



# “What’s Market”

## 2008 LBO Legal Issues Survey

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**KAYE SCHOLER LLP**

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# Basis of Survey

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## Survey criteria:

- Acquisitions by private equity funds of privately-held businesses
- Acquisitions funded with debt under Rule 144A that were later registered under the Securities Act of 1933, as amended, on Form S-4
- Agreements entered into from January 1, 2002 through June 1, 2007

# Private Equity Sponsor Groups

3

## Including:

- Apollo Management, LP
- Bain Capital
- Berkshire Hathaway Inc.
- The Blackstone Group
- Bruckmann, Rosser, Sherrill & Co.
- The Carlyle Group
- Castle Harlan, Inc.
- Caxton - Iseman Capital
- CCMP Capital Advisors
- Cerberus
- CSFB Private Equity
- Cypress Group
- DLJ Merchant Banking
- Fenway Partners, Inc.
- GS Capital Partners (Goldman Sachs)
- GTCR Golder Rauner, LLC
- H.I.G. Capital LLC
- Jefferies Capital Partners
- J.W. Childs Associates
- Kohlberg & Co.
- Madison Dearborn Partners
- Merrill Lynch Global Private Equity
- Morgan Stanley Capital Partners
- Onex Corporation
- One Equity Partners
- Ripplewood Holdings
- Summit Partners
- Texas Pacific Group
- Thoma Cressey Equity Partners
- Thomas H. Lee Partners
- Veritas Capital Management
- Vestar Capital Partners
- Warburg Pincus LLP
- Welsch Carson Anderson & Stowe
- Wind Point Partners



# Purchase Price

# Range of Purchase Prices

5

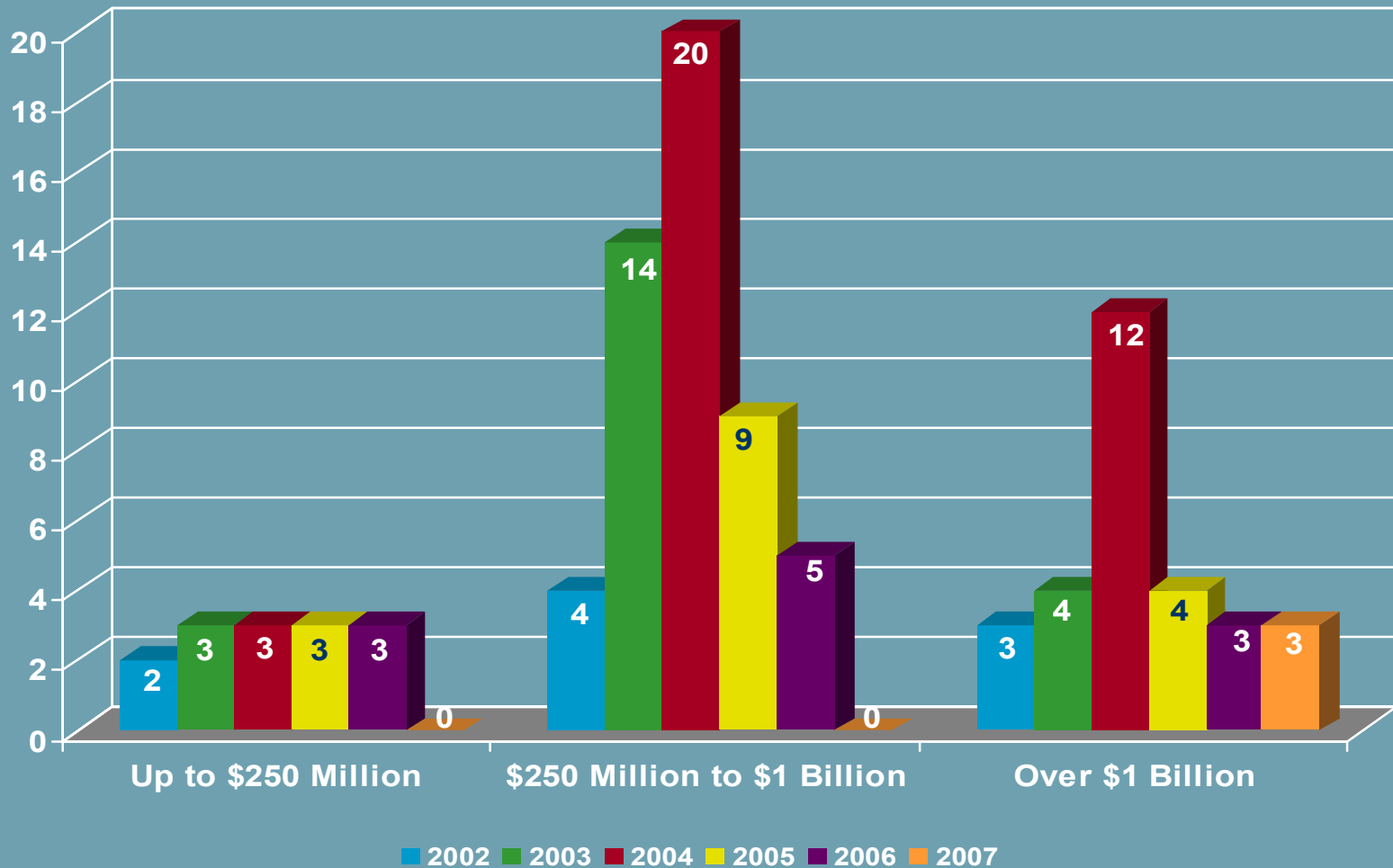
The transactions included in the survey range in value as follows:

Year	# of Deals	Range of Purchase Prices	Average
2007	3	\$2,162-\$4,152 M	\$3,207 M
2006	11	\$125-\$3,703 M	\$965 M
2005	16	\$180-\$2,300 M	\$775 M
2004	35	\$125-\$3,900 M	\$906 M
2003	21	\$165-\$4,200 M	\$814 M
2002	9	\$90-\$4,300 M	\$1,222 M
<b>Total</b>	<b>95</b>	<b>\$90-\$4,300 M</b>	<b>\$973 M</b>

# Range of Purchase Prices

What are the Sizes of the Deals Included in this Survey?

6



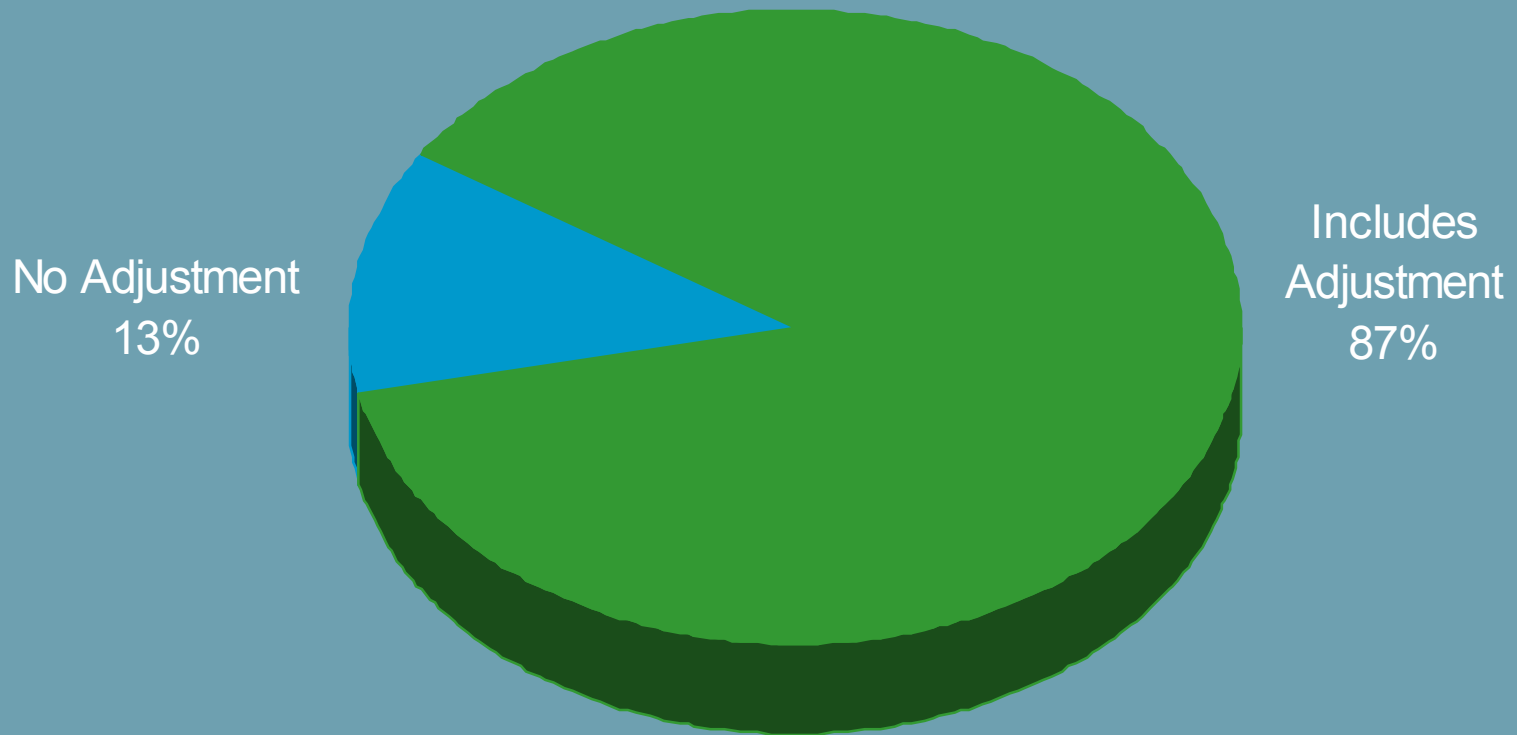


# Purchase Price Adjustments

# Purchase Price Adjustment

What Percentage of Deals Utilized a Purchase Price Adjustment?

