standard & Poor's LCD, issuers added an average of 1.9 turns of debt via dividend deals in 4Q 2010, increasing total leverage to 4.3x (versus 4.9x for LBO deals). Dividend deals were driven by the IPO window being too narrow for most issuers, and M&A not recovering as strongly as the credit markets. Private equity sponsors were the principal drivers in this arena, accounting for 84% of dividend-related loans.



Source: Standard & Poor's LCD

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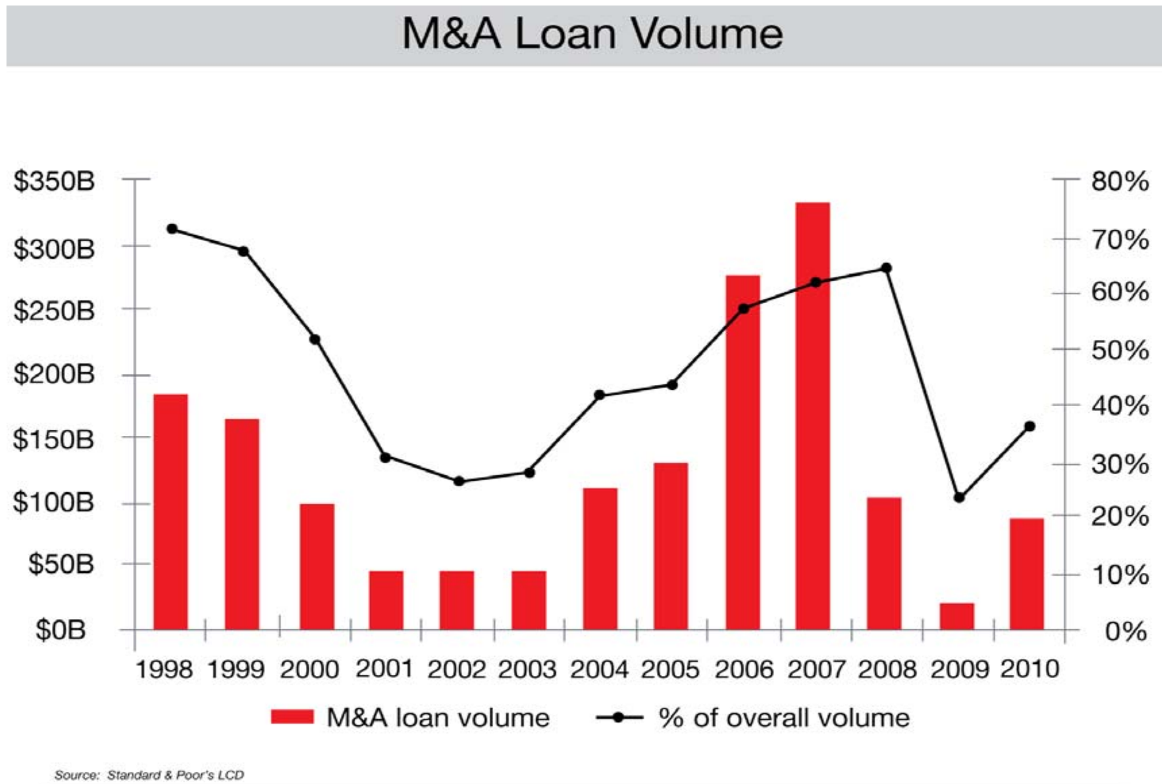
I. Current Market Conditions

While M&A loan volume rose several fold over 2009 levels, it remained at a fraction of 2007 peak levels.



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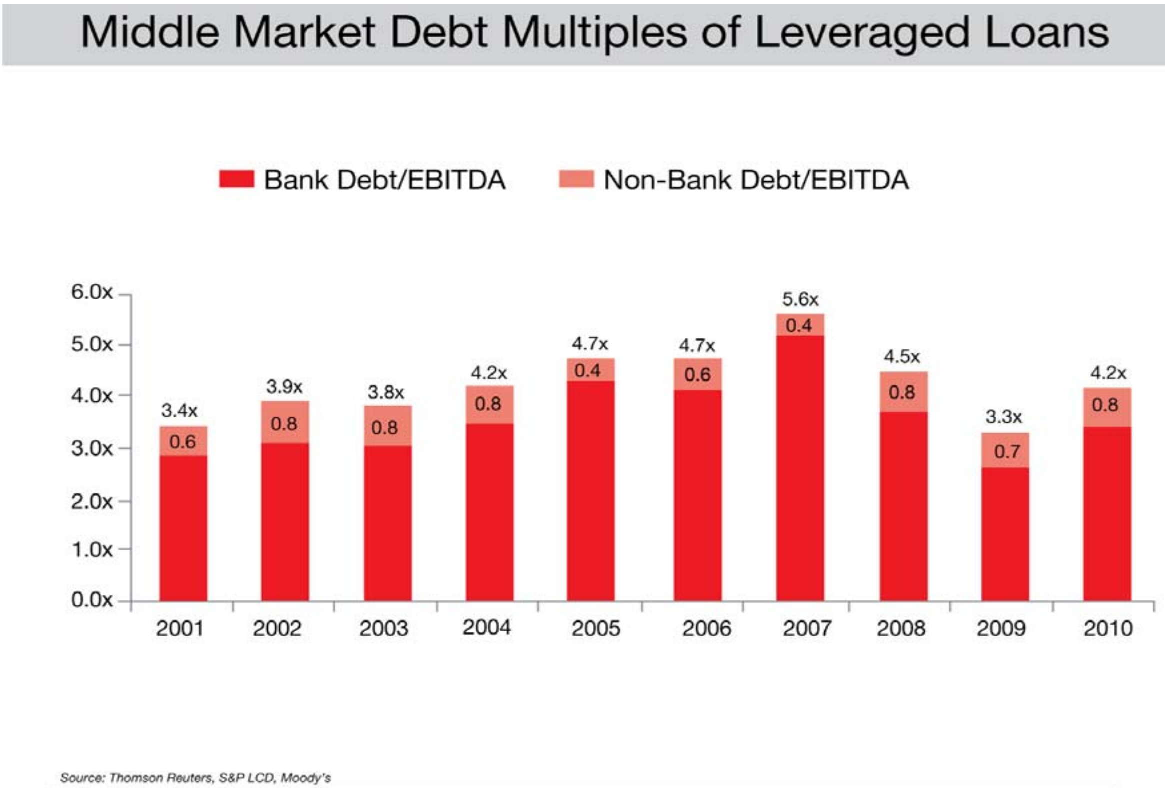
I. Current Market Conditions

Leverage levels rebounded in 2010 from a ten year low in 2009 due primarily to improved earnings and credit markets.



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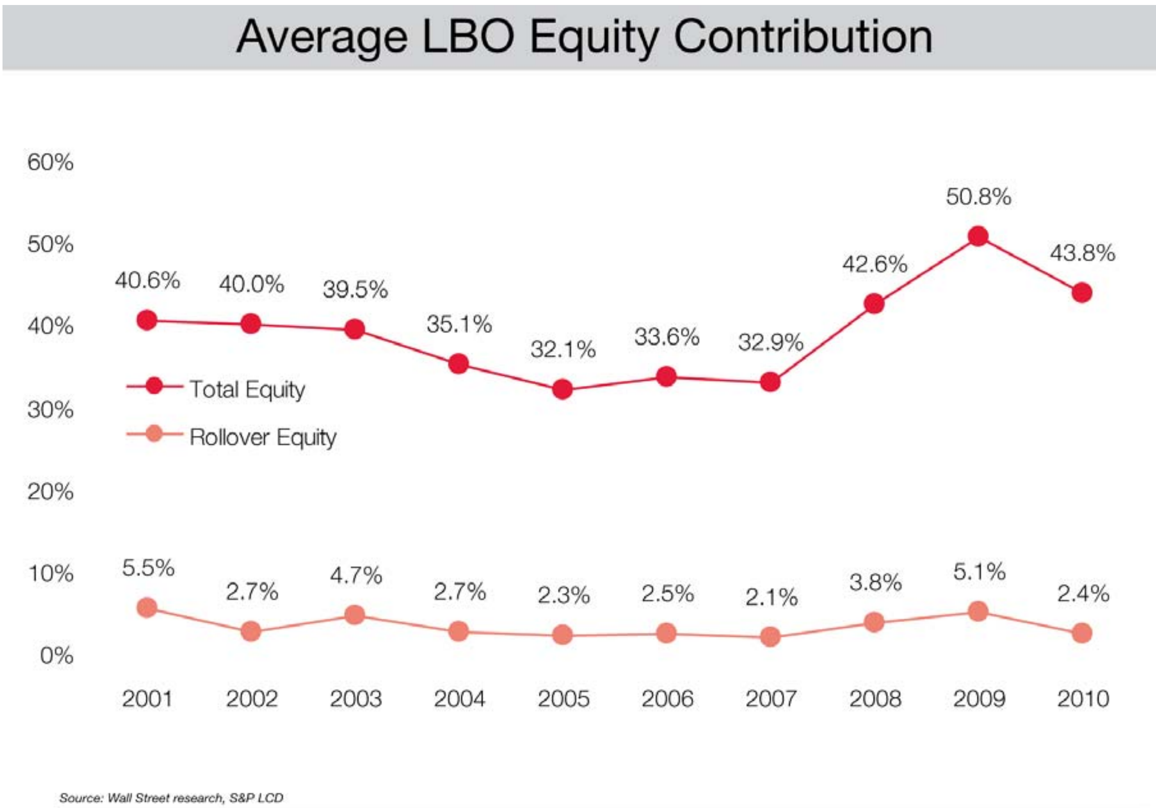
I. Current Market Conditions

In 2010, LBOs continued to require a higher proportionate equity contribution than prior to the financial crisis. However, as the credit markets recovered, equity contributions began to decrease.



