

**PRIVATE TARGET MERGERS & ACQUISITIONS  
DEAL STUDY POINTS**

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**ADVANCED BUSINESS LAW STRATEGIES**  
October 21-22, 2010  
San Antonio  
**CHAPTER 2.1**





# 2009 Private Target Mergers & Acquisitions Deal Points Study

(For Transactions Completed in 2008)

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

# **2009 Private Target M&A Deal Points Study (For Transactions Completed in 2008)**

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

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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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2009 Private Target Study, slide 4  
Release Date 12/23/09

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## 2009 Private Target Study Sample Overview

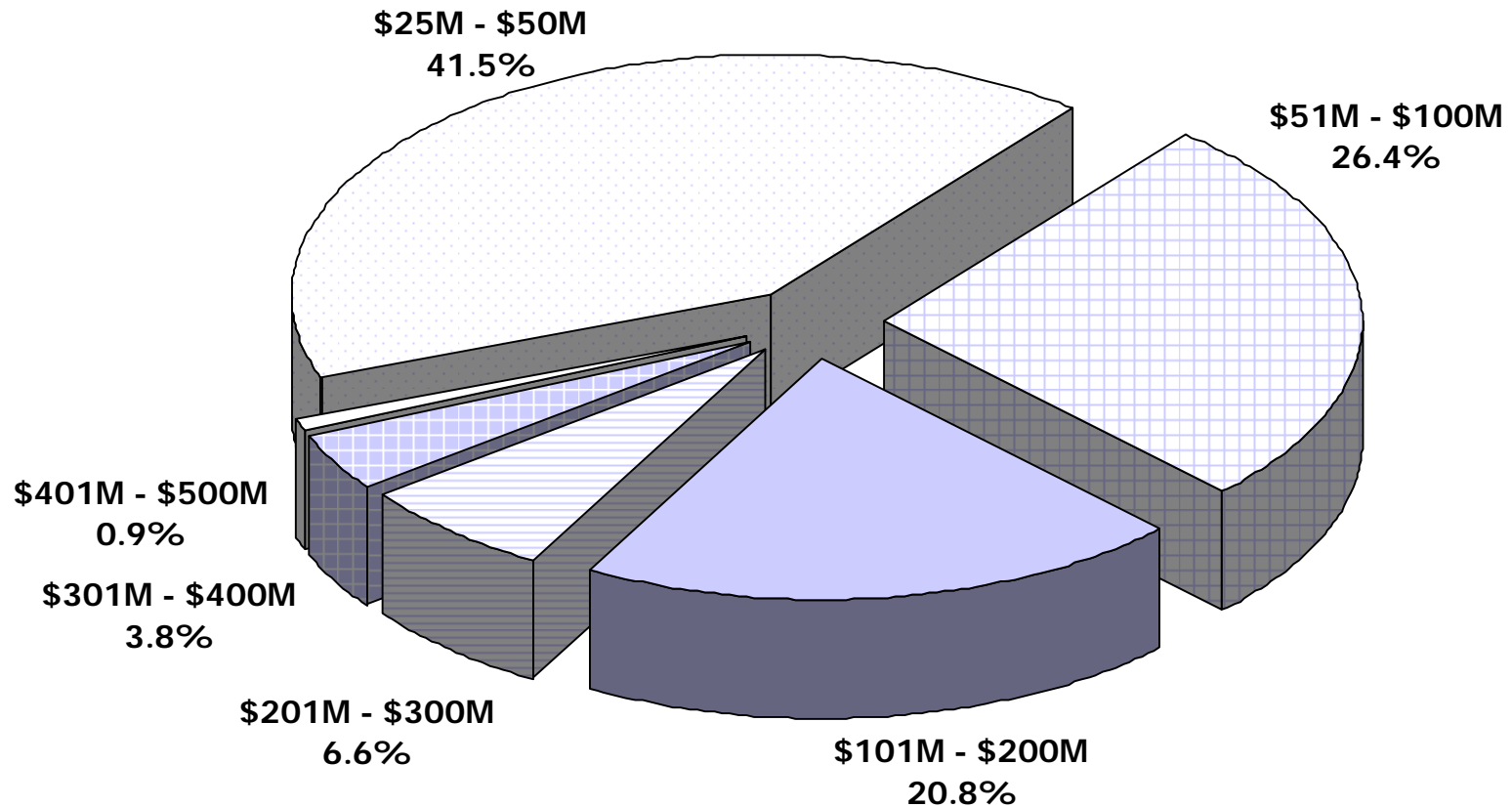
- ◆ This Study analyzes publicly available acquisition agreements for transactions completed in 2008 that involved private targets being acquired by public companies. The previous studies published in 2007 and 2006 analyzed such agreements for transactions completed in 2006 and 2004, respectively.
- ◆ The Study sample was obtained from <https://www.mergermetrics.com>.
- ◆ The final Study sample of 106 acquisition agreements excludes agreements for transactions in which the target was in bankruptcy, reverse mergers, and transactions otherwise deemed inappropriate for inclusion.

Transaction Value* Range	# of Deals	Closing	
		<i>Deferred</i>	<i>Simultaneous Sign-and-Close</i>
\$25M - \$500M	106	79%	21%

\* As determined by *mergermetrics* (does not include reported debt assumed). For purposes of this Study, it is assumed that transaction value as determined by *mergermetrics* is equal to "Purchase Price" as that term is used in the underlying acquisition agreements.

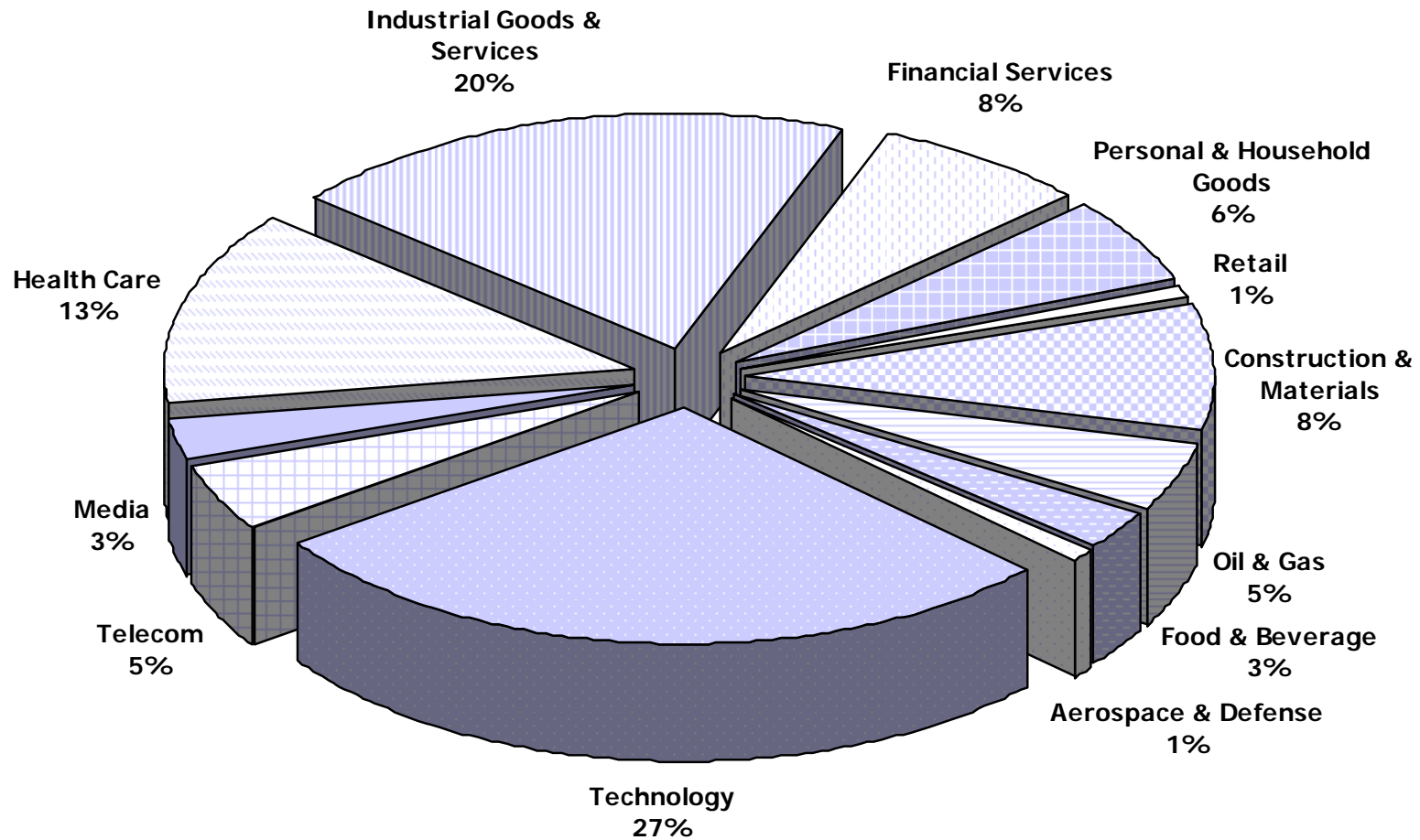


## 2009 Private Target Study Sample Overview (by transaction value)\*

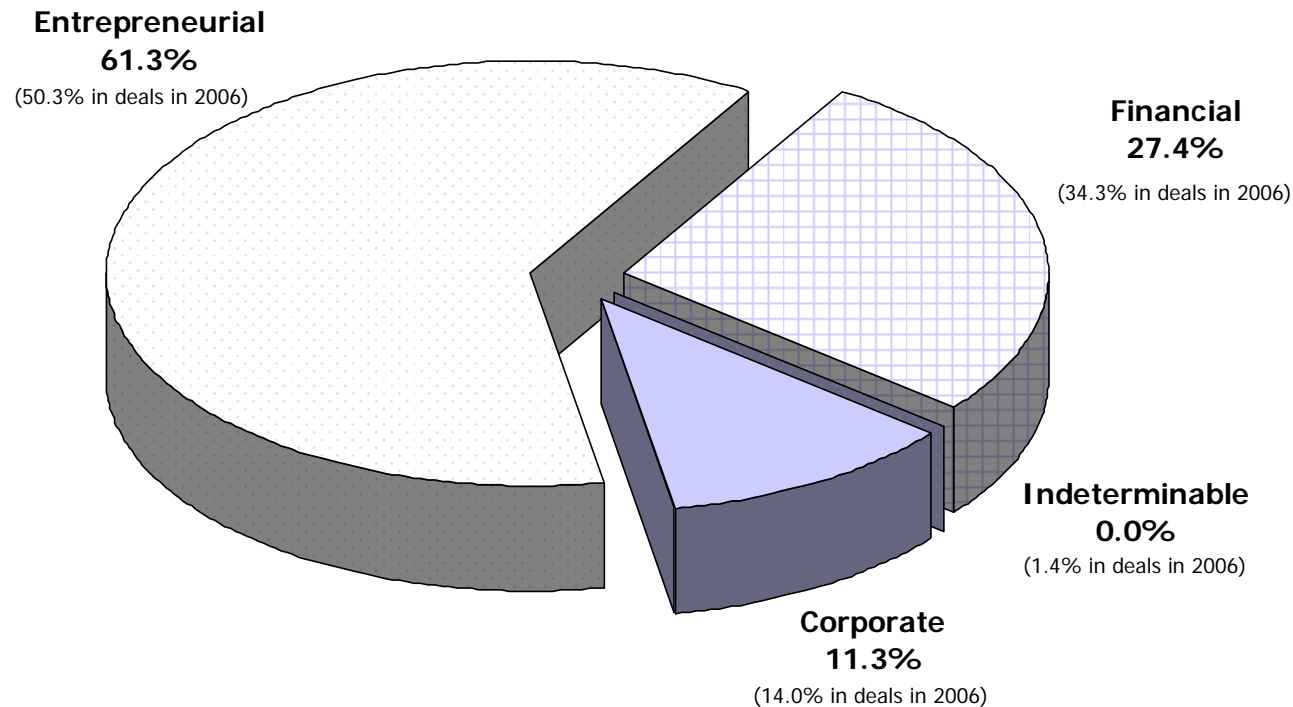


\* For the Study sample, the average transaction value was \$98.28 million and the median transaction value was \$65.85 million.

# 2009 Private Target Study Sample Overview (by industry)



## 2009 Private Target Study Sample Overview (by nature of principal sellers)



*Entrepreneurial:* founders appear to dominate management/ownership

*Corporate:* founders appear not to dominate management/ownership (other than “Financial”)

*Financial:* backed by financial sponsors (including VCs) who appear to have significant influence/control

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# Financial Provisions

## Post-Closing Purchase Price Adjustments

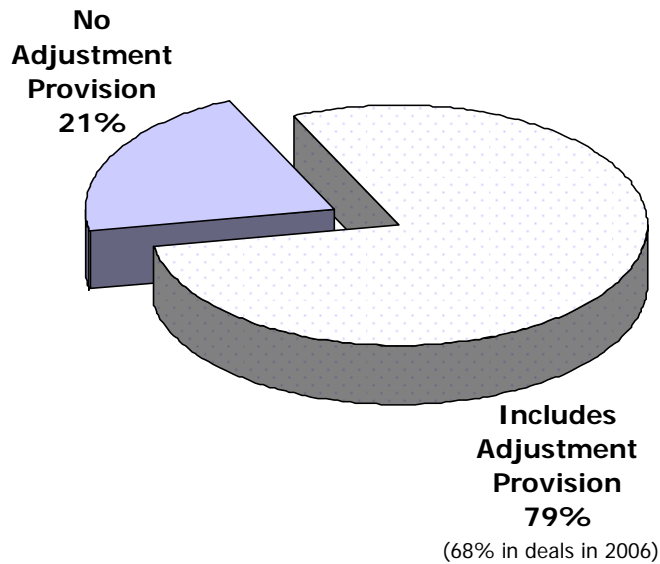
The “Adjustment Amount” (which may be a positive or negative number) will be equal to the amount determined by subtracting the Closing Working Capital from the Initial Working Capital. If the Adjustment Amount is positive, the Adjustment Amount shall be paid by wire transfer by Seller to an account specified by Buyer. If the Adjustment Amount is negative, the difference between the Closing Working Capital and the Initial Working Capital shall be paid by wire transfer by Buyer to an account specified by Seller.

...

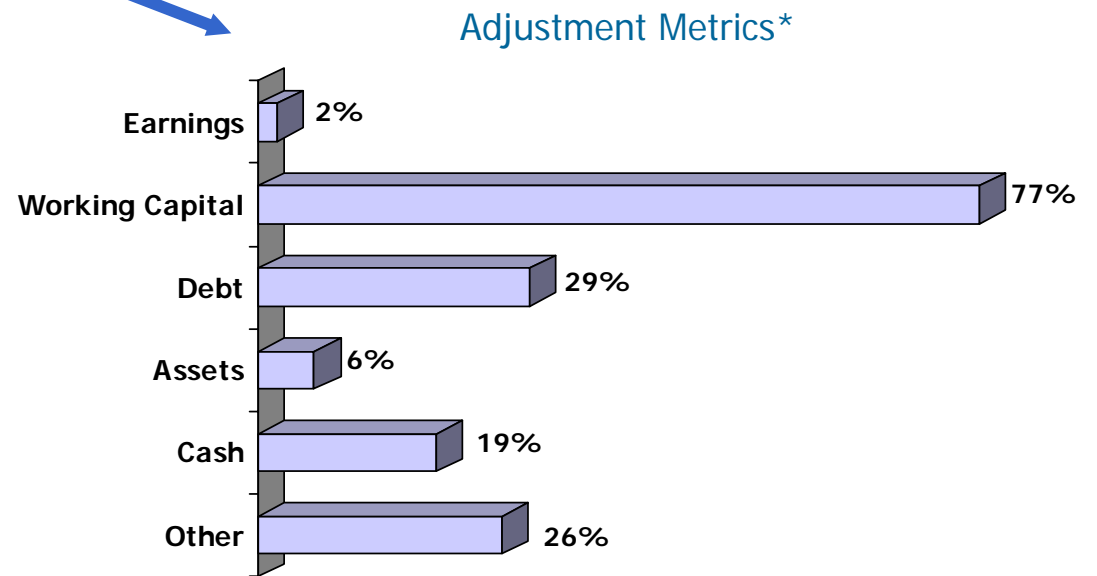
“Working Capital” as of a given date shall mean the amount calculated by subtracting the current liabilities of Seller... as of that date from the current assets of Seller... as of that date. The Working Capital of Seller as of the date of the Balance Sheet (the “Initial Working Capital”) was \_\_\_\_\_ dollars (\$\_\_\_\_\_).

(ABA Model Asset Purchase Agreement)

# Post-Closing Purchase Price Adjustments



(Subset: includes adjustment)

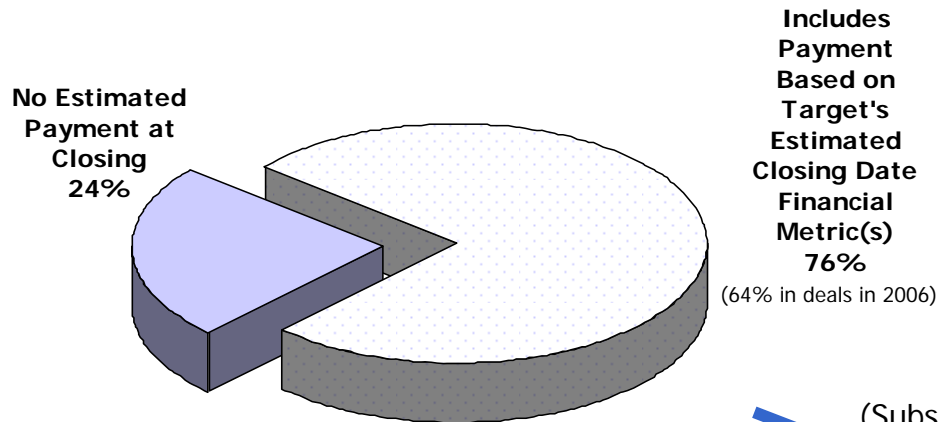


\* 38% of the post-closing purchase price adjustments were based on more than one metric.

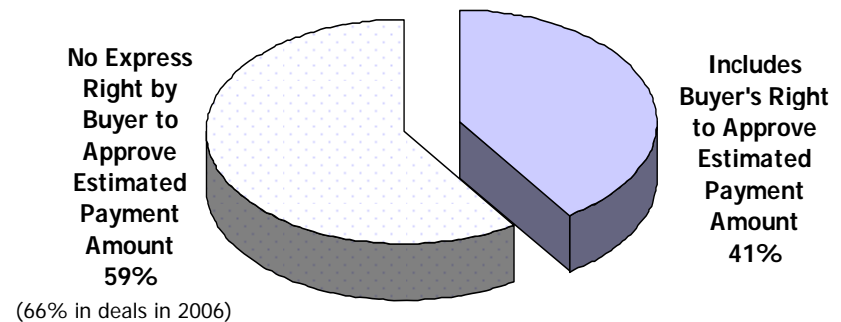


# Post-Closing Purchase Price Adjustments – Estimated Payments at Closing

(Subset: deals with post-closing purchase price adjustment)



(Subset: includes estimated closing payment)

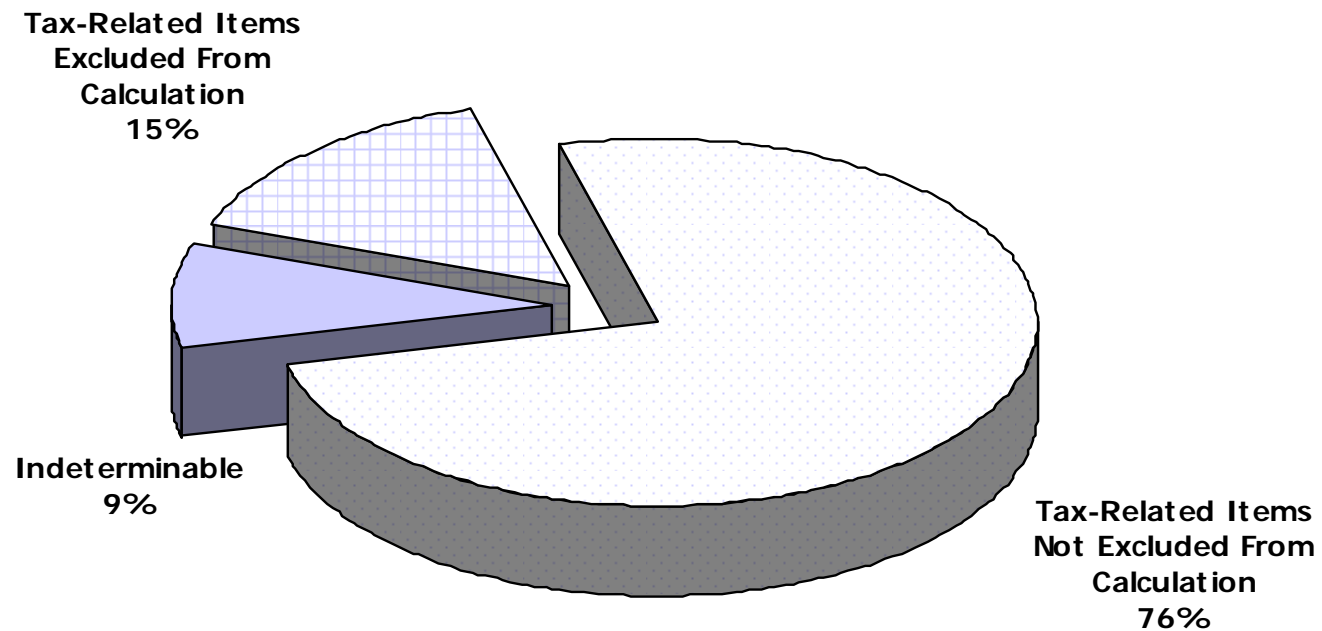


## Post-Closing Purchase Price Adjustments – Working Capital Excludes Tax-Related Items

“Adjusted Working Capital” means current assets minus current liabilities; provided, however, that “Adjusted Working Capital” **excludes from current assets all tax assets and excludes from current liabilities all tax liabilities.**

# Post-Closing Purchase Price Adjustments – Working Capital Excludes Tax-Related Items

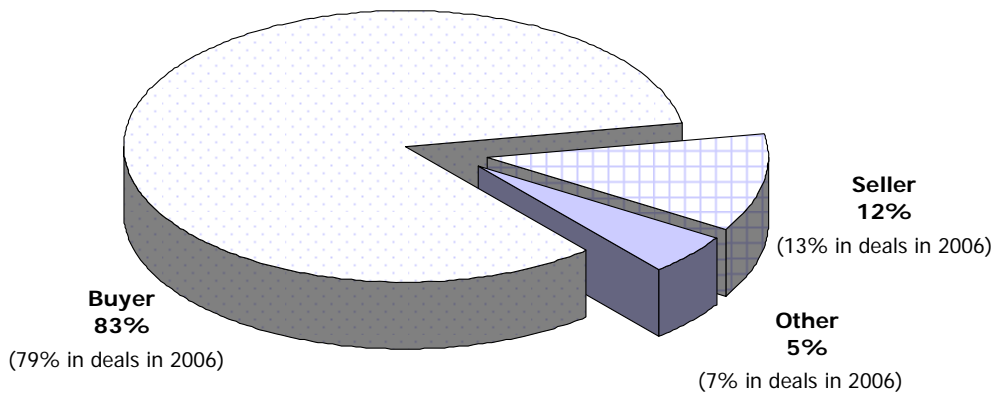
(Subset: deals with working capital purchase price adjustment)



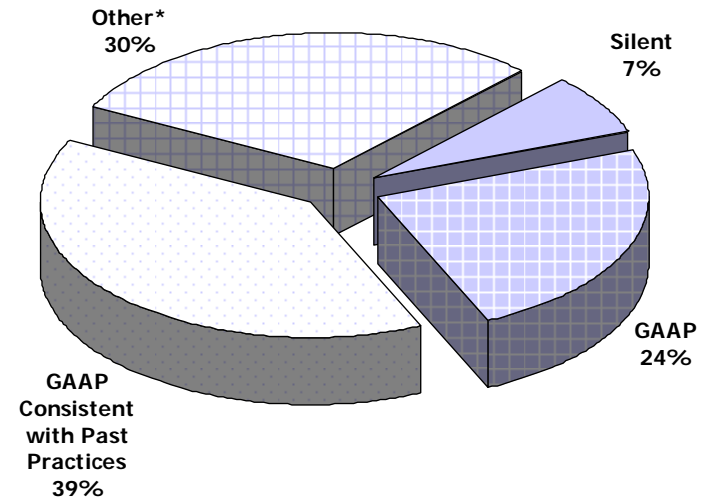
# Post-Closing Purchase Price Adjustments – Preparation of Closing Balance Sheet

(Subset: deals with post-closing purchase price adjustment)

Preparing Party



Methodology

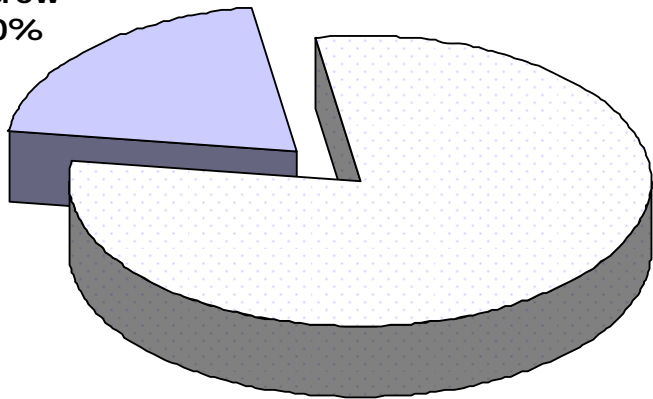


\* Other methodology most commonly used was GAAP as modified by the principles and changes set forth on a schedule.

# Post-Closing Purchase Price Adjustments – Separate Escrow

(Subset: deals with post-closing purchase price adjustment)

Includes Separate Escrow  
20%

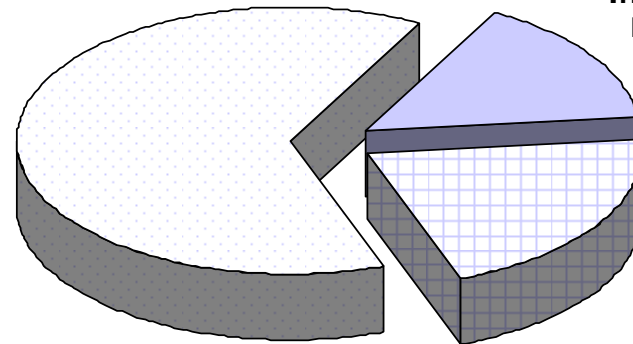


No Separate Escrow  
80%

(78% in deals in 2006)

(Subset: no separate escrow\*)

True-Up Payment from Indemnity Escrow  
64%



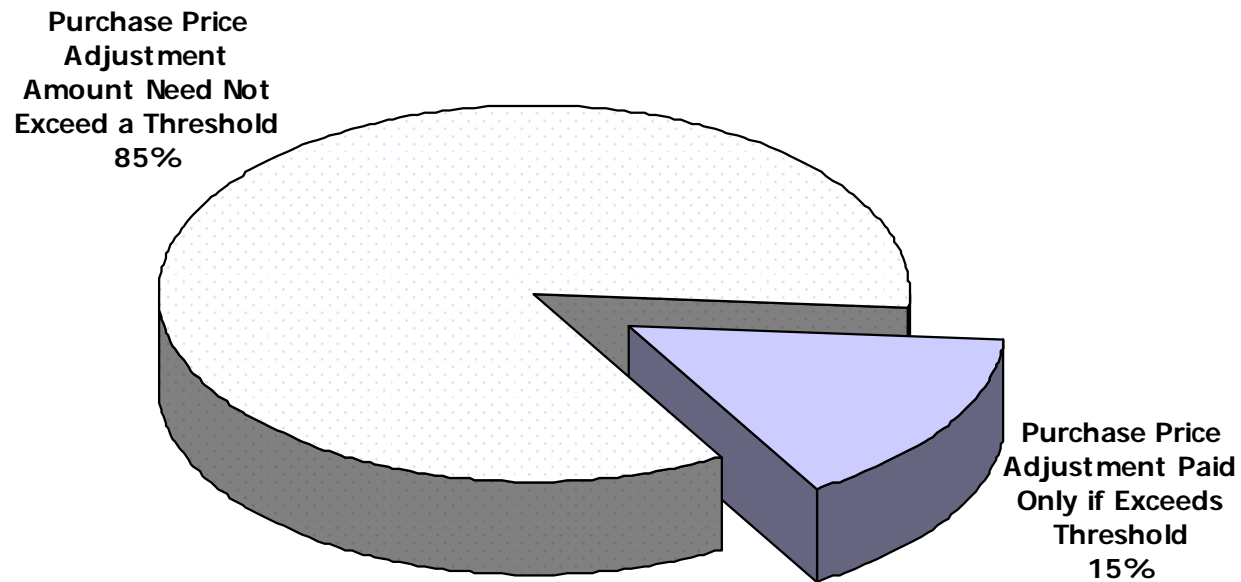
Payment Not from Indemnity Escrow  
15%

Silent  
21%

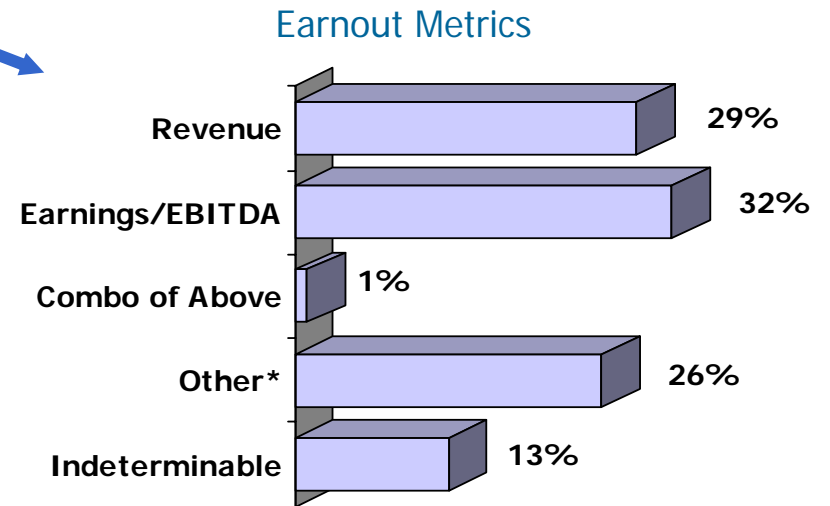
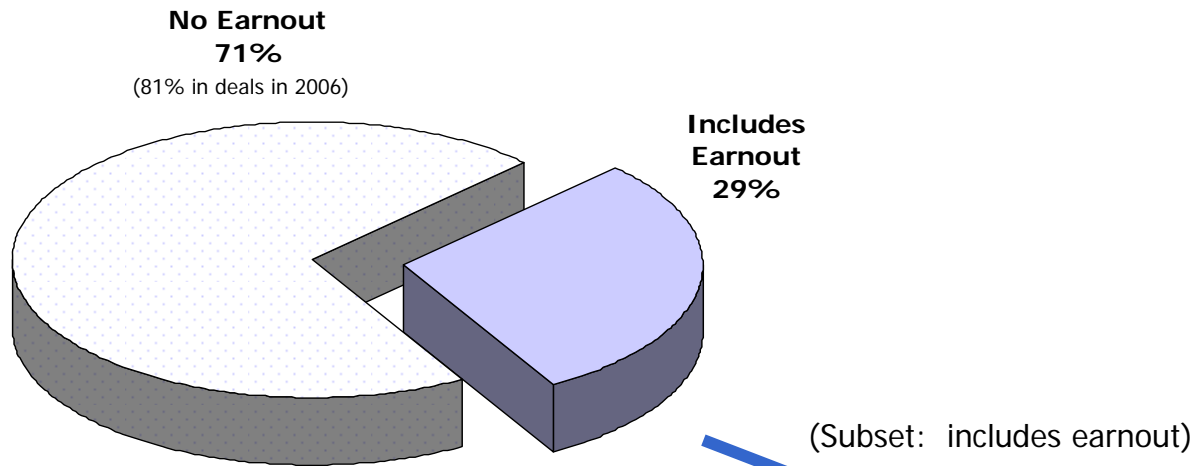
\* Excludes 15 deals with no indemnity escrow/holdback.

