



Middle Market
M&A
SurveyBook

2022 Survey of Key M&A Deal Terms

Introduction

Seyfarth Shaw LLP is pleased to present the 8th edition of its Middle Market M&A SurveyBook (“2020/2021 Survey”) which analyzes key transaction terms from more than 175 middle market private target acquisition agreements signed in 2020 and 2021.^{1,2} The information presented is intended to serve as a guide to buyers, sellers, and deal professionals on “what’s market” when negotiating these terms in private target acquisition agreements in 2022.

The 2020/2021 Survey focuses on key deal terms, including those comprising the “indemnity package” included in almost all private target acquisition agreements to address a seller’s potential post-closing liability to a buyer and to set the parameters of a buyer’s ability to claw back purchase price from a seller. Each deal, of course, has unique facts and circumstances that affect the negotiation of the acquisition agreement, including, significantly, the relative leverage of the buyer and seller. It is nonetheless helpful when negotiating an acquisition agreement to have a strong understanding of where the terms of your “indemnity package” fall in the current market spectrum.

Given the continued growth in the use of representation and warranty (“R&W”) insurance in private middle market M&A transactions, in this 2020/2021 Survey, we have continued to track data from deals that included R&W insurance separately from deals where no R&W insurance was utilized. Approximately 59% of the transactions reviewed for the 2020/2021 Survey included R&W insurance, compared to approximately 55% of the transactions in 2019. Buyers consistently use R&W insurance in acquisition proposals to make their bids more competitive and attractive to sellers. Not surprisingly, the terms of the typical indemnity package differ substantially between transactions in which R&W insurance is utilized and non-R&W insurance deals. For example, the indemnity escrow amount and indemnity cap size are typically drastically lower in transactions that use R&W insurance as compared to transactions that do not use such insurance. The 2020/2021 Survey demonstrated the continued trend and growth of “no survival” private target acquisitions, in which, similar to public company M&A transactions, the representations and warranties of the seller terminate at closing. Relatedly, the 2020/2021 Survey also showed the continued trend of decreased use of an indemnity escrow. In these scenarios, recourse to a R&W insurance policy is typically a buyer’s primary remedy.

Again this year, the 2020/2021 Survey reviews the number of private target acquisition agreements that included “fraud” exceptions to certain limitations on buyers’ indemnification rights and remedies, such as caps and baskets, and whether and how “fraud” was defined across those transactions.

Although the COVID-19 pandemic severely contracted M&A deal making during the initial months of Spring 2020, US M&A activity quickly recovered to pre-pandemic levels with respect to both volume and value by July 2020 and continued to be extremely strong throughout 2021³, bringing 2021 to the highest level of M&A deal activity in modern history. In addition, the number of announced deals exceeded 62,000 globally in 2021 which was a 24% increase from

2020.⁴ Some of the drivers of the tremendous amount of M&A deal activity in the second half of 2020 and 2021 included (i) both strategic and private equity buyers' continued willingness to pay high multiples (averages of 11.1 times EBITDA, which rose past pre-pandemic levels), (ii) massive amounts of cash available to be deployed for acquisitions, (iii) the continued ultra-low interest rate environment which has allowed for greater buyer financing leverage, and (iv) the continued potential for regulatory and tax changes under the Biden Administration pushing additional sellers into the market looking to "get ahead" of these potential structural changes.⁵

Private equity M&A deal making also reached an all-time high in 2021, with 38% of total global deals being completed by sponsors rather than strategic acquirers, which represents a 13% increase over the past five years.⁶

While there is every indication that 2022 will continue to be a strong year for middle market M&A activity, most M&A professionals are not expecting the same record-breaking levels as 2021. The reasons for the continued positive outlook for 2022 include deal flow quality and quantity, the continued high amount of uninvested capital or "dry powder" available for deal making, as well as potential 2022 sellers being advised to wait out the market in the second half of 2021 because of an already oversaturated deal environment which overwhelmed deal professionals trying to close deals by the end of 2021.⁷ In addition, some deal making will continue to be driven by market changes initially fueled by the pandemic, including companies adding-on business for human talent to shortcut a tight labor market, as well as companies seeking to employ a vertical integration strategy to mitigate supply chain disruptions.⁸ However, market participants are also weighing potential deal making damping factors, including that rising inflation and Federal Reserve interest rate increases will both likely contribute to a higher cost of capital, as well as a leveling off of valuations and easing fears around capital gains tax rate increases.⁹

We hope that you find the information presented in our 2020/2021 Survey valuable, and we welcome the opportunity to further discuss our findings with you.

¹ Due to the decrease in publicly available data regarding applicable transactions during 2020 (due, in part, to the dearth of M&A deal activity during the early months of the COVID-19 pandemic), we did not publish an edition of our Middle Market M&A SurveyBook last year. So, this edition surveys deals signed in both 2020 and 2021 and compares those deals against deals signed in 2019.

² For purposes of this survey, "middle market" means transactions with a purchase price of less than \$1 billion, and "purchase price" means the total cash consideration paid by the buyer in a transaction but does not include contingent purchase price payments (e.g., earnouts). This survey does not include any transactions that involved the payment of consideration other than cash.

³ Deloitte. The future of M&A 2022 M&A Trends Survey, January 2022

⁴ Global M&A Industry Trends: 2022 Outlook

⁵ Capstone Partners, November 2021 Middle Market M&A Outlook

⁶ Pitchbook Global M&A Report 2021 Annual

⁷ Dealmakers Look Forward to an Active but Slightly Cooler Market in 2022, MiddleMarket Growth

⁸ 2022 M&A Outlook: Deal Market Expected to Continue Hot Pace, Vincent Ryan

⁹ See footnotes 5, 6, and 7

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Seyfarth's Leading Middle Market M&A Practice

The Legal 500

Recognized as a Tier 1 middle market M&A (sub-\$500m) practice.