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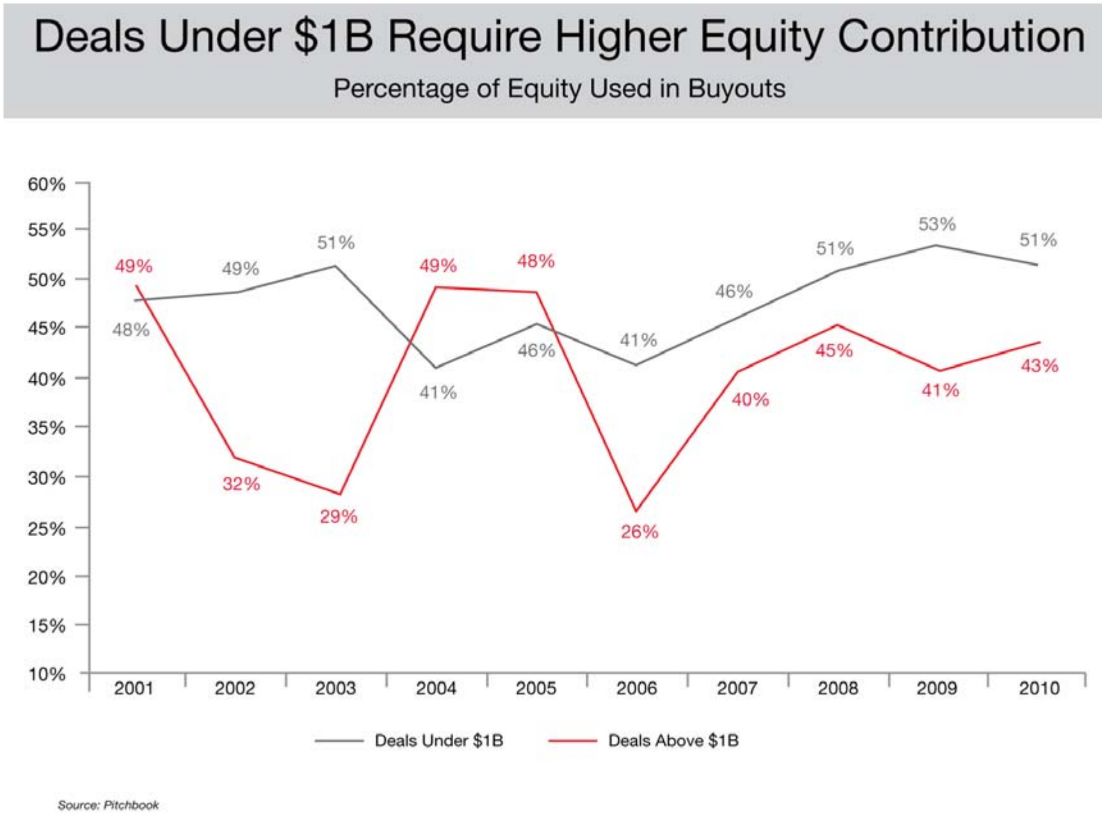
I. Current Market Conditions

The percentage of equity used in LBOs of under $1 billion is greater than the percentage of equity used in larger LBOs.



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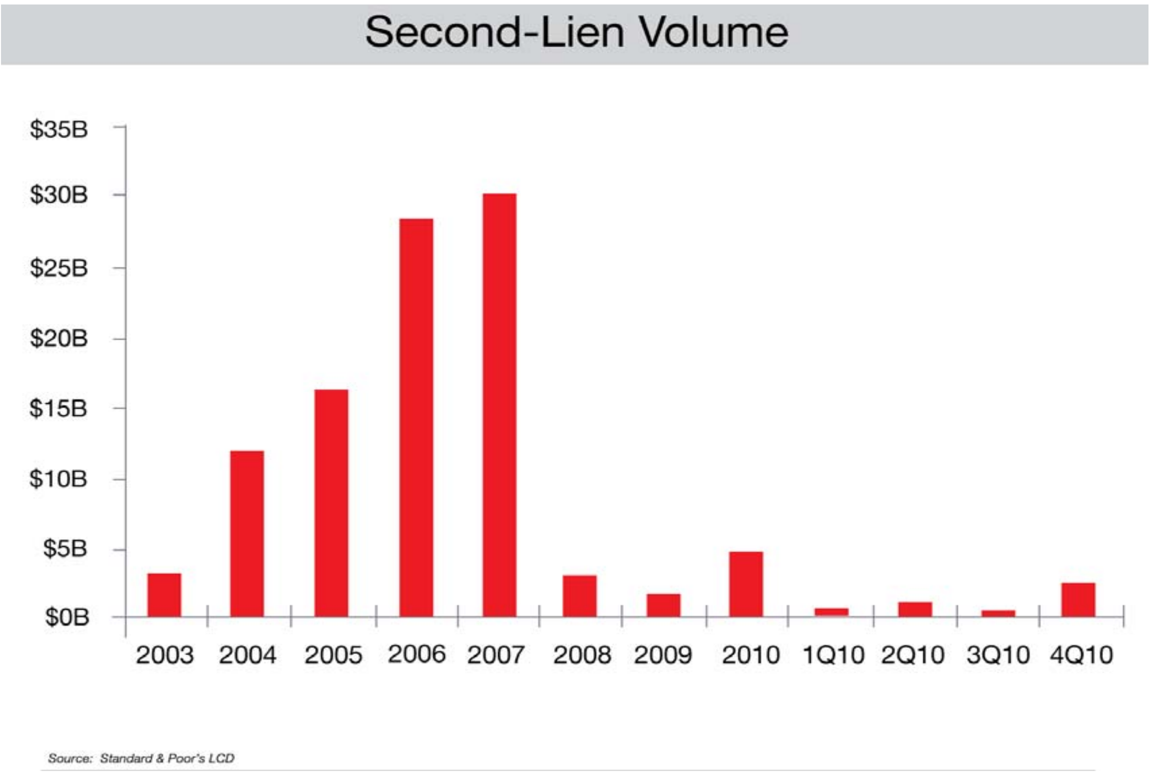
I. Current Market Conditions

Although second-lien volume is still down considerably since the 2007 peak, it has more than doubled compared to 2009.



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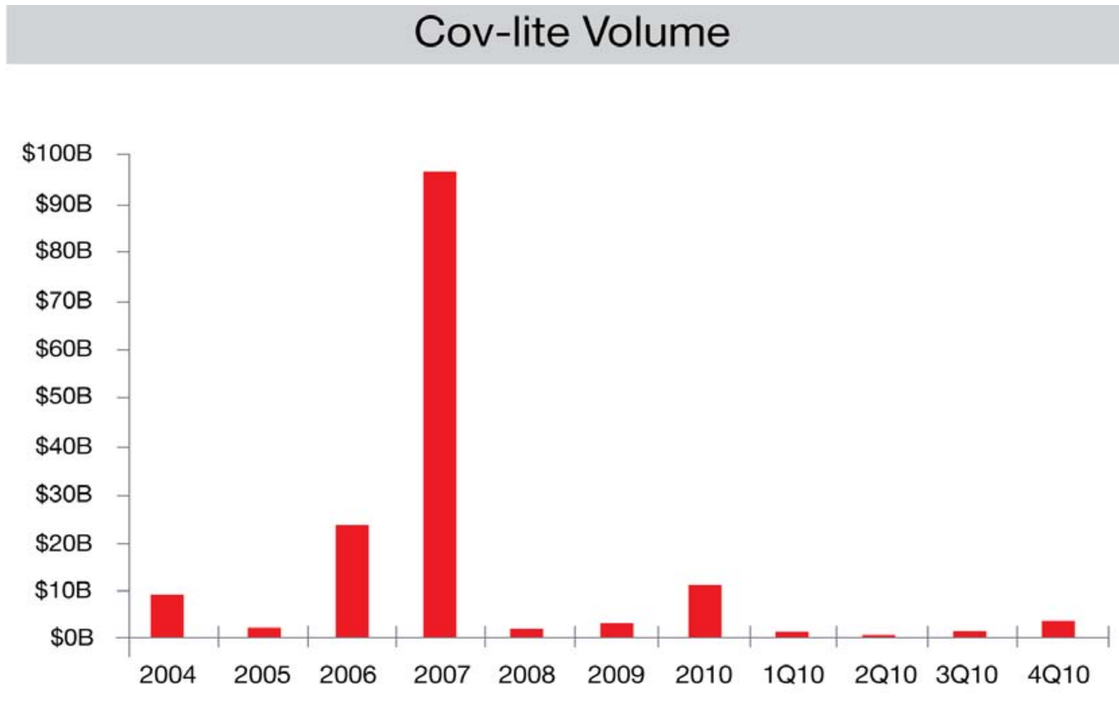
I. Current Market Conditions

Cov-lite volume has increased many fold since 2008, but remains a small fraction of peak levels in 2007.



Source: Standard & Poor's LCD

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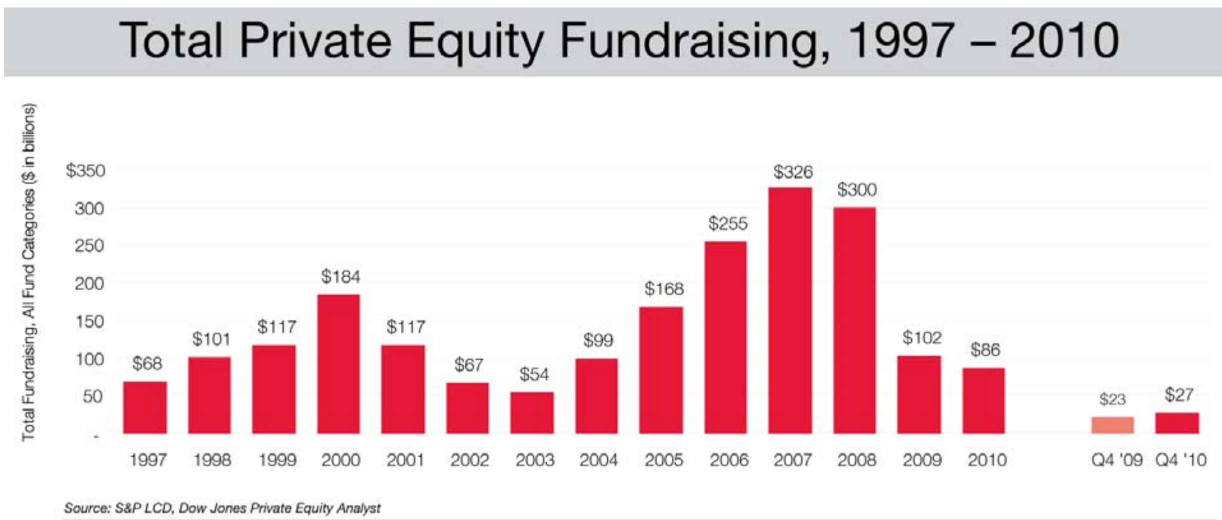
I. Current Market Conditions

Private equity fundraising fell to a seven year low in 2010, declining by approximately 16% from 2009 figures and 73% from the 2007 peak. One constructive sign, however, is that 4Q 2010 saw an increase of approximately 17% from 4Q 2009.