# Post-Closing Purchase Price Adjustments – Threshold

(Subset: deals with post-closing purchase price adjustment)



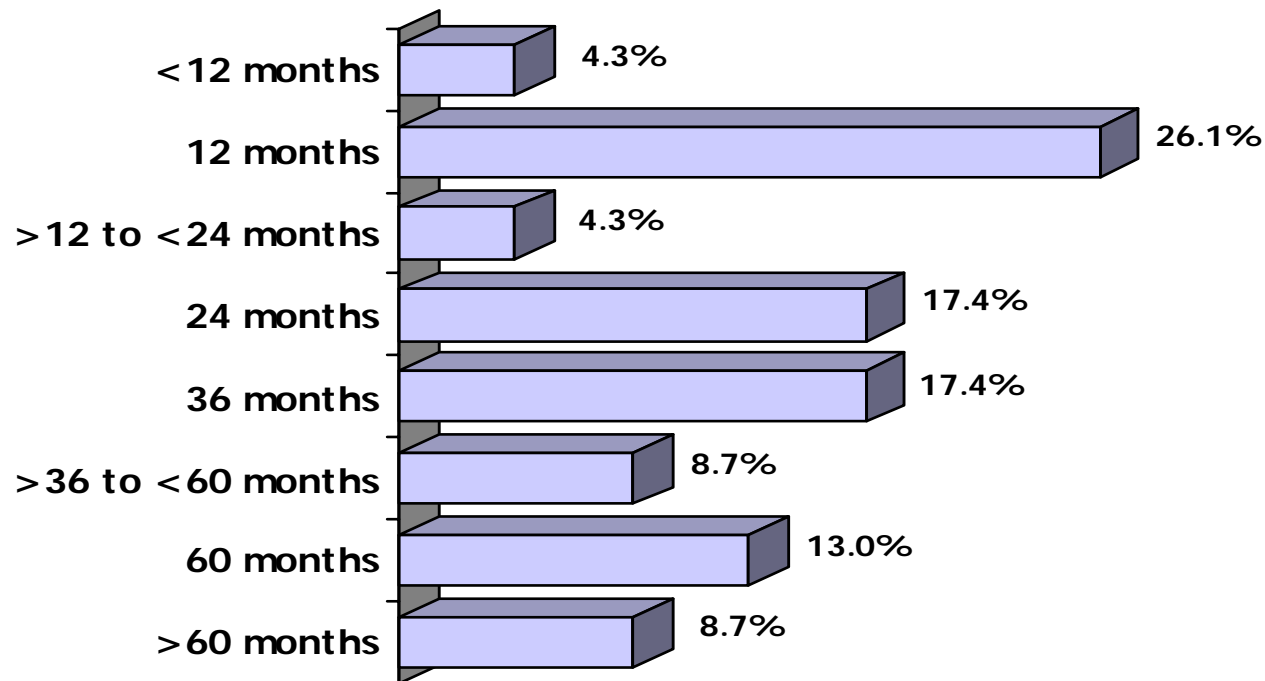
# Earnouts



\* Examples: regulatory approval of drug applications; attainment of certain post-closing contracts; launch of certain products.



## Earnouts – Period of Earnout (Subset: deals with earnouts\*)

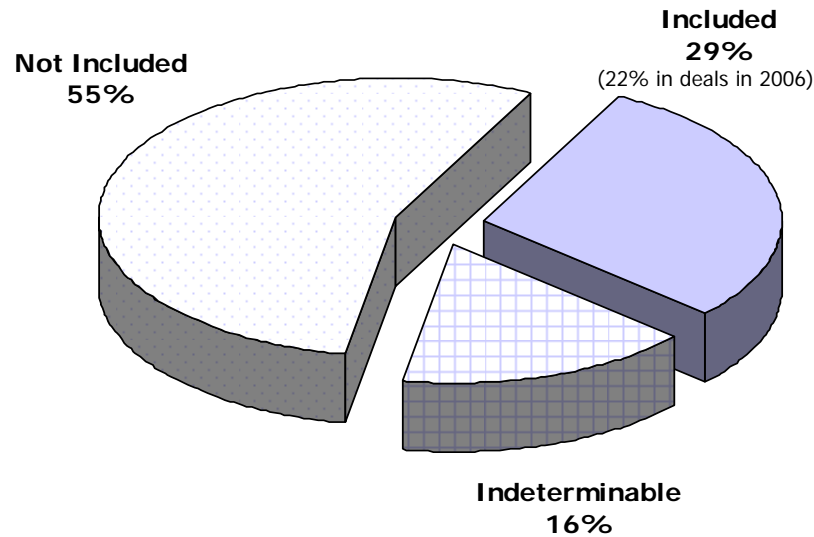


\* Excludes 8 deals where provisions relating to period of the earnout were redacted or included in separate agreements or schedules not publicly filed.

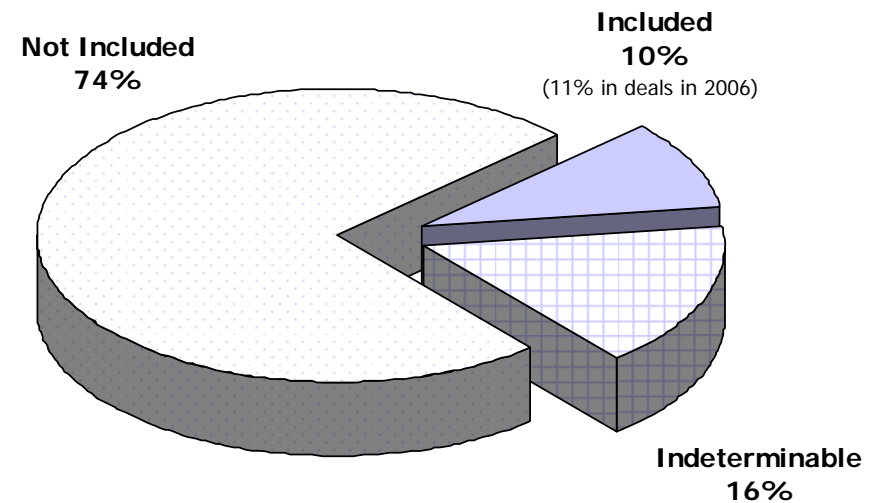
# Earnouts – Buyer’s Covenants as to Acquired Business

(Subset: deals with earnouts\*)

Covenant to Run Business  
in Accordance with Past Practice



Covenant to Run Business  
to Maximize Earnout

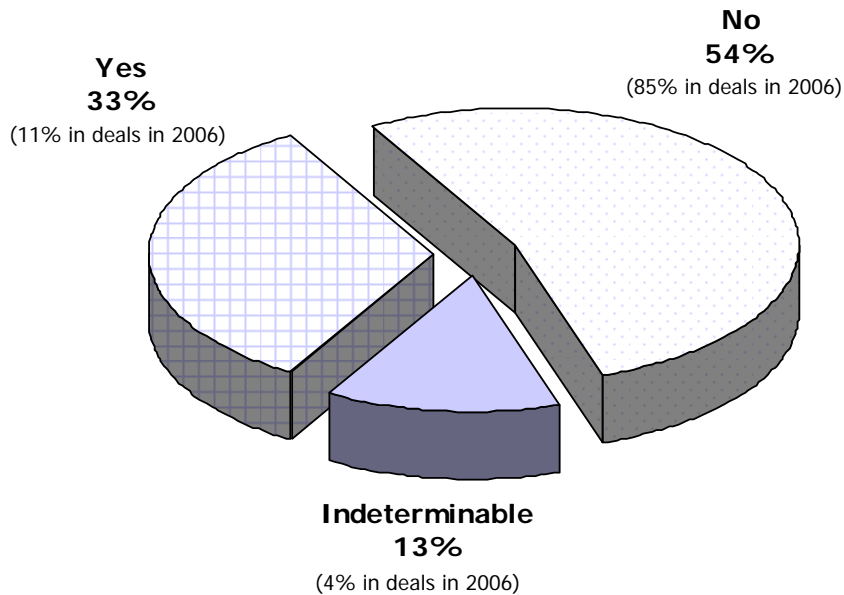


\* Two deals that included an earnout contained a provision authorizing Buyer to operate the business in its own best interest.

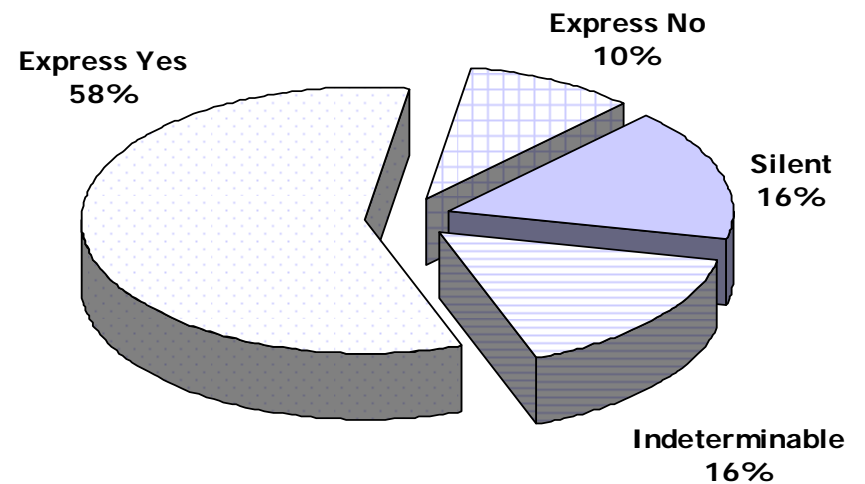
# Earnouts – Acceleration and Offsets

(Subset: deals with earnouts)

Does the Earnout Expressly Accelerate on a Change of Control?



Can Buyer Offset Indemnity Payments Against Earnout?



## Earnouts – Additional Provisions

### *Provision Intended to Ensure Earnout Not Treated as a Security*

The right of Seller to a portion of the Earnout Amount, if any, shall not be represented by a certificate or other instrument, shall not represent an ownership interest in Buyer or the Business and shall not entitle Seller to any rights common to any holder of any equity security of Buyer.

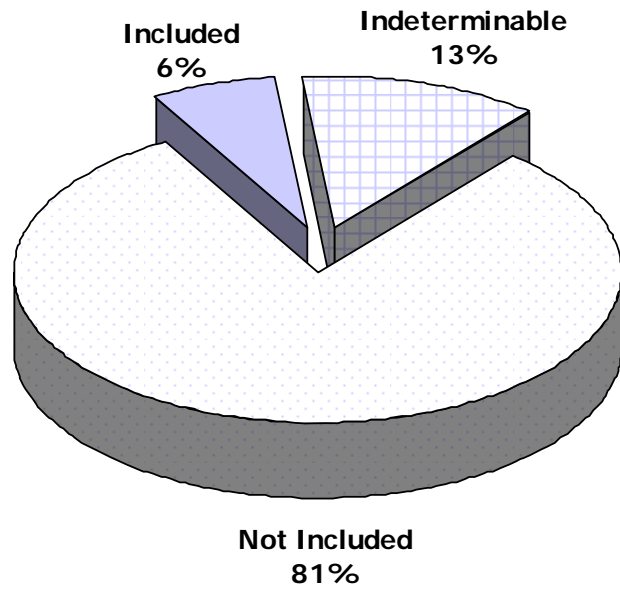
### *Express Disclaimer of Fiduciary Relationship*

Nothing in this Agreement creates a fiduciary duty on the part of Buyer to Seller in respect of the Earnout.

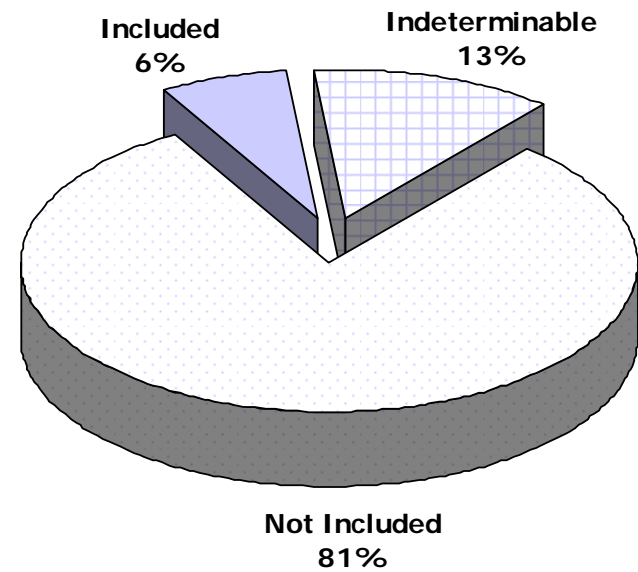
# Earnouts – Additional Provisions

(Subset: deals with earnouts)

Provision Intended to Ensure  
Earnout Not Treated as a Security



Express Disclaimer of  
Fiduciary Relationship



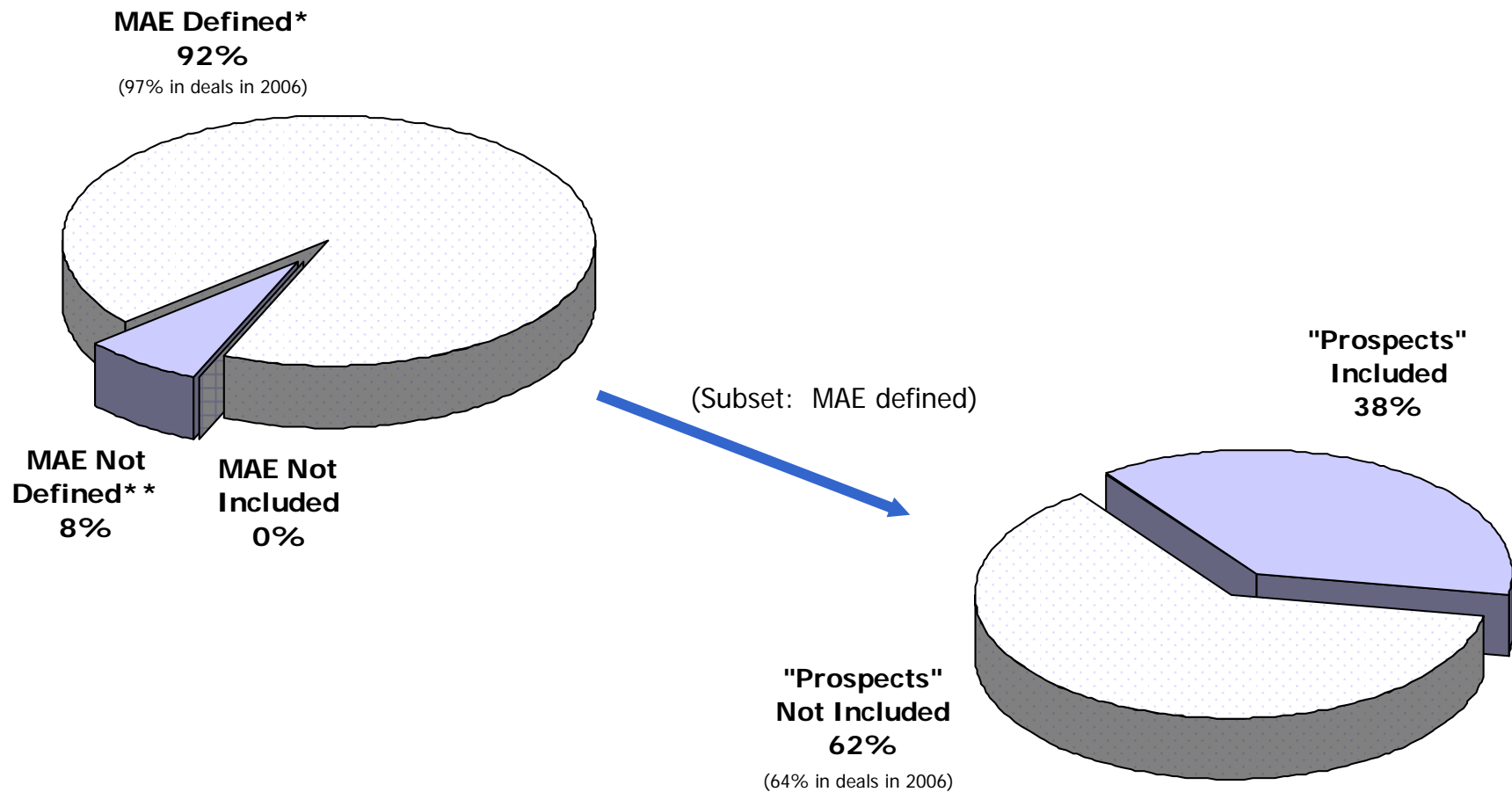
# Pervasive Qualifiers

## 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.



# Definition of "Material Adverse Effect"



\* Excludes one agreement for which the applicable provisions were included on an unfiled schedule.

\*\* Among the deals with MAE undefined, several incorporated portions of a typical MAE definition (including, in some cases "prospects" and forward-looking language) into some uses of the term "material adverse effect."

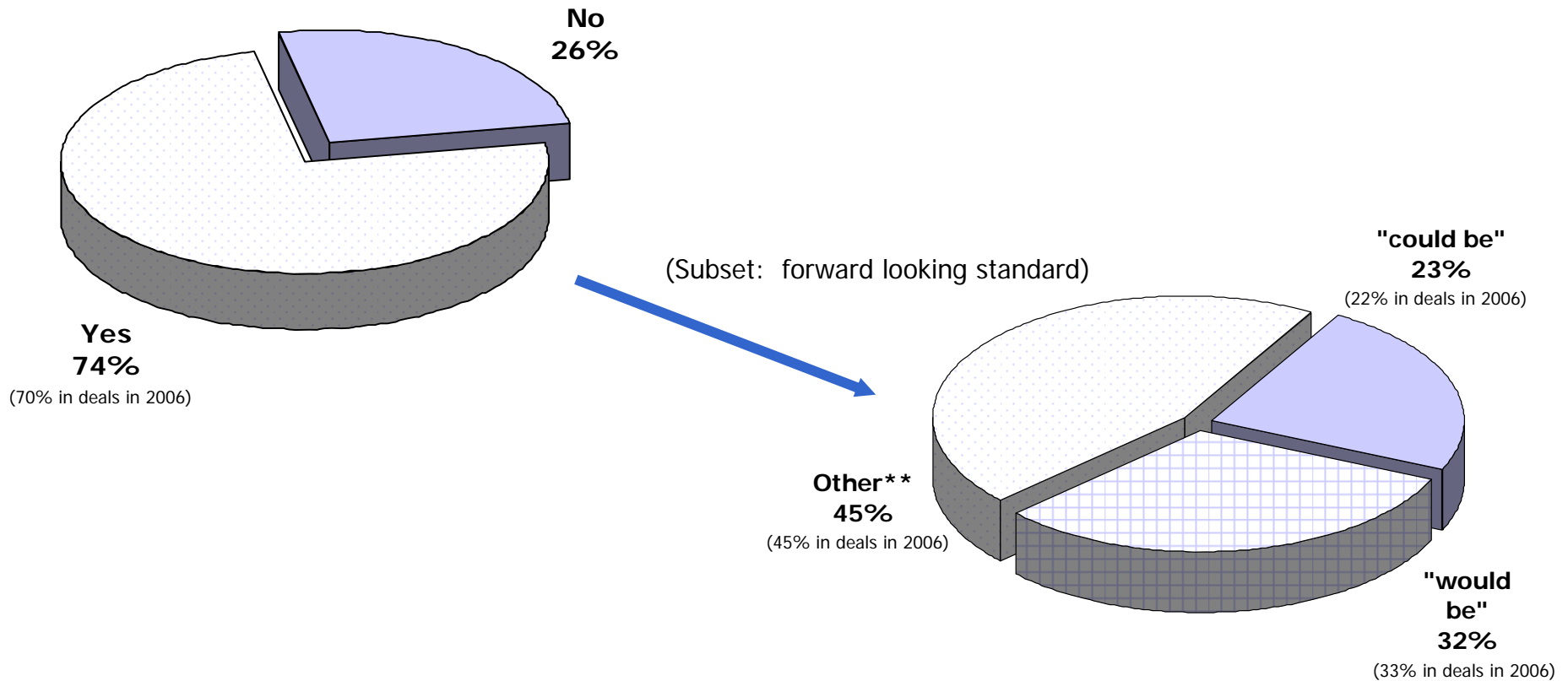
## Definition of “Material Adverse Effect” – Forward Looking Standards

“Material Adverse Effect” means any result, occurrence, fact, change, event or effect that has, **or could reasonably be expected to have**, a materially adverse effect on the business, assets, liabilities, capitalization, condition (financial or other), results of operations or prospects of Target.

# Definition of "Material Adverse Effect" – Forward Looking Standards

(Subset: deals with MAE definition)

Is MAE Forward Looking?\*



\* Includes both deals where the MAE definition included forward looking language and deals where the MAE definition did not include forward looking language but forward looking language was predominantly used in conjunction with the use of the defined term in the body of the agreement.

\*\* Agreements in the "Other" category use a combination of "could" and "would" or some other forward looking standard.

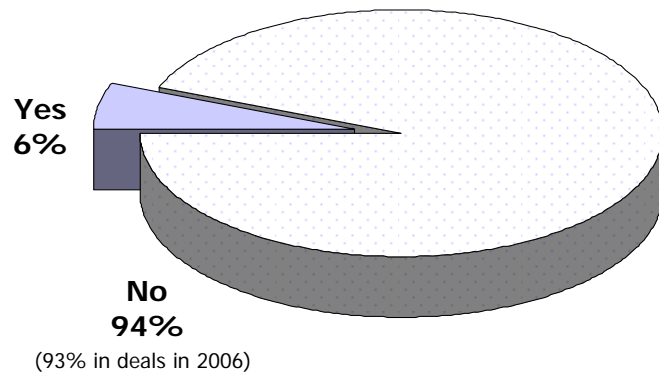
## Definition of “Material Adverse Effect” – Buyer’s Ability to Operate Target’s Business Post Closing Target’s Ability to Consummate Contemplated Transaction

“Material Adverse Effect” means any result, occurrence, fact, change, event or effect that is or could reasonably be expected to have a materially adverse effect on (i) the business, assets, liabilities, capitalization, condition (financial or other), or results of operations of Target, (ii) **Seller’s ability to consummate the transactions contemplated hereby**, or (iii) **Buyer’s ability to operate the business of Target immediately after Closing in the manner operated by Seller before Closing**.

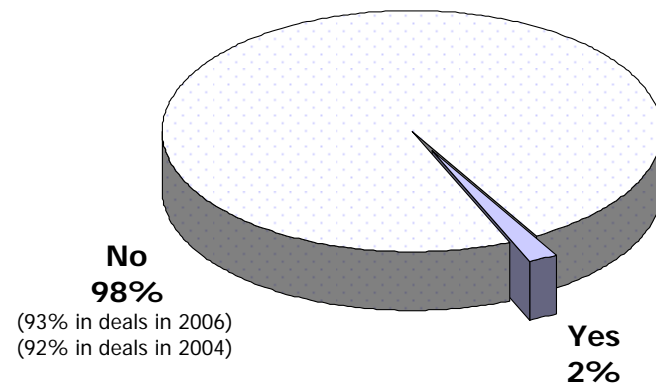
# Definition of "Material Adverse Effect"

(Subset: deals with MAE definition)

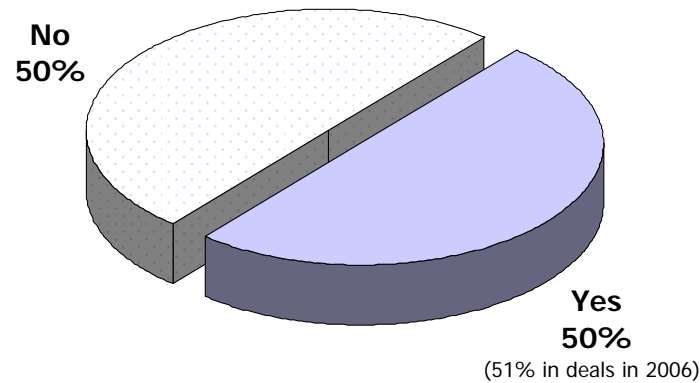
Includes Buyer's Ability to Operate Target's Business Post Closing



Includes Stated Dollar Amount



Includes Target's Ability to Consummate Contemplated Transaction

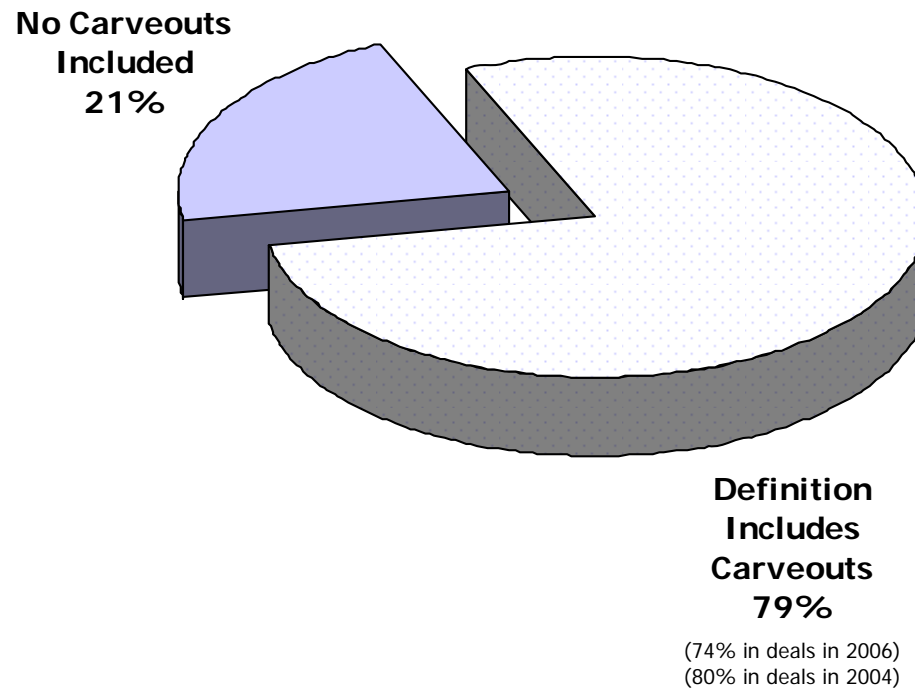


## Definition of “Material Adverse Effect” – Carve Outs

“Material Adverse Effect” means..., **except to the extent resulting from** (A) changes in general local, domestic, foreign, or international economic conditions, (B) changes affecting generally the industries or markets in which Company operates, (C) acts of war, sabotage or terrorism, military actions or the escalation thereof, (D) any changes in applicable laws or accounting rules or principles, including changes in GAAP, (E) any other action required by this Agreement, or (F) the announcement of the Transactions.