US News & World Report: Best Lawyers

"Best Law Firms" recognized our Mergers & Acquisitions Law and Corporate Law practices.

Resources for More Information



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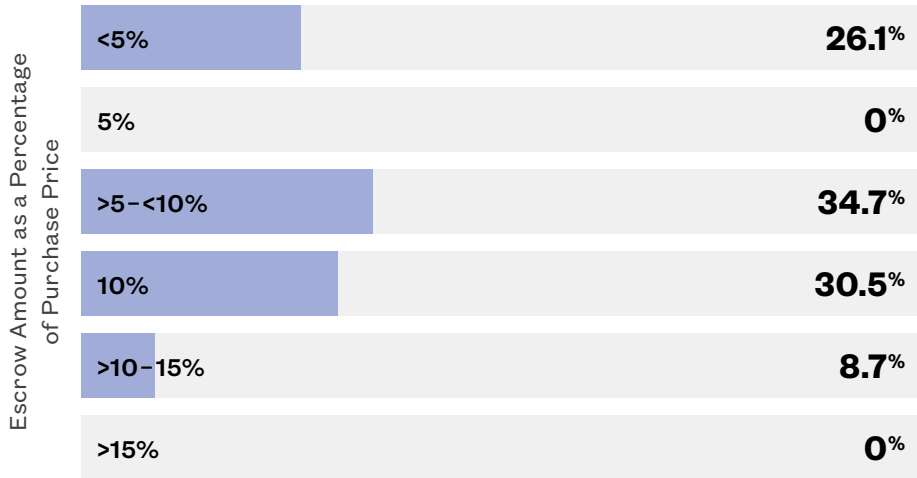
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Indemnity Escrow Amount

NO R&W INSURANCE



Percentage of Deals Surveyed Providing for Indemnity Escrow

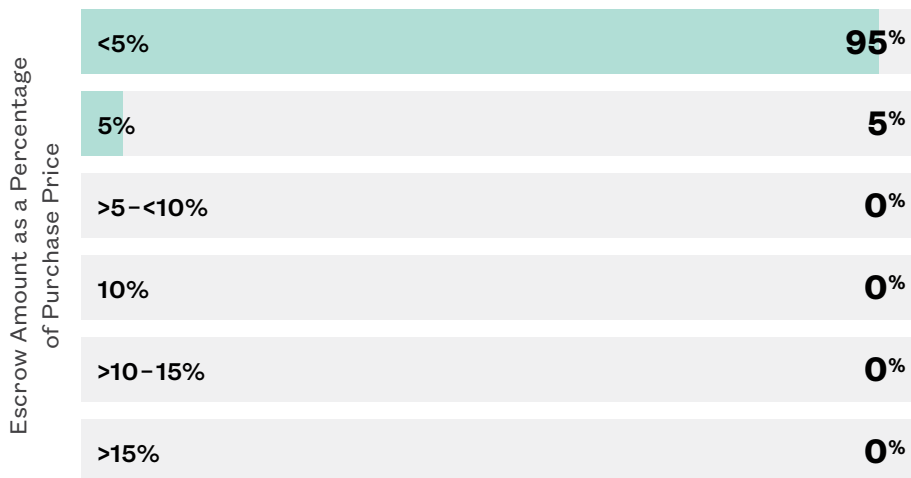
OBSERVATIONS

- The median indemnity escrow amount during the period of 2020 and 2021 (“2020/2021”) for the non-insured deals surveyed was approximately 8% of the purchase price (as compared to approximately 10% in 2018 and 2019).
- Approximately 91% of non-insured deals had an indemnity escrow amount of 10% or less (as compared to approximately 83% in 2019), but only approximately 26% of non-insured deals had an indemnity escrow amount of 5% or less, which is consistent with 2019.

IMPORTANT NOTE: Data included under “no R&W insurance” sections reflects deals where no R&W insurance was used, or where we were unable to confirm whether R&W insurance was used based on a review of the acquisition, as confirmed by the acquisition agreement. Data included under “R&W insurance” sections reflects deals where R&W insurance was used.

Indemnity Escrow Amount

R&W INSURANCE



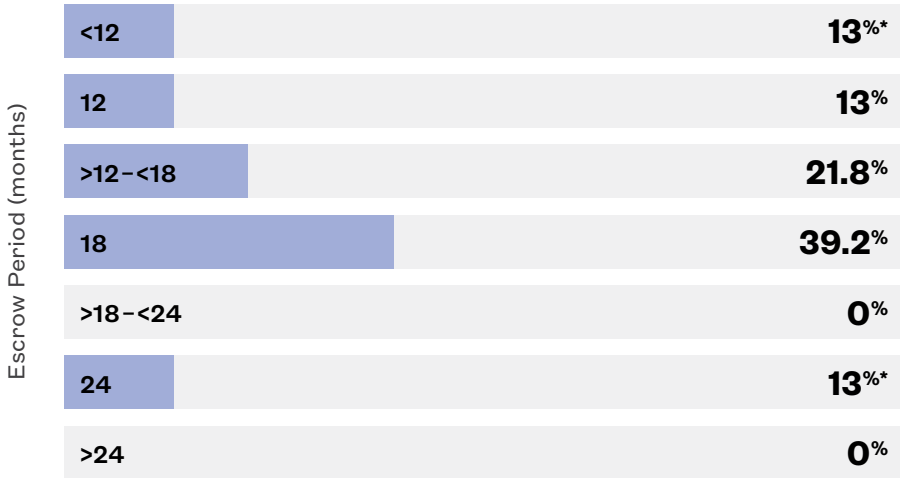
Percentage of Deals Surveyed Providing for Indemnity Escrow

