



# Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

## **Seyfarth Shaw LLP**

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2022 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



# Key Deal Terms in Today's Middle Market Private M&A Environment

*Is the Rise of No Seller  
Indemnity Deals Here to Stay?*

June 29, 2022

**Seyfarth Shaw LLP**

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).  
©2022 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

# Agenda

01 Overview

02 Data Highlights

03 Value Adds

04 Q&A



**Andrew Lucano**  
Partner, New York  
212-218-6492  
alucano@seyfarth.com



**Aaron Gillett**  
Partner, Chicago  
312-460-5992  
agillett@seyfarth.com



**Matthew Wiener**  
Associate, New York  
212-218-5552  
mwiener@seyfarth.com



**Alessandra Reedy**  
Associate, Chicago  
312-460-5149  
areedy@seyfarth.com



**Gian Ricco**  
Managing Director, Chicago  
312-752-3359  
gricco@stout.com



**Kip Wallen**  
Senior Director, Denver  
720-452-5364  
kwallen@srsacquiom.com

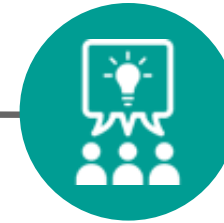
8<sup>th</sup> Edition



Middle Market  
**M&A**  
SurveyBook

2022 Survey of Key M&A Deal Terms

Over 175 middle market private target acquisition agreements signed in 2020 and 2021



2022 Press Coverage



**\$\$ Our Focus Areas \$\$**

Key deal terms and a comparison of deals both with and without R&W insurance

# General Findings

---

01

Continues to be  
seller friendly

02

Approximately  
59% of deals had  
R&W Insurance

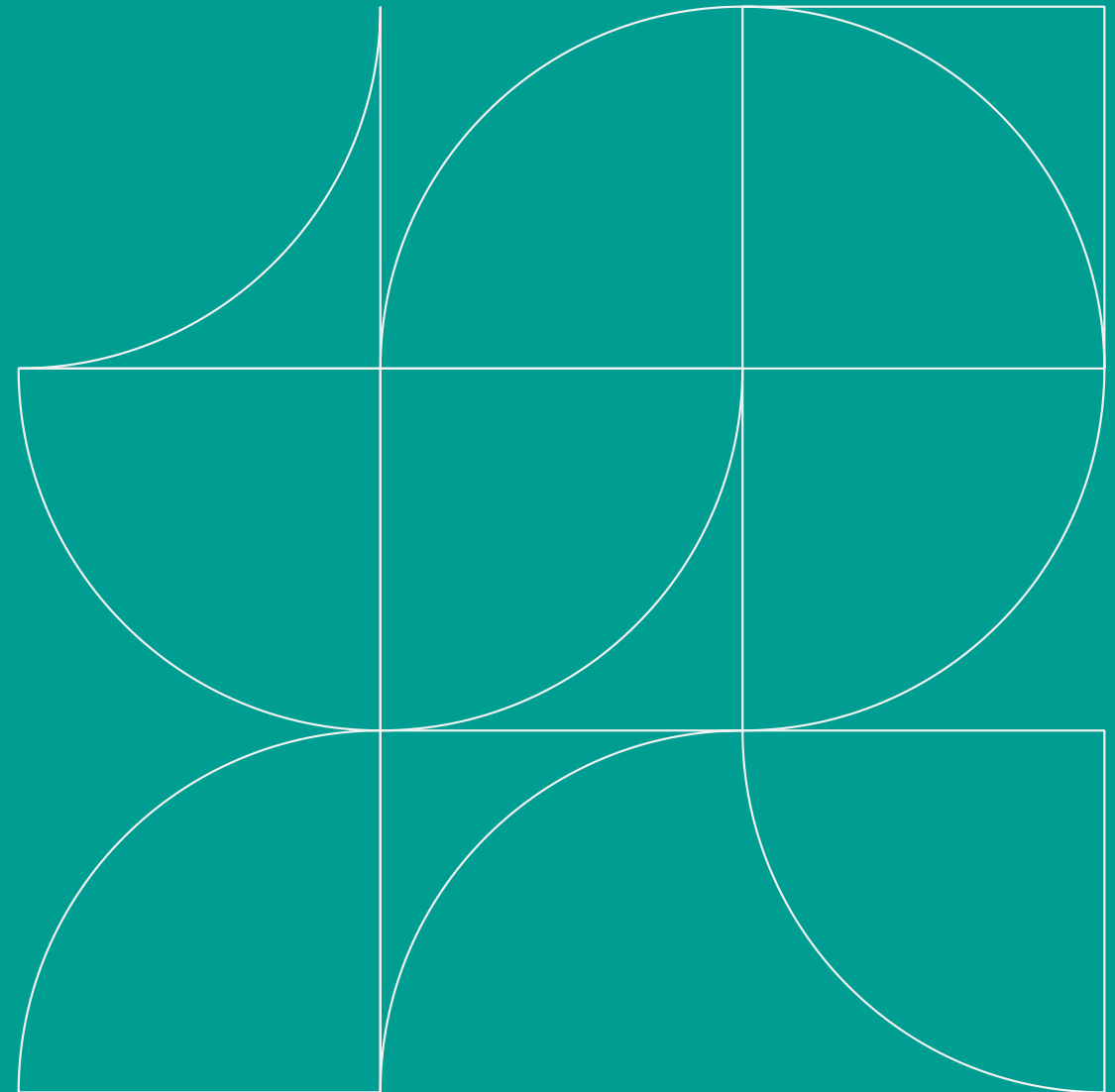
03

Continued trend  
and growth of “no  
survival” private  
target acquisitions

04

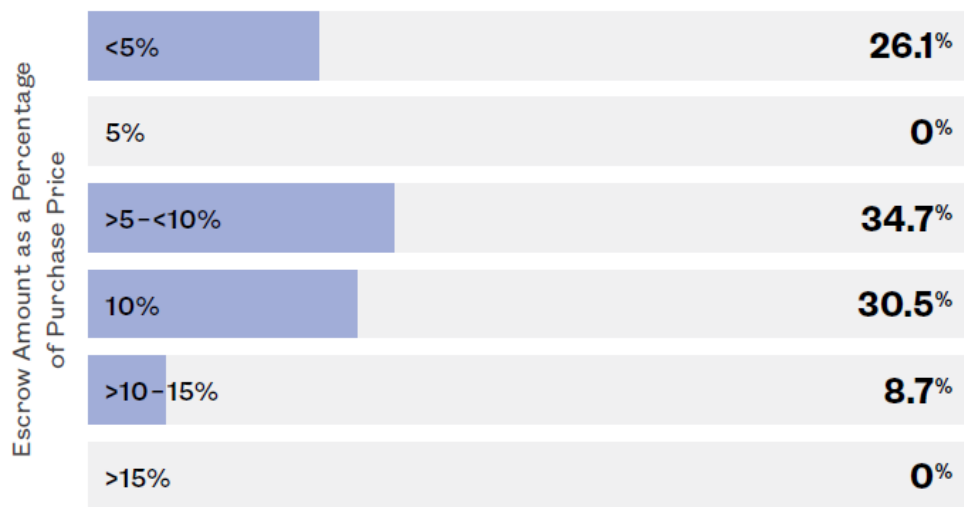
Continued trend  
of decreased use  
of an indemnity  
escrow