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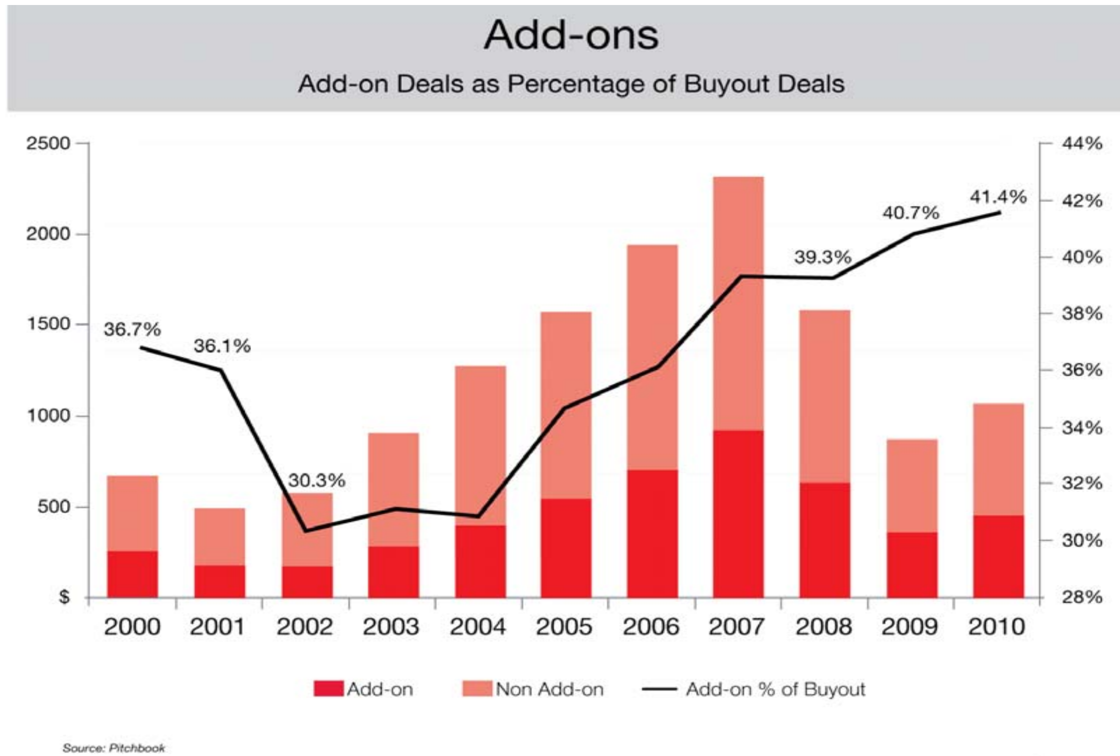
I. Current Market Conditions

The percentage of LBOs that were add-ons increased for the sixth straight year. According to Pitchbook, the median value of add-on deals also increased from $25 million in 2009 to $51.5 million in 2010.



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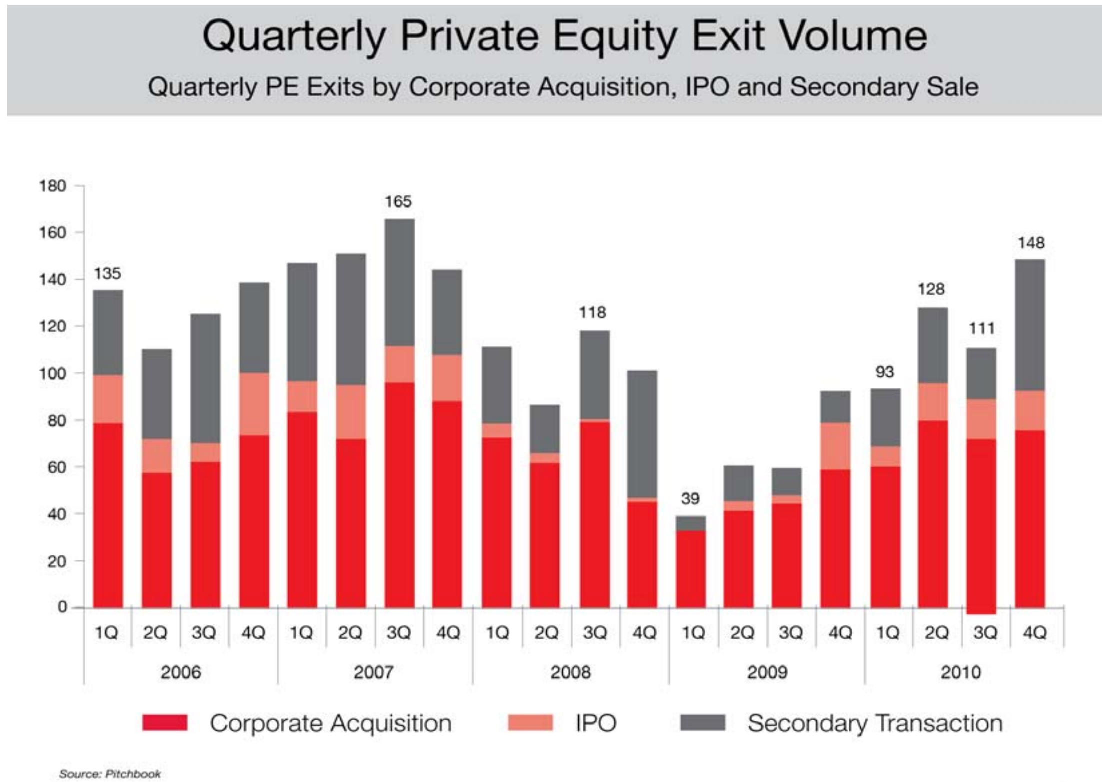
I. Current Market Conditions

The number of private equity exits has risen dramatically from the nadir in 1Q 2009, and is approaching 2007 peak levels. According to Pitchbook, there are nearly 1,800 investments that have reached the point where they need to be sold so that funds can return capital to investors.



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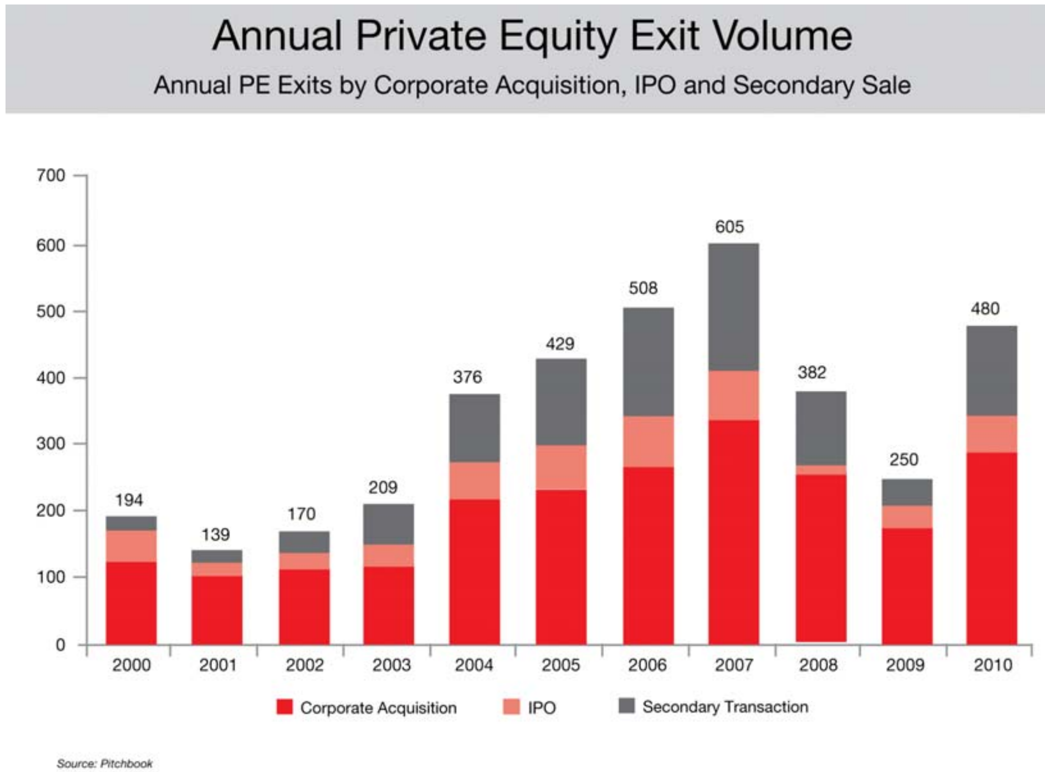
I. Current Market Conditions

The number of private equity exits in 2010 not only rose sharply from a seven year low in 2009 but was the third best year for exits on record.