OBSERVATIONS

- The median indemnity escrow amount in 2020/2021 for the insured deals surveyed was approximately 0.5% of the purchase price (as compared to approximately 0.6% in 2019 and 0.9% in 2018). It is plain to see the dramatic impact that R&W insurance has on the indemnity escrow amount (approximately 0.5% for insured deals, as compared to approximately 8% for non-insured deals).
- The vast majority of insured deals had an indemnity escrow amount of less than 5%, and of those deals, approximately 89% had an indemnity escrow amount of 1% or less (as compared to 91% in 2019). This is consistent with the prevailing R&W insurance structure of including a retention (deductible) equal to approximately 1% of deal value.

Indemnity Escrow Period

NO R&W INSURANCE



Percentage of Deals Surveyed Providing for Indemnity Escrow

OBSERVATIONS

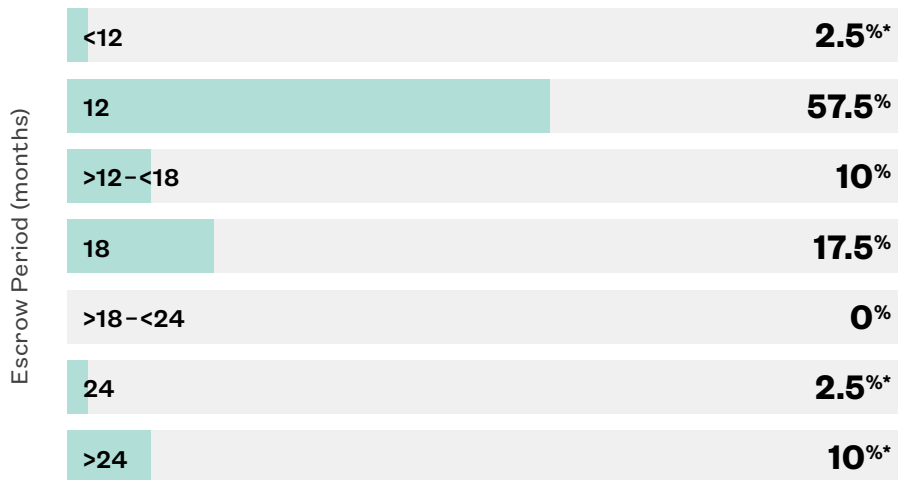
Of the non-insured deals surveyed which provided for an indemnity escrow:

- Approximately 74% of such deals had an indemnity escrow period of 12-18 months. However, without taking the Unique Deals (as defined below) into account, 100% of such deals had an indemnity escrow period of 12-18 months, which is consistent with 2019.
- Approximately 13% of such deals had an indemnity escrow period of less than 12 months. However, without taking the Unique Deals into account, 0% of such deals had an indemnity escrow period of less than 12 months, which is consistent with 2019.
- The median indemnity escrow period of such deals was 18 months. This reflects an increase from 13.5 months 2019, despite the trend of continuing seller strength during 2020/2021.

***IMPORTANT NOTE:** A limited number of the deals surveyed had indemnity escrow periods of either (i) less than 12 months or (ii) 24 months or greater due to unique facts applicable to such deals (the "Unique Deals"). This highlights that the specific facts and circumstances of each deal will often carry the day in deal negotiations even if "not market".

Indemnity Escrow Period

R&W INSURANCE



Percentage of Deals Surveyed Providing for Indemnity Escrow

OBSERVATIONS

Of the insured deals surveyed which provided for an indemnity escrow:

- Approximately 85% of such deals had an indemnity escrow period of 12-18 months. However, without taking the Unique Deals into account, 100% of such deals had an indemnity escrow period of 12-18 months, which is consistent with 2019.
- Approximately 3% of such deals had an indemnity escrow period of less than 12 months. However, without taking the Unique Deals into account, 0% of such deals had an indemnity escrow period of less than 12 months, which is consistent with 2019.
- The median indemnity escrow period of such deals was 12 months. This is consistent with 2019 and shows a trend of continuing seller strength during 2020/2021.

Trends in Indemnity Escrow Usage and No Survival Deals

Over the last four years, our surveys have identified trends pointing to fewer deals involving an indemnity escrow and more deals involving no survival of the general representations and warranties. These trends appear to be particularly the case in deals utilizing R&W insurance. In looking to analyze these trends further, we partnered with SRS Acquiom (“SRS”), a professional shareholder representative, paying agent and escrow agent with experience from over 5,600 M&A deals, to provide the below data with respect to the usage of indemnity escrows and the general application of “no survival” deals in transactions surveyed by SRS.