# Data Highlights



## Indemnity Escrow Amount

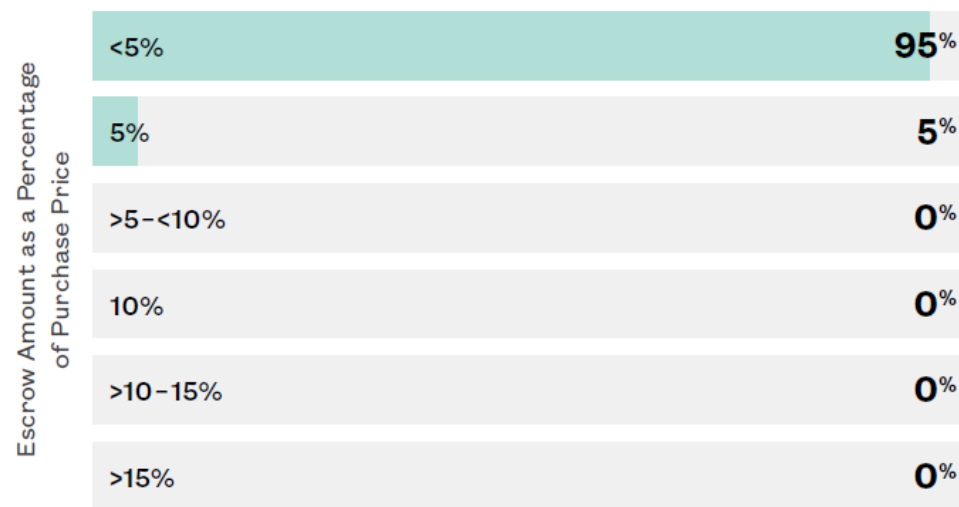
### NO R&W INSURANCE



Percentage of Deals Surveyed Providing for Indemnity Escrow

## Indemnity Escrow Amount

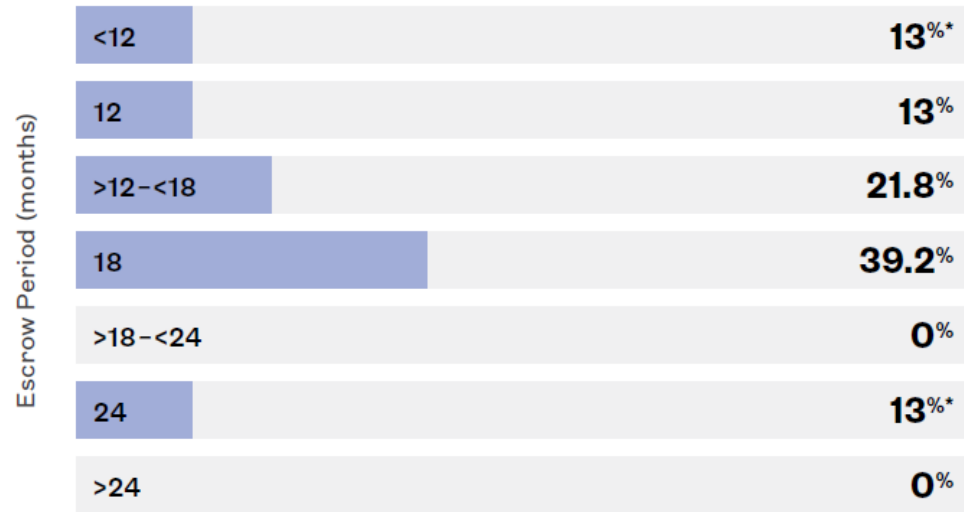
### R&W INSURANCE



Percentage of Deals Surveyed Providing for Indemnity Escrow

## Indemnity Escrow Period

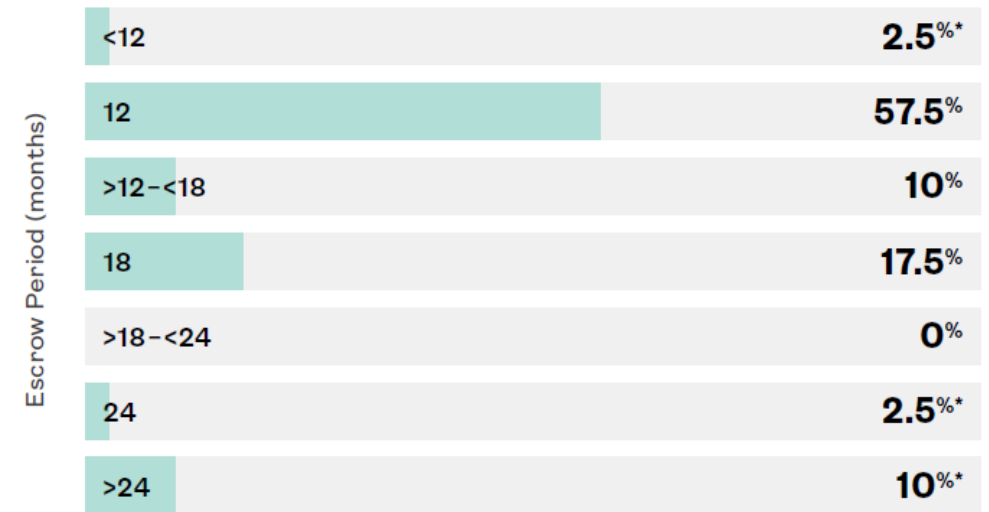
### NO R&W INSURANCE



Percentage of Deals Surveyed Providing for Indemnity Escrow

## Indemnity Escrow Period

### R&W INSURANCE

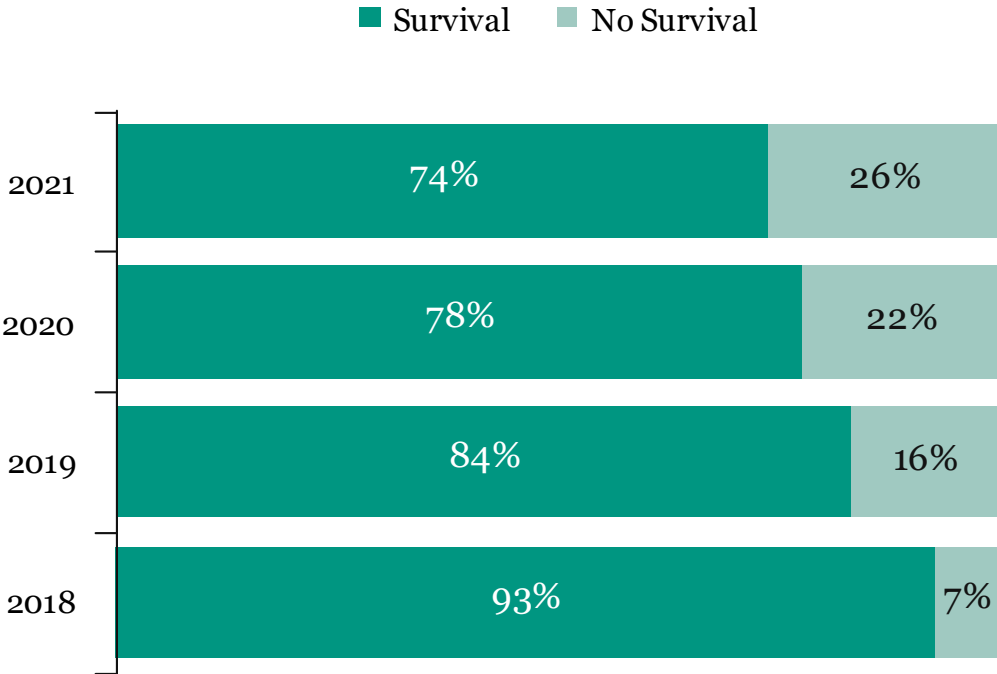


Percentage of Deals Surveyed Providing for Indemnity Escrow

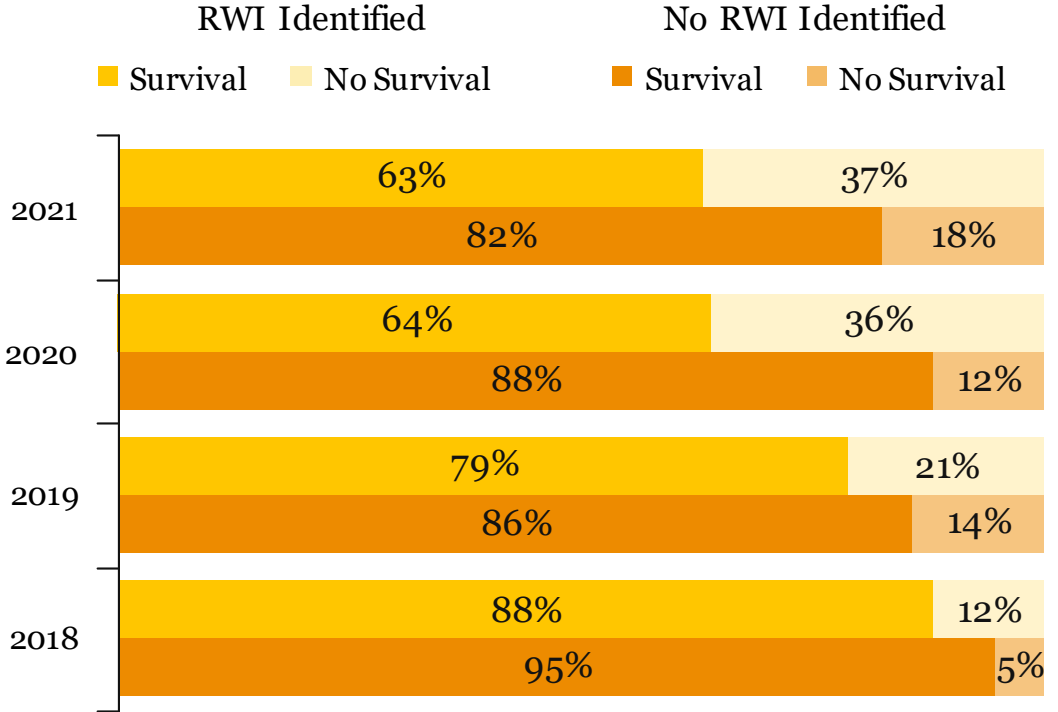


# General Survival of Seller’s Representations and Warranties

All deals (2018–2021)