# Definition of "Material Adverse Effect" – Carve Outs

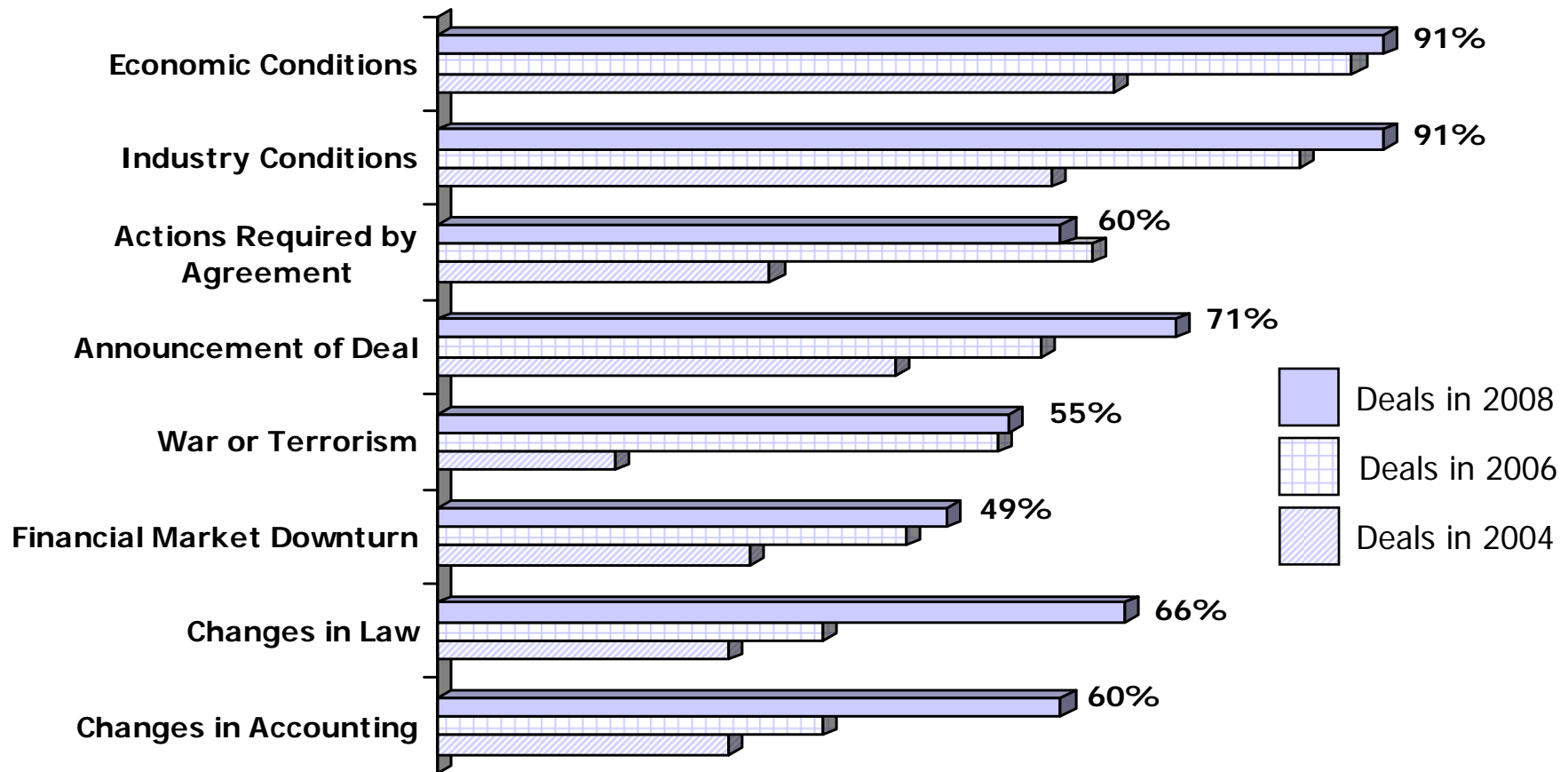
(Subset: deals with MAE definition)





# Definition of "Material Adverse Effect" – Carve Outs

(Subset: deals with MAE definition with carveouts)

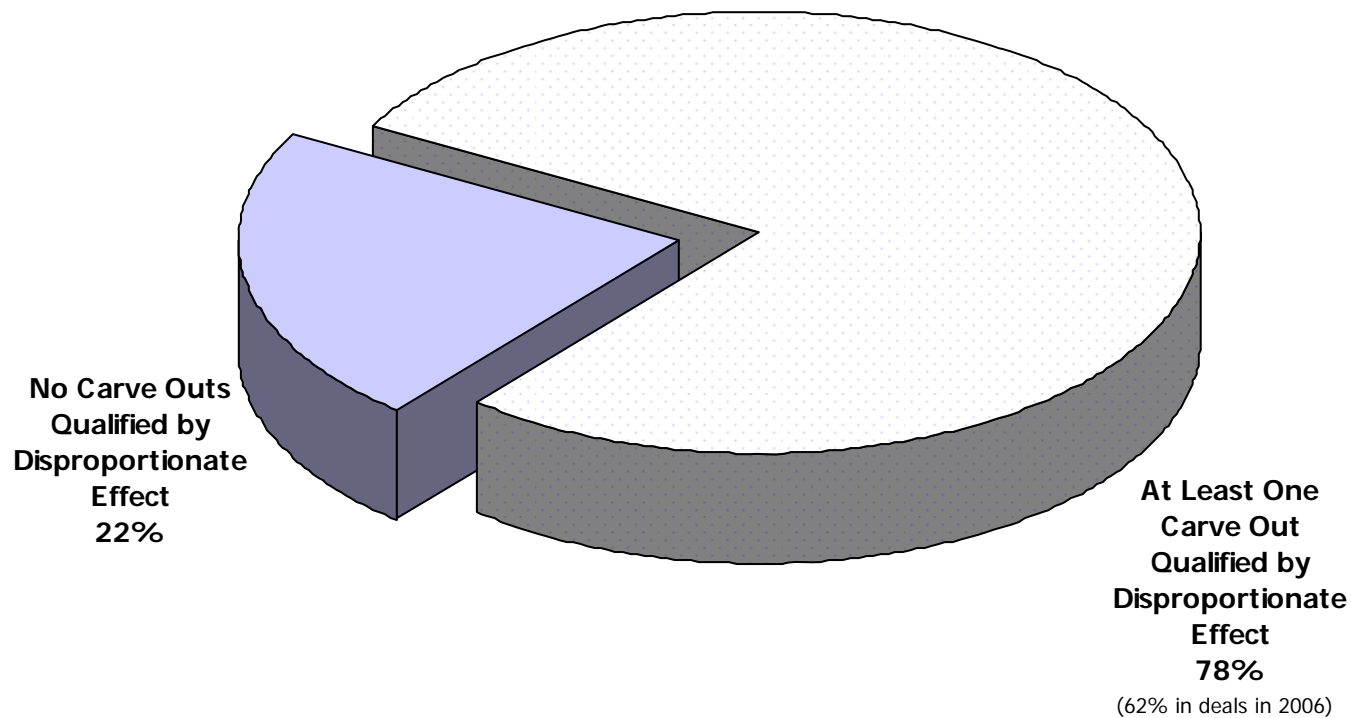


## Definition of “Material Adverse Effect” – Carve Out(s) Qualified by Disproportionate Effect

“Material Adverse Effect” means..., except to the extent resulting from (A) changes in general local, domestic, foreign, or international economic conditions, (B) changes affecting generally the industries or markets in which Company operates, (C) acts of war, sabotage or terrorism, military actions or the escalation thereof, (D) any changes in applicable laws or accounting rules or principles, including changes in GAAP, (E) any other action required by this Agreement, or (F) the announcement of the Transactions **(provided that such event, change, or action does not affect Company in a substantially disproportionate manner).**

# Definition of “Material Adverse Effect” – Carve Out(s) Qualified by Disproportionate Effect

(Subset: deals with MAE definition with carve outs)

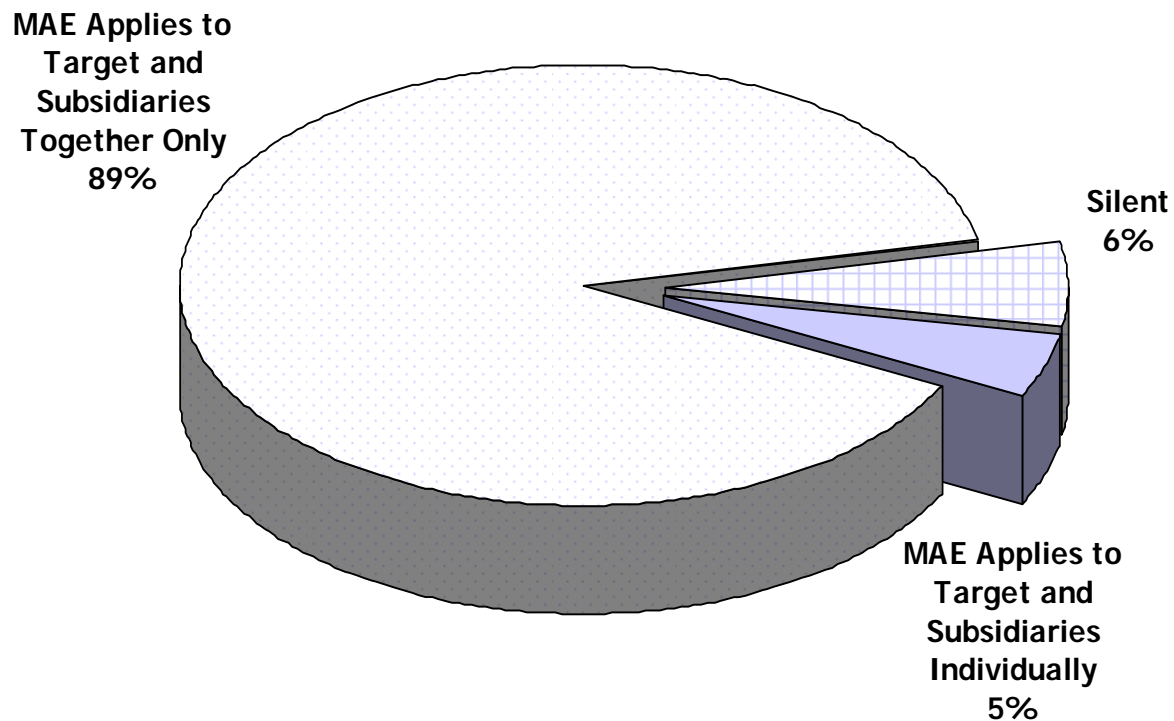


## Definition of “Material Adverse Effect” – Application to Individual Subsidiaries

“Material Adverse Effect” means any result, occurrence, fact, change, event or effect that is or could reasonably be expected to have a materially adverse effect on (i) the business, assets, liabilities, capitalization, condition (financial or other), or results of operations of **Target or any of its Subsidiaries**, or (ii) Seller’s ability to consummate the transactions contemplated hereby.

# Definition of “Material Adverse Effect” – Application to Individual Subsidiaries

(Subset: deals with MAE definition\*)



\* Excludes 15 deals where Target did not have any subsidiaries.

## Knowledge – Standards

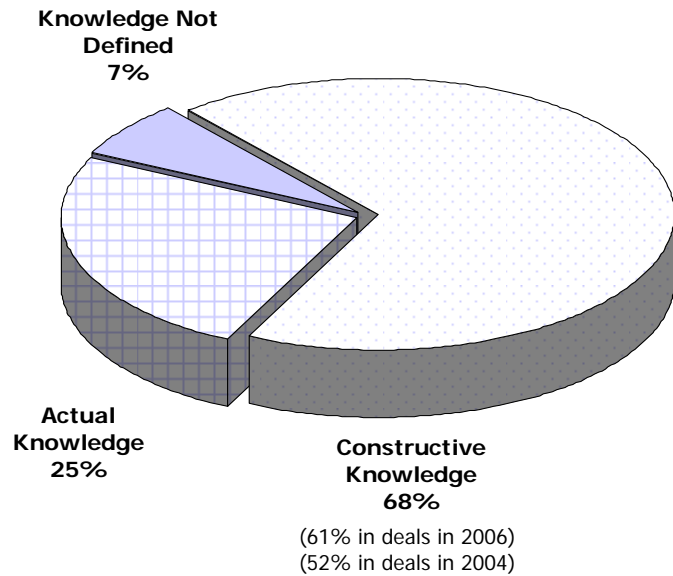
### *Actual Knowledge*

“Knowledge” means *the actual knowledge of the directors and officers of Target.*

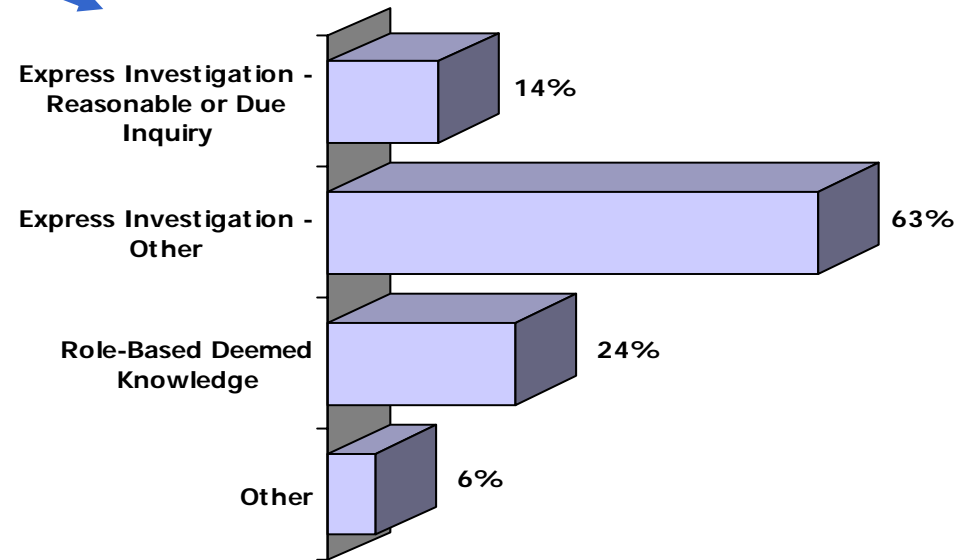
### *Constructive Knowledge (Role-Based Deemed Knowledge)*

“Knowledge” means the knowledge of the directors and officers of Target and other individuals that have a similar position or have similar powers and duties as the officers and directors of Target, including, in the case of such officers, *the knowledge of facts that such officers should have after due inquiry.*

# Knowledge – Standards\*



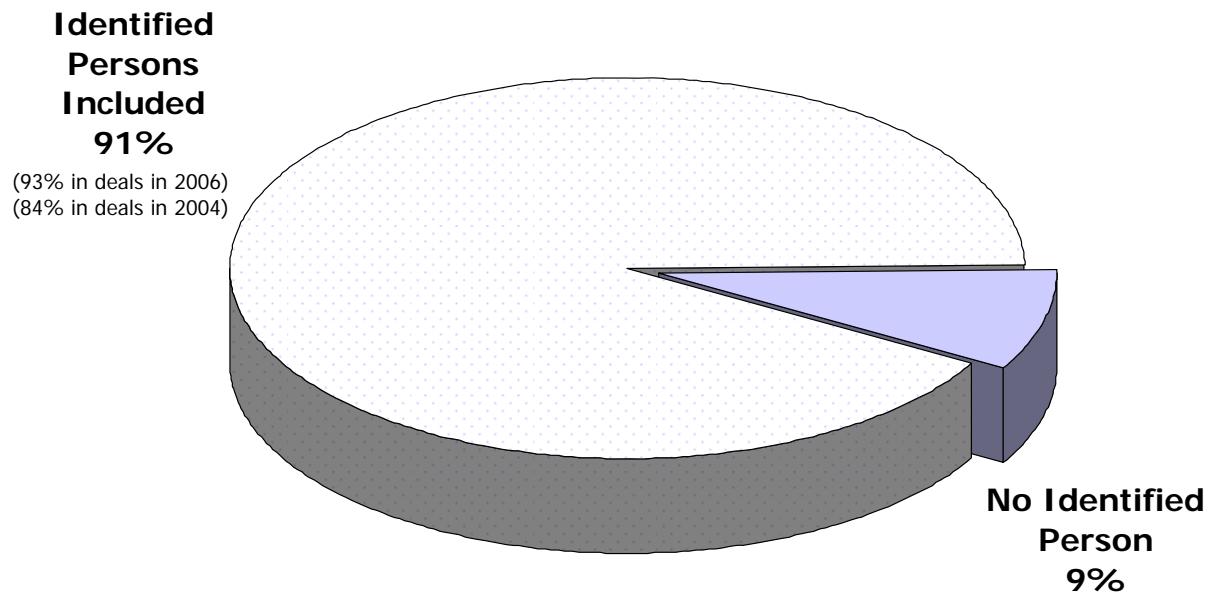
(Subset: constructive knowledge\*\*)



\* Excludes one agreement for which the applicable provisions were included on an unfiled schedule and one deal for which the applicable provisions were subject to a confidential treatment request.

\*\* 7% include more than one constructive knowledge element, e.g., role-based deemed knowledge and an express investigation requirement.

# Knowledge – Whose Knowledge is Imputed to Target?





# Target's Representations, Warranties, and Covenants\*

**\* Excludes one deal for which provisions were redacted.**

## Financial Statements – “Fair Presentation” Representation

### *“Fairly presents” is GAAP qualified*

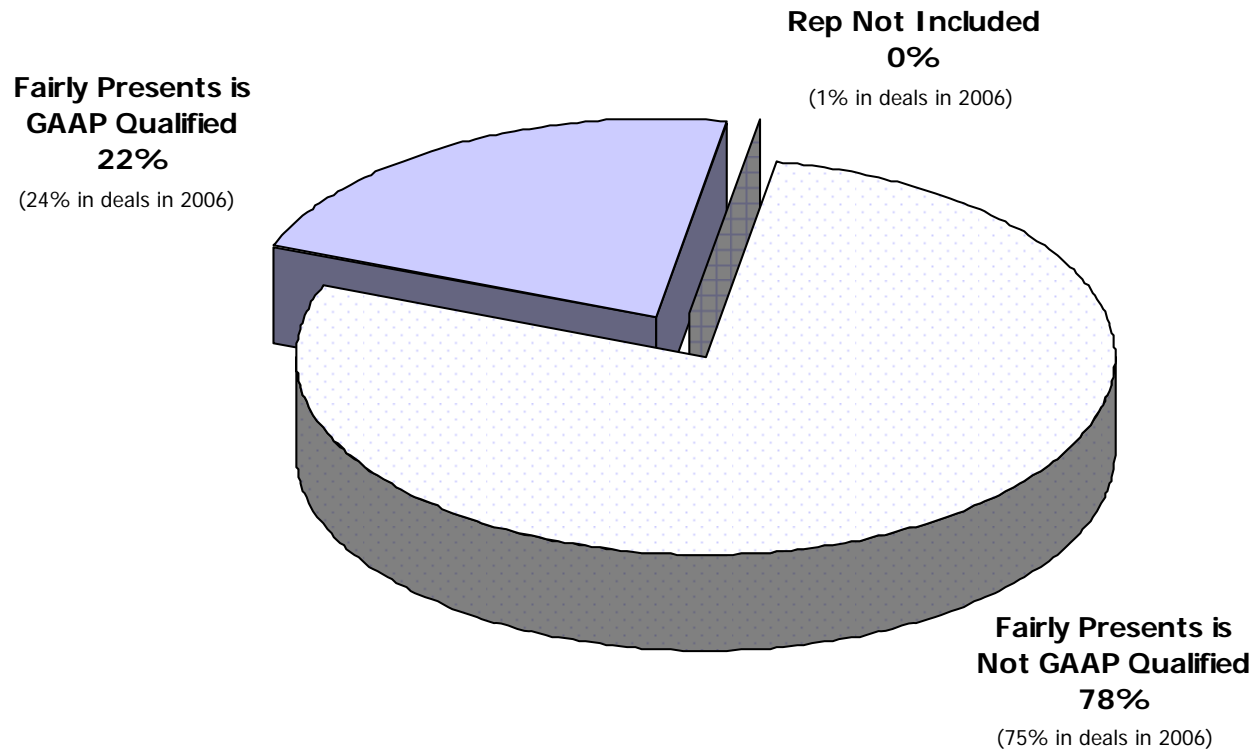
Such financial statements fairly present (and the financial statements delivered pursuant to Section 5.8 will fairly present) the financial condition and the results of operations, changes in shareholders' equity and cash flows of [Target] as at the respective dates of and for the periods referred to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

(ABA Model Asset Purchase Agreement)

### *“Fairly presents” is not GAAP qualified*

Each Financial Statement (including the notes thereto) has been prepared in accordance with GAAP applied on a consistent basis throughout the periods involved and fairly presents, in all material respects, the financial condition of Target as of such dates and the results of Target's operations for the periods specified.

## Financial Statements – “Fair Presentation” Representation



## **“No Undisclosed Liabilities” Representation**

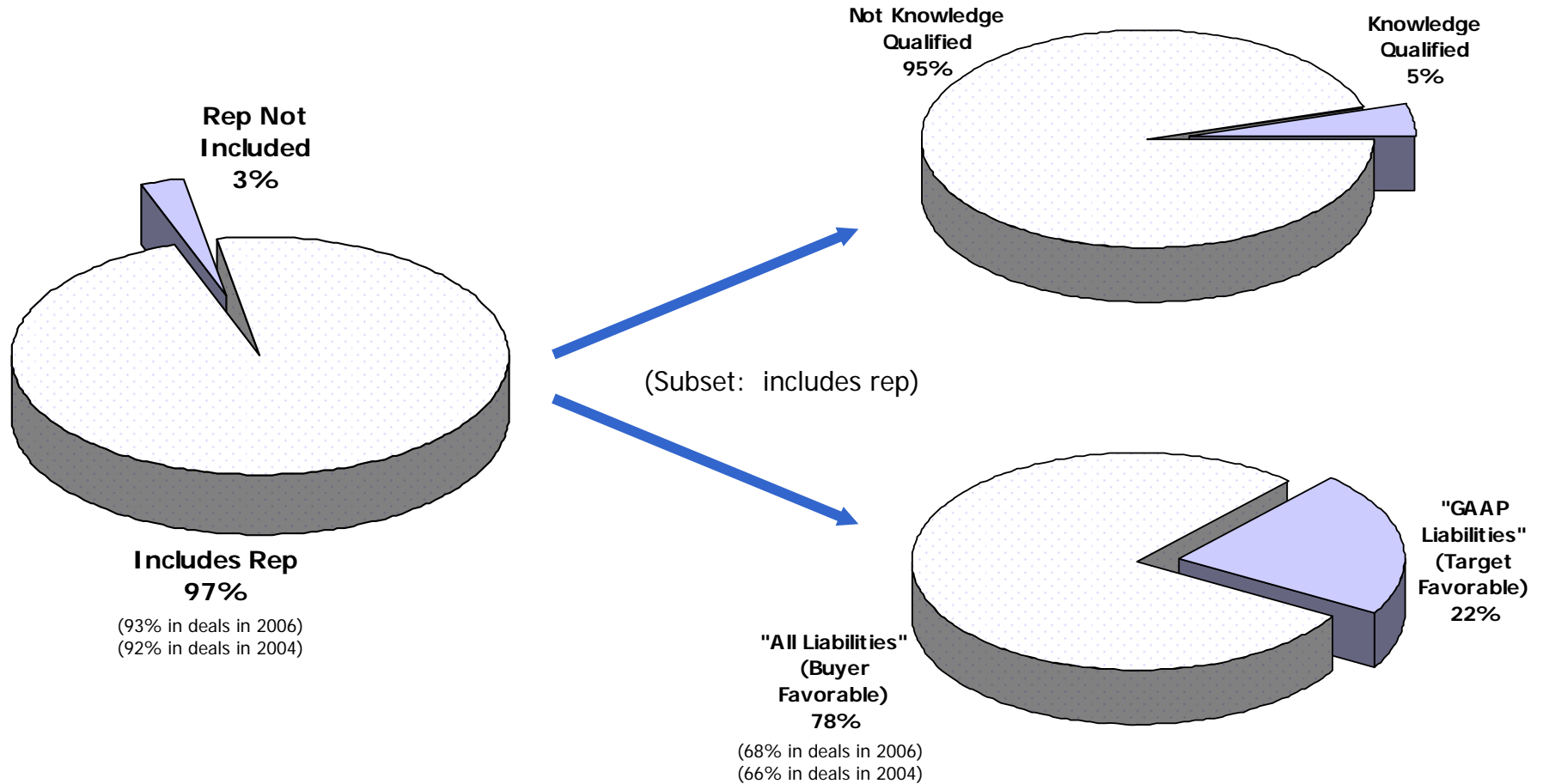
### ***Buyer-Favorable Formulation***

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 Target's ordinary course of business since the date of the Interim Balance Sheet.

### ***Target-Favorable Formulation***

Target has no liability **of the nature required to be disclosed in a balance sheet prepared in accordance with GAAP** except for...

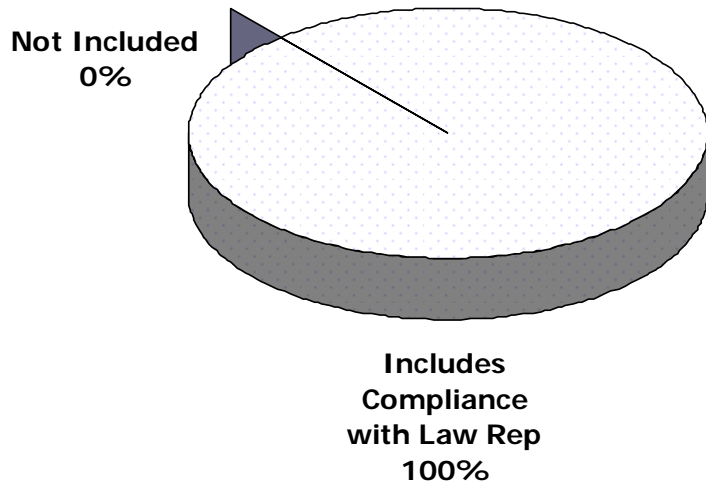
# "No Undisclosed Liabilities" Representation



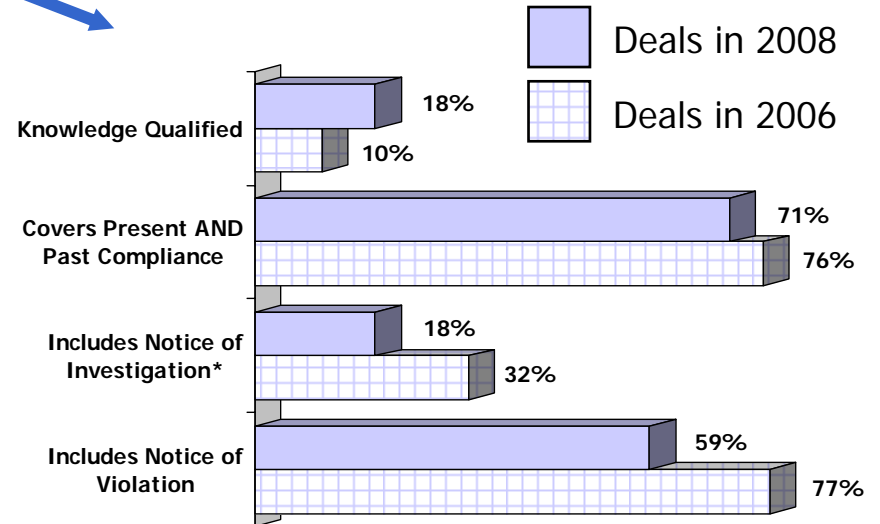
## Compliance with Law Representation

[*To the Sellers' knowledge,*] the business of Target [*has been and*] is being conducted in compliance with all applicable laws.

# Compliance with Law Representation



(Subset: includes rep)



\* Does not test whether notice of investigation requirement appears in other representations.

## **"10b-5"/Full Disclosure Representation**

### ***"10b-5" Formulation***

No representation or warranty or other statement made by [Target] 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.