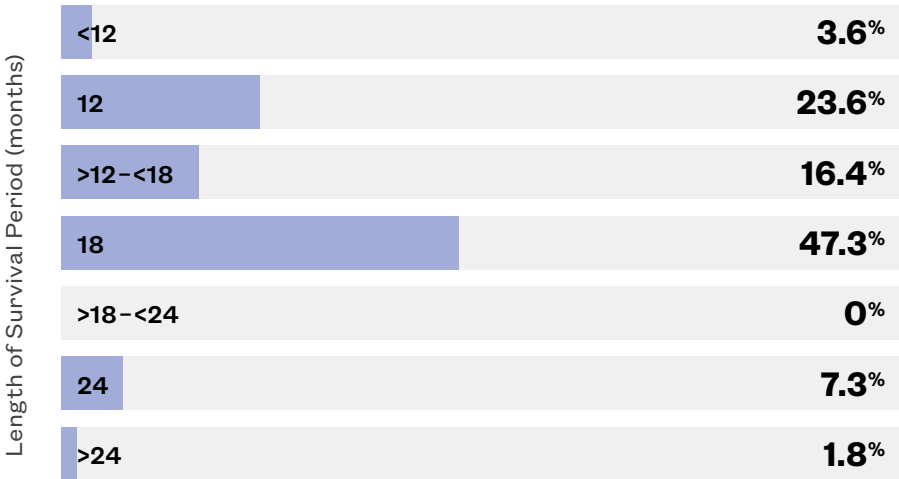
	YEAR	INDEMNITY ESCROW	NO INDEMNITY ESCROW
All Deals	2018	80%	20%
	2019	76%	24%
	2020	68%	32%
	2021	65%	35%
No R&W Insurance Identified	2018	81%	19%
	2019	78%	22%
	2020	75%	25%
	2021	70%	30%
R&W Insurance Identified	2018	78%	22%
	2019	73%	27%
	2020	59%	41%
	2021	59%	41%

Trends in Indemnity Escrow Usage and No Survival Deals

	YEAR	REPS SURVIVE	NO SURVIVAL
All Deals	2018	93%	7%
	2019	83%	17%
	2020	78%	22%
	2021	74%	26%
No R&W Insurance Identified	2018	95%	5%
	2019	86%	14%
	2020	88%	12%
	2021	83%	17%
R&W Insurance Identified	2018	88%	12%
	2019	79%	21%
	2020	64%	36%
	2021	63%	37%

Representation & Warranty General Survival Period

NO R&W INSURANCE



Percentage of Deals Surveyed

OBSERVATIONS

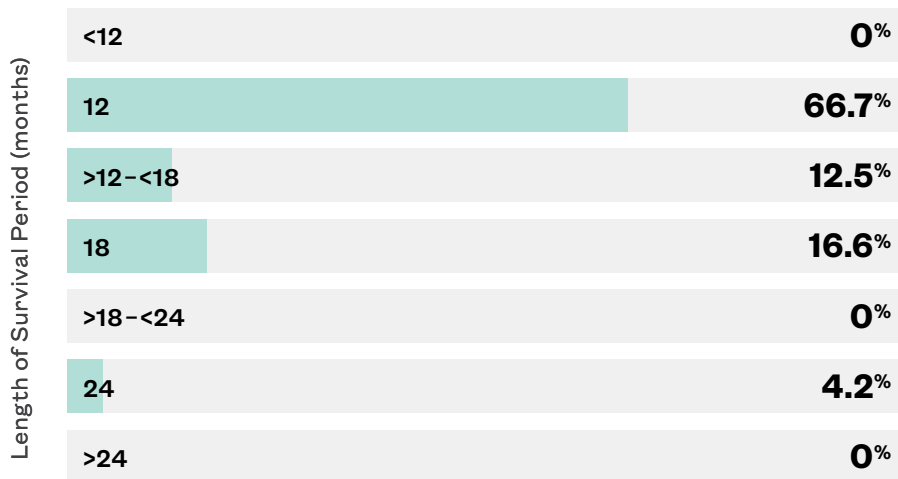
- The median general survival period for non-insured deals was 18 months. This reflects a slight increase from 15 months in 2019. In addition, this is consistent with the median indemnity escrow period of 18 months for non-insured deals in 2020/2021.
- Only approximately 9% of non-insured deals surveyed had survival periods of greater than 18 months, which is consistent with 2019. This is also generally consistent with the results from prior years where such deals represented only a small percentage of the total number of deals surveyed.

IMPORTANT NOTE: The calculations for the charts on pages 11 and 12 do not include “no survival” deals, which would have a significant impact on the data regarding general survival periods.

Representation & Warranty

General Survival Period

R&W INSURANCE



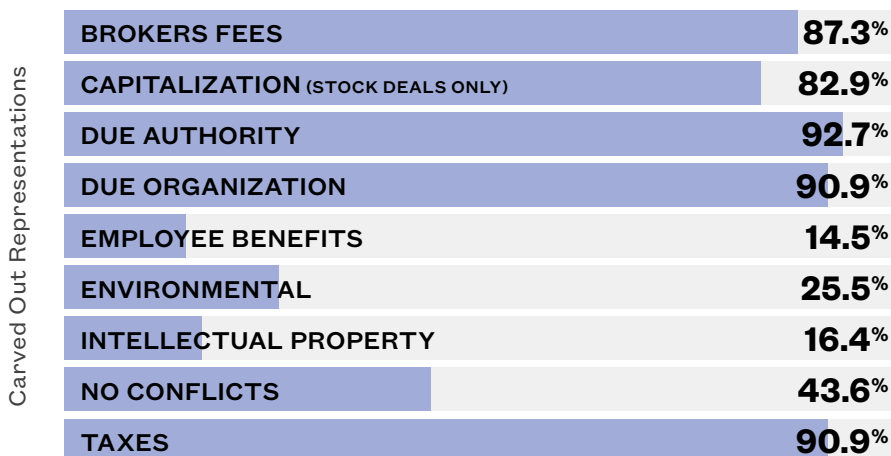
Percentage of Deals Surveyed

OBSERVATIONS

- The median general survival period for insured deals surveyed was 12 months, which is consistent with 2019. In addition, this is consistent with the median indemnity escrow period of 12 months for insured deals in 2020/2021.
- Only approximately 4% of insured deals surveyed had survival periods of greater than 18 months, which is consistent with 2019. This is also generally consistent with the results from prior years where such deals represented only a small percentage of the total number of deals surveyed.