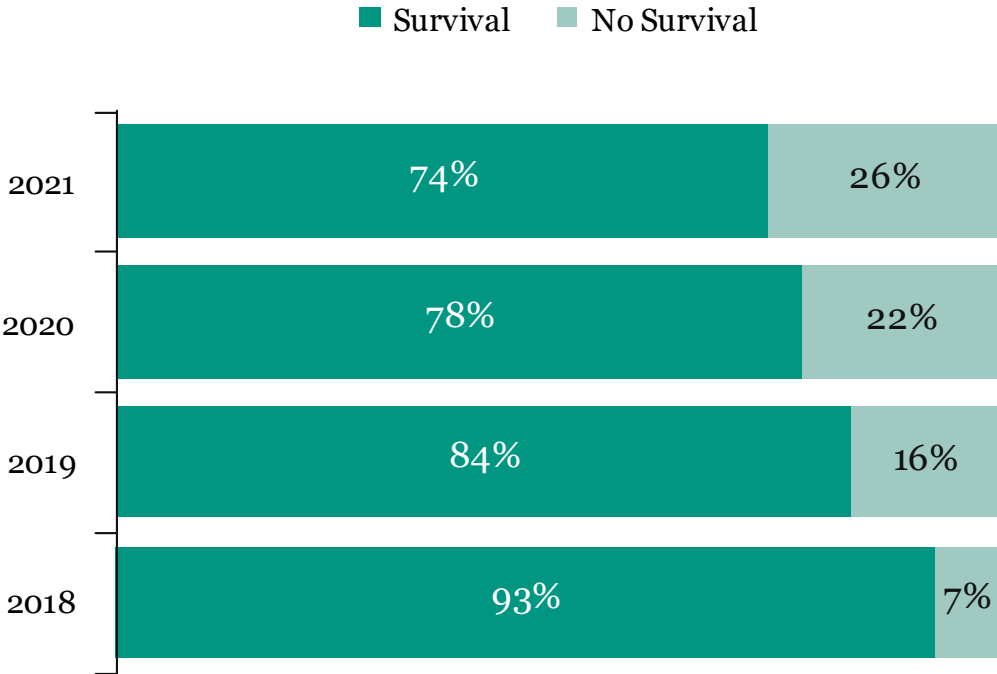


Influence of RWI (2018–2021)

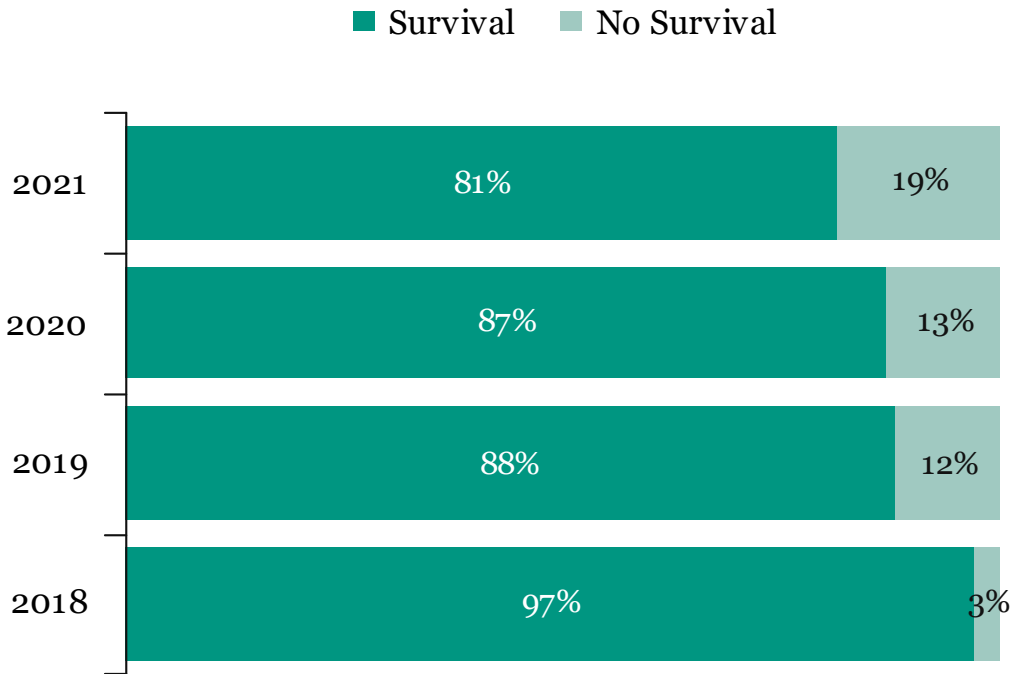


# General Survival of Seller's Representations and Warranties

All deals (2018–2021)



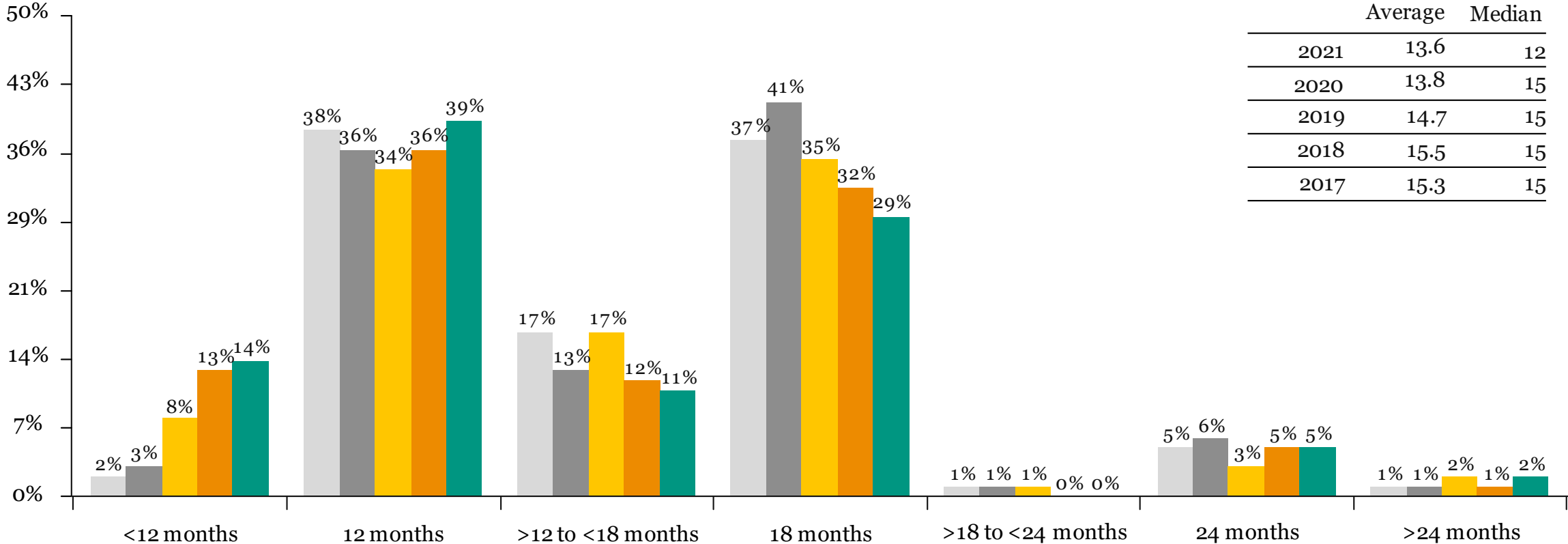
Tech Deals (2018–2021)