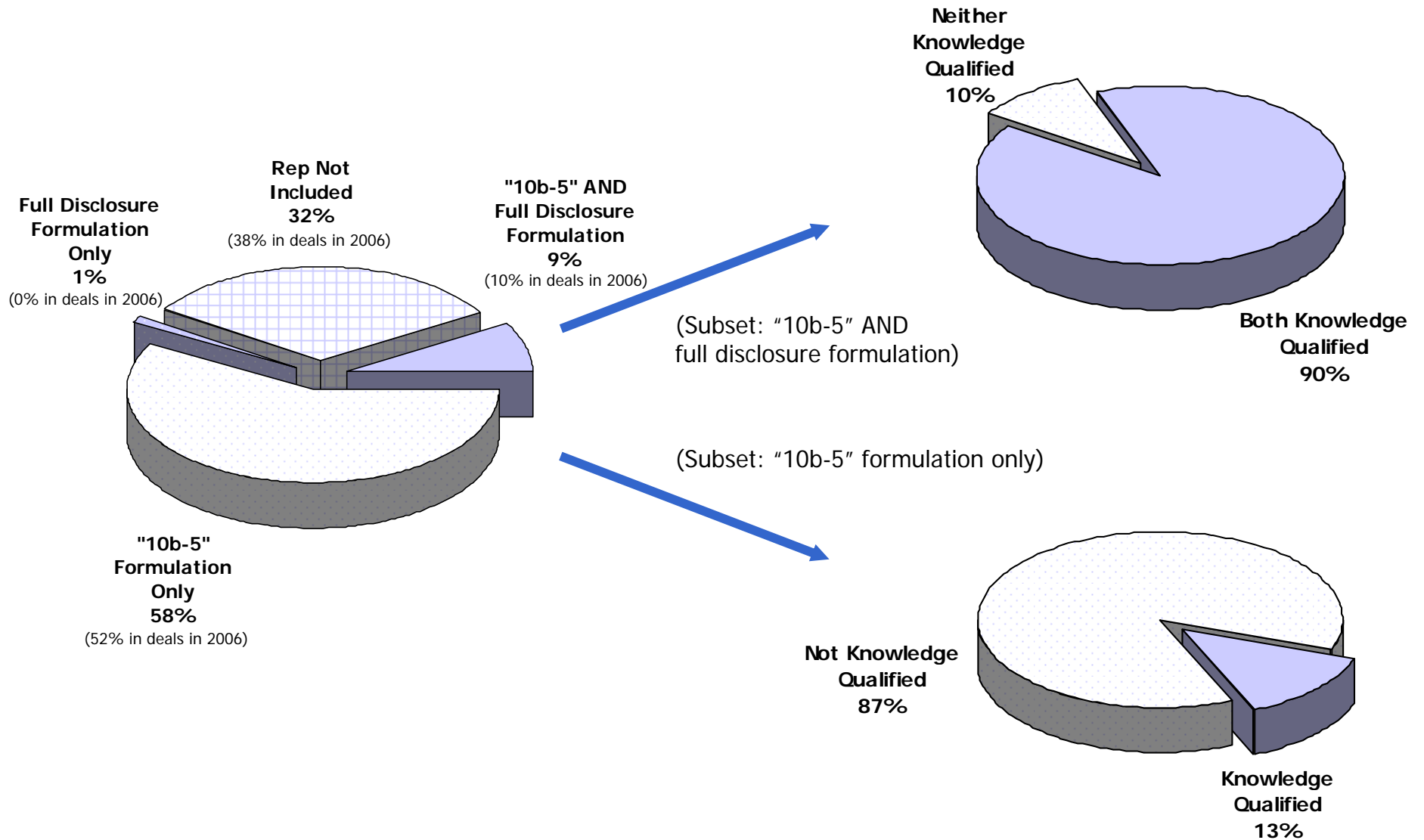
### ***Full disclosure Formulation***

Seller does not have Knowledge of any fact that has specific application to Seller (other than general economic or industry conditions) and that may materially adversely affect the assets, business, prospects, financial condition or results of operations of Seller that has not been set forth in this Agreement or the Disclosure Letter.

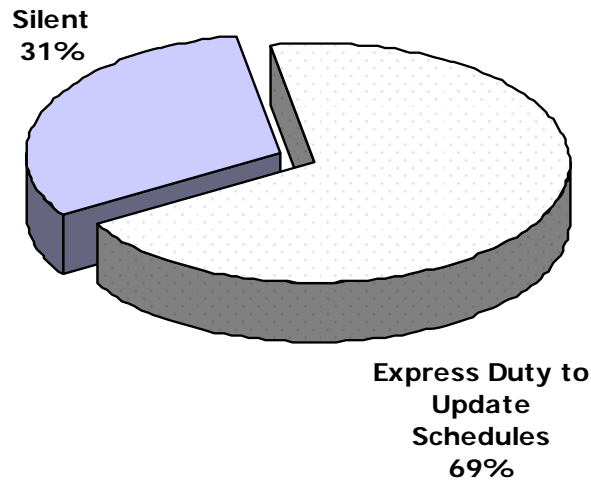
(ABA Model Asset Purchase Agreement)



# "10b-5"/Full Disclosure Representation

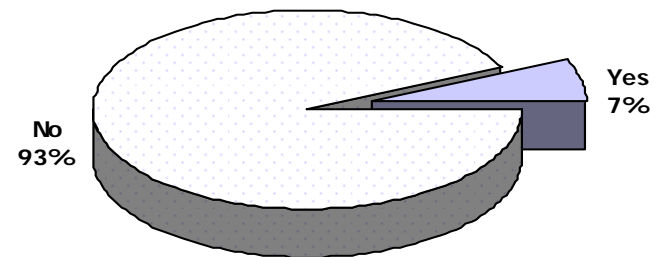


# Covenants - Target's Duty to Update for Breaches of Representations and Warranties\*

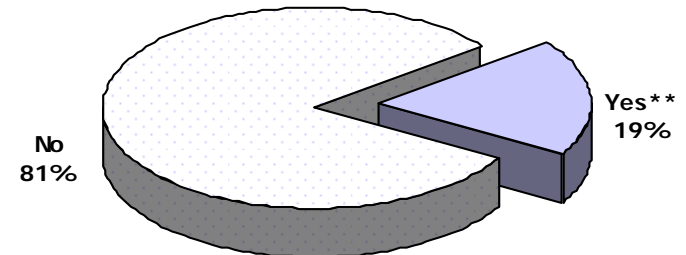


(Subset: Express Duty)

Is Duty to Update Limited to Information Required to Have Been Disclosed at Signing?



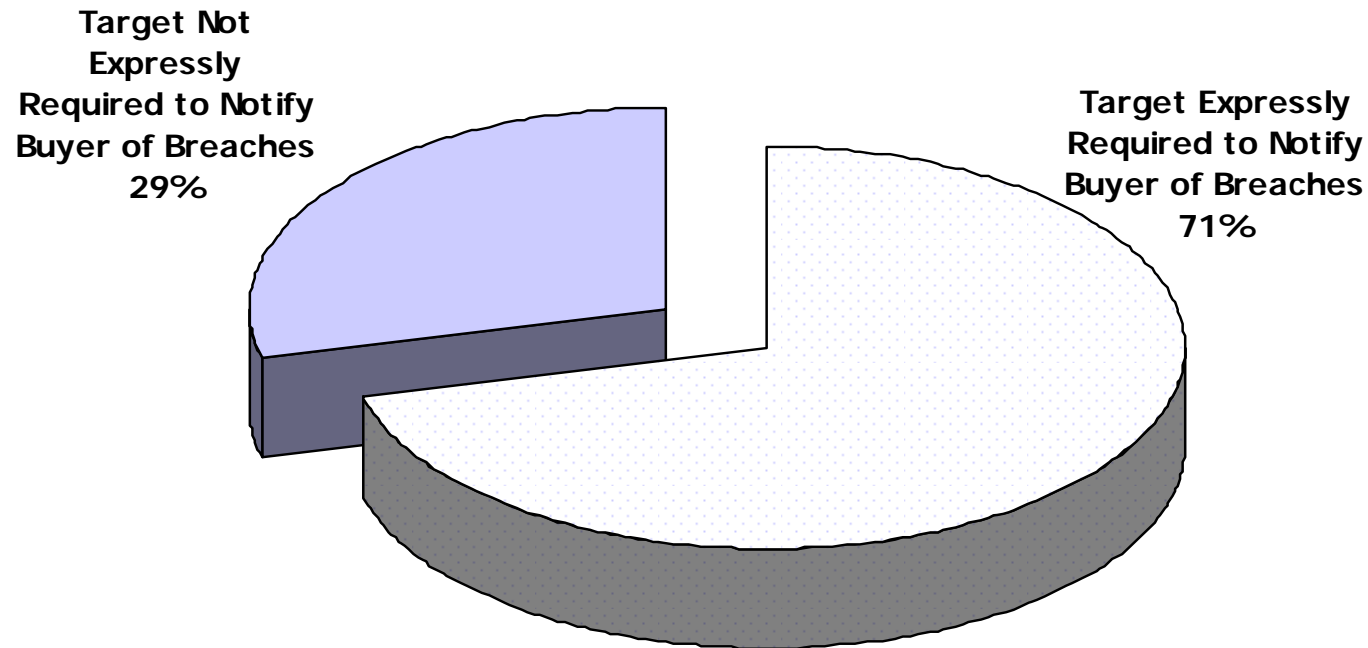
Is Buyer's Right to Indemnification Limited for Updated Matters?



\* Disregards the Study sample's 21% of deals that are "simultaneous sign-and-close." Includes updates to disclosure schedules and other requirements to inform Buyer.

\*\* These deals generally eliminate Buyer's right to indemnification for the updated matter if Buyer chooses to waive the relevant closing condition or does not exercise an existing or newly provided right to terminate the transaction because of the [material] update. Includes one deal where Buyer and Target agree to negotiate effect on indemnification rights in good faith.

## Covenants – Notice of Breaches\*

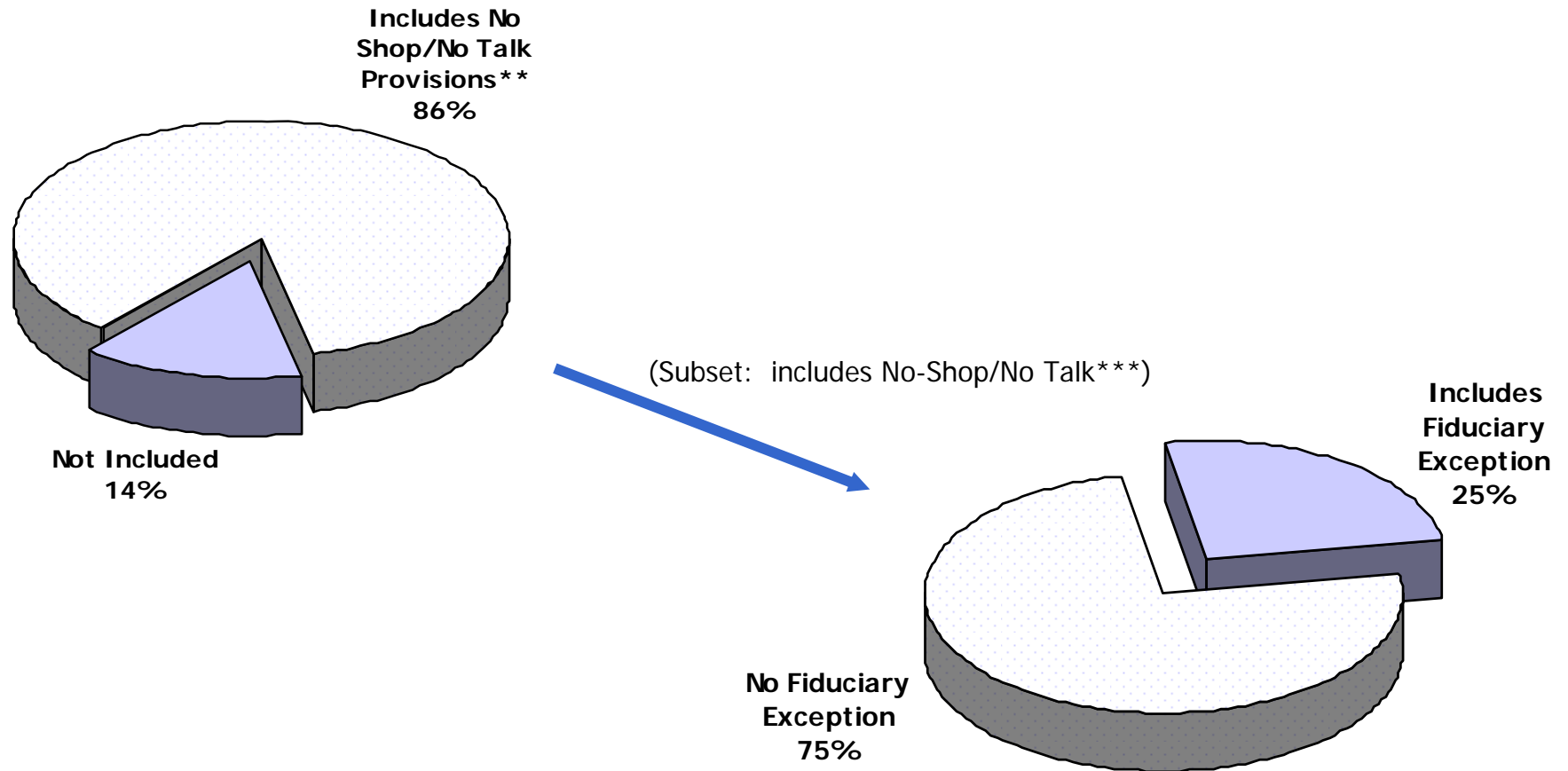


\* Disregards the Study sample's 21% of deals that are "simultaneous sign-and-close" and one deal for which covenants were not publicly disclosed.

## Covenants – No Shop/No Talk

Between the date of this Agreement and the earlier of the Closing and the termination of this Agreement, Target shall not, and shall take all action necessary to ensure that none of Target's Representatives shall (i) solicit, initiate, consider, encourage or accept any proposal or offer that constitutes an Acquisition Proposal or (ii) participate in any discussions, conversations, negotiations or other communications regarding, or furnish to any other Person any information with respect to, or otherwise cooperate in any way, assist or participate in, facilitate or encourage the submission of, any proposal that constitutes, or could reasonably be expected to lead to, an Acquisition Proposal.

## Covenants – No Shop/No Talk\*



\* Disregards the Study sample's 21% of deals that are "simultaneous sign-and-close" and one deal for which covenants were not publicly disclosed.

\*\* Includes one deal where relevant provisions are referenced but not publicly available and one deal with prohibition on soliciting/initiating contact but no prohibition on providing information or negotiating.

\*\*\* Subset disregards direct stock purchase deals.

# Conditions to Closing\*

**\* Disregards the Study sample's 21% of deals that are "simultaneous sign-and-close" and one other deal that did not include conditions to closing.**

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

### *Single point in time: at closing*

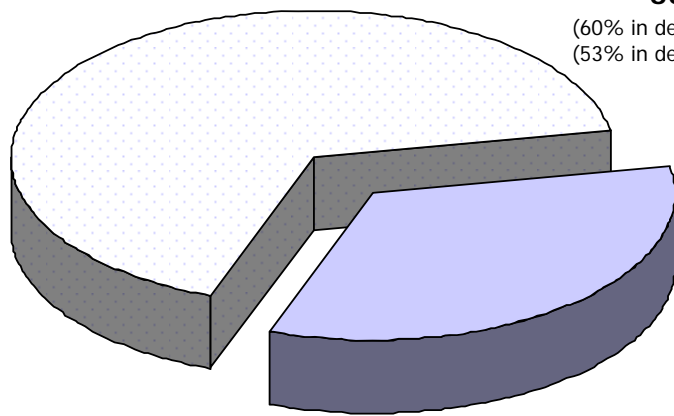
Each of the representations and warranties made by Target in this Agreement shall have been accurate in all respects **as of the Closing Date** as if made on the Closing Date.

### *Two points in time: at signing and at closing*

Each of the representations and warranties made by 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?

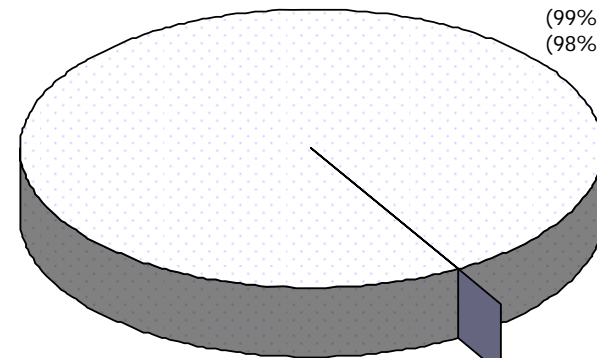
“When Made”  
(i.e., at signing)



Includes  
"When  
Made"  
Requirement  
**66%**  
(60% in deals in 2006)  
(53% in deals in 2004)

Not Included  
**34%**

“Bring Down”  
(i.e., at closing)\*



Includes  
"Bring Down"  
Requirement  
**100%**  
(99% in deals in 2006)  
(98% in deals in 2004)

Not Included  
**0%**

\* 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*

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

### *Accurate in all material respects*

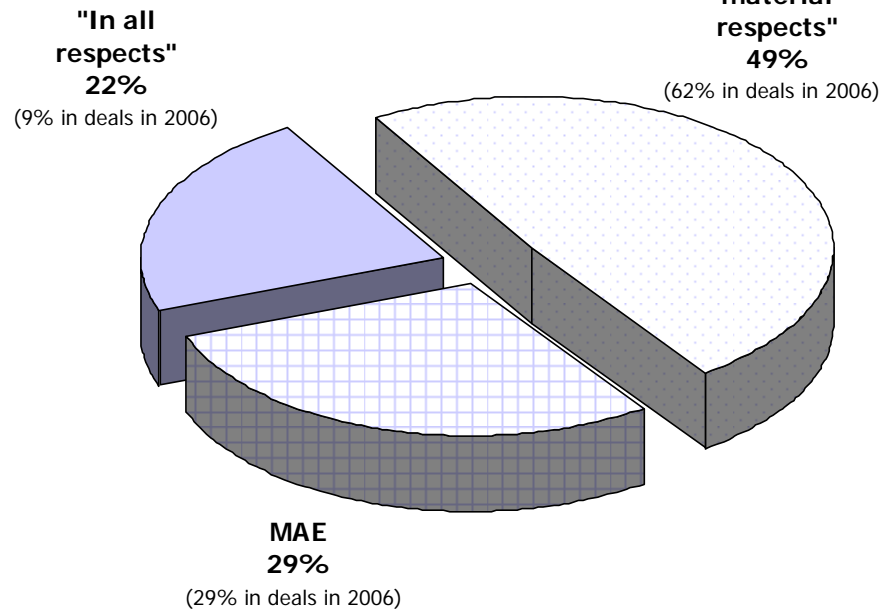
Each of the representations and warranties made by Target in this Agreement shall have been accurate **in all material respects** as of the Closing Date as if made on the Closing Date.

### *MAE qualification*

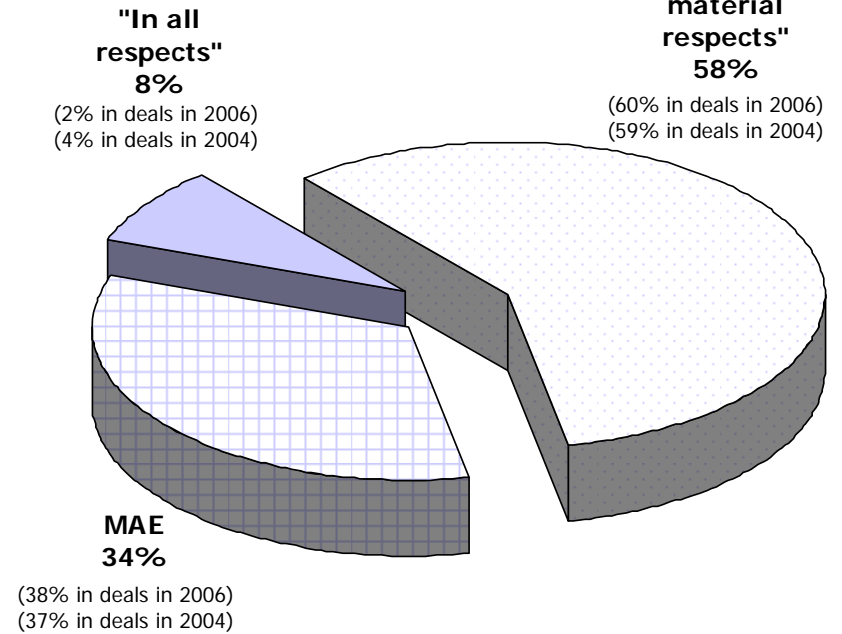
Each of the representations and warranties made by Target in this Agreement shall be accurate in all respects as of the Closing Date as if made on the Closing Date, **except for inaccuracies of representations or warranties the circumstances giving rise to which, individually or in the aggregate, do 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)

## “When Made” (i.e., at signing)



## “Bring Down” (i.e., at closing)\*



\* 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?

(MAE qualifier with capitalization carve out)

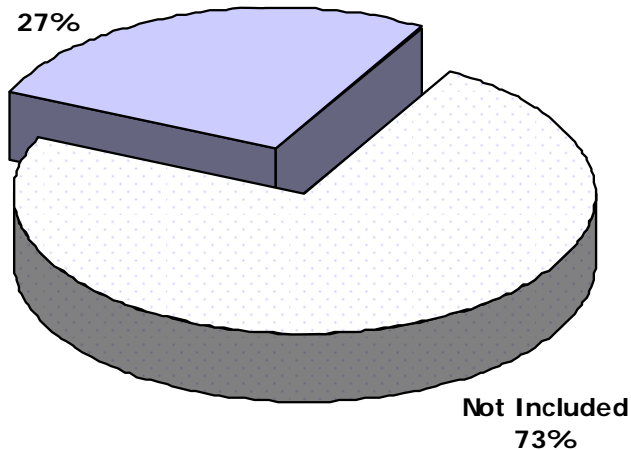
The representation and warranty set forth in **Section 3.3 (Capitalization) shall be accurate in all [material] respects** as of the Closing Date as if made on the Closing Date. Each of the **other representations and warranties** made by Target in this Agreement **shall be accurate** as of the Closing 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?

(MAE qualifier with capitalization carve out)  
(Subset: deals with MAE qualifier)

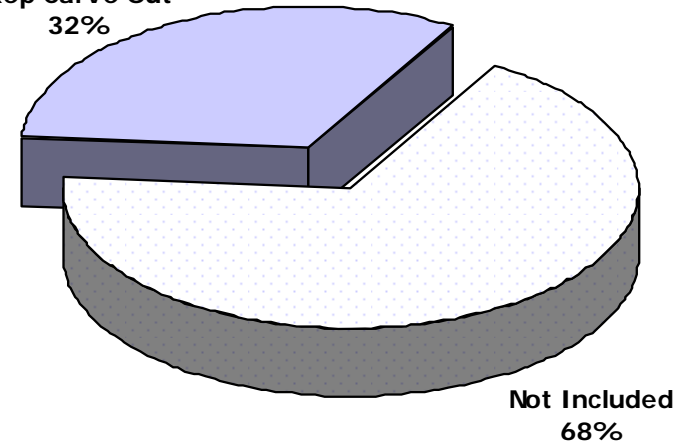
“When Made”  
(i.e., at signing)

Includes  
Capitalization  
Rep Carve Out  
27%



“Bring Down”  
(i.e., at closing)\*

Includes  
Capitalization  
Rep Carve Out  
32%



\* 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? ("double materiality" scrape)

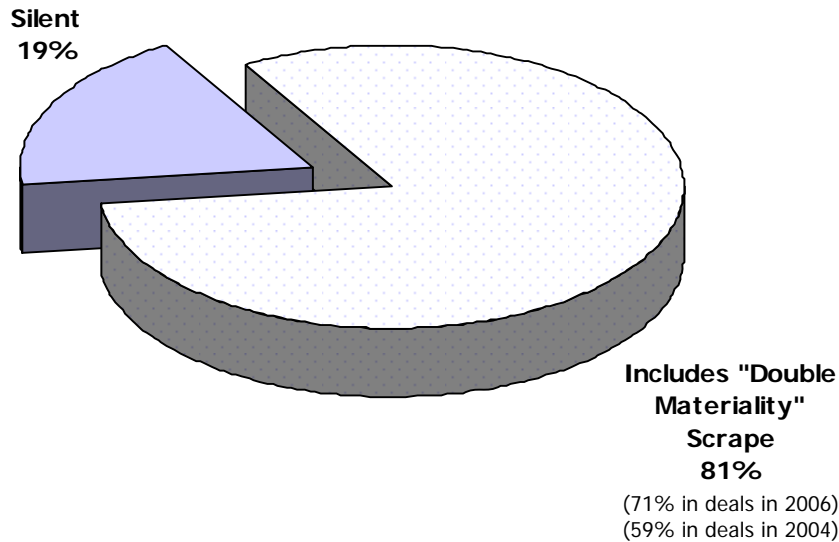
Each of the representations and warranties made by Target in this Agreement shall be accurate in all respects as of the Closing Date as if made on the Closing Date, except for inaccuracies of representations or warranties the circumstances giving rise to which, individually or in the aggregate, do not 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 – How Accurate Must They Be?

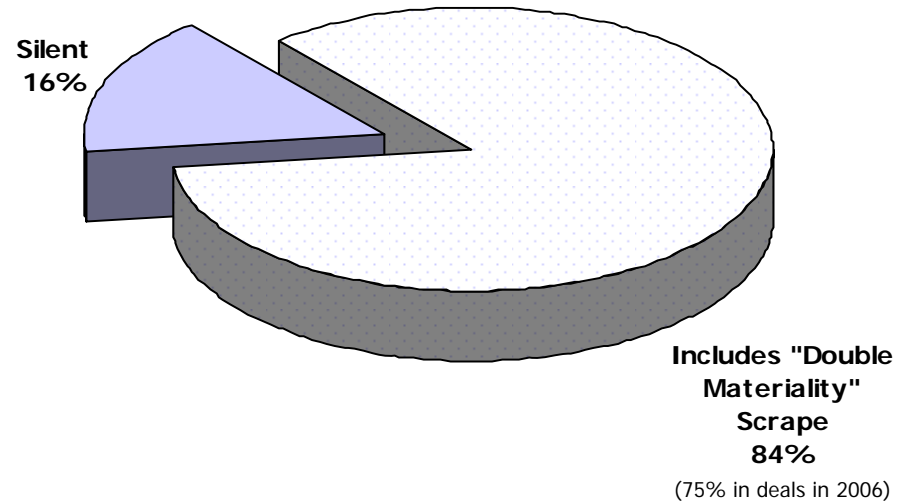
("double materiality" scrape)

(Subset: deals with materiality/MAE qualifiers)

"When Made"  
(i.e., at signing)



"Bring Down"  
(i.e., at closing)\*



\* Includes deals with both "when made" and "bring down" requirements and deals solely with a "bring down" requirement.

## Buyer's MAC Condition

### ***Stand-Alone:***

Since the date of this Agreement, there has not been any Target Material Adverse Change.

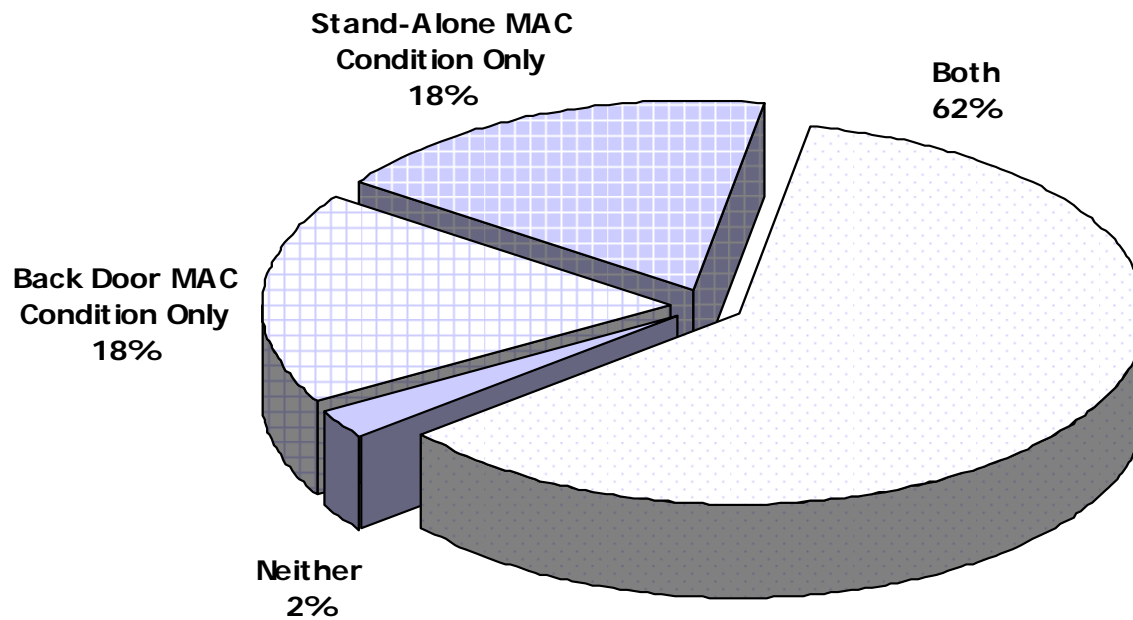
### ***“Back-Door”:***

*“absence 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\*



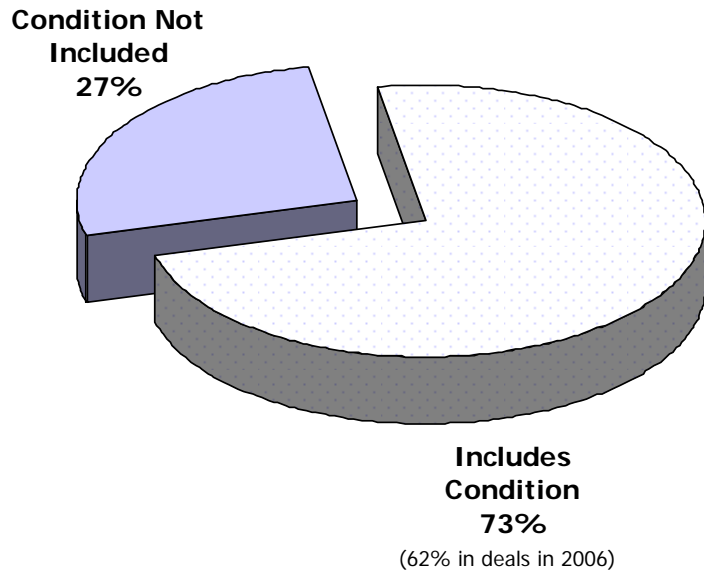
\* Excludes one deal where representations are on an unavailable separate schedule.