Carve Outs to General Survival Period

NO R&W INSURANCE



Percentage of Deals Surveyed in Which Applicable Representation Was Carved Out

OBSERVATIONS

Employee Benefits

- The percentage of non-insured deals surveyed that carved out representations and warranties regarding employee benefits was approximately 15% in 2020/2021. This represents a significant decrease from approximately 38% in 2019.

Environmental

- The percentage of non-insured deals that carved out representations and warranties regarding environmental matters was approximately 26% in 2020/2021. This represents a significant decrease from approximately 38% in 2019.

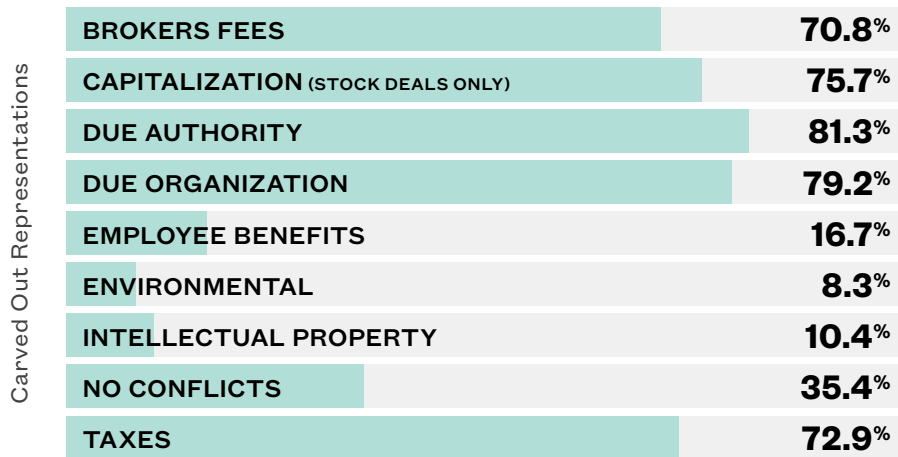
General Comparison Against Insured Deals

- Consistent with the overall more buyer-friendly nature suggested by our data of certain deal terms in non-insured deals, carve outs to the survival period of general representations and warranties tend to be more prevalent in non-insured deals than in insured deals.

IMPORTANT NOTE: The calculations for the charts on pages 13 and 14 do not include “no survival” deals where representations and warranties do not survive as a general matter (as the concept of carve-outs to survival periods is not applicable to such deals).

Carve Outs to General Survival Period

R&W INSURANCE



Percentage of Deals Surveyed in Which Applicable Representation Was Carved Out

OBSERVATIONS

Environmental

- The percentage of insured deals surveyed that carved out representations and warranties regarding environmental matters was approximately 8% in 2020/2021. This represents a significant decrease from approximately 24% in 2019.

Taxes

- The percentage of insured deals that carved out representations and warranties regarding tax matters was approximately 73% in 2020/2021. This represents a significant increase from approximately 59% in 2019.

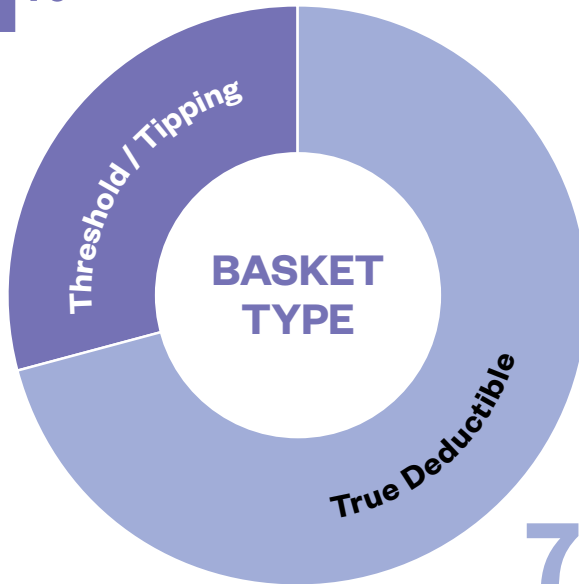
R&W Insurance Policy Coverage of Fundamental Representations

- In insured deals, the R&W insurance policy generally provides six years of coverage for fundamental representations and warranties.