# General Survival Period/Time to Assert Claims: All Deals

Survival period (in months)

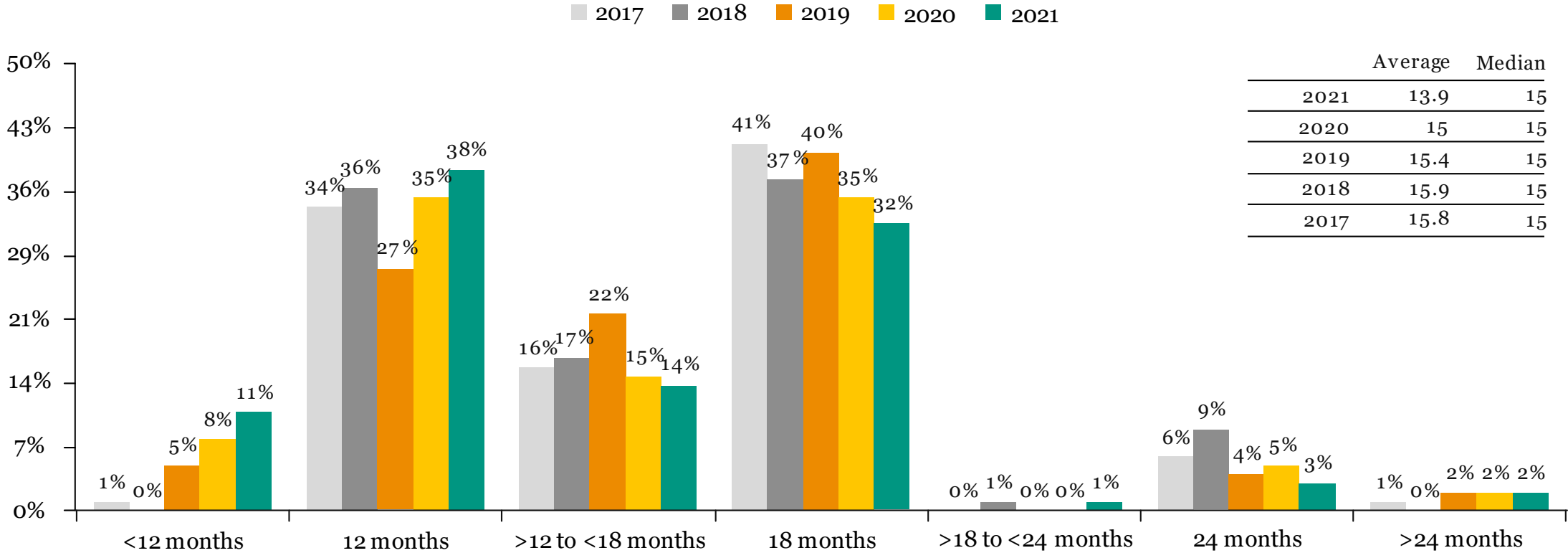
2017 2018 2019 2020 2021



	Average	Median
2021	13.6	12
2020	13.8	15
2019	14.7	15
2018	15.5	15
2017	15.3	15

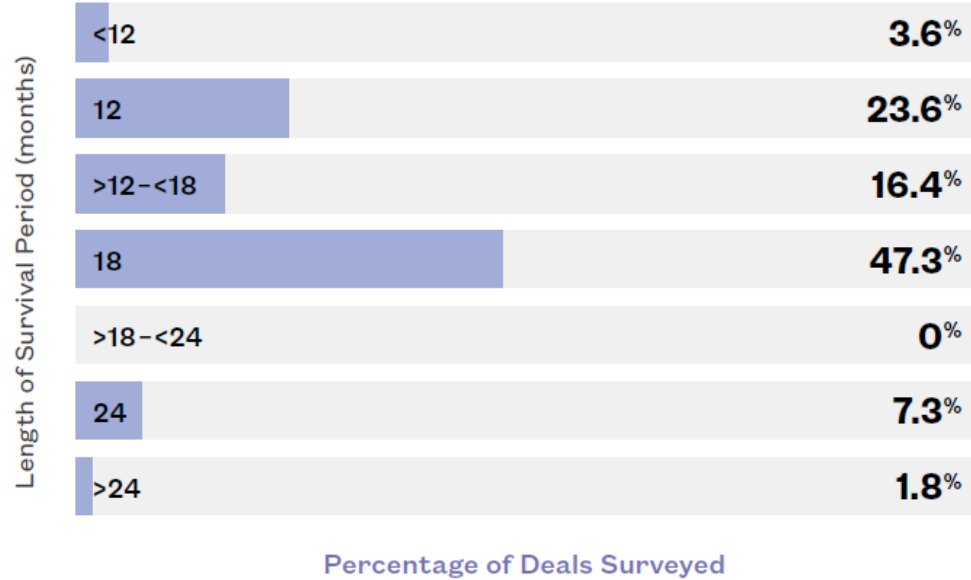
# General Survival Period/Time to Assert Claims: Tech Deals

Survival period



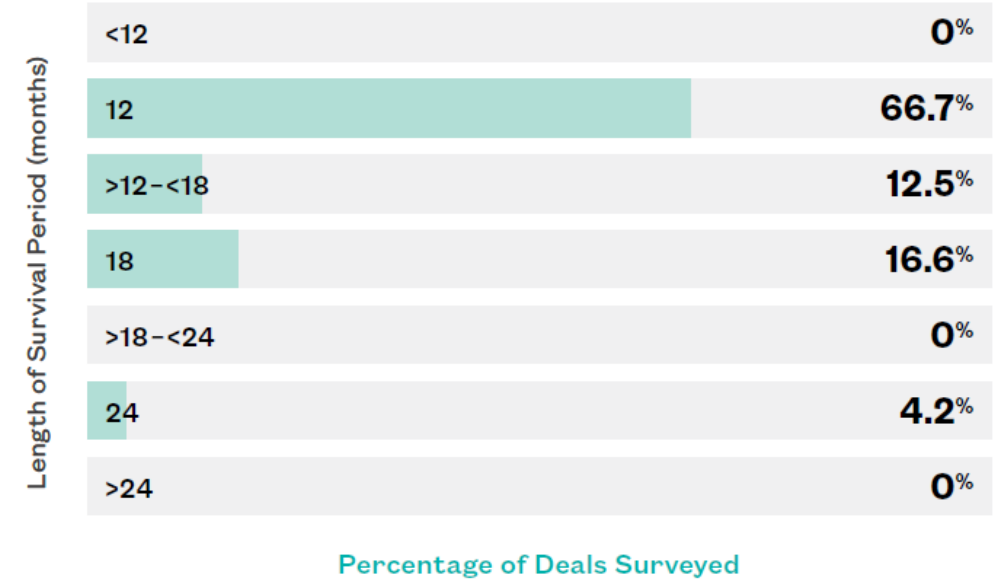
## Representation & Warranty General Survival Period

### NO R&W INSURANCE



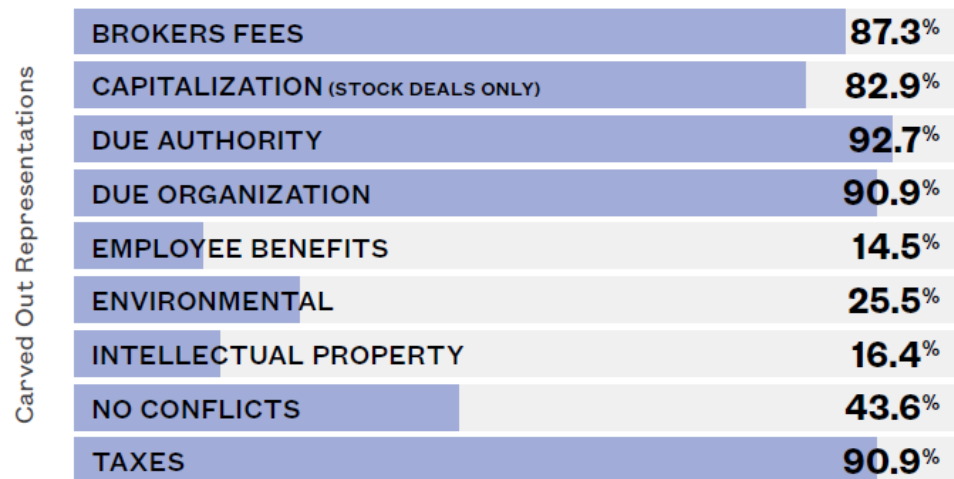
## Representation & Warranty General Survival Period