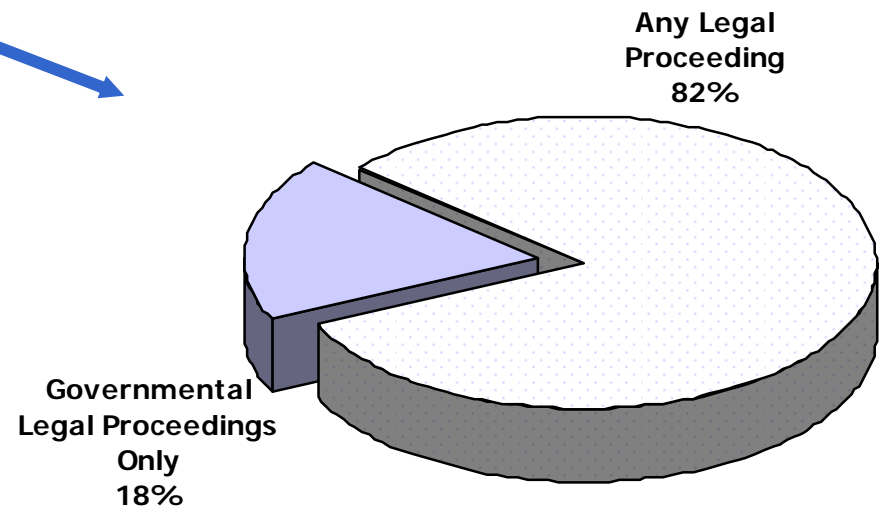
## No Legal Proceedings Challenging the Transaction

There will not be pending [or threatened] any action, suit, or similar legal proceeding brought by any Governmental Entity [or third party] challenging or seeking to restrain or prohibit the consummation of the Transactions.

# No Legal Proceedings Challenging the Transaction

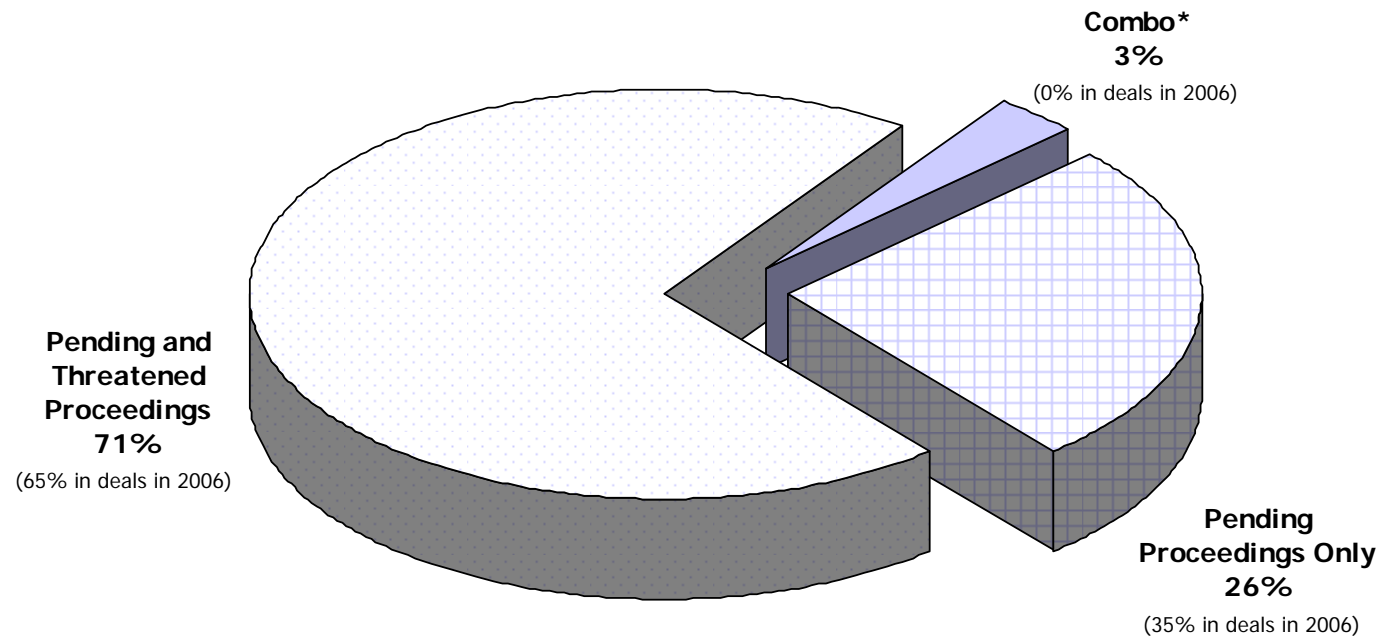


(Subset: includes condition)



# No Legal Proceedings Challenging the Transaction

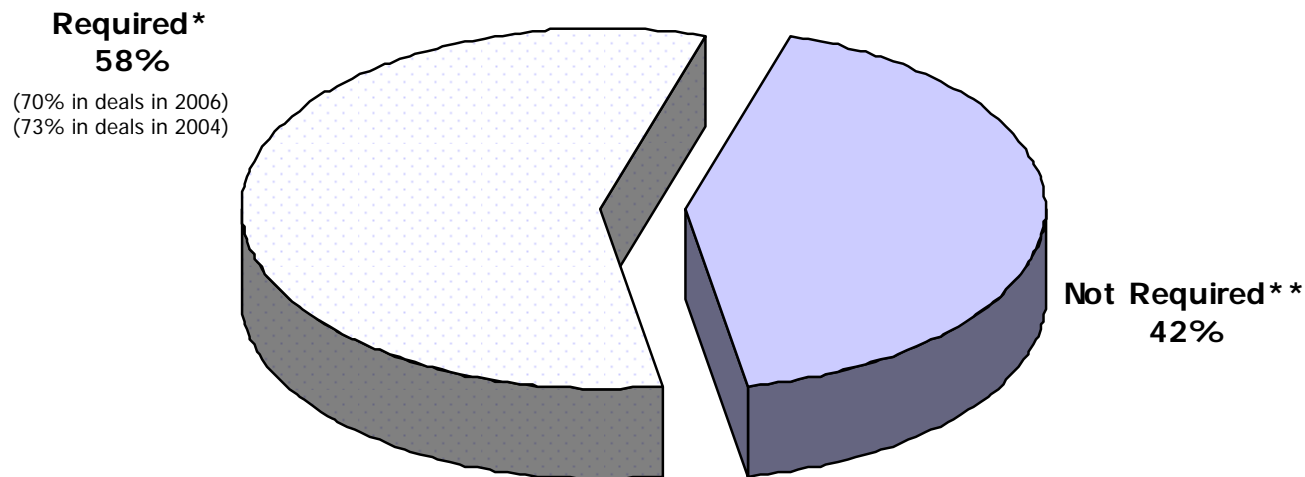
(Subset: deals with closing condition of no legal proceedings challenging the transaction)



\* Represents deals where private proceedings were modified by “pending” only but governmental proceedings were modified by “pending or threatened.”

# Legal Opinions (Non-Tax) of Target's Counsel

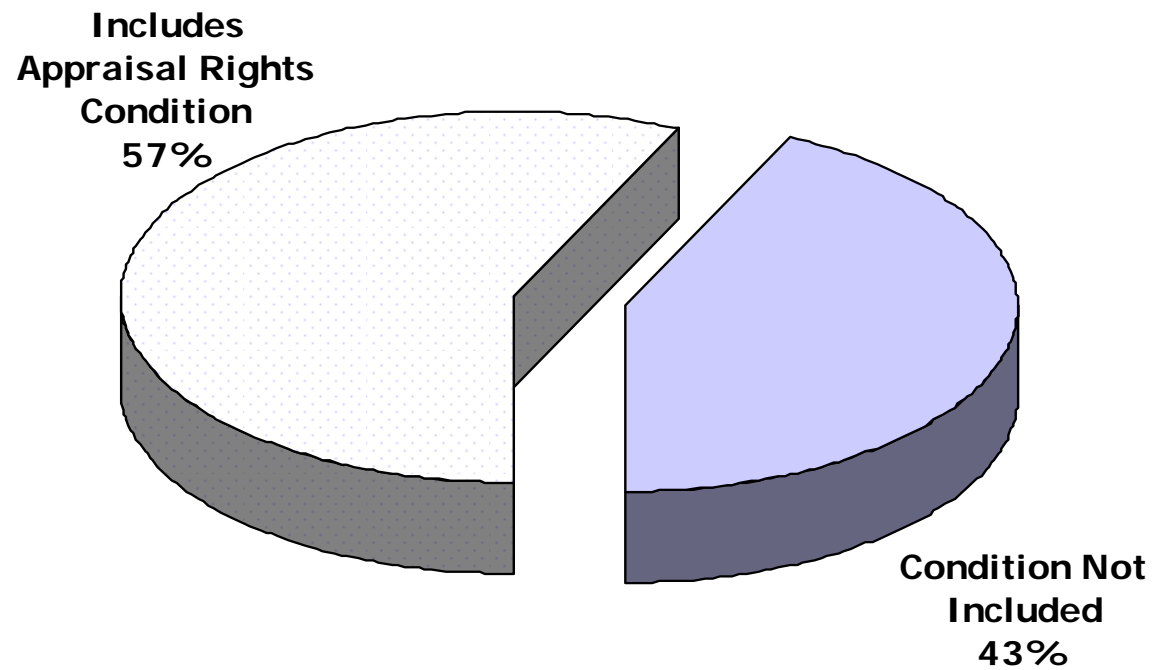
(All deals: includes simultaneous sign-and-close deals)



\* Typically as a condition to closing, but includes 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.

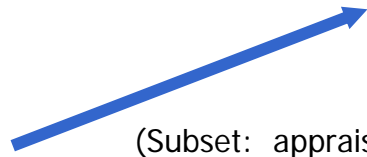
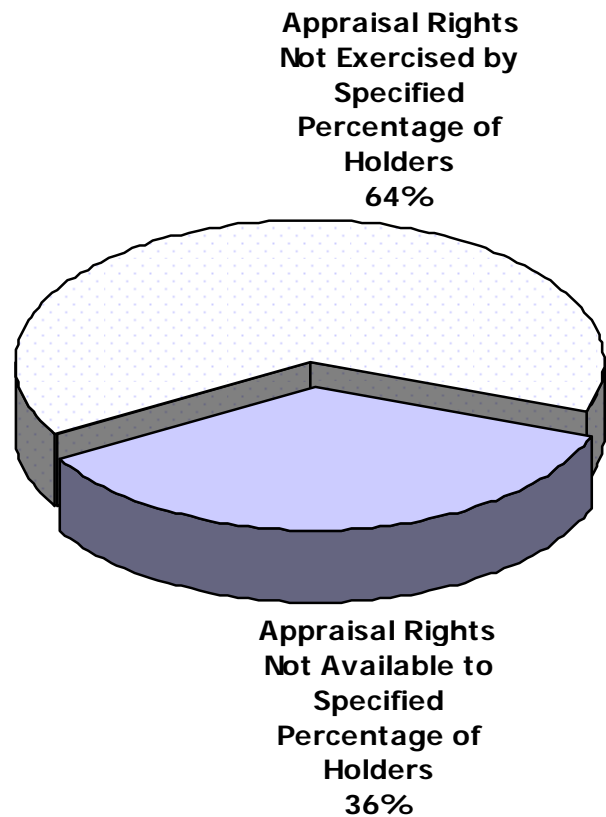
## Appraisal Rights\*



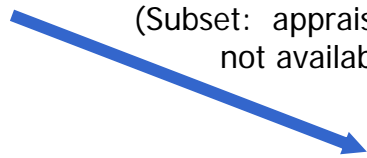
\* Includes only merger deals.

# Appraisal Rights – Condition Threshold

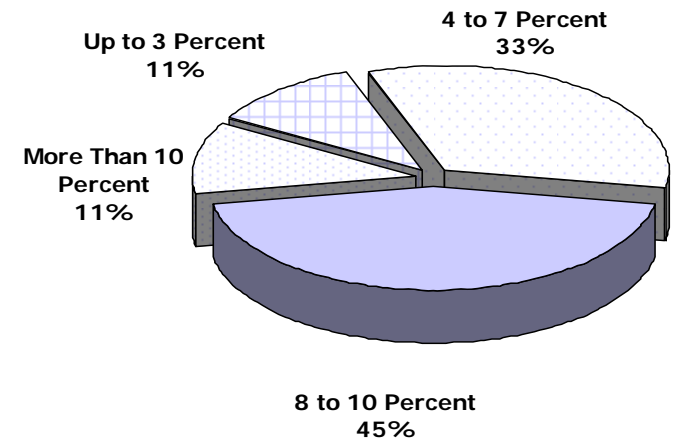
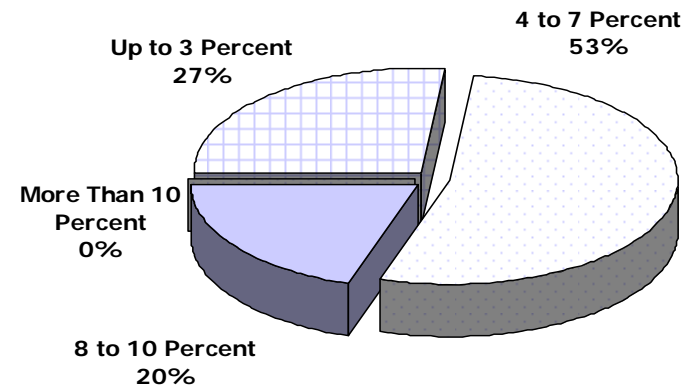
(Subset: deals with appraisal rights condition)



(Subset: appraisal rights not exercised\*)



(Subset: appraisal rights not available)



\* Excludes one deal with redacted percentages.

# Indemnification\*

**\* Disregards 3 transactions with redacted indemnification provisions.**

## “Sandbagging” (pro-sandbagging)

The right to indemnification, reimbursement or other remedy based upon any such representation [or] warranty... **will not be affected by... 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... such representation [or] warranty....

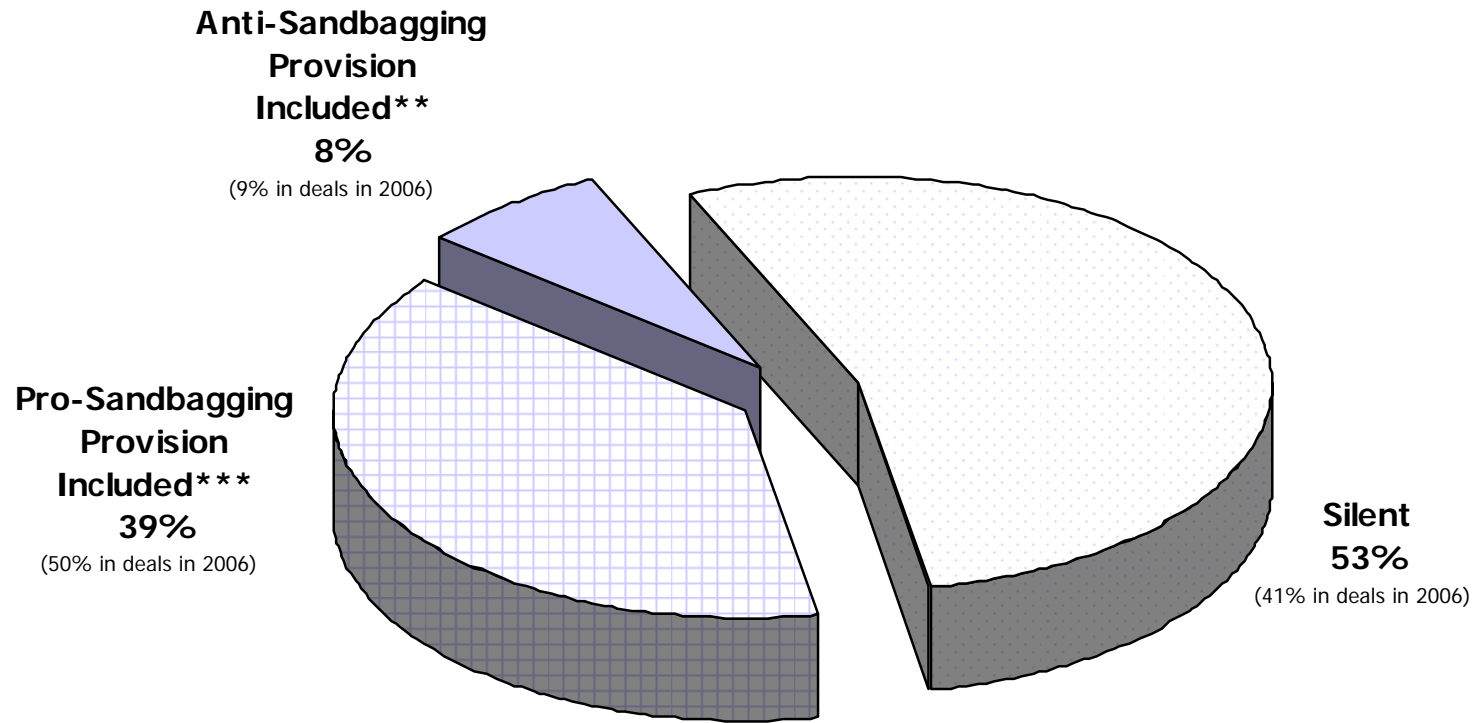
(ABA Model Stock Purchase Agreement)



## **“Sandbagging” (anti-sandbagging provision)**

**No party shall be liable** under this Article for any Losses resulting from or relating to any inaccuracy in or breach of any representation or warranty in this Agreement **if the party seeking indemnification for such Losses had Knowledge of such Breach before Closing.**

# “Sandbagging”\*

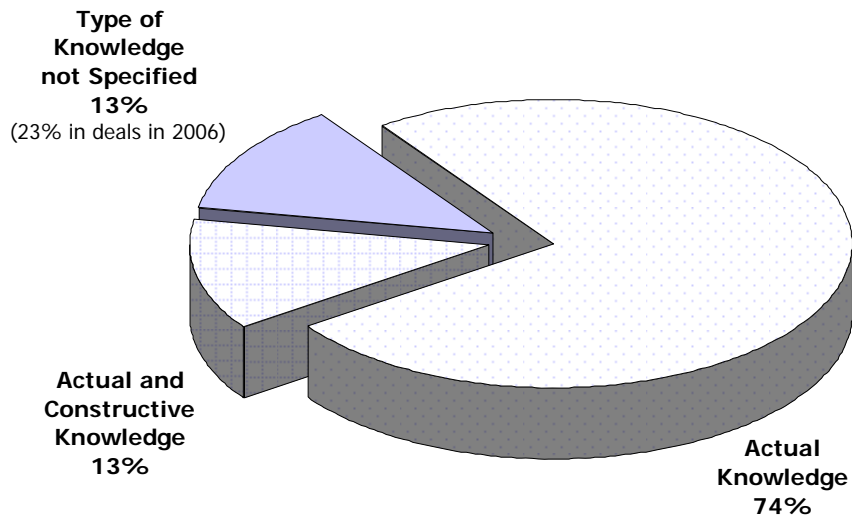


- \* Disregards one deal with a hybrid provision that allows sandbagging for constructive knowledge, but prohibits sandbagging in the event of actual knowledge.
- \*\* Includes one deal in which Buyer represented it was not aware of any breach without further reference to effect on indemnification rights, 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 representations and warranties “survive Buyer’s investigation” unless they include an express statement on the impact of Buyer’s knowledge on Buyer’s post-closing indemnification rights.

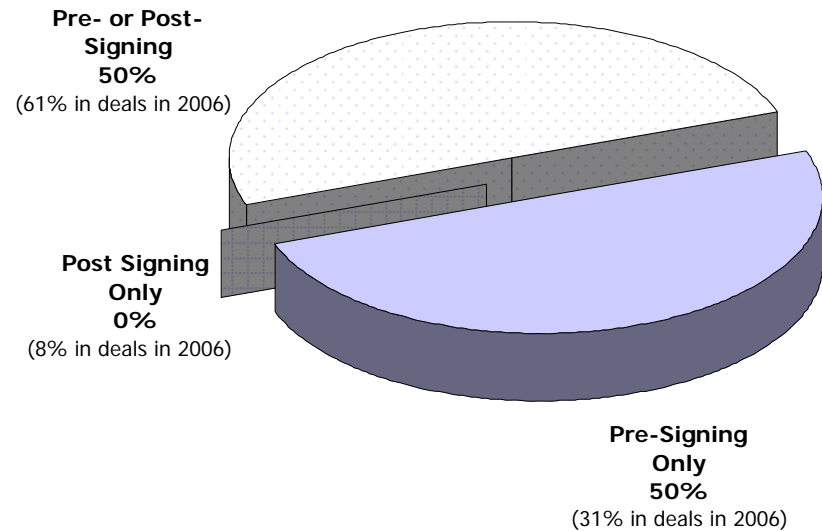
# “Sandbagging” – Anti-Sandbagging Provisions

(Subset: deals with anti-sandbagging provisions)

Type of Knowledge



Timing of Knowledge\*



\* Disregards the Study sample’s 21% of deals that are “simultaneous sign-and-close.”

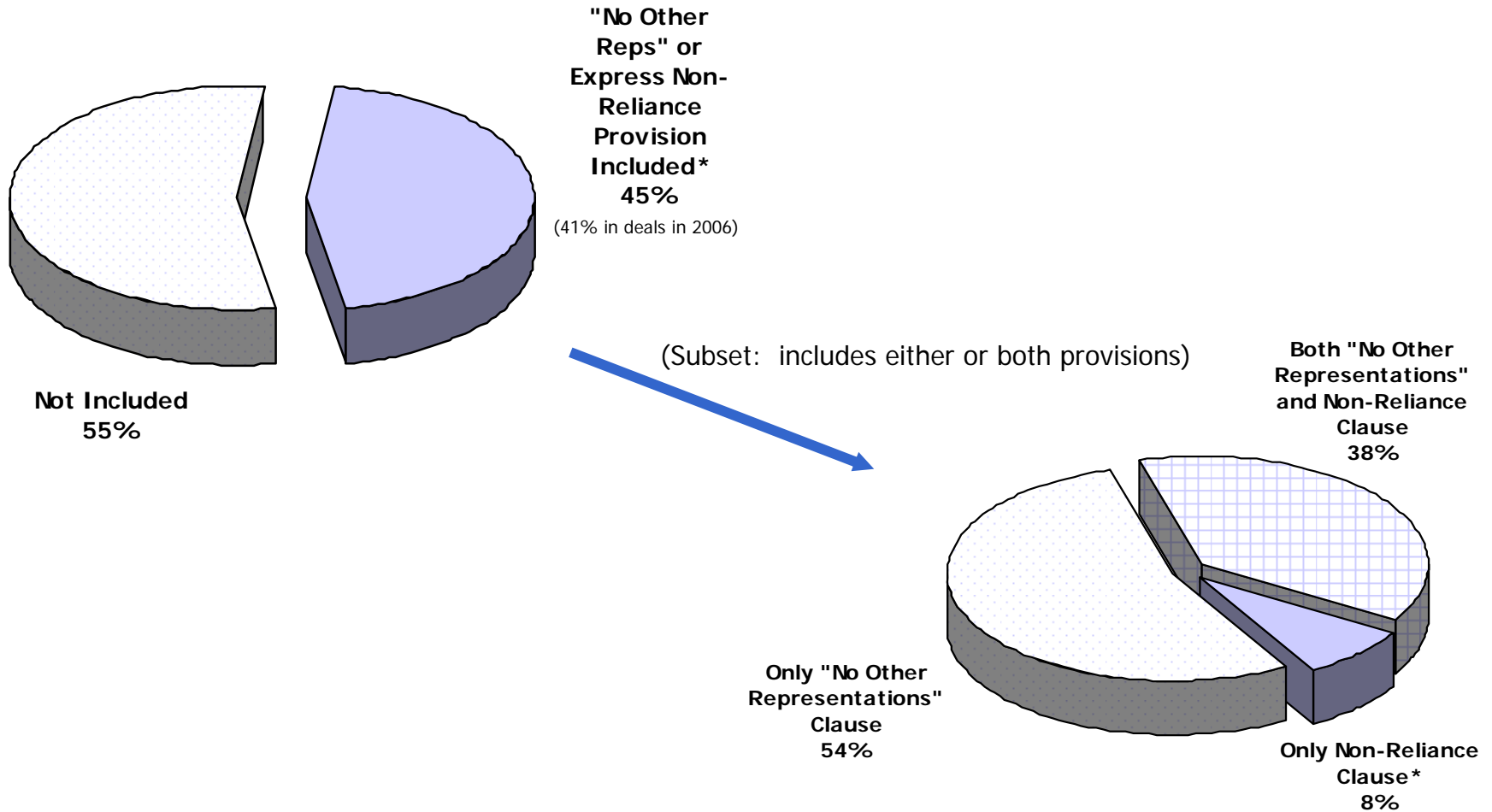
## “No Other Representations”

Buyer acknowledges that Target **has not made and is not making any representations or warranties** whatsoever regarding the subject matter of this Agreement, express or implied, **except as provided in Section 3.**

## “No Other Representations”/Non-Reliance

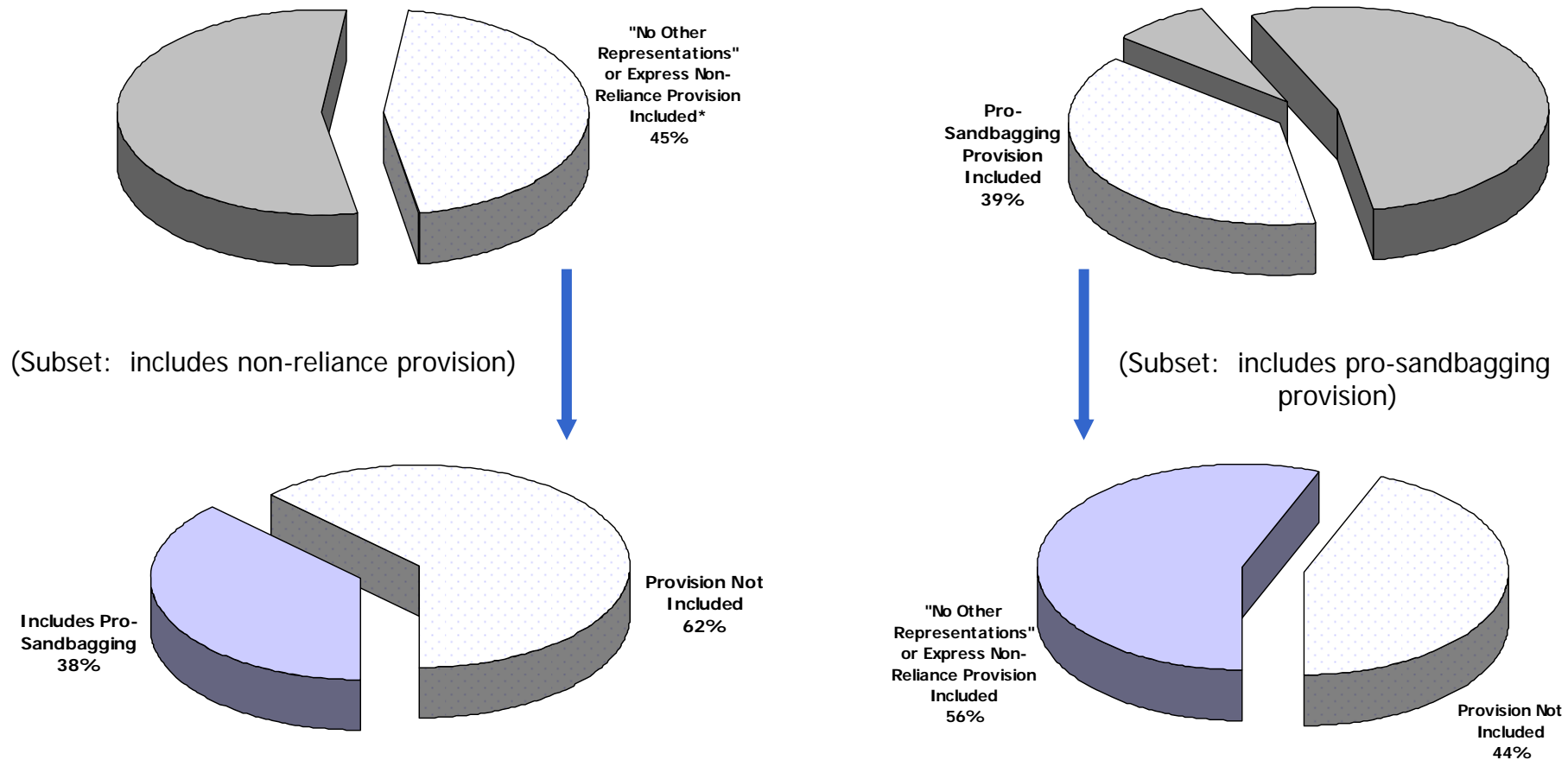
Buyer acknowledges that Target has not made and is not making any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except as provided in Section 3, **and that it is not relying and has not relied on any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except for the representations and warranties in Section 3.**

# "No Other Representations" / Non-Reliance



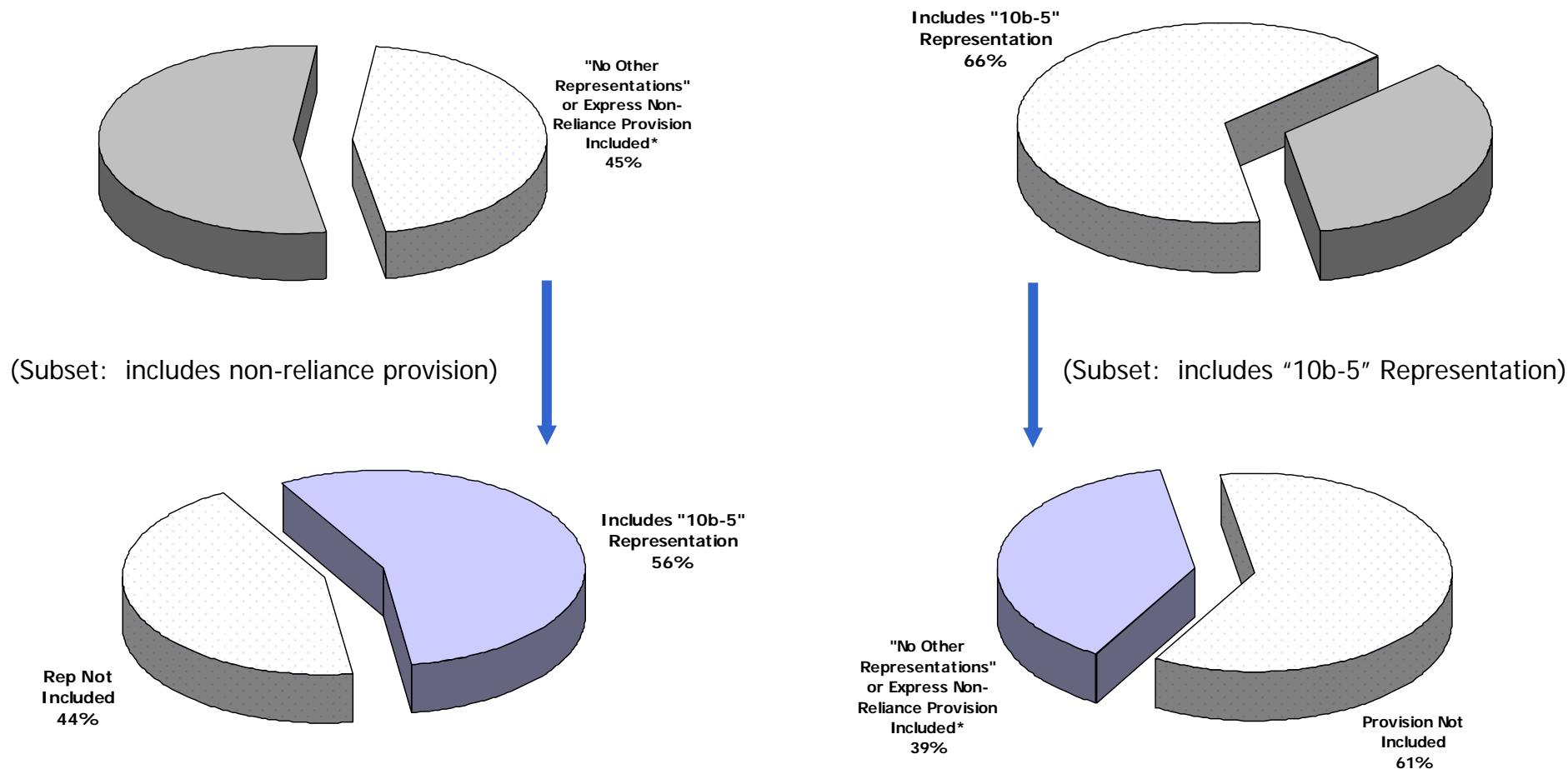
\* Includes 3 deals in which Target represented that Buyer could not rely on extra-contractual representations.