Indemnity Basket Type

NO R&W INSURANCE

29.1%



70.9%

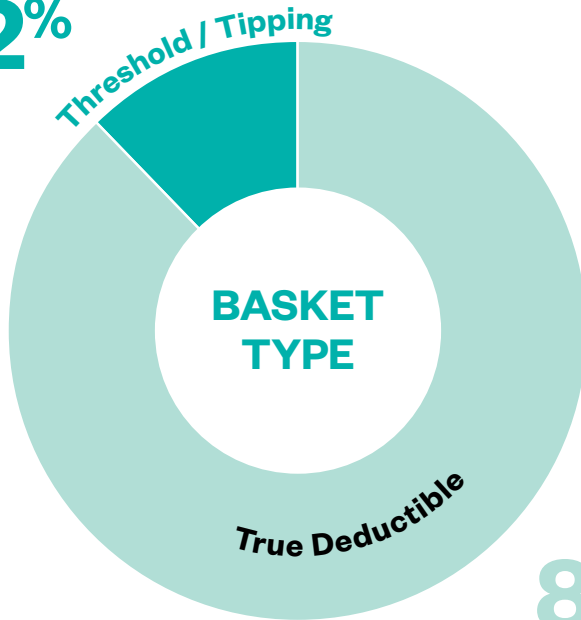
OBSERVATIONS

- Approximately 75% of non-insured deals surveyed provided for an indemnity basket, which is consistent with 2019 and corresponds to the continued increase in the number of “no survival” deals in 2020/2021 deals surveyed (as compared to approximately 90% in 2018). Taking out the “no survival” deals, approximately 98% of non-insured deals surveyed provided for an indemnity basket, which is also consistent with 2019. An indemnity basket would generally not be applicable in no survival deals.
- Of the non-insured deals providing for an indemnity basket, approximately 29% were structured as threshold/tipping baskets (as compared to approximately 31% in 2019) and approximately 71% were structured as deductible baskets (as compared to approximately 69% in 2019), which is consistent with prior years. The higher percentage of non-insured deals providing for a deductible basket, rather than a threshold/tipping basket, is evidence of a seller-friendly transaction market.

Indemnity Basket Type

R&W INSURANCE

12.2%



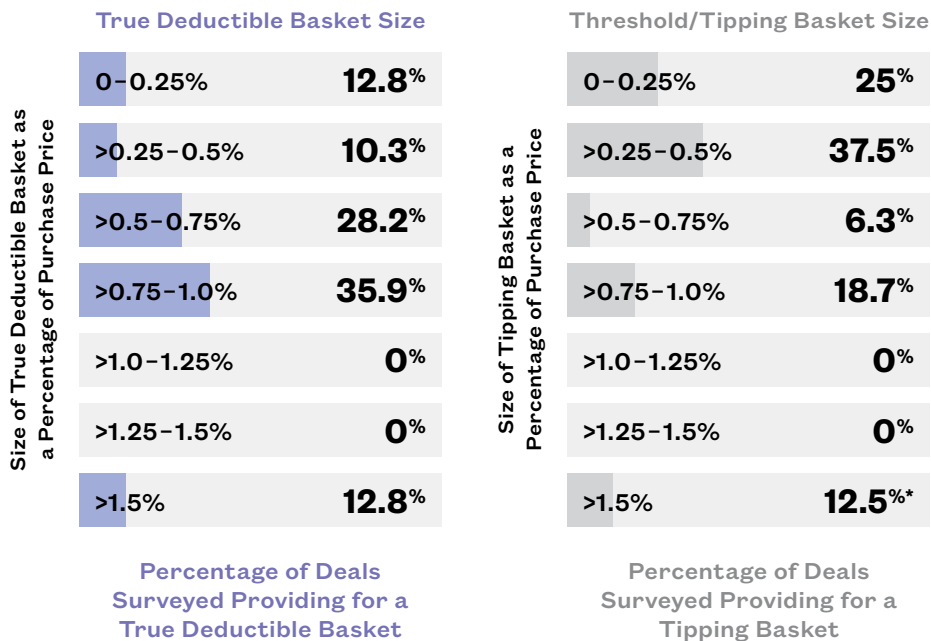
87.8%

OBSERVATIONS

- Approximately 47% of insured deals surveyed provided for an indemnity basket (as compared to approximately 57% in 2019 and approximately 73% in 2018). This declining percentage over the last several years is due in part to the rise in “no survival” deals where having an indemnity basket is not relevant. Accordingly, taking out the “no survival” deals, approximately 94% of deals provided for an indemnity basket, which is consistent with 2019.
- Of the insured deals providing for an indemnity basket, approximately 12% were structured as threshold/tipping baskets (as compared to approximately 9% in 2019) and approximately 88% were structured as deductible baskets (as compared to approximately 91% in 2019), which is consistent with prior years. The higher percentage of insured deals providing for a deductible basket, rather than a threshold/tipping basket, is further evidence of a seller-friendly transaction market.