### R&W INSURANCE



## Carve Outs to General Survival Period

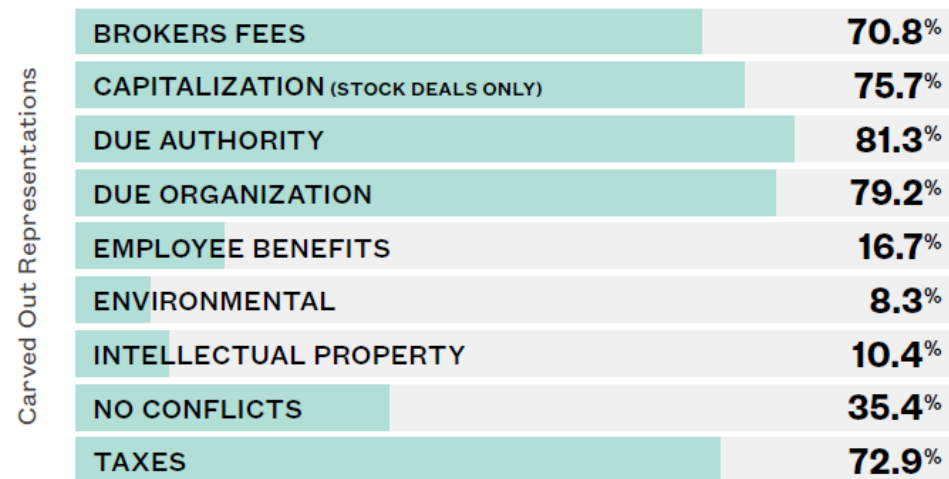
### NO R&W INSURANCE



Percentage of Deals Surveyed in Which Applicable Representation Was Carved Out

## Carve Outs to General Survival Period

### R&W INSURANCE

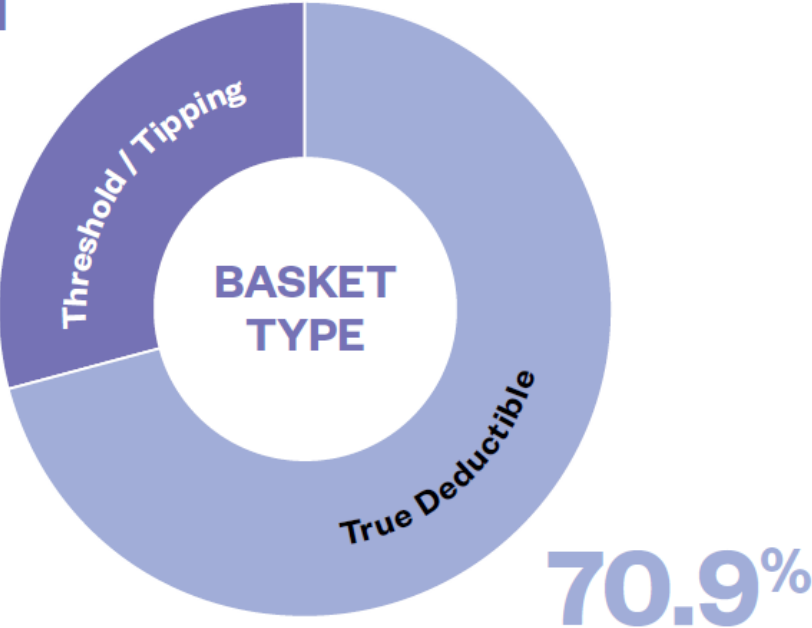


Percentage of Deals Surveyed in Which Applicable Representation Was Carved Out

# Indemnity Basket Type

NO R&W INSURANCE

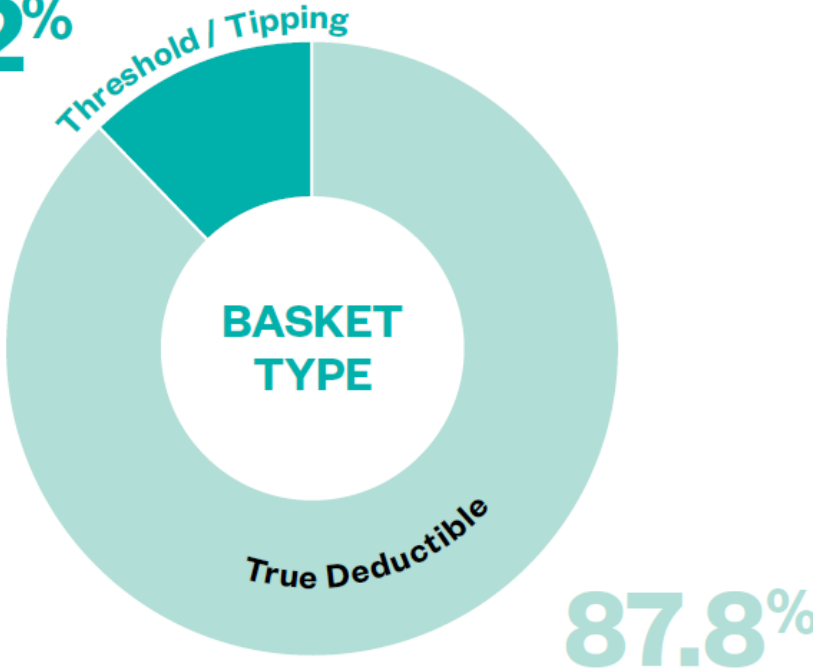
29.1%



# Indemnity Basket Type

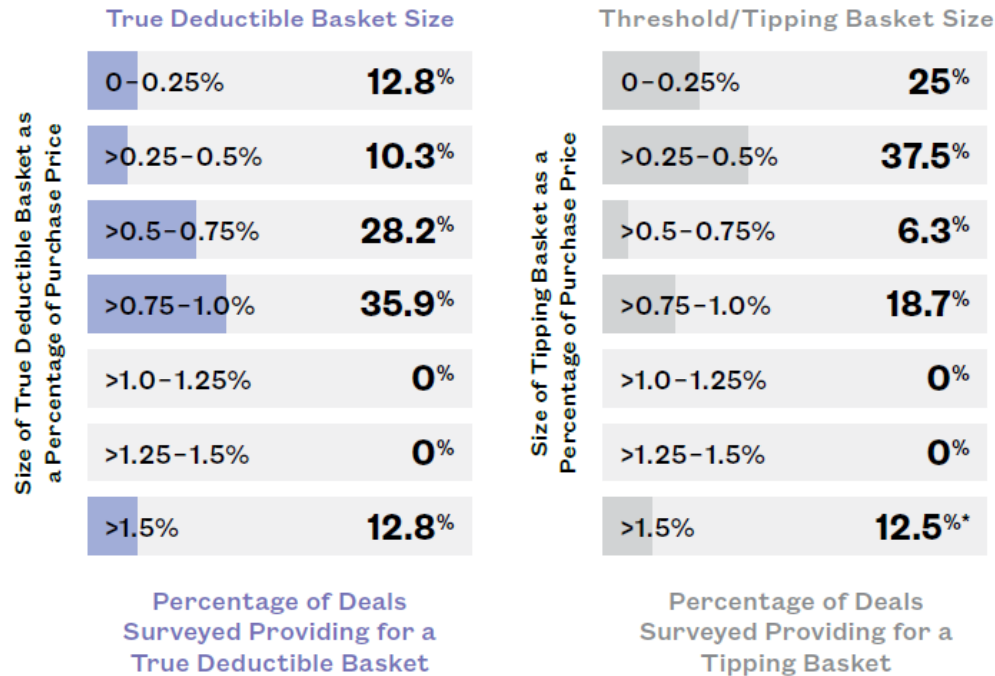
R&W INSURANCE

12.2%



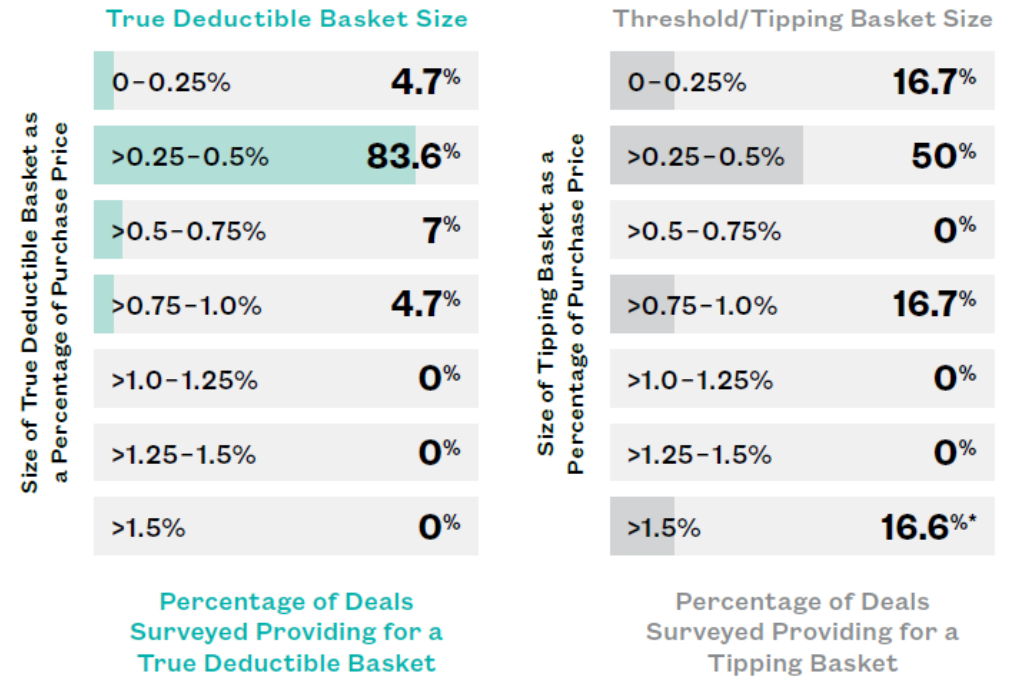
# Indemnity Basket Size

## NO R&W INSURANCE



# Indemnity Basket Size

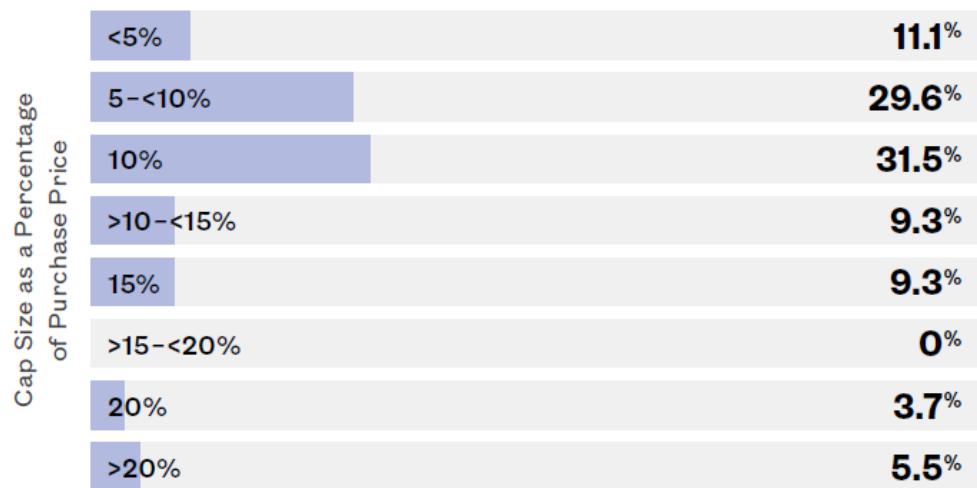
## R&W INSURANCE





## Indemnity Cap Size

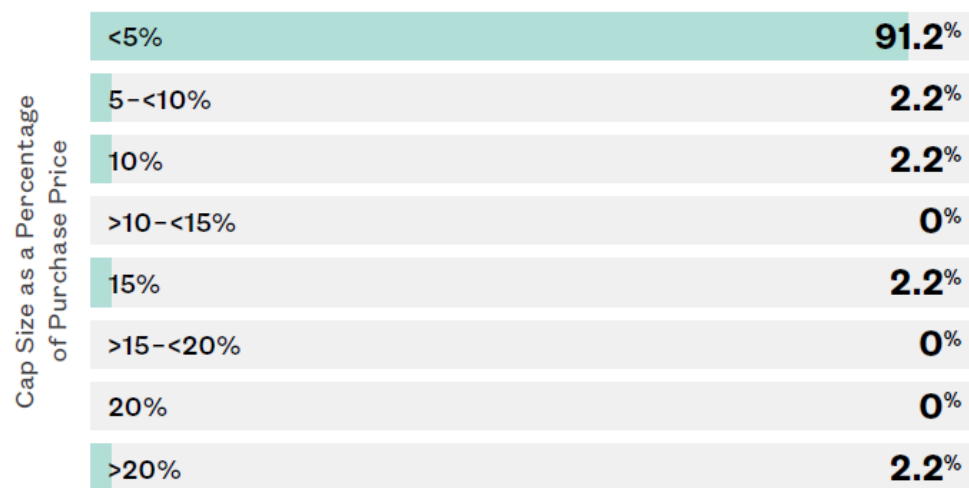
### NO R&W INSURANCE



Percentage of Deals Surveyed Providing for Indemnity Cap

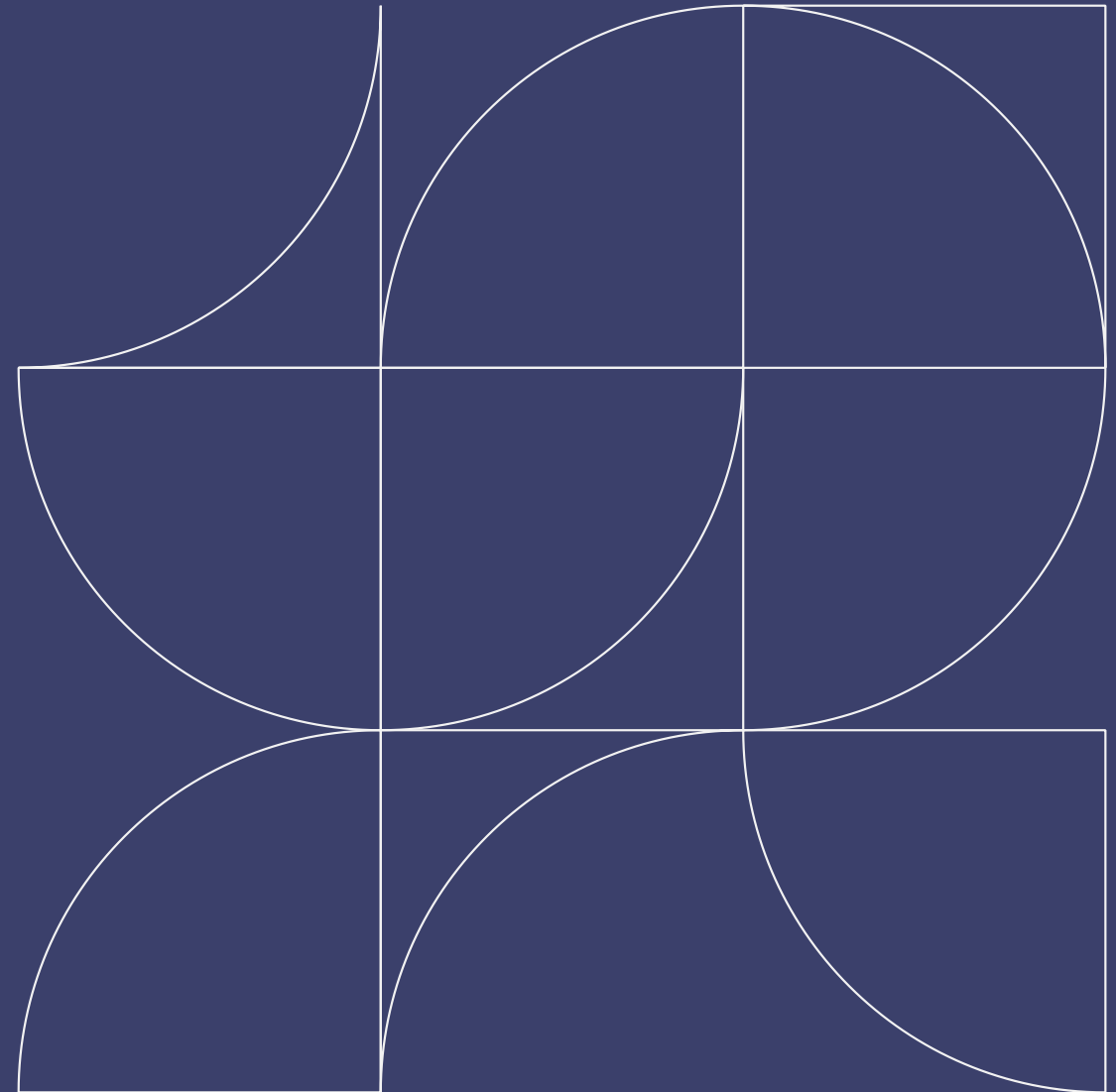
## Indemnity Cap Size

### R&W INSURANCE



Percentage of Deals Surveyed Providing for Indemnity Cap

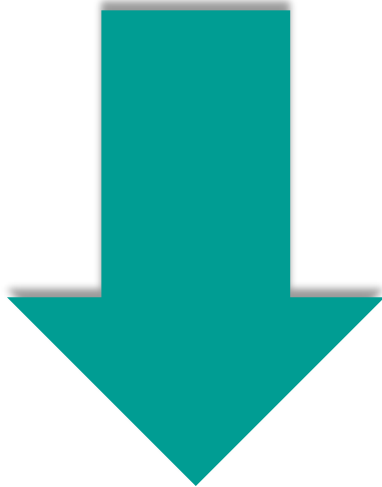
# Value Adds



# Fraud Exceptions and Definitions

---

Seller's Preference



Buyer's Preference

- **“Fraud”** means a final determination by a court of competent jurisdiction that the Sellers (or any Seller), on the one hand, or the Buyers (or any Buyer), on the other hand, committed actual fraud with the intent to deceive the other Party to this Agreement, or to induce it to enter into this Agreement, all of which (a) requiring a false representation made by a such party herein, (b) with actual knowledge (as opposed to imputed or constructive knowledge) that such representation is false, (c) with an intention to induce the Party to this Agreement to whom such representation is made to act or refrain from acting in reliance upon it, (d) causing that Party, in justifiable reliance upon such false representation and with ignorance to the