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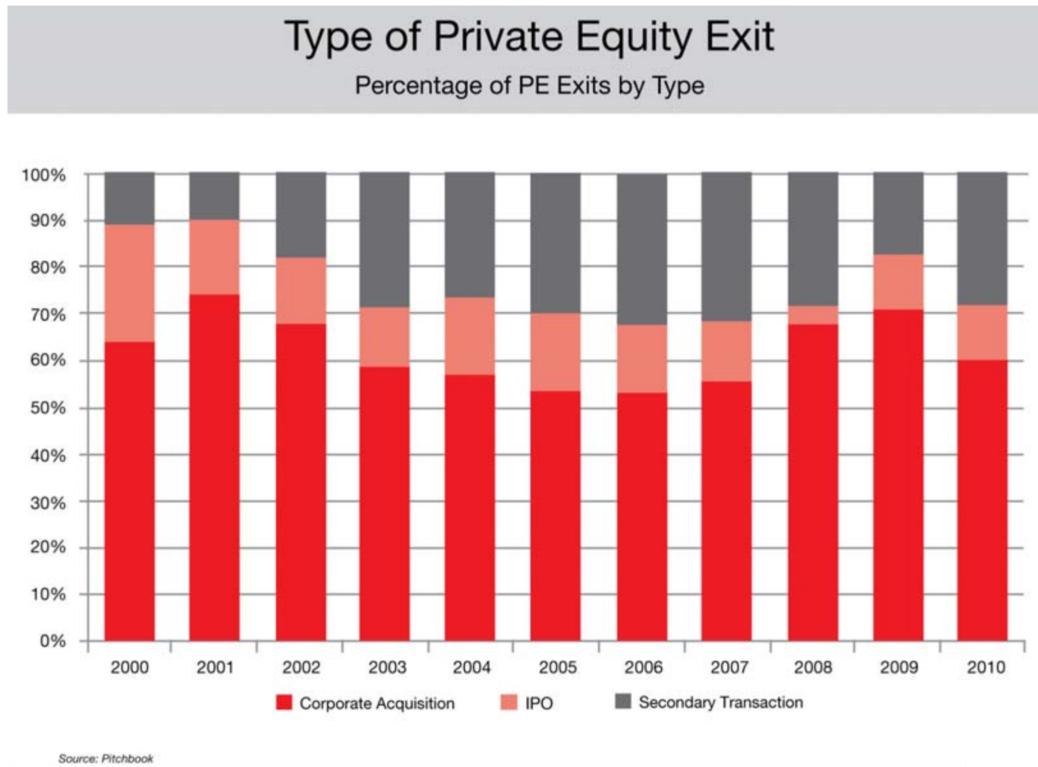
I. Current Market Conditions

Although corporate acquisitions still accounted for the largest portion of private equity exits in 2010, the number of secondary transactions increased as LBO activity increased. While the IPO window is still open only narrowly, volume in 2010 was substantially higher than at the nadir in 2008.



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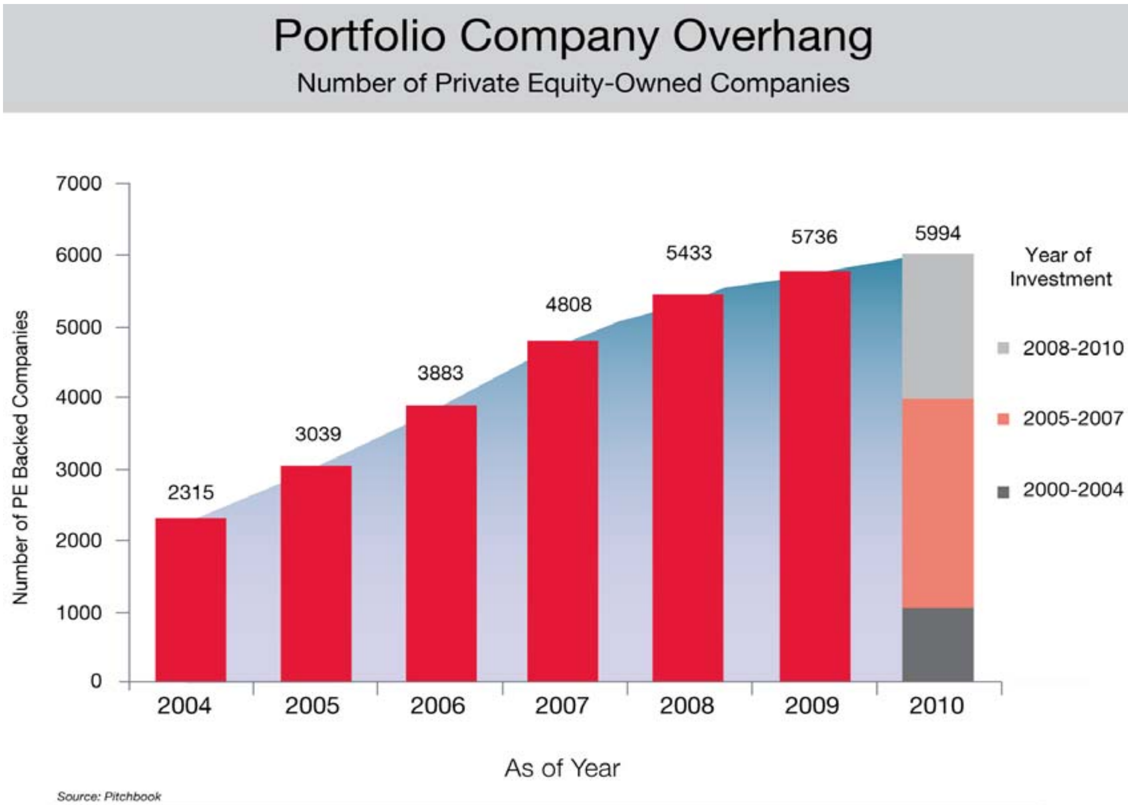
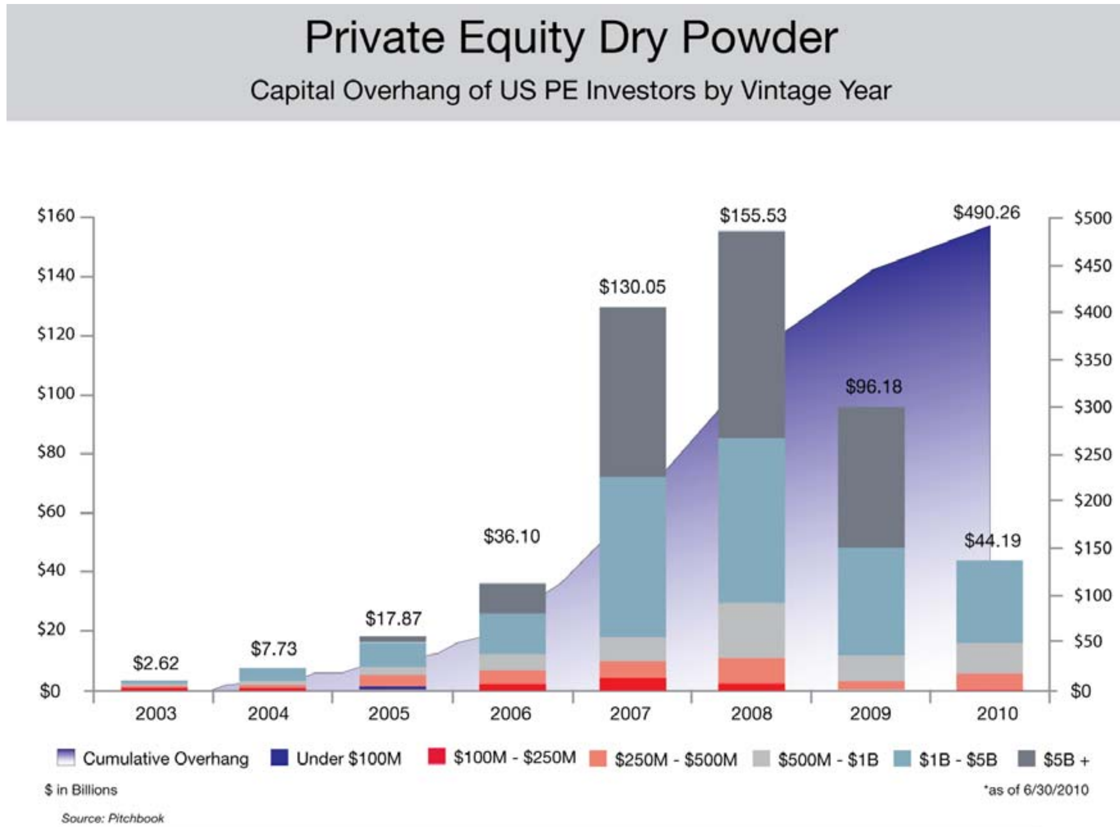
I. Current Market Conditions

Portfolio company overhang has continued to grow for more than five years. Of the almost 6,000 private equity owned companies, approximately 4,000 have been held for five years or more.



I. Current Market Conditions

In 2010 private equity funds were sitting on almost $500 billion of dry powder. As this capital must be deployed or not called, it will likely drive LBO activity levels going forward.



II. What's Market in Legal Trends

A. Timing

Deals continue to take longer to complete in the post-2008 deal environment, with an increased focus on due diligence. Sellers are increasingly focused on expedited sale processes.

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II. What's Market in Legal Trends

B. 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 earn-outs (tax and implied covenants to maximize earn-outs are a focus).

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II. What's Market in Legal Trends

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

i. Generally

When financing and back-up buyers were plentiful during the M&A boom that ended in 2007, buyers and targets were confident that signed transactions would close, and less emphasis was placed on negotiating conditions to closing and remedies for transactions that failed to close. Targets were confident that buyers would close to avoid reputational risk, buyers were confident that lenders would honor financing commitments, and lenders were confident that their private equity borrowers would not hold their feet to the fire. Buyers were so competitive and confident in their lenders that they increasingly agreed to transactions with no financing contingencies, gave targets specific performance remedies and placed faith in MAC conditions. Targets were so confident that they agreed to transactions with buyers which were shell companies of private equity funds (and for which there was no recourse to the funds).

As the crisis unfolded, buyers (who often had no financing contingencies) had to rely on their MAC conditions to avoid closing. As IBP/Tyson and Hexion/Huntsman illustrated that MAC clauses might be less protective than many commentators had expected, and the number of disputes over transactions that failed to close increased, the landscape for conditions to closing and remedies began to evolve rapidly (although MAC clauses have not included quantitative metrics to the extent expected by many commentators).