Indemnity Basket Size

NO R&W INSURANCE



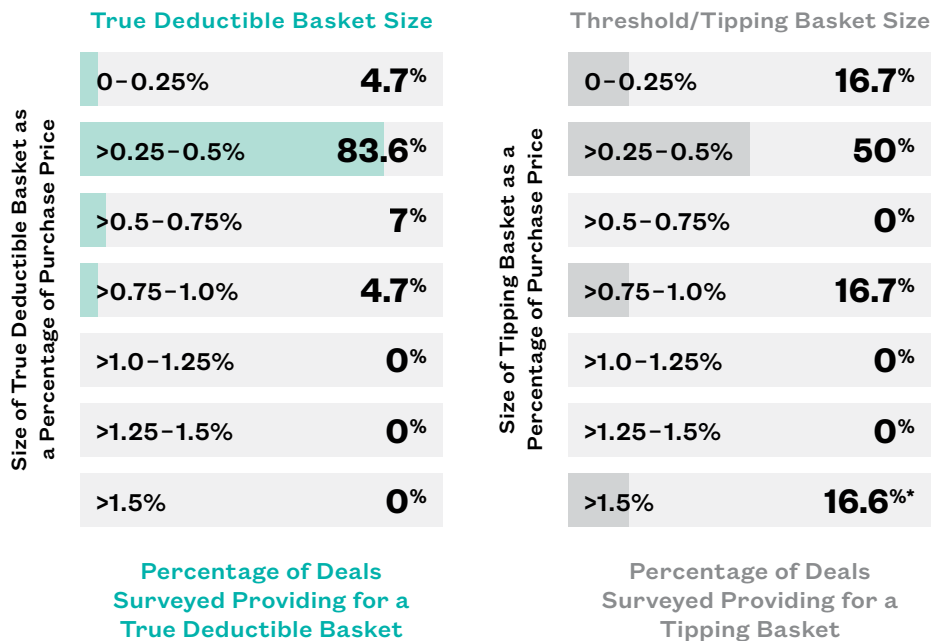
OBSERVATIONS

- The median basket size in non-insured deals surveyed in 2020/2021 was 0.8% of the purchase price, which is consistent with prior years.
- Approximately 87% of non-insured deals with a deductible had a basket size of 1% or less (as compared to approximately 76% in 2019) and approximately 51% had a deductible basket of 0.75% or less (as compared to approximately 44% in 2019).
- Approximately 69% of non-insured deals with a tipping basket had a basket size of 0.75% or less (as compared to approximately 82% in 2019).

***IMPORTANT NOTE:** A limited number of the deals surveyed, which such deals are included in the calculations for the charts on pages 17 and 18, had a basket size in excess of 1.5% of the purchase price. These deals were subject to unique facts and included certain terms that vary from the “market” terms in the other deals surveyed. Again, the specific facts and circumstances of each deal will often carry the day in deal negotiations even if “not market”.

Indemnity Basket Size

R&W INSURANCE

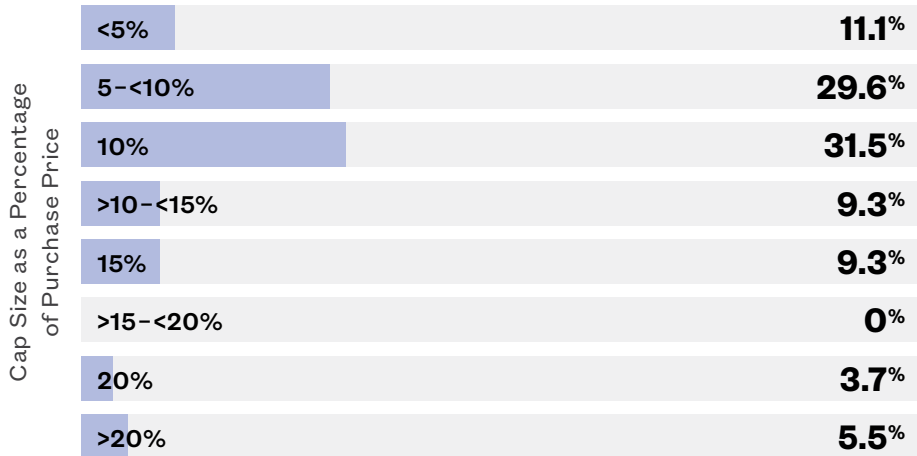


OBSERVATIONS

- The median basket size in insured deals surveyed in 2020/2021 was 0.5% of the purchase price, which is consistent with prior years.
- Approximately 88% of insured deals surveyed with a deductible had a basket size of 0.5% or less and approximately 95% had a deductible basket size of 0.75% or less, each of which is consistent with 2019.

Indemnity Cap Size

NO R&W INSURANCE



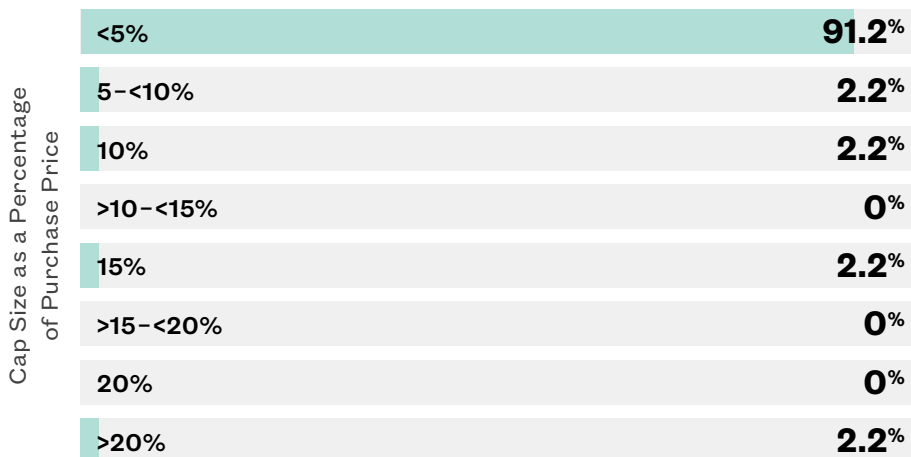
Percentage of Deals Surveyed Providing for Indemnity Cap

OBSERVATIONS

- Approximately 75% of non-insured deals surveyed had an indemnity cap, which is consistent with 2019. The decrease in number of deals with an indemnity cap since 2018 (approximately 90%) has been in large part due to the continued increase in “no survival” deals, which removed the need for an indemnity cap related to representations and warranties. However, without taking “no survival” deals into account, approximately 98% of non-insured deals surveyed provided for an indemnity cap, which is consistent with 2019.
- The median indemnity cap for non-insured deals surveyed without taking “no survival” deals into account was approximately 10%, which is consistent with 2019.
- Approximately 72% of non-insured deals surveyed without taking “no survival” deals into account had an indemnity cap of 10% or less (as compared to approximately 58% in 2019), and approximately 91% had an indemnity cap of 15% or less (as compared to approximately 79% in 2019).