falsity of such representation, to take or refrain from taking action, and (e) causing that Party to suffer, or resulting in that Party suffering, damage (which, for the avoidance of doubt, does not include constructive fraud or other claims based on constructive knowledge, negligent misrepresentation, recklessness or similar theories).
- **“Fraud”** means that a Person has willfully and knowingly committed fraud against such other Person, with the specific intent to deceive and mislead such other Person with respect to the representations and warranties set forth in this Agreement. In no event shall Fraud be based upon, or include, any representation or statement other than the express representations and warranties of the Parties set forth in this Agreement.
- **“Fraud”** means common law fraud under Delaware law committed by a Person in the making of the representations and warranties (as modified by the Disclosure Schedules), covenants or agreements in this Agreement or any certificate delivered pursuant hereto.
- **“Fraud”** means common law fraud under the Laws of the State of Delaware.

# Fraud Exceptions and Definitions (cont.)

NO R&W INSURANCE	R&W INSURANCE
<b>Fraud Exception</b>	
<p>Approximately 92% of non-insured deals surveyed in 2020/2021 included fraud exceptions to certain indemnity provisions of the agreement, as compared to approximately 83% in 2019.</p>	<p>Approximately 97% of insured deals surveyed in 2020/2021 included fraud exceptions to certain indemnity provisions of the agreement, as compared to approximately 98% in 2019.</p>
<b>Fraud Defined</b>	
<p>Of the non-insured deals that included a fraud exception, approximately 48% of such deals defined the term “fraud,” as compared to approximately 43% in 2019.</p>	<p>Of the insured deals that included a fraud exception, approximately 89% of such deals defined the term “fraud,” as compared to approximately 67% in 2019.</p>