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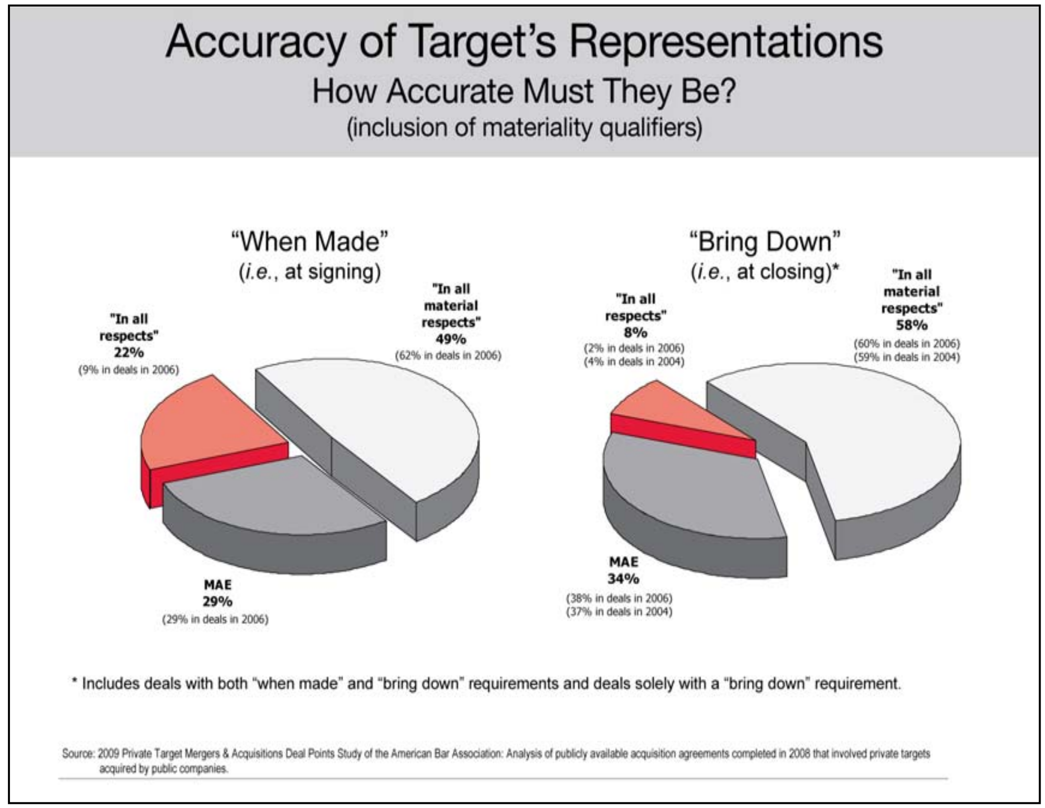
II. What's Market in Legal Trends

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

ii. MAC Conditions

Conditions to closing are increasingly a principle focus of negotiations. 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 particular focus of attention during negotiations. MAE or materiality qualifiers continue to be included in the vast majority of acquisition agreements.



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II. What's Market in Legal Trends

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

iii. Seller Remedies

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

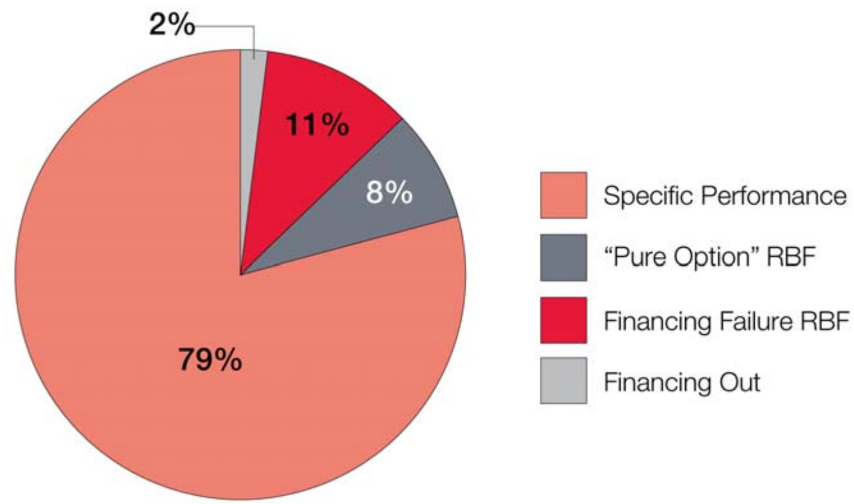
(i) Specific performance is available as a remedy to the target for all breaches by the buyer (with no financing condition);

(ii) A reverse break-up fee ("RBF") is payable by the buyer as the exclusive remedy if the financing condition's failure is the reason for the transaction not closing, with specific performance being the target's remedy for other buyer breaches;

(iii) A "pure option" 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); and

(iv) A "financing out" is available to the buyer, with no RBF payable to the target and no specific performance available to the target if the failure to obtain financing is the reason the transaction does not close.

Incidence of Remedies Across All Merger Agreements in Study*



*Each remedy counted individually, including for agreements with multiple remedies (e.g., each fee is counted in an agreement with a "pure option" reverse break-up fee for financing failure).

Source: Practical Law Company; Reverse Break-up Fees and Specific Performance: A Survey of Remedies in Public Deals; 2009 and Q1 2010; Includes all domestic transactions with an enterprise value of $100 million or more and a public target.

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II. What's Market in Legal Trends

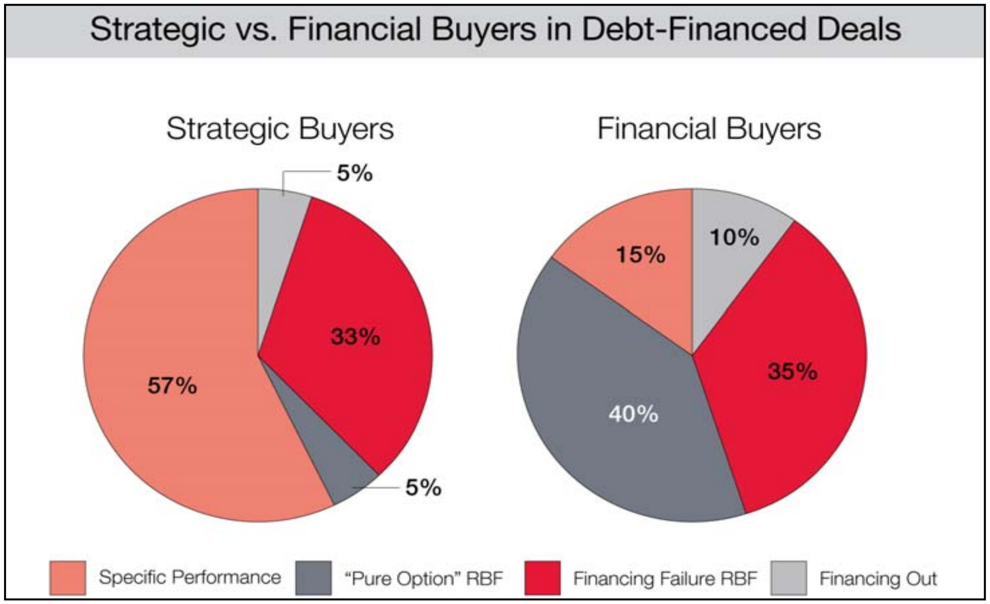
C. Evolution of Conditions to Closing and Remedies through M&A Boom, Crisis and Today

iii. Seller Remedies

As a result of the crisis, 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. RBF's 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 financing out or RBF as the exclusive remedy. Increasingly, strategic buyers are taking a page out of the financial buyers' book and also insisting on a remedy other than specific performance. 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/equity commitment letters from the financial sponsor remain common.



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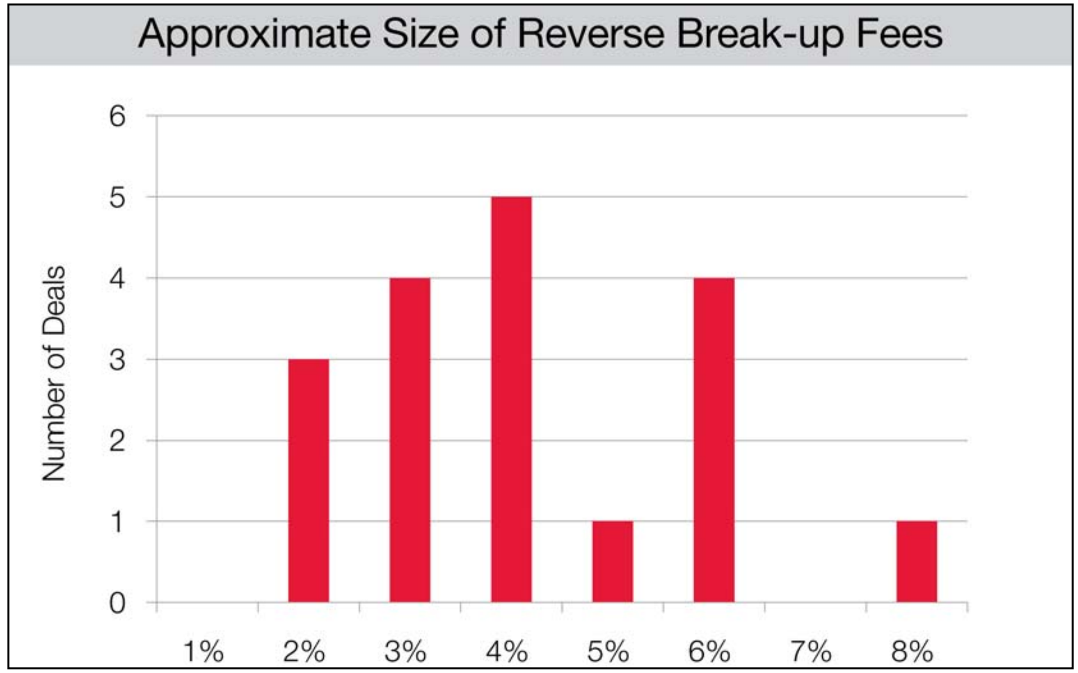
II. What's Market in Legal Trends

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

iii. Seller Remedies

During the 3Q of 2010, RBF's for public company targets were in the range of 2% to 8% of enterprise value of the target. Increasingly, break-up fees are structured with multiple tiers – often one tier payable in the event of a financing failure (generally in the range of 2% to 6% of the target's enterprise value) and another tier in the event of a buyer breach (generally in the range of 3% to 18% of the target's enterprise value). While the amounts are heavily negotiated and are transaction-specific, there is a solid rationale for applying these amounts in the context of private targets as well.