# Non-Reliance and "Sandbagging" – Correlation



\* See footnote on slide 81.

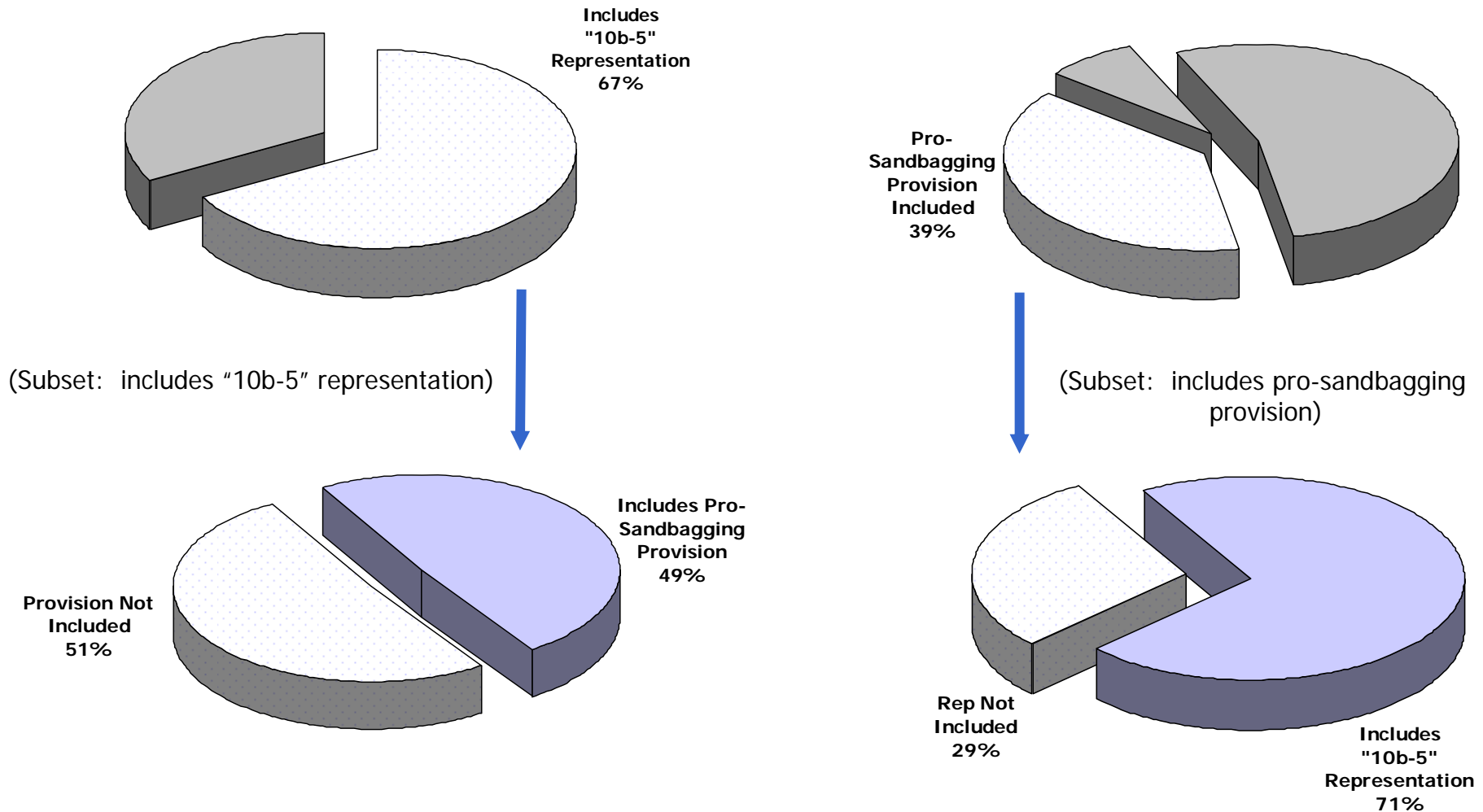
# Non-Reliance and "10b-5" Representation – Correlation



\* See footnote on slide 81.



# "Sandbagging" and "10b-5" Representation – Correlation



## Survival/Time to Assert Claims

### 10.1 SURVIVAL...

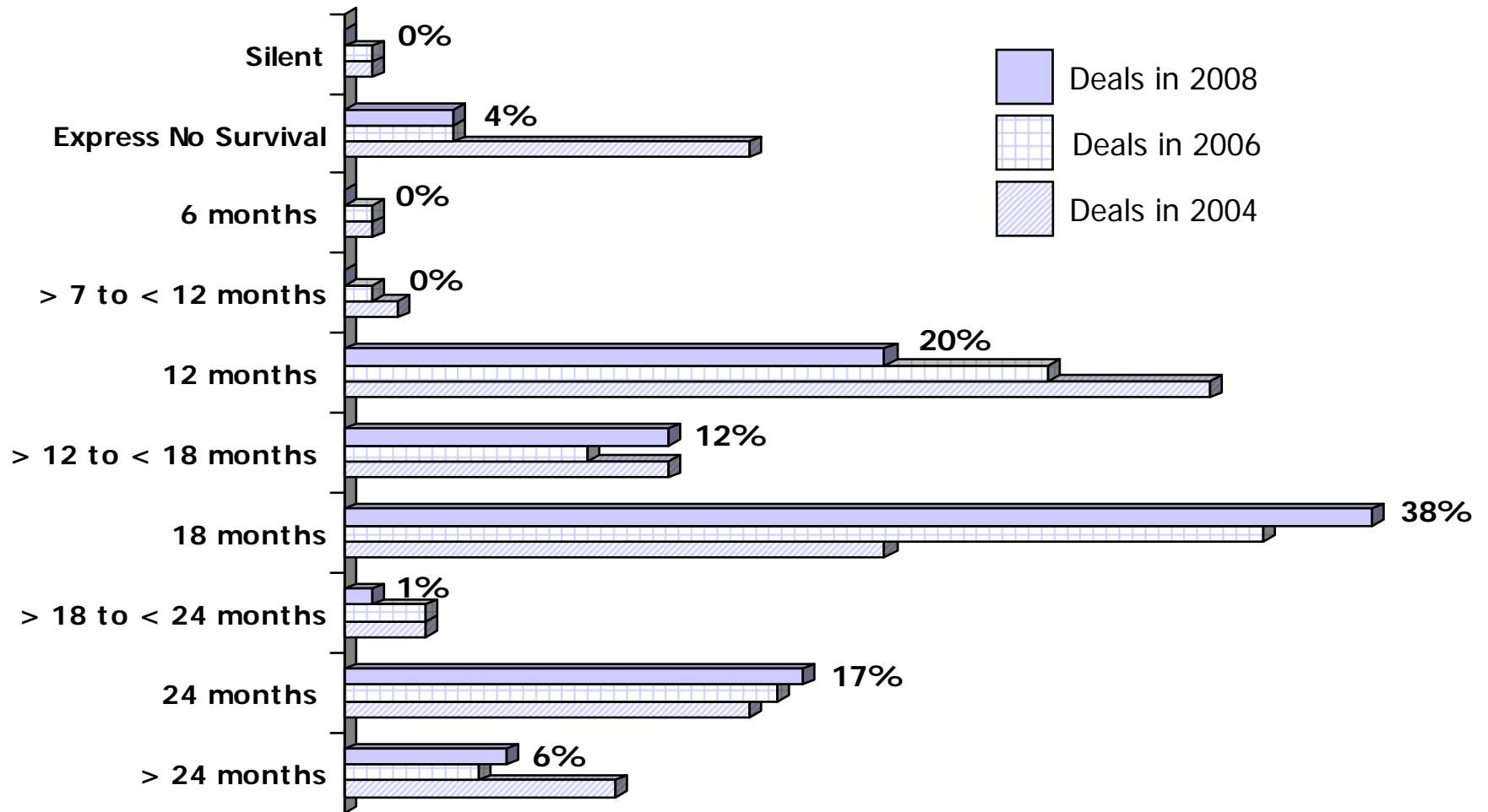
All representations, warranties ... in this Agreement, the Disclosure Letter, the supplements to the Disclosure Letter, the certificate delivered pursuant to Section 2.4(a)(v), and any other certificate or document delivered pursuant to this Agreement will survive the Closing...

### 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\* (generally)

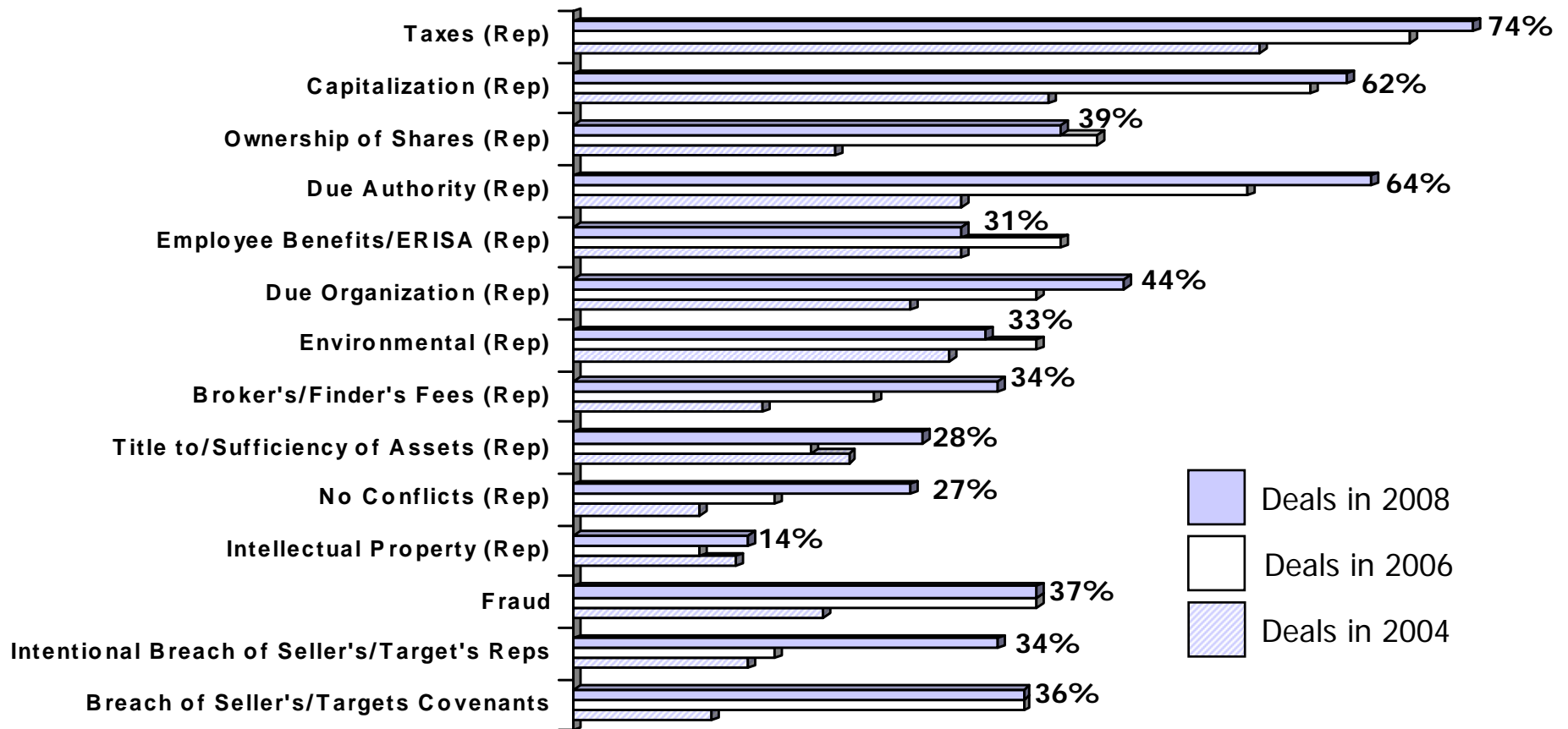


\* 2% of the deals had survival periods equal to the applicable statute of limitations.

\*\* 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.

# Survival/Time to Assert Claims – Carve Outs to Survival Limitations\*

(Subset: deals with survival provisions)

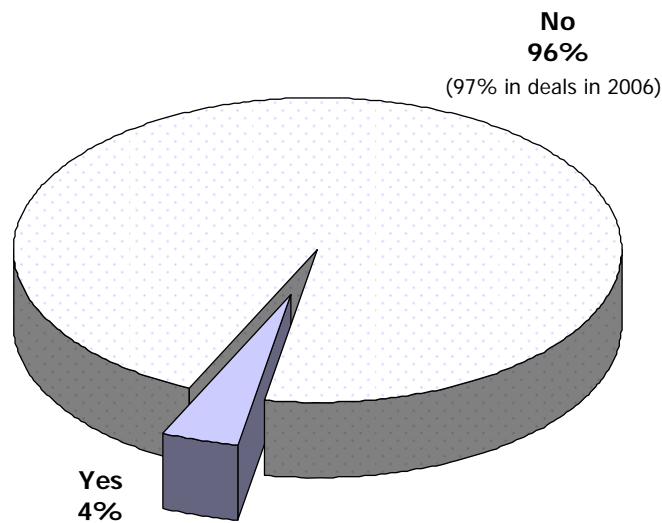


\* Matters subject to carve outs typically survive longer than time periods generally applicable to representations. Only those categories appearing more than 10% of the time for deals in 2008 are shown.

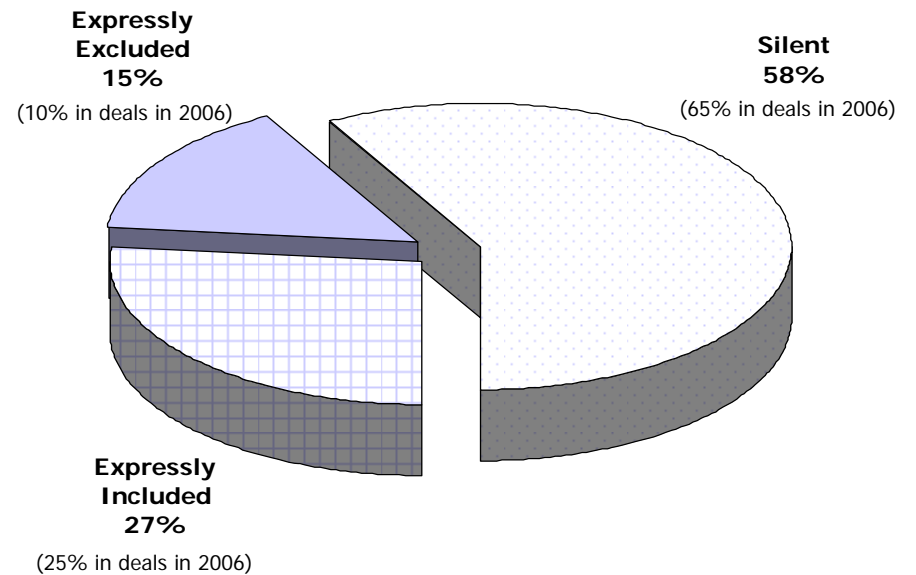
# Types of Damages/Losses Covered

(Subset: deals with survival provisions\*)

## Limited to "Out of Pocket" Damages?



## Diminution in Value

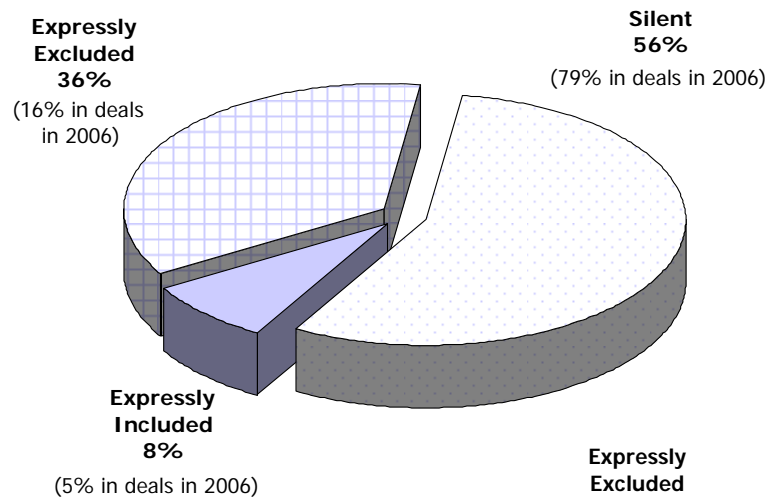


\* Excludes one deal where damages/losses provisions were not publicly available.

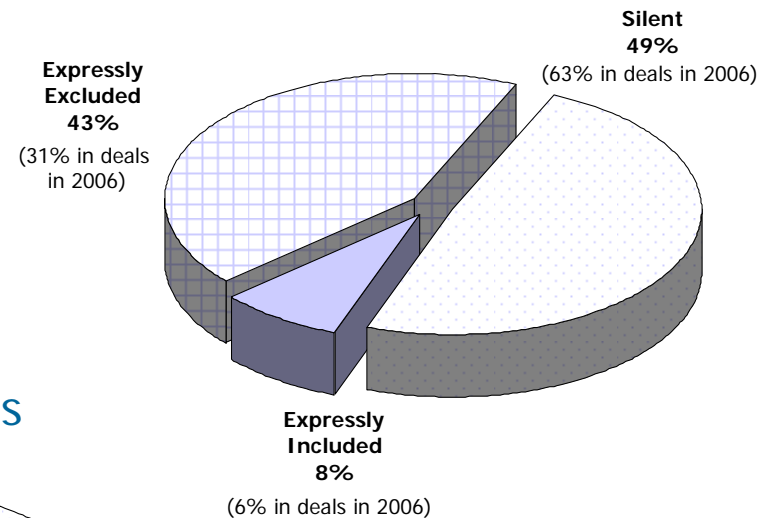
# Types of Damages/Losses Covered

(Subset: deals with survival provisions\*)

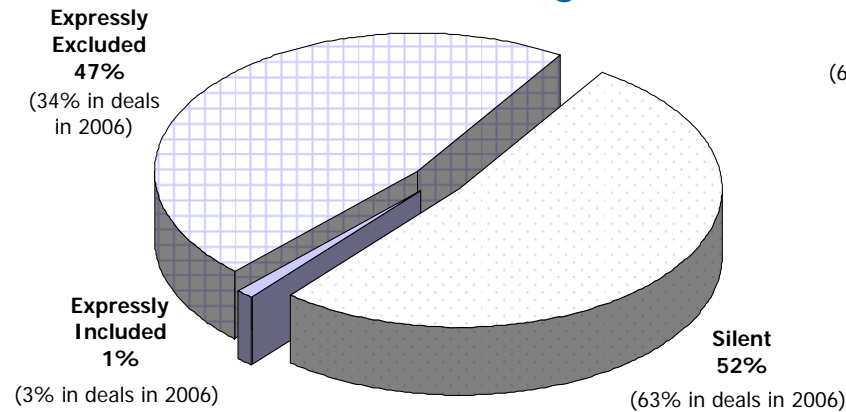
## Incidental Damages



## Consequential Damages



## Punitive Damages



\* Excludes one deal where damages/losses provisions were not publicly available.

## Baskets

### *Deductible*

Sellers shall not be required to indemnify Buyer for Losses until the aggregate amount of all such Losses exceeds **\$300,000 (the “Deductible”)** in which event Sellers shall be responsible **only for Losses exceeding the Deductible.**

### *First Dollar*

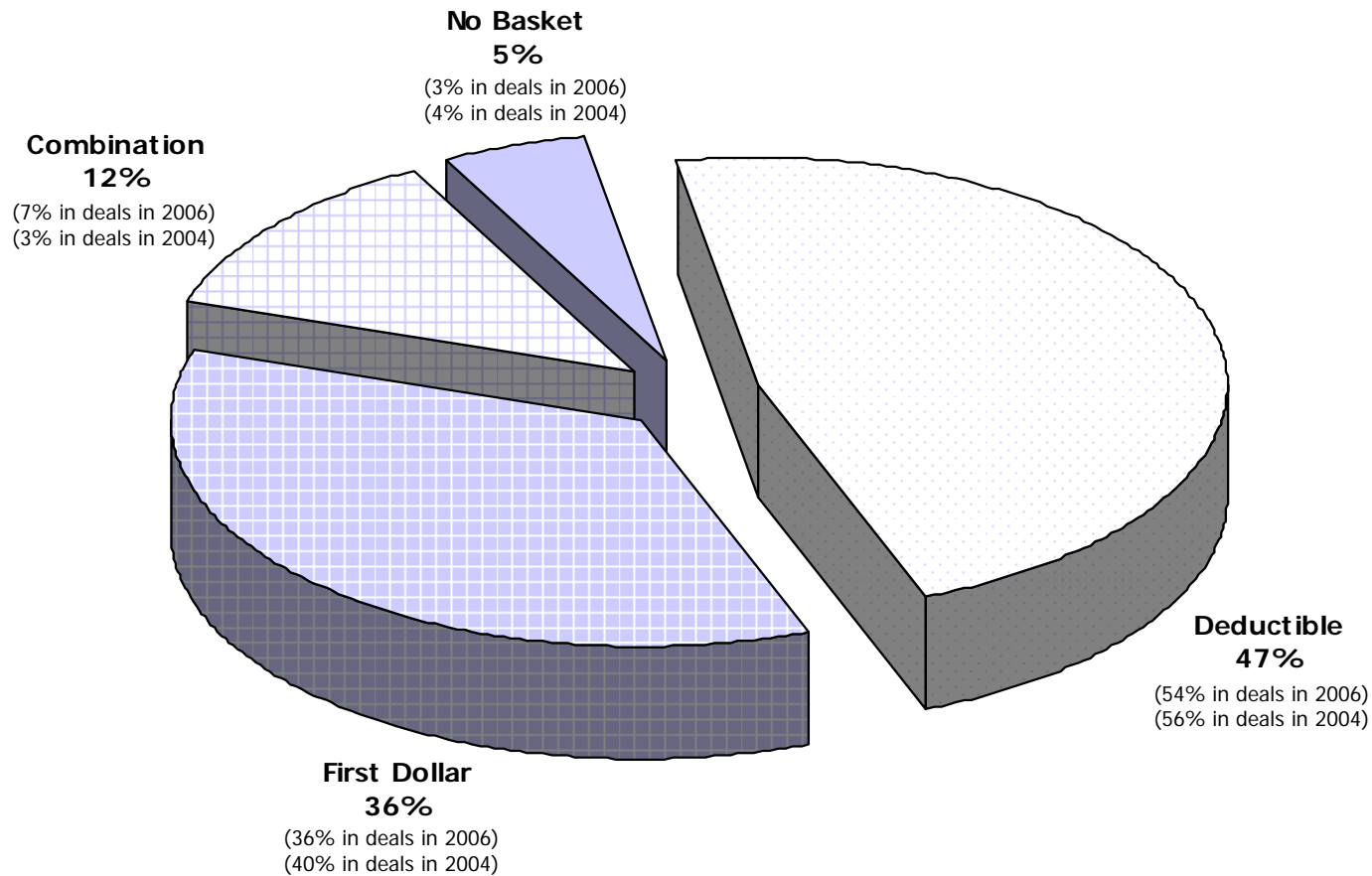
Sellers shall not be required to indemnify Buyer for Losses until the aggregate amount of all such Losses exceeds **\$500,000 (the “Threshold”)** in which event Sellers shall be responsible for the **aggregate amount of all Losses, regardless of the Threshold.**

### *Combination*

Sellers shall not be required to indemnify Buyer for Losses until the aggregate amount of all such Losses exceeds **\$500,000 (the “Threshold”)** in which event Sellers shall be responsible **only for Losses in excess of \$300,000 (the “Deductible”).**

# Baskets\*

(Subset: deals with survival provisions)

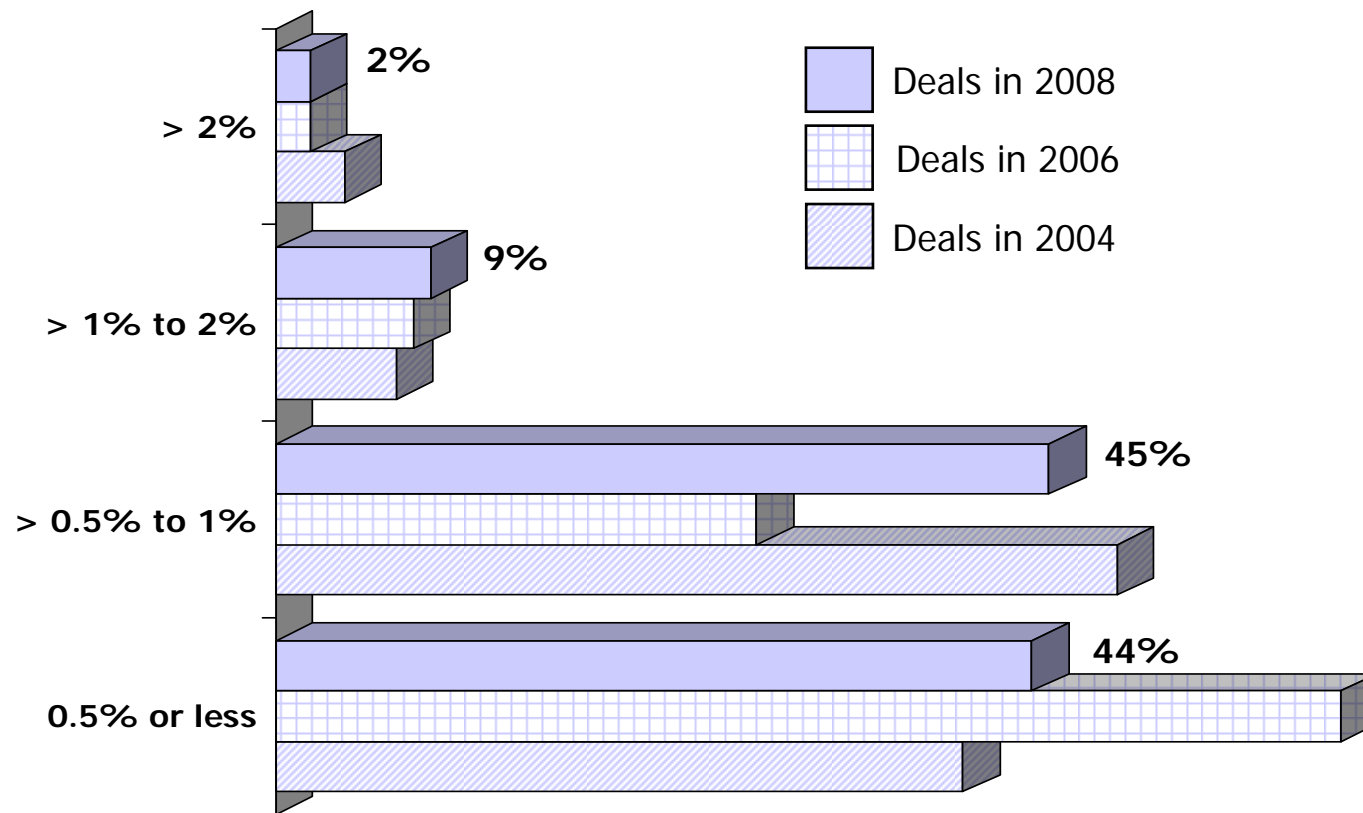


\* Excludes one deal where basket provisions were not publicly available.