<p>Of the non-insured deals that defined the term “fraud,” approximately 55% of such deals limited fraud to those representations and warranties contained in the agreement only, as compared to approximately 60% in 2019 and approximately 39% in 2018.</p>	<p>Of the insured deals that defined the term “fraud,” approximately 69% of such deals limited fraud to those representations and warranties contained in the agreement only, as compared to approximately 68% in 2019 and approximately 67% in 2018.</p>
<p>Of the non-insured deals that defined the term “fraud,” approximately 76% of such deals included an intent prong in the fraud definition, as compared to approximately 80% in 2019 and approximately 81% in 2018.</p>	<p>Of the insured deals that defined the term “fraud,” approximately 79% of such deals included an intent prong in the fraud definition, as compared to approximately 63% in 2019 and approximately 77% in 2018.</p>

## Earnouts

---

Of the deals surveyed in 2020/2021, approximately 15% included earnouts, which is consistent with 2019.

In addition, of the deals surveyed in 2020/2021 with earnouts:

- Approximately 73% of such deals provided for earnout amounts in excess of 10% of the purchase price.
- Approximately 12% of such deals provided for earnout amounts less than 5% of the purchase price.

## Bring-Down

---

Of the deals surveyed in 2020/2021:

- Approximately 76% used a “Material Adverse Effect” qualifier for the representations and warranties bring-down closing condition, as compared to approximately 73% in 2019.
- Approximately 24% used an “in all material respects” qualifier for the representations and warranties bring-down closing condition, as compared to approximately 27% in 2019.

The higher percentage of deals using the “Material Adverse Effect” qualifier for the representations and warranties bring-down closing condition is further evidence of a seller-friendly transaction market.