Source: Practical Law Company; Reverse Break-up Fees and Specific Performance: A Survey of Remedies in Public Deals; 2009 and Q1 2010; Includes all domestic transactions with an enterprise value of $100 million or more and a public target.

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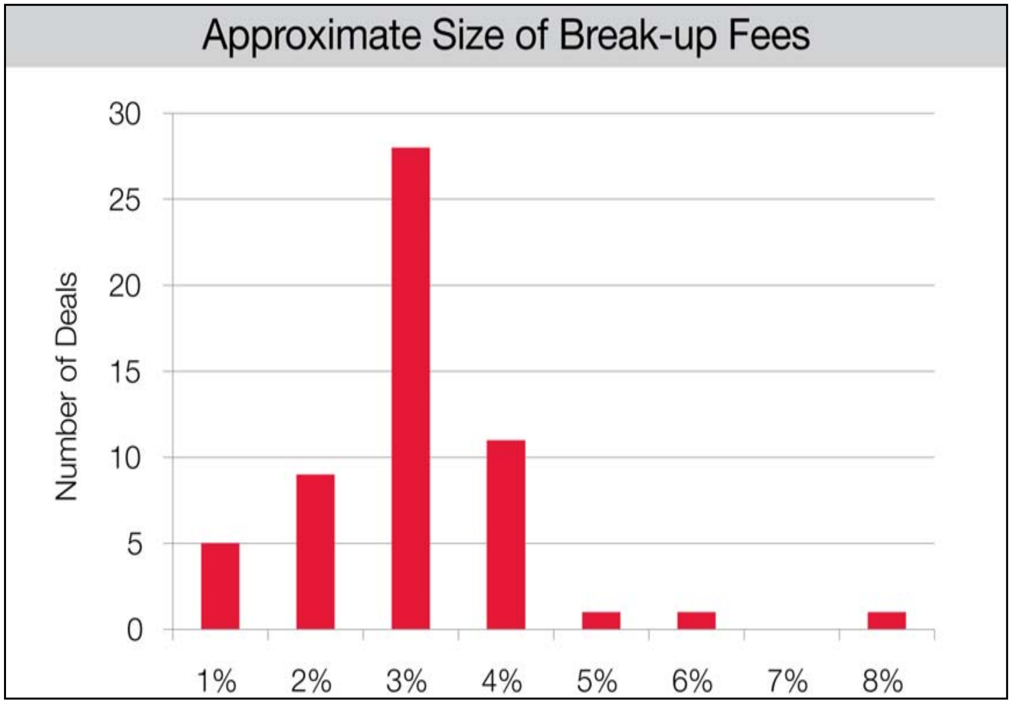
II. What's Market in Legal Trends

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

iv. Buyer Remedies

In light of the cost and expense of negotiating acquisitions, acquirers of public companies are continuously seeking means of deterring competing offers. These deterrents are heavily negotiated and include lockup agreements, no-shop provisions and break-up fees. Under Delaware law, break-up fees must be reasonable in order to be enforceable. According to Thompson Reuters, the mean break-up fee for public company targets was 3.5% of enterprise value in 2009, an increase from approximately 3.1% in 2007. Break-up fees for public company targets continue to be predominantly in the range of 2% to 4% of enterprise value during the third quarter of 2010. Increasingly, break-up fees are two-tiered with a lower fee payable prior to the end of the go-shop period.



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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, that newly-gained leverage of buyers has dissipated somewhat. The following discussion is intended to be a summary of a number of the more important indemnity features, but due to space considerations is not comprehensive.

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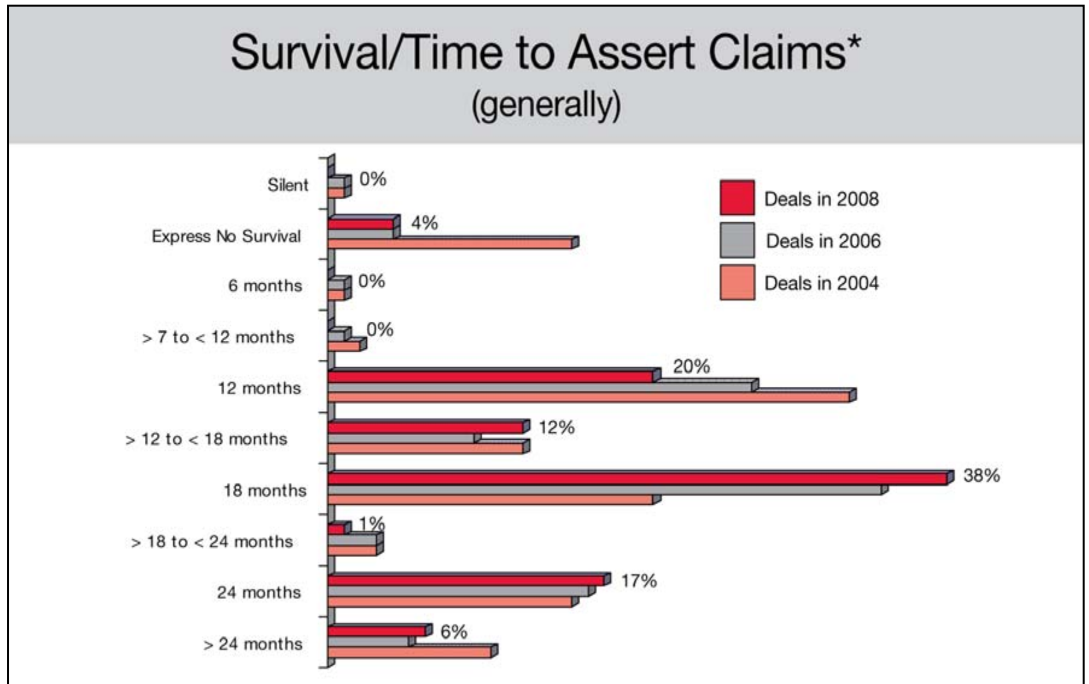
II. What's Market in Legal Trends

D. Key Indemnity Terms

ii. Survival Period

Survival periods for private company targets continue to be most commonly 12 to 18 months. The most frequent carve-outs continue to be for taxes, ownership of shares or assets, capitalization, due organization and authority, ERISA, environmental, broker's fees, no conflicts, covenants, and fraud and intentional breach.



* 2% of the deals had survival periods equal to the applicable statute of limitations.
** These periods apply to most representations and warranties; Certain representations and warranties may be carved out from these periods in order to survive for other specified periods.

Source: 2009 Private Target Mergers & Acquisitions Deal Points Study of the American Bar Association: Analysis of publicly available acquisition agreements completed in 2008 that involved private targets acquired by public companies.

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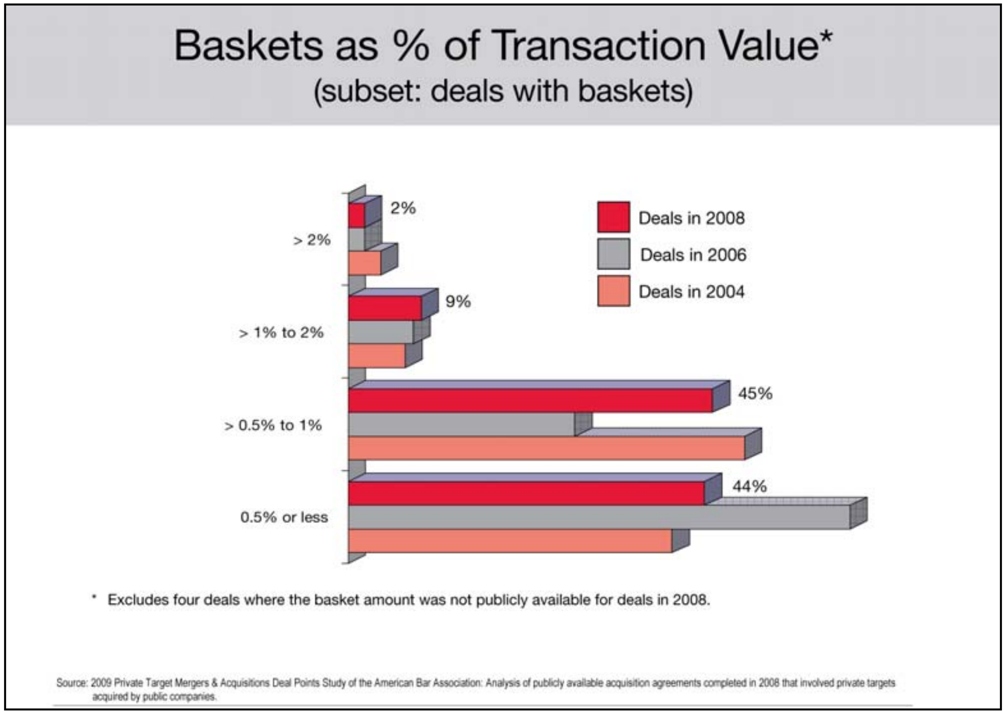
II. What's Market in Legal Trends

D. Key Indemnity Terms

iii. Baskets

Baskets for breaches by private company targets are most commonly in the range of one-half to two-thirds of a 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 or assets, capitalization, due organization and authority, ERISA, environmental, broker's fees and non-contravention, and for fraud and intentional breach. 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.