Indemnity Cap Size

R&W INSURANCE



Percentage of Deals Surveyed Providing for Indemnity Cap

OBSERVATIONS

- Approximately 60% of insured deals surveyed had an indemnity cap, which is consistent with 2019. The decrease in number of deals with an indemnity cap since 2018 (approximately 78%) was due in large part to the increase in “no survival” deals, which removed the need for an indemnity cap related to representations and warranties. However, without taking the “no survival” deals into account, approximately 96% of insured deals surveyed provided for an indemnity cap, which is consistent with 2019.
- The median indemnity cap for insured deals surveyed without taking “no survival” deals into account was 0.5%, which is consistent with prior years.
- As is evident when compared to non-insured deals, the use of R&W insurance will typically greatly reduce the seller’s indemnity cap (median cap of 0.5% for insured deals, as compared to 10% for non-insured deals, without taking “no survival” deals into account) under the purchase agreement, which is due to the fact that the buyer can seek recourse under the R&W policy.

Fraud Exceptions and Definitions

Private target middle market acquisition agreements often include fraud exceptions to certain limitations on buyers’ indemnification rights and remedies, such as caps and baskets. Unless “fraud” is carefully defined in the agreement, however, a seller may find itself subject to post-closing liability for more than intended by the fraud exception. In the 2020/2021 Survey, we have continued to analyze the percentage of deals that included fraud carve outs to certain limitations on liability, and continued to track the percentage of deals that limited fraud to intentional acts, and the percentage of deals that limited fraud to the representations and warranties made in the acquisition agreement.

NO R&W INSURANCE	R&W INSURANCE
Fraud Exception	
<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>
Fraud Defined	
<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>

Following are a few examples of fraud definitions based on the agreements reviewed the 2020/2021 Survey, ordered from most to least seller protective. Note that the most seller protective of the definitions also limits fraud to a particular universe of individuals with actual knowledge of the fraud.

- **“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.

Choice of Governing Law

The 2020/2021 Survey results revealed that Delaware law continues to be the most popular “governing law” choice.

NO R&W INSURANCE	R&W INSURANCE
Of the non-insured deals surveyed in 2020/2021, the governing law for 66% of such deals was Delaware (as compared to 50% in 2019), 7% was New York (as compared to 15% in 2019), and 27% was a jurisdiction other than Delaware or New York (as compared to 35% in 2019).	Of the insured deals surveyed in 2020/2021, the governing law for 86% of such deals was Delaware (as compared to 74% in 2019), 10% was New York (which is consistent with 2019), and 4% was a jurisdiction other than Delaware or New York (as compared to 16% in 2019).

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.

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.

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.

2022 Hart-Scott-Rodino Act Thresholds

The Hart-Scott-Rodino (“HSR”) Act requires that parties to transactions for the acquisition of voting securities or assets that exceed certain thresholds notify the Federal Trade Commission (“FTC”) and US Department of Justice (“DOJ”) of the proposed transaction, pay the required fee, and observe a 30-day waiting period before closing so that the agencies can review the deal for potential anticompetitive effects. Effective February 23, 2022, transactions with a value greater than \$403.9 million are generally reportable regardless of the annual net sales or the value of the total assets of the acquiring and acquired entities, while transactions with a value greater than \$101 million but less than \$403.9 million are generally reportable if one party to the transaction has annual net sales or total assets valued at \$20.2 million or more and the other party has annual net sales or total assets valued at \$202 million or more.

The HSR rules provide four additional reporting thresholds: in 2022, parties must report the acquisition of (A) voting securities valued at \$202 million or greater but less than \$1.0098 billion; (B) voting securities valued at \$1.0098 billion or greater; (C) 25% of the voting securities of an issuer, if 25% (or any amount above 25% but less than 50%) is valued at greater than \$2.0196 billion; and (D) 50% of the voting securities of an issuer if valued at greater than \$101 million. The filing fees associated with an HSR filing range between \$45,000 and \$280,000, depending on the size of the transaction, and the HSR reporting thresholds are adjusted annually and are tied to changes in the US gross national product.

Parties to a proposed transaction typically could request an early termination of the 30-day statutory waiting period if the proposed transaction obviously presents no competitive issues. On February 4, 2021, however, the FTC announced that due to the “unprecedented volume of HSR filings for the start of a fiscal year” it would be “reviewing the processes and procedures used to grant early termination” and would be suspending the grant of early termination until further notice. The suspension currently remains in effect, and the FTC has not indicated when it might be lifted.

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Glossary

Indemnity Escrow Amount

The indemnity escrow amount is the portion of the purchase price held in escrow to serve as a fund to satisfy indemnification claims against the seller.

Indemnity Escrow Period

The indemnity escrow period is the length of time after the transaction closing date that the indemnity escrow amount is held before being released to the seller.

Representation & Warranty Survival Period

The survival period is the length of time after the transaction closing date during which a party may make claims for breaches of representations and warranties.

Carve Outs to General Survival Period

Certain specified representations and warranties may be carved out of the general survival period for representations and warranties and survive for a longer period of time.

Indemnity Basket

An indemnity basket requires a party to incur a certain amount of indemnifiable losses before it can seek indemnification from the other party. There are generally two types of baskets: true deductibles and threshold/tipping baskets. With a true deductible, the indemnifying party is only responsible for losses exceeding the basket amount. With a threshold/tipping basket, the indemnifying party is responsible for all losses from dollar one once a party's indemnifiable losses reach the basket amount. Indemnity baskets typically apply only to breaches of "general" representations and warranties.

Indemnity Cap

The indemnity cap limits a party's maximum liability under the indemnification provisions to a stated dollar amount. Indemnity caps typically only apply to breaches of "general" representations and warranties.

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