## Seller Retains Attorney-Client Privilege

---

### NO R&W INSURANCE

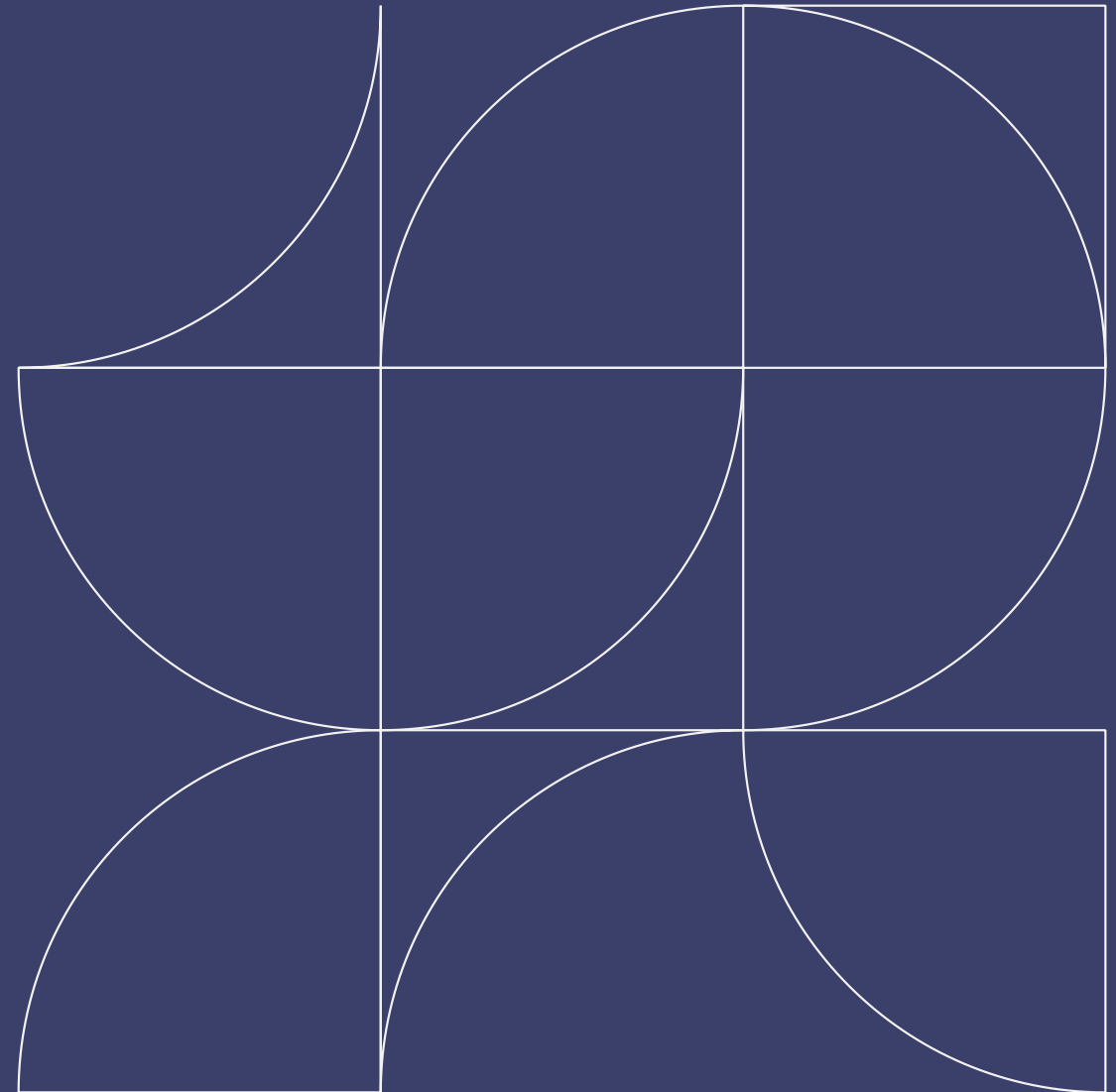
Of the non-insured deals surveyed in 2020/2021, 82% of such deals provided for the seller retaining attorney-client privilege after the closing of the transaction.

### R&W INSURANCE

Of the non-insured deals surveyed in 2020/2021, 91% of such deals provided for the seller retaining attorney-client privilege after the closing of the transaction.

**IMPORTANT NOTE:** This deal term is only applicable for equity transactions.

# Investment Banking Perspective



# U.S. M&A and Financing Market Environment

## 2022 Outlook

Multiple Factors Converging to Support the Strongest M&A Market in Years

Company Valuations and Multiples Reaching All-Time Highs in the Wake of the COVID-19 Pandemic

M&A and Financing Markets Remain Highly Competitive with Significant Interest from Both Strategic Acquirors and Financial Sponsors

### Market Update

- M&A activity increased significantly in 2021, particularly in the fourth quarter, as a result of “pent-up” demand from buyers, improved performance within many end market segments, and the race to get deals done in anticipation of potential tax law changes
- 2022 was expected to be another strong year, building off the positive momentum in late 2021 despite numerous challenges, including the continuation of the COVID-19 pandemic, labor constraints, and supply chain issues, among others however
  - Dislocations in the equity markets and increasing prospects for a recession have some buyers nervous
- Strategic, hybrid, and financial buyers remain active in M&A – financial buyers, holding near record levels of dry powder, continue to pursue new and add-on investment opportunities

### Valuation Multiples

- Multiples continue to be at or near all-time highs in many sectors
- Valuation differences continue to exist across key end markets served – company-specific value drivers also affect value

### Capital Markets

- Private equity and strategic buyers have ample reserves and capital to be deployed
- Interest rates and cost of capital continue to remain low by historical standards
- Most lenders and specialty finance firms are open for business, with leverage multiples returning back to pre-pandemic levels

### Macro Economy

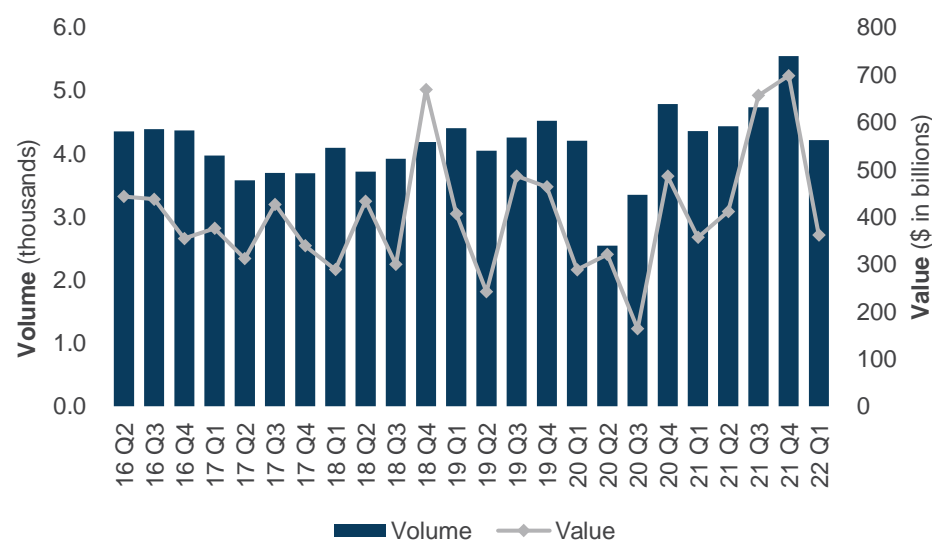
- Supply chain issues have and are expected to continue impacting businesses in the middle market
- Many distributors are benefiting from re-shoring efforts that started before the pandemic and have since accelerated in some segments
- Labor costs and availability, along with material price volatility will continue to impact businesses across the supply chain

# M&A Market Overview

Overall availability of capital, improving and sustained company performance, and narrower valuation gaps have powered U.S. M&A transaction activity

- Relative to the prior year, transaction volume for the trailing twelve months ending March 31, 2022 increased by 25.9%, and total reported value increased by 60.4%
- The number of U.S. based deals neared 19K in the trailing twelve months ending March 31, 2022, representing an aggregate value of ~\$2.1 trillion
- A healthy supply of capital is available to both strategic and financial buyers, which drives future demand for acquisitions

U.S. M&A Deal Volume and Value



U.S. Deal Volume by Deal Size

Deal Size	Number of Deals			Agg. Value (\$ billions)		
	12 Months Ended		%	12 Months Ended		%
	3/31/21	3/31/22		3/31/21	3/31/22	
\$ 1 Billion +	194	397	104.6%	\$960	\$1,558	62.4%
\$500M to \$999.9M	162	259	59.9%	115	190	65.1%
\$250M to \$499.9M	239	401	67.8%	86	142	65.0%
\$100M to \$249.9M	510	819	60.6%	82	128	57.1%
\$50M to \$99.9M	589	843	43.1%	42	60	43.1%
\$25M to \$49.9M	667	822	23.2%	25	30	22.6%
\$10M to \$24.9M	754	866	14.9%	13	15	17.0%
Under \$10M	1,322	1,169	(11.6%)	5	4	(21.5%)
Value Not Disclosed	10,599	13,354	26.0%	-	-	N/A
<b>Total</b>	<b>15,036</b>	<b>18,930</b>	<b>25.9%</b>	<b>\$1,327</b>	<b>\$2,128</b>	<b>60.4%</b>

Source: S&P Capital IQ as of 3/31/2022





# Q&A

## Thank you!

### Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).  
©2022 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



**Andrew Lucano**  
Partner, New York  
212-218-6492  
alucano@seyfarth.com



**Aaron Gillett**  
Partner, Chicago  
312-460-5992  
agillett@seyfarth.com



**Matthew Wiener**  
Associate, New York  
212-218-5552  
mwiener@seyfarth.com



**Alessandra Reedy**  
Associate, Chicago  
312-460-5149  
areedy@seyfarth.com



**Gian Ricco**  
Managing Director, Chicago  
312-752-3359  
gricco@stout.com



**Kip Wallen**  
Senior Director, Denver  
720-452-5364  
kwallen@srsacquiom.com