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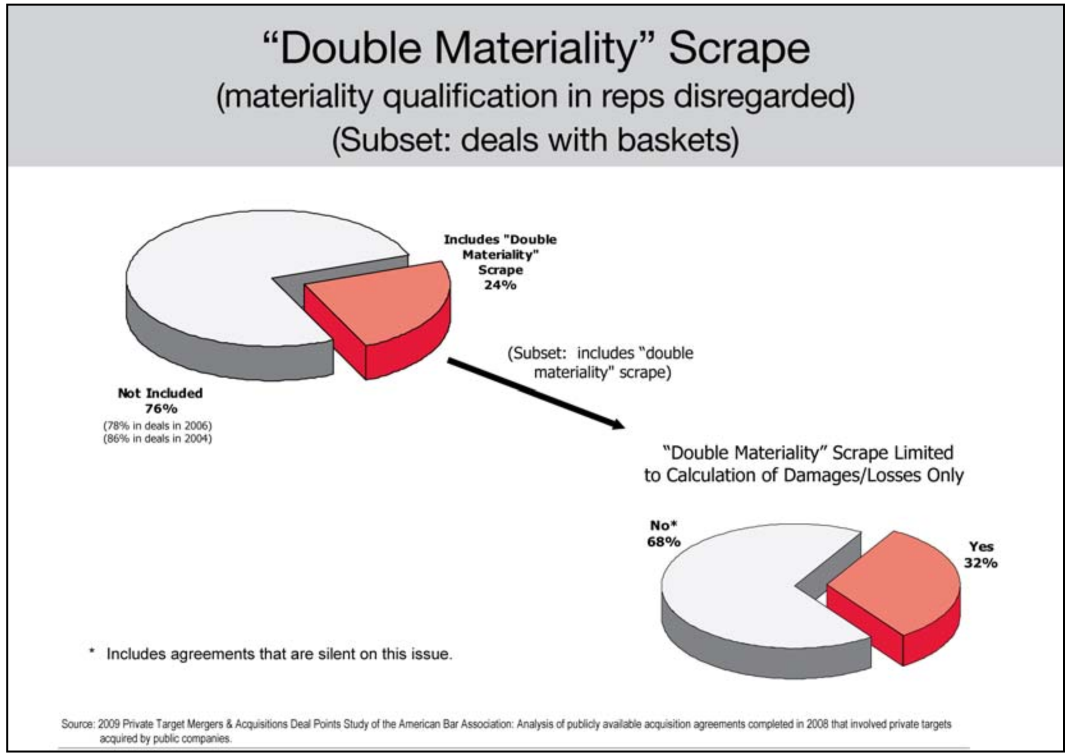
II. What's Market in Legal Trends

D. Key Indemnity Terms

iv. Materiality Scrapes

Provisions requiring the disregarding of materiality or MAE qualifiers (*i.e.*, "materiality scrapes") for all indemnification purposes (or solely for determining losses) for private company targets continue to be found in a significant minority of deals.



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II. What's Market in Legal Trends

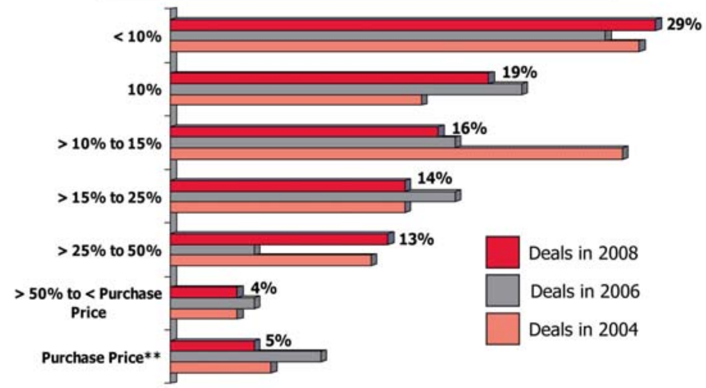
D. Key Indemnity Terms

v. Caps

Indemnity caps for breaches continue to be found in the vast majority of transactions involving private company targets. Most frequently, caps are in the range of 10% to 15% of enterprise value, although caps of 5% to 25% are not infrequent. 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 or assets, capitalization, due organization and authority, ERISA, environmental, broker's fees and non-contravention, and for fraud and intentional misrepresentation.

Cap Amounts as % of Transaction Value*
(subset: deals with determinable caps)

	Mean	Median	Minimum	Maximum
Deals in 2008	21.72%	11.19%	1.23%	100%



* Caps generally applicable to contractual indemnification obligations; does not take into account different caps for specific items

** 2004 data includes one deal with cap amount greater than purchase price.

Source: 2009 Private Target Mergers & Acquisitions Deal Points Study of the American Bar Association: Analysis of publicly available acquisition agreements completed in 2008 that involved private targets acquired by public companies.

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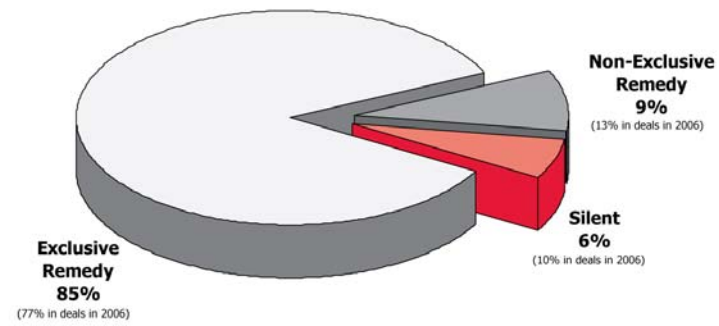
II. What's Market in Legal Trends

D. Key Indemnity Terms

vi. 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.

Indemnification as Exclusive Remedy
(subset: deals with survival provisions)



Source: 2009 Private Target Mergers & Acquisitions Deal Points Study of the American Bar Association: Analysis of publicly available acquisition agreements completed in 2008 that involved private targets acquired by public companies.

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II. What's Market in Legal Trends

D. Key Indemnity Terms

vii. Escrows and Holdbacks

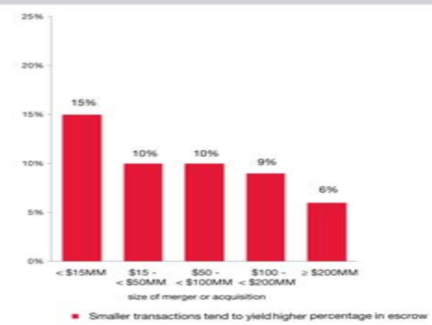
Mean and median escrows and holdbacks in transactions involving private company targets continue to average approximately 10% of enterprise value, with the vast majority falling in the 5% to 15% range. In a substantial minority of these transactions recourse is solely to the escrow. Not surprisingly, smaller transactions generally have a larger percentage of consideration placed in escrow. According to J.P.Morgan, indemnity claims for breaches of representations and warranties occur in approximately one-seventh of the transactions surveyed.

Escrows/Holdbacks as % of Transaction Value
(statistical summary)
(subset: deals with determinable escrows/holdbacks)

Deals in:	Mean	Median	Minimum	Maximum
2008	10.51%	9.93%	1.23%	37.30%
2006	8.94%	8.95%	1.10%	25.00%

Source: 2009 Private Target Mergers & Acquisitions Deal Points Study of the American Bar Association. Analysis of publicly available acquisition agreements completed in 2008 that involved private targets acquired by public companies.

Average Percentage of Purchase Price Placed in Escrow by Merger or Acquisition Size[1]



[1] Value of cash escrow deposits only; stock escrow deposits excluded

Source: J.P.Morgan: 2010 M&A Holdback Escrow Report

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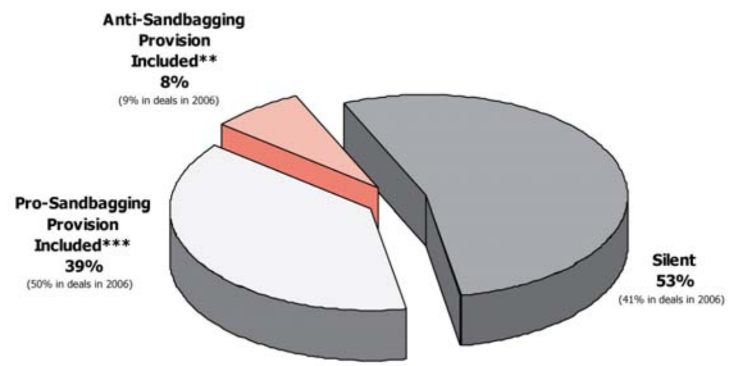
II. What's Market in Legal Trends

D. Key Indemnity Terms

viii. 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.

"Sandbagging"*



* Disregards one deal with a hybrid provision that allows sandbagging for constructive knowledge, but prohibits sandbagging in the event of actual knowledge.

** Includes one deal in which Buyer represented it was not aware ofany breach without further reference to effect on indemnification rights, as Seller should have a reciprocal counter-claim if Buyer makes a claim based on a previously-known breach.

*** For purposes of this Study "pro-sandbagging"is defined by excluding clauses that merely state, for example,that Target's Buyer's knowledge on Buyer's post-closing indemnification rights.

Source: 2009 Private Target Mergers & Acquisitions Deal Points Study of the American Bar Association: Analysis of publicly available acquisition agreements completed in 2008 that involved private targets acquired by public companies.

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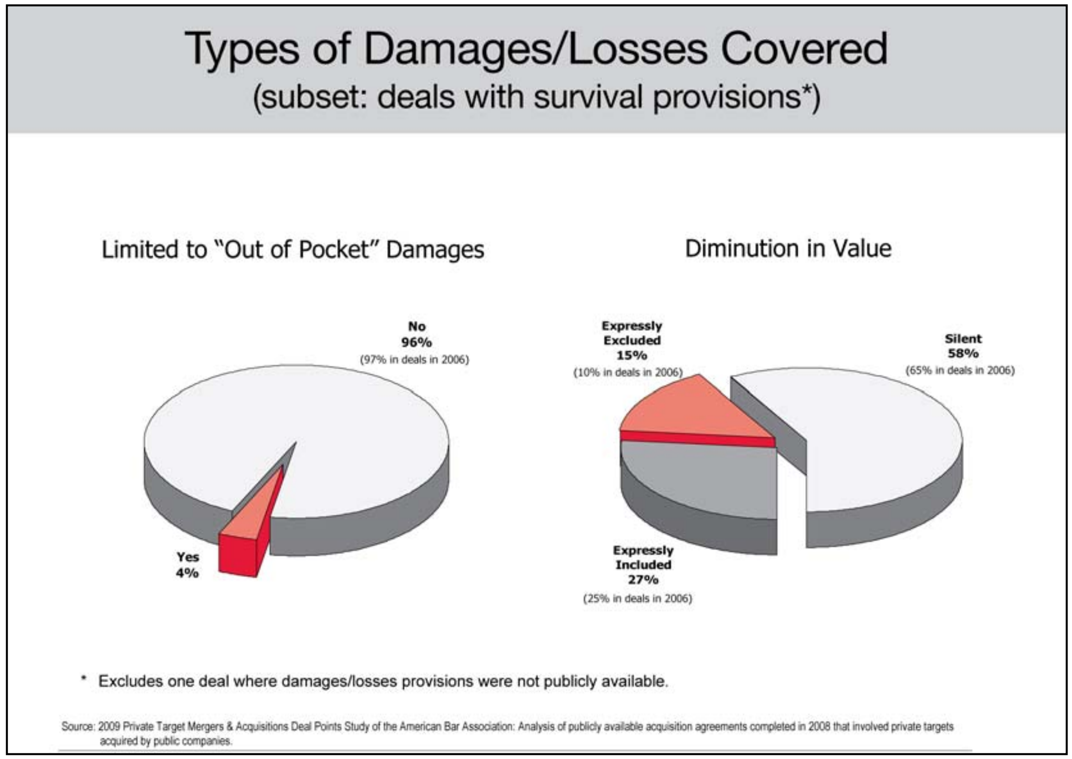
II. What's Market in Legal Trends