# Baskets as % of Transaction Value\*

(Subset: deals with baskets)



\* Excludes four deals where the basket amount was not publicly available for deals in 2008.

## Baskets as % of Transaction Value\*

(statistical summary)

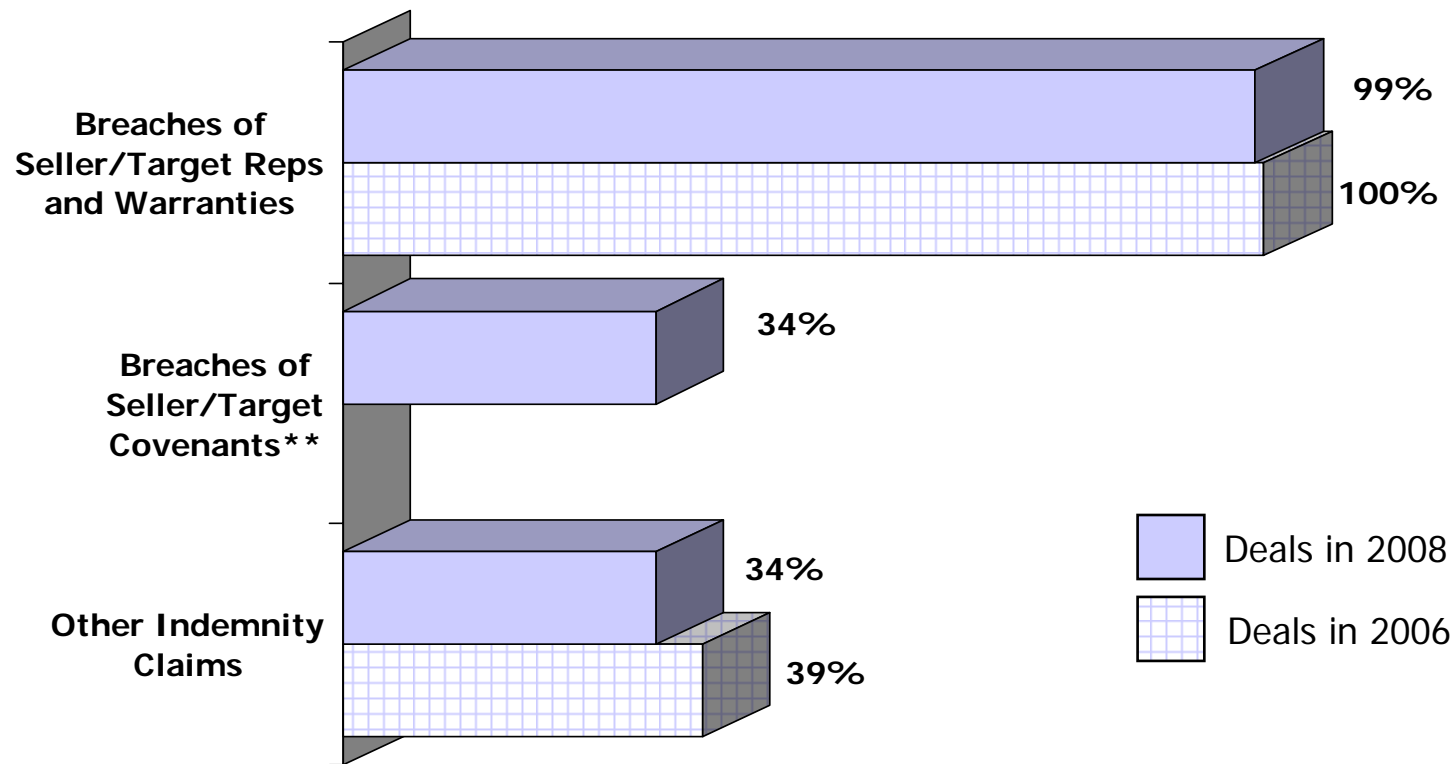
(Subset: deals with baskets)

Basket Type	Mean	Median	Minimum (> 0)	Maximum
Deductible	0.80% (0.53% in deals in 2006) (0.77% in deals in 2004)	0.66% (0.40% in deals in 2006) (0.62% in deals in 2004)	0.20% (0.03% in deals in 2006) (0.01% in deals in 2004)	5.00% (2.00% in deals in 2006) (3.13% in deals in 2004)
First Dollar	0.47% (0.50% in deals in 2006) (0.60% in deals in 2004)	0.45% (0.39% in deals in 2006) (0.47% in deals in 2004)	0.02% (0.02% in deals in 2006) (0.08% in deals in 2004)	1.19% (2.03% in deals in 2006) (2.00% in deals in 2004)
All Baskets (other than Combination)	0.66% (0.52% in deals in 2006) (0.69% in deals in 2004)	0.55% (0.40% in deals in 2006) (0.60% in deals in 2004)	—	—

\* Excludes four deals where the basket amount was not publicly available for deals in 2008.

# Baskets - General Coverage\*

(Subset: deals with baskets)

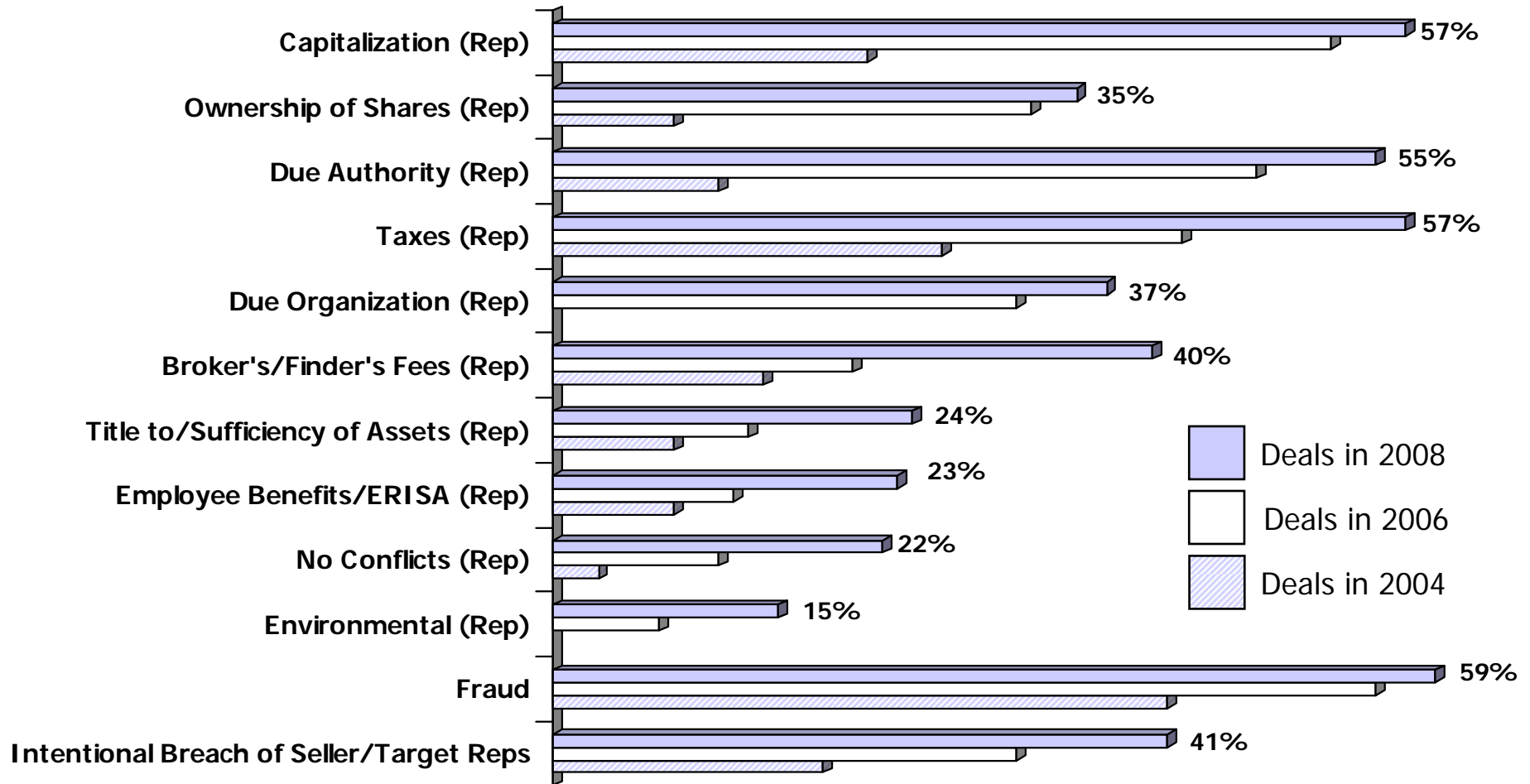


\* Carve outs for individual representations and warranties, fraud, and intentional breaches of representations and warranties addressed on next slide.

\*\* Prior data regarding breaches of Seller/Target covenants omitted as the 2009 Study takes a more nuanced approach by including only deals where (i) breaches of covenants were covered by the basket, and (ii) covenants (as a category) were not carved out of the basket coverage.

# Basket Carve Outs\*

(Subset: deals with baskets)



\* Only those categories appearing more than 10% of the time for deals in 2008 are shown, with corresponding data from prior years where available. Carve outs for breaches of Seller/Target covenants taken into account on prior slide.

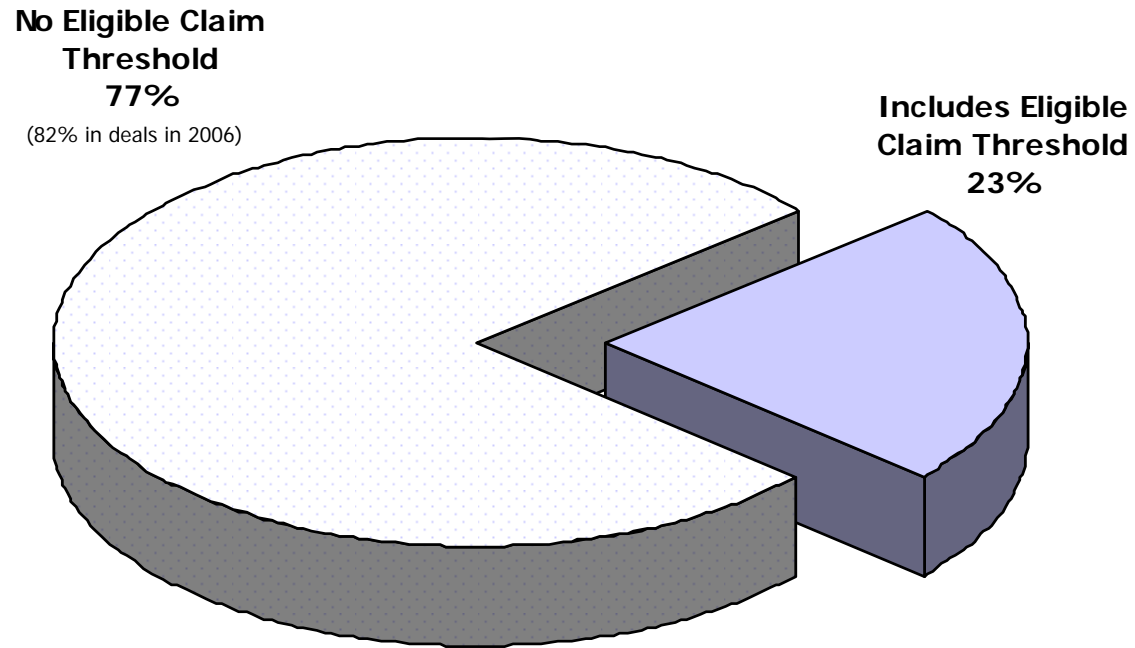
## Eligible Claim Threshold

(Subset: deals with baskets)

Sellers shall not be required to indemnify Buyer for any individual item where the Loss relating to such claim (or series of claims arising from the same or substantially similar facts or circumstances) is less than \$15,000.

# Eligible Claim Threshold

(Subset: deals with baskets)



## **“Double Materiality” Scrape** **(materiality qualification in reps disregarded)**

*Materiality qualification in reps disregarded for all indemnification-related purposes*

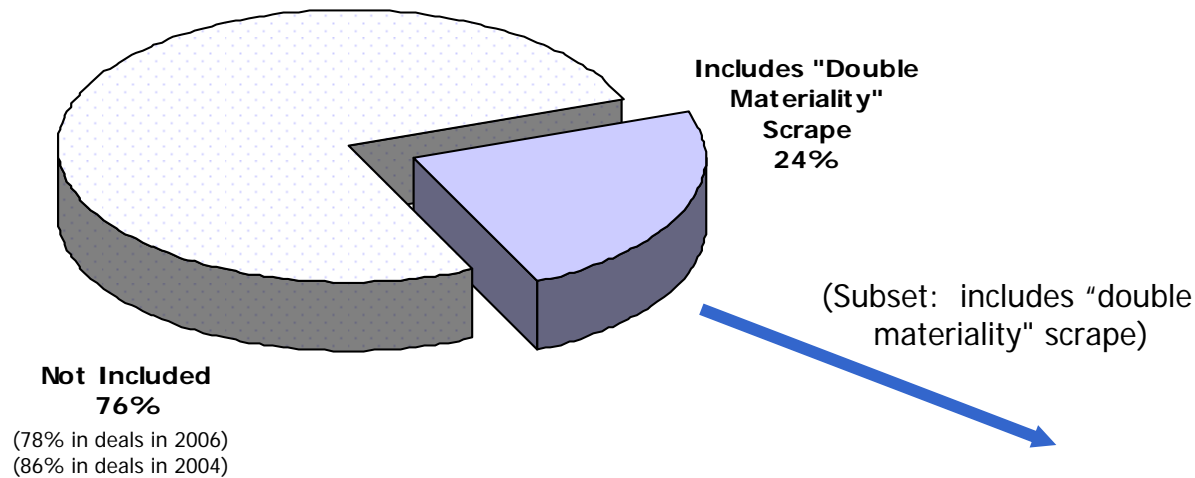
**For purposes of this Article VIII (Indemnification)**, the representations and warranties of Target shall not be deemed qualified by any references to materiality or to Material Adverse Effect.

*Materiality qualification in reps disregarded for calculation of damages/losses only*

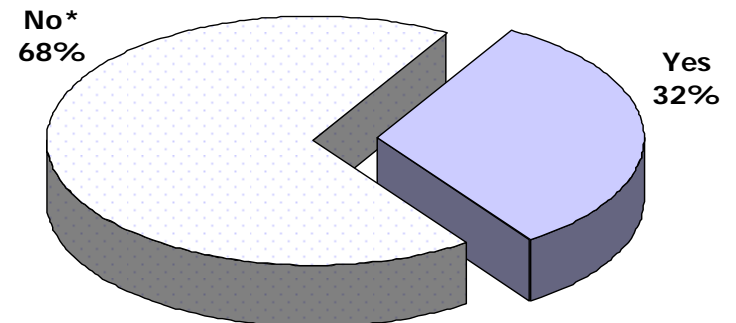
**For the sole purpose of determining Losses (and not for determining whether or not any breaches of representations or warranties have occurred)**, the representations and warranties of Target shall not be deemed qualified by any references to materiality or to Material Adverse Effect.

# "Double Materiality" Scrape (materiality qualification in reps disregarded)

(Subset: deals with baskets)



"Double Materiality" Scrape Limited to Calculation of Damages/Losses Only?

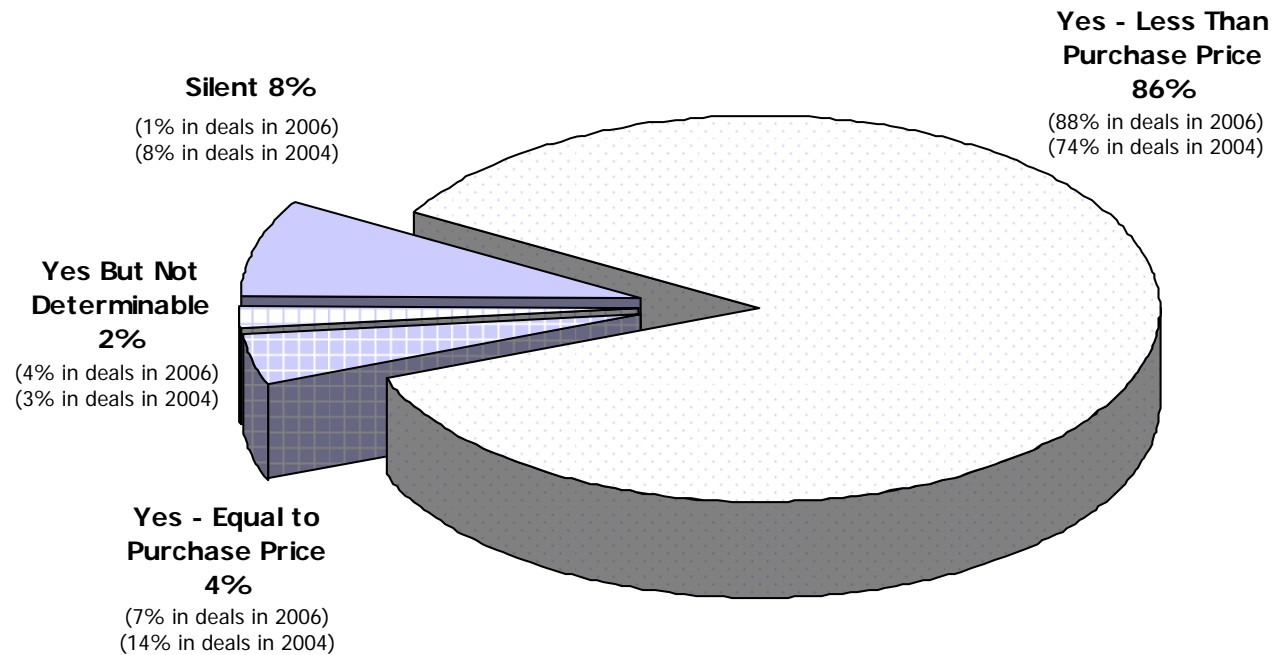


\* Includes agreements that are silent on this issue.



# Caps\*

(Subset: deals with survival provisions)

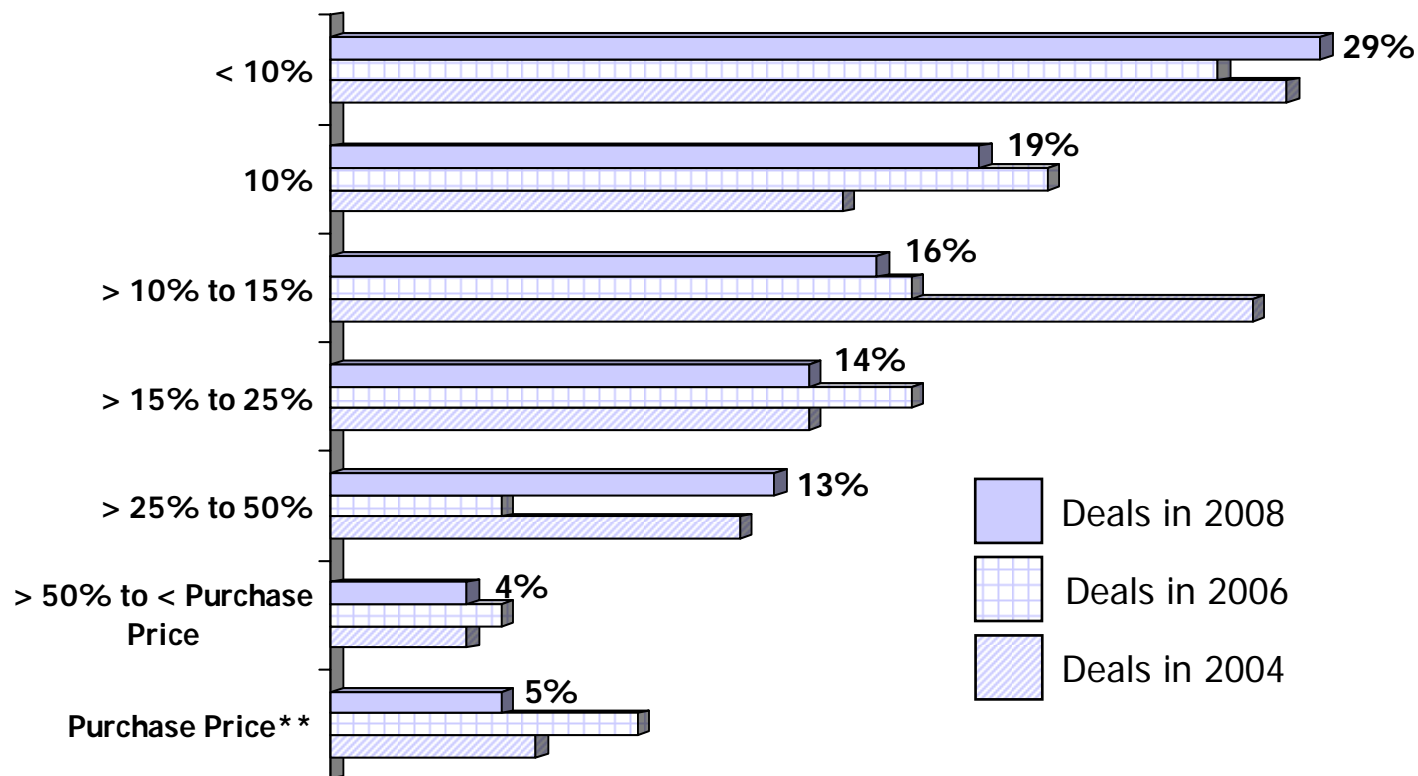


\* Caps generally applicable to contractual indemnification obligations; does not take into account different caps for specific items (see “Cap Carve Outs”).

# 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%

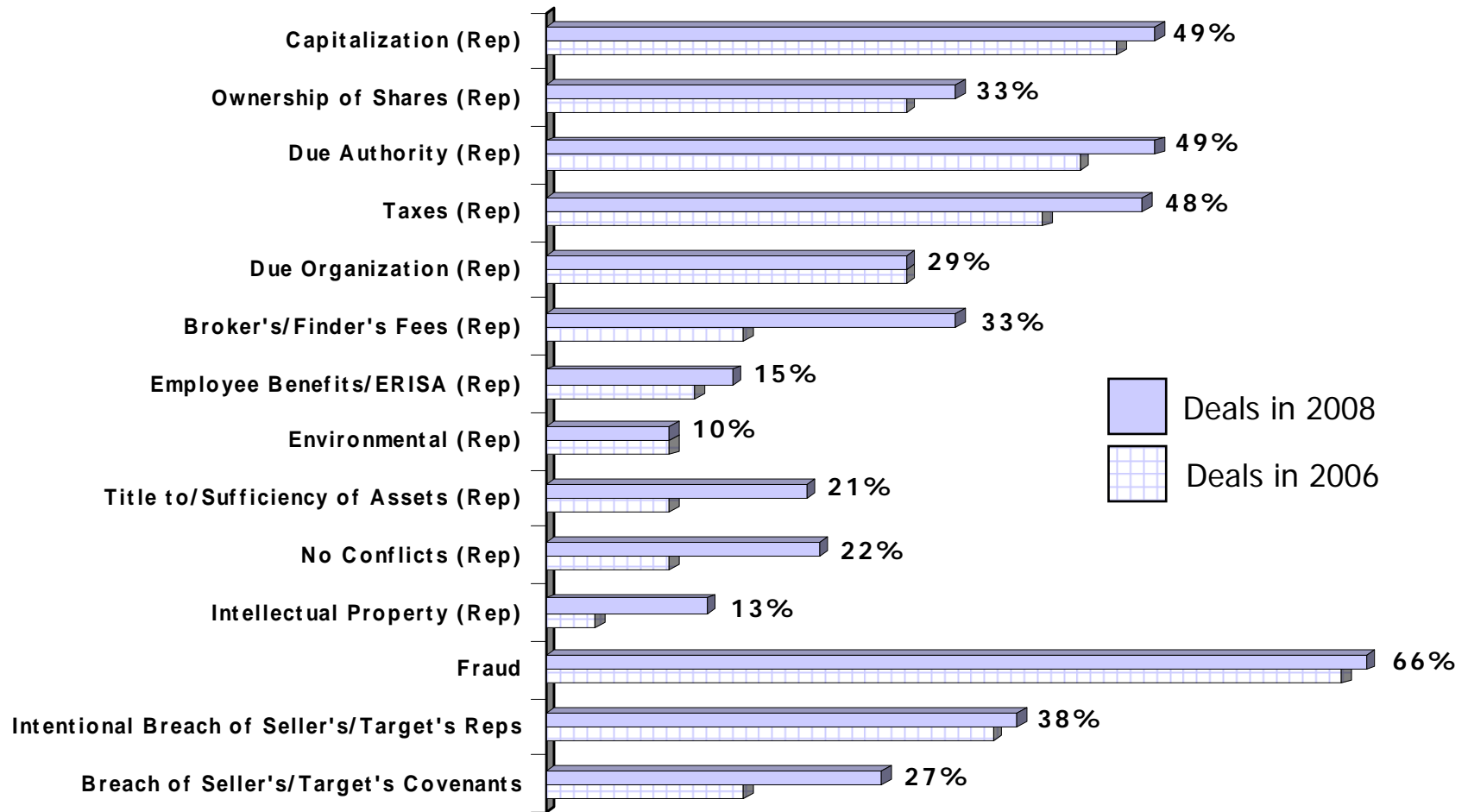


\* Caps generally applicable to contractual indemnification obligations; does not take into account different caps for specific items (see “Cap Carve Outs”).

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

# Cap Carve Outs\*

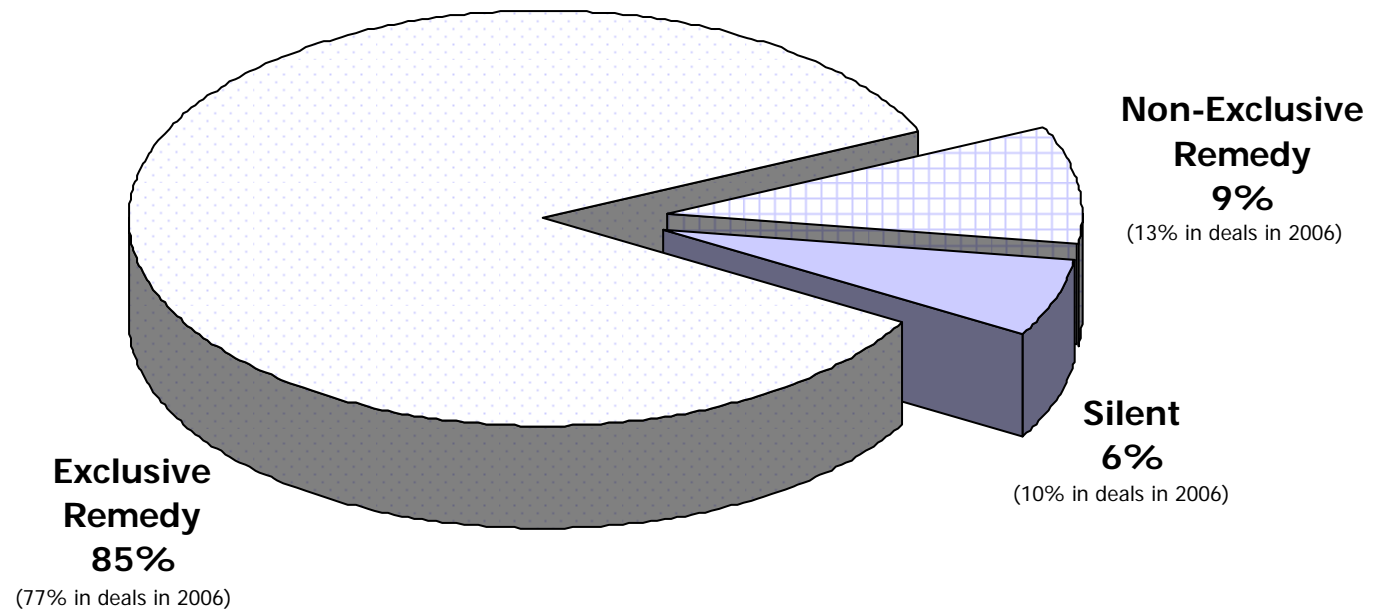
(Subset: deals with determinable caps)



\* Only those categories appearing 10% of the time or more for deals in 2008 are shown.

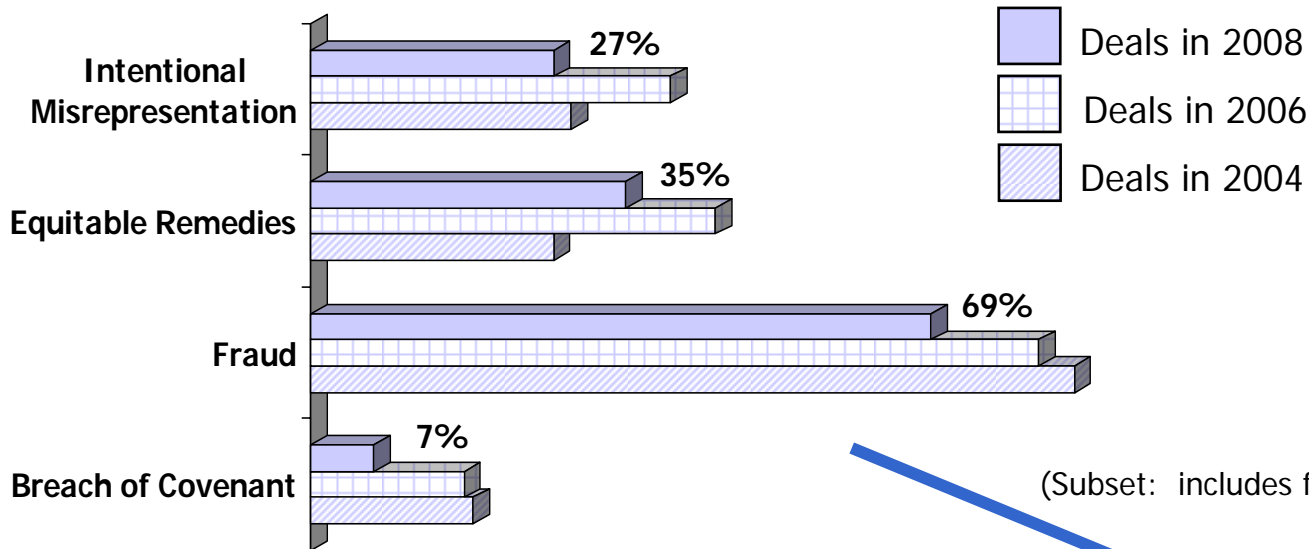
# Indemnification as Exclusive Remedy

(Subset: deals with survival provisions)

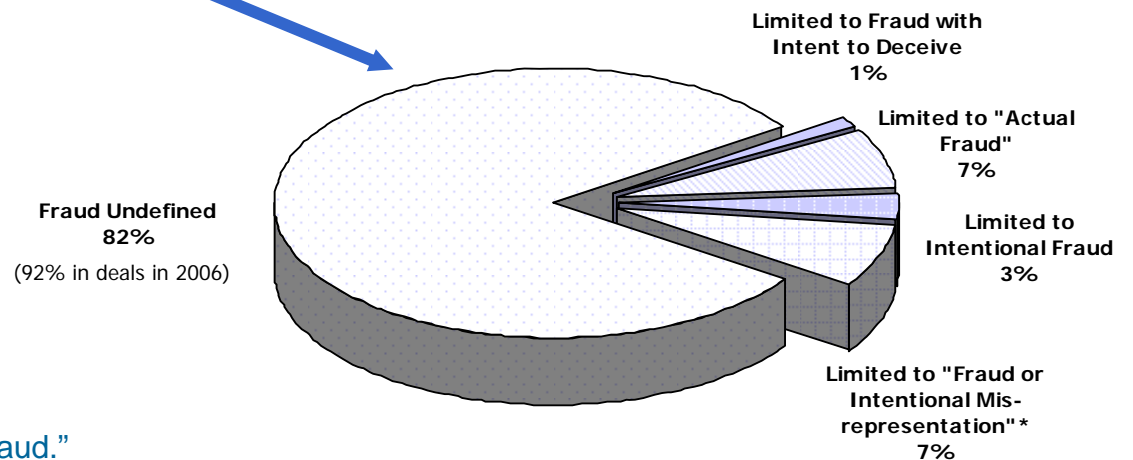


# Indemnification as Exclusive Remedy – Carve Outs

(Subset: deals with indemnification as exclusive remedy)



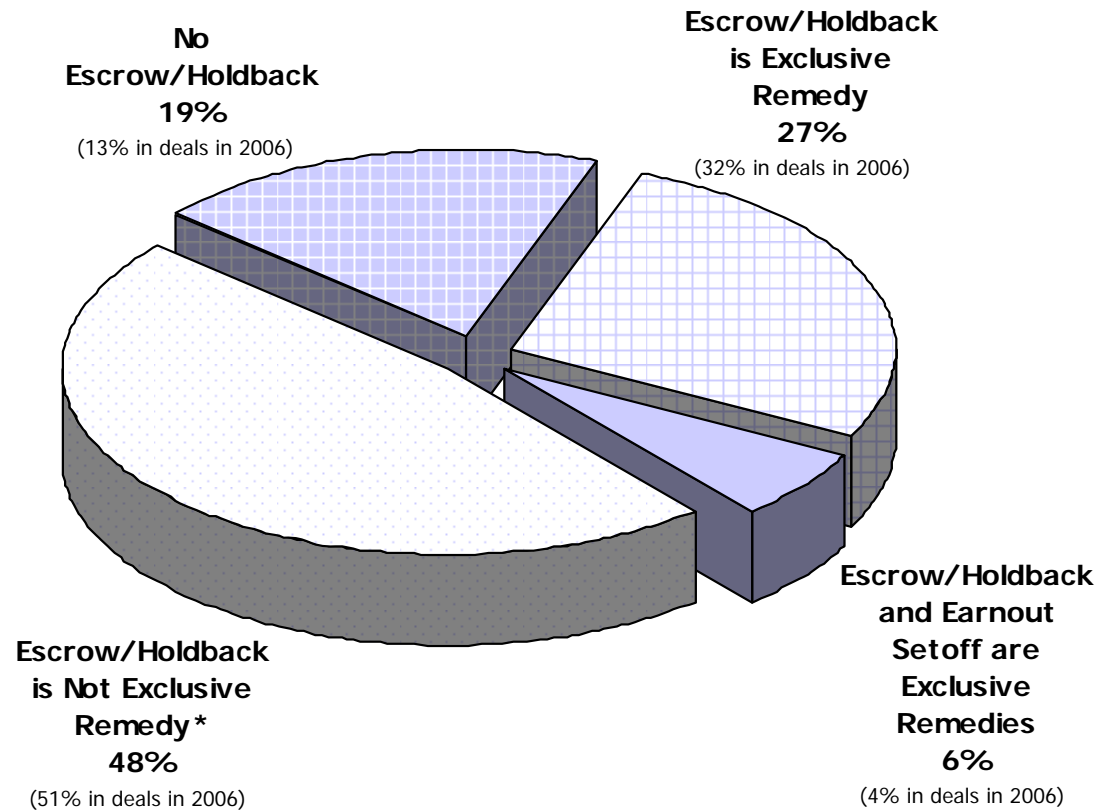
(Subset: includes fraud carveout)



\* Includes 2 deals where fraud was limited to "actual fraud."

# Escrows/Holdbacks

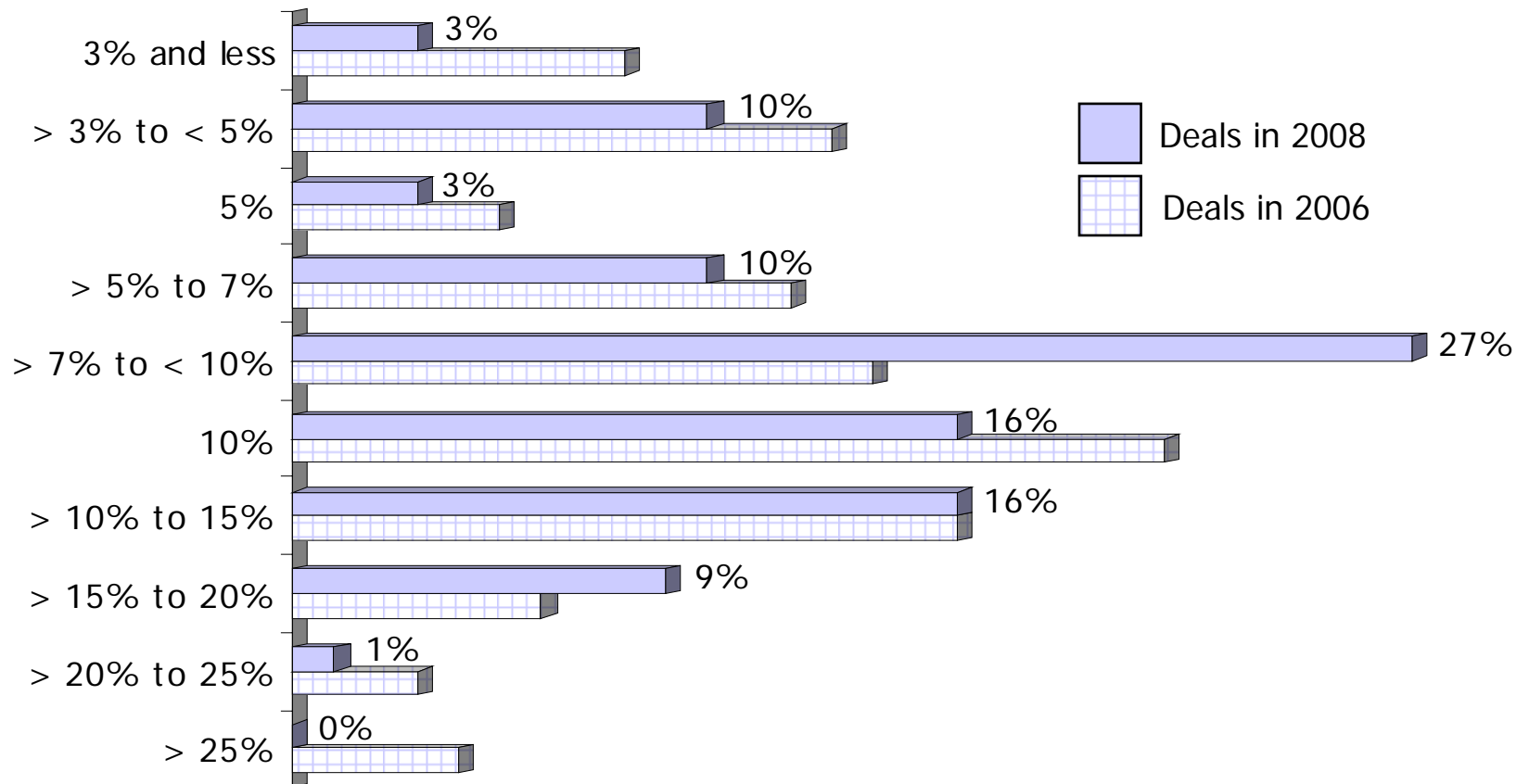
(Subset: deals with survival provisions)



\* Includes deals that state that the escrow/holdback is the exclusive remedy but provide one or more exceptions.

# Escrows/Holdbacks as % of Transaction Value\*

(Subset: deals with determinable escrows/holdbacks)



\* 50% of the deals with escrows/holdbacks had a cap equal to the amount of the escrow/holdback.

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

(Subset: deals with determinable escrows/holdbacks)

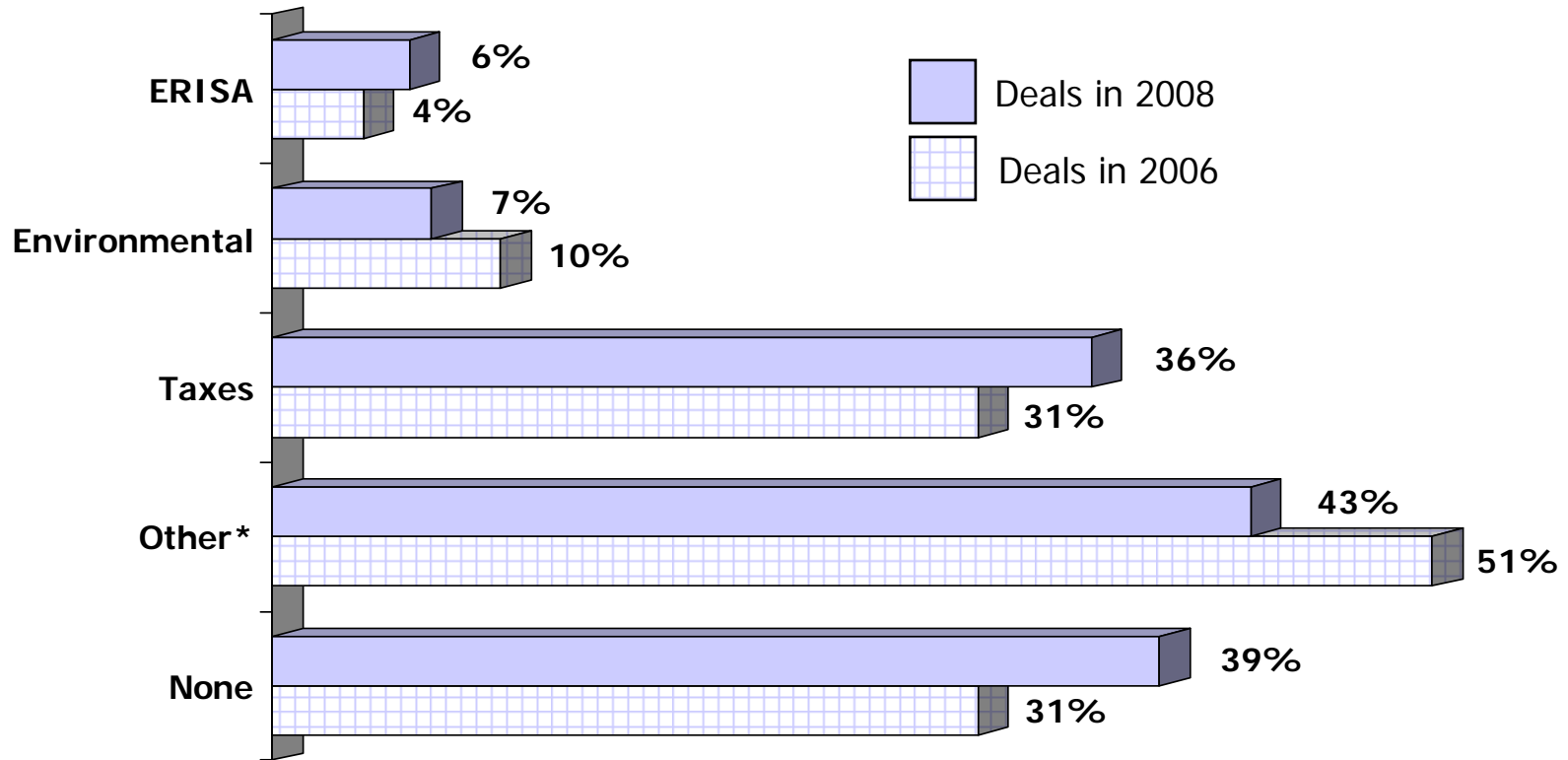
Deals in:	Mean	Median	Minimum	Maximum
2008	10.51%	9.93%	1.23%	37.30%
2006	8.94%	8.95%	1.10%	25.00%



# Stand-Alone Indemnities

(items for which indemnification specifically provided regardless of indemnification for breaches of representations and warranties)

(Subset: deals with survival provisions)

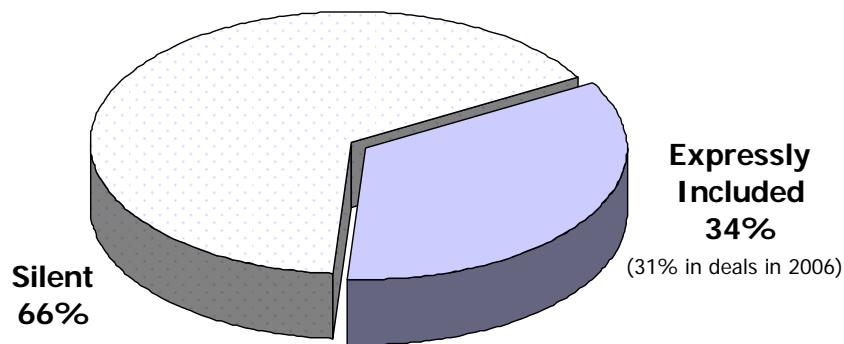


\* Other frequently appearing stand-alone indemnities were items disclosed on a schedule; excluded or retained liabilities; litigation; dissenters' rights/dissenting share payment claims; and transaction expenses.

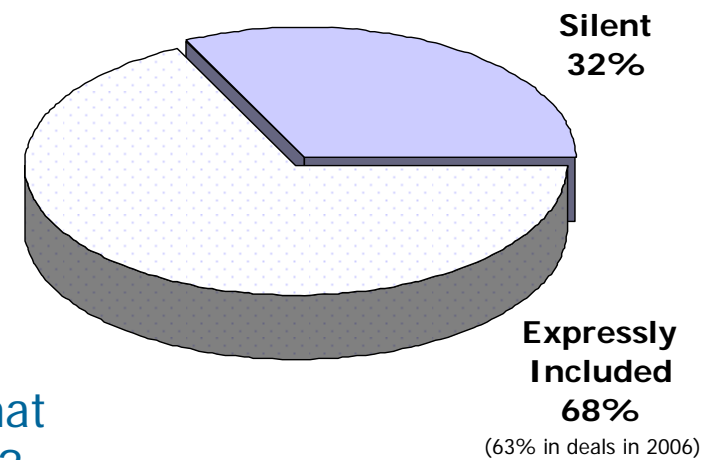
# Reductions Against Buyer's Indemnification Claims

(Subset: deals with survival provisions)

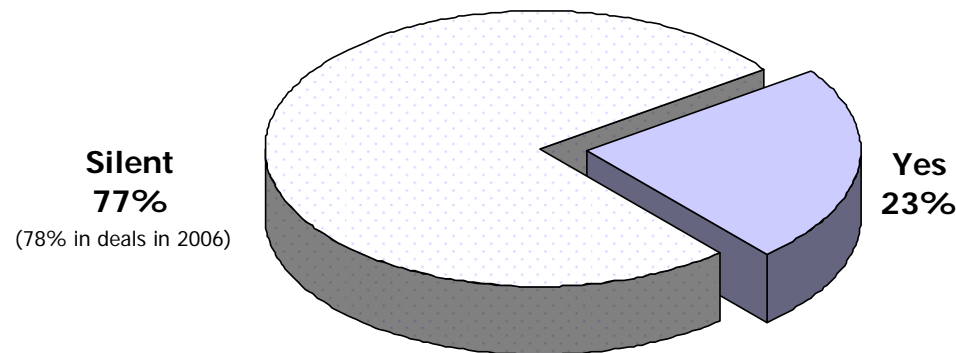
Reduction for Tax Benefits



Reduction for Insurance Proceeds

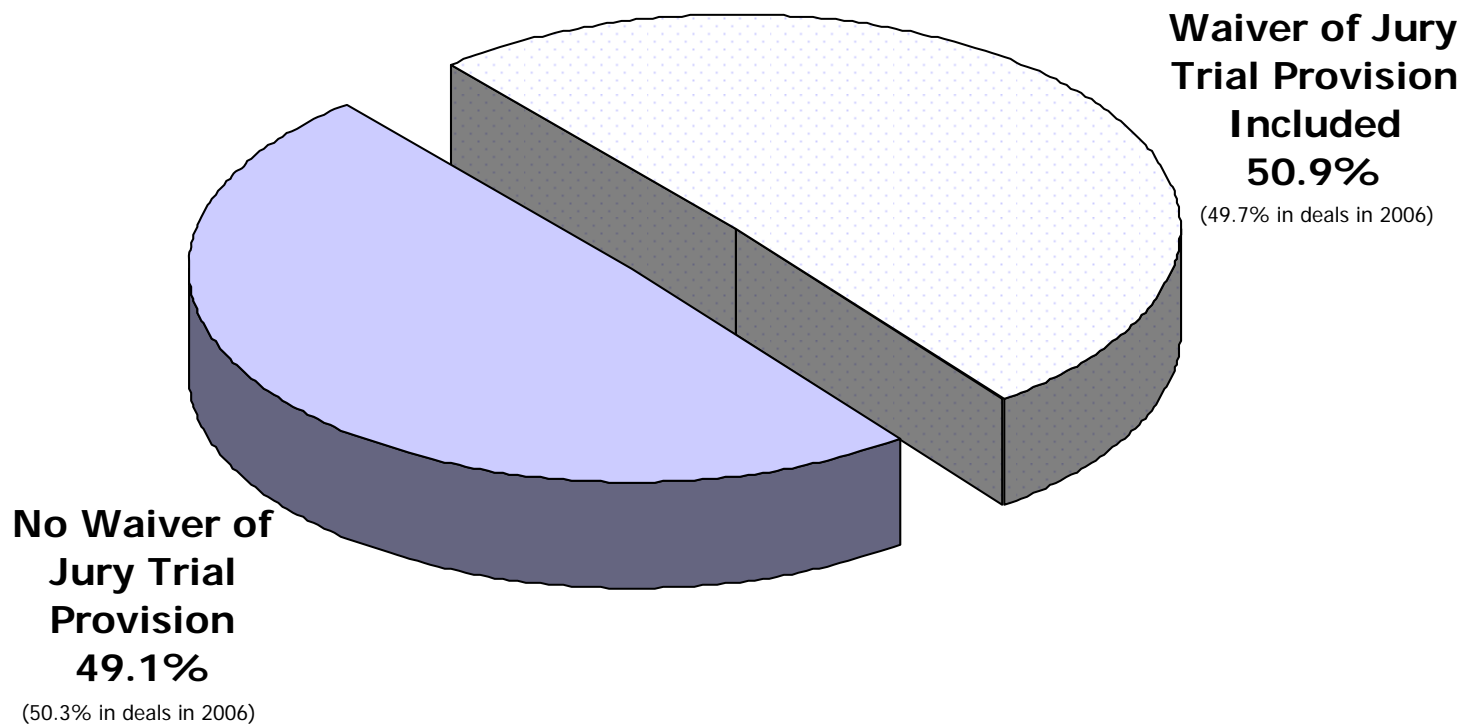


Express Requirement that Buyer Mitigate Losses?



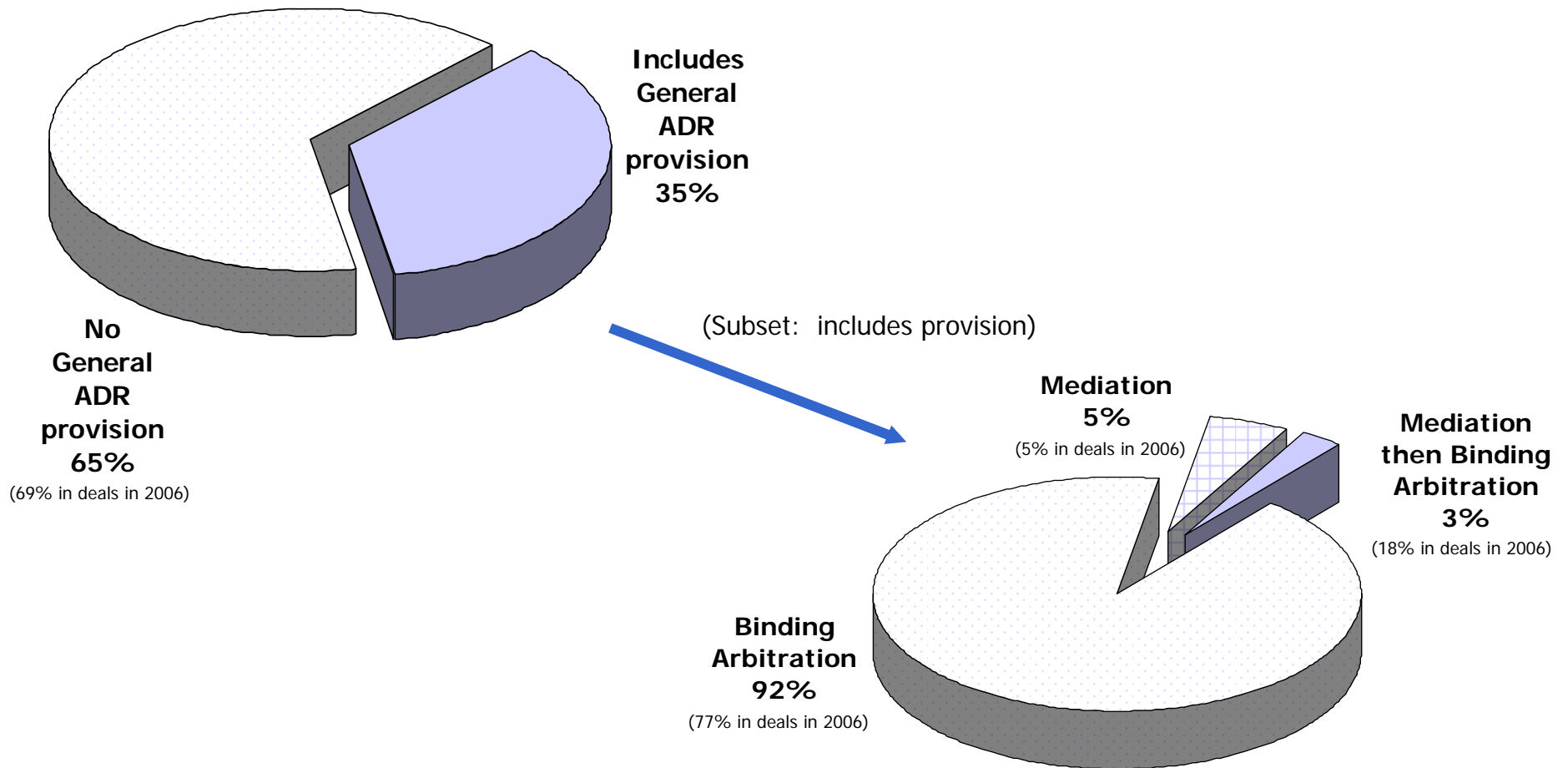
# Dispute Resolution

# Waiver of Jury Trial\*



\* May include deals in jurisdictions where jury trials are not available or where waivers of jury trials are unenforceable.

# Alternative Dispute Resolution ("ADR")\*

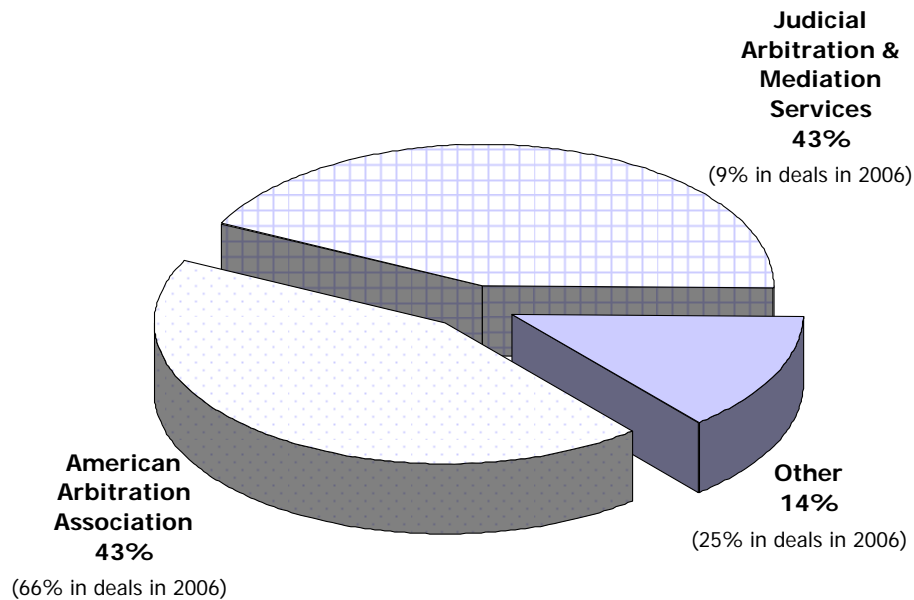


\* ADR provisions that generally cover disputes under acquisition agreement (rather than those limited to specific disputes such as purchase price adjustments or earnouts).

# Alternative Dispute Resolution ("ADR")

(Subset: deals with general ADR provisions)

## Specified Arbitrator(s)



## Arbitration Expenses