D. Key Indemnity Terms

ix. Types of Damages

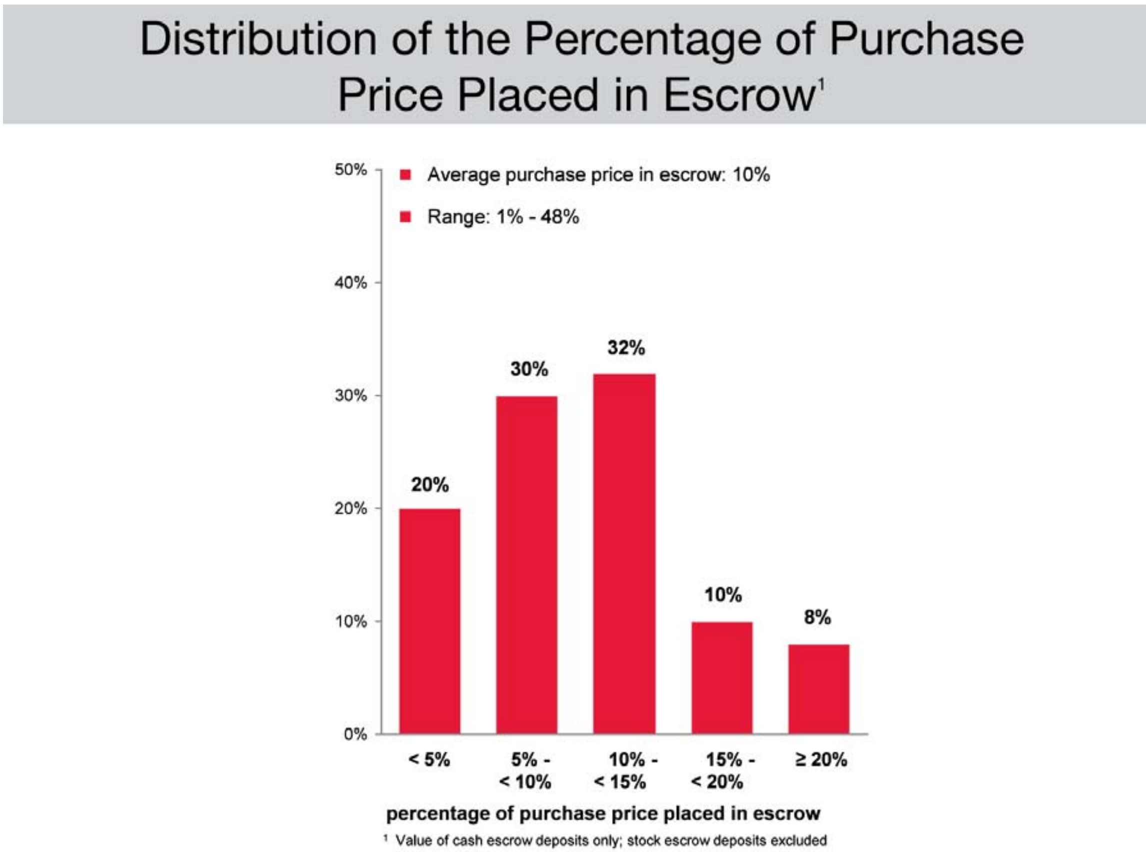
Only in rare instances are private targets successful in limiting indemnification solely to out of pocket damages. While a majority of transactions are silent as to whether damages may include a diminution of value, in approximately one quarter of transactions diminution in value is expressly included as a permitted type of damages, while in approximately one sixth of transactions it is expressly excluded. In a substantial minority of transactions other types of damages are excluded (e.g., consequential, incidental and punitive).



II. What's Market in Legal Trends

E. Key Escrow Terms

The percentage of purchase price placed in escrow continues to average approximately 10%, with over 60% of escrow amounts falling in the range of 5% to 15% of the purchase price.



Source: JP Morgan 2010 Holdback Escrow Report

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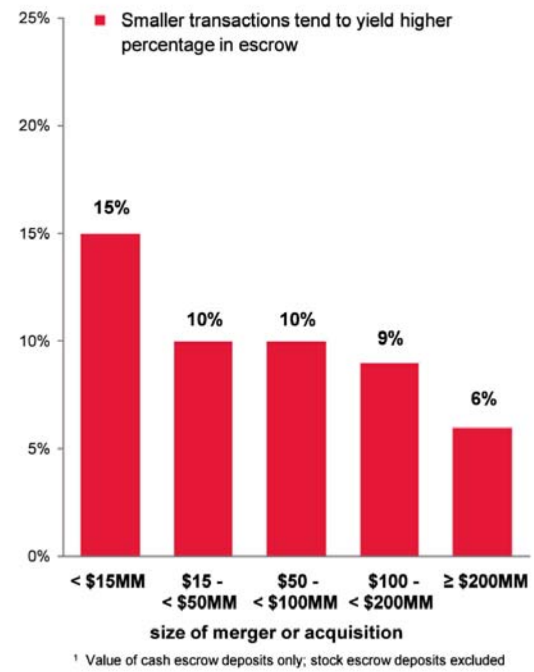
E. Key Escrow Terms

Not surprisingly, smaller transactions generally have a larger percentage of the purchase price being placed in escrow.

Average Percentage of Purchase Price Placed in Escrow by Merger or Acquisition Size[1]



Source: JP Morgan 2010 Holdback Escrow Report

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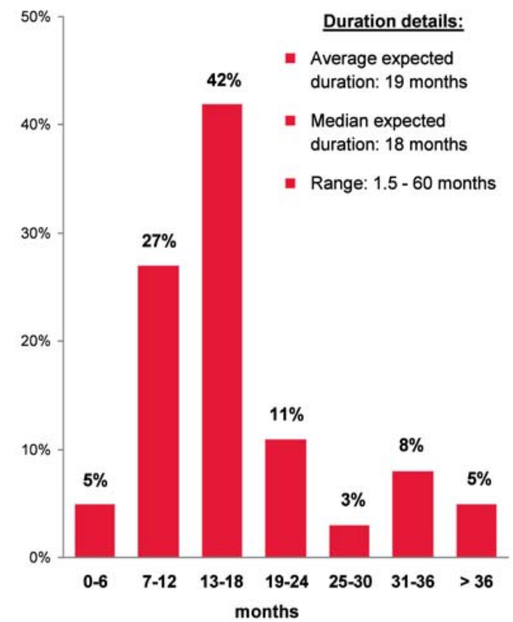
E. Key Escrow Terms

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 1.5 months while the longest was 60 months. According to J.P. Morgan, 76% of escrow agreements specify a termination date (the most prevalent being 18 months) and 26% 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.

Expected Duration of Escrows[1]



[1] Expected duration is defined as the number of months that funds are scheduled to stay in an escrow account prior to the final disbursal to the seller as explicitly stated in the escrow agreement

Source: JP Morgan 2010 Holdback Escrow Report

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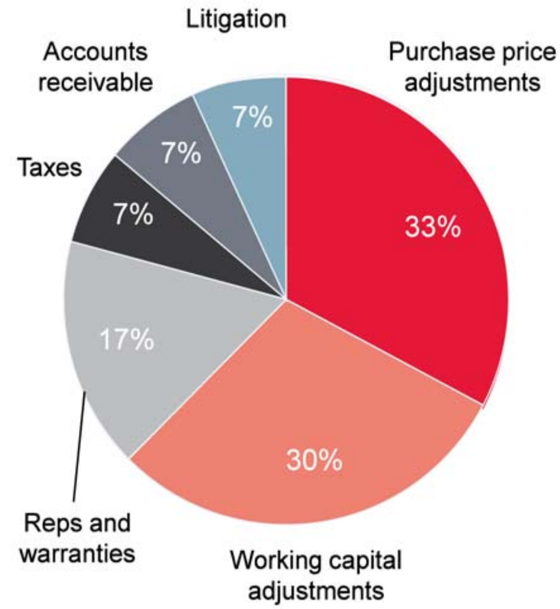
II. What's Market in Legal Trends

E. Key Escrow Terms

As expected, purchase price and working capital adjustments account for the majority of all claims. Interestingly, litigation, accounts receivable and taxes each account for 7% of escrow claims.

Claim Reasons[1]



[1] Active and terminated deals; reasons based on J.P. Morgan Escrow Services' filings and conversations with clients; excludes claims for which a reason was not ascertained

Source: JP Morgan 2010 Holdback Escrow Report

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- *Chambers USA*: #1 Corporate practice in Florida; recognized as market leader since 2003 for Mergers & Acquisitions and Private Equity in Florida
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- *Corporate Counsel* magazine: “Go To” law firm for corporate transactions/M&A
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- Focus on middle-market transactions, including LBO's, take private transactions, growth equity investments, recapitalizations, distressed debt and other distressed investments, and exits through private sales, SPAC's, and IPO's

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Akerman is ranked among the top 100 law firms in the U.S. by *The National Law Journal NLJ 250* (2010) in number of lawyers and is the leading Florida firm. With approximately 500 lawyers and government affairs professionals, Akerman serves local, regional, national and multi-national clients throughout the U.S. and overseas from offices located in Florida, New York, Washington, D.C., California, Virginia, Colorado, Nevada, and Texas. We have been recognized by *U.S. News - Best Lawyers*, *Corporate Counsel* magazine, *PLC Which Lawyer? The Legal 500*, *Chambers USA*, and other industry publications for numerous practice areas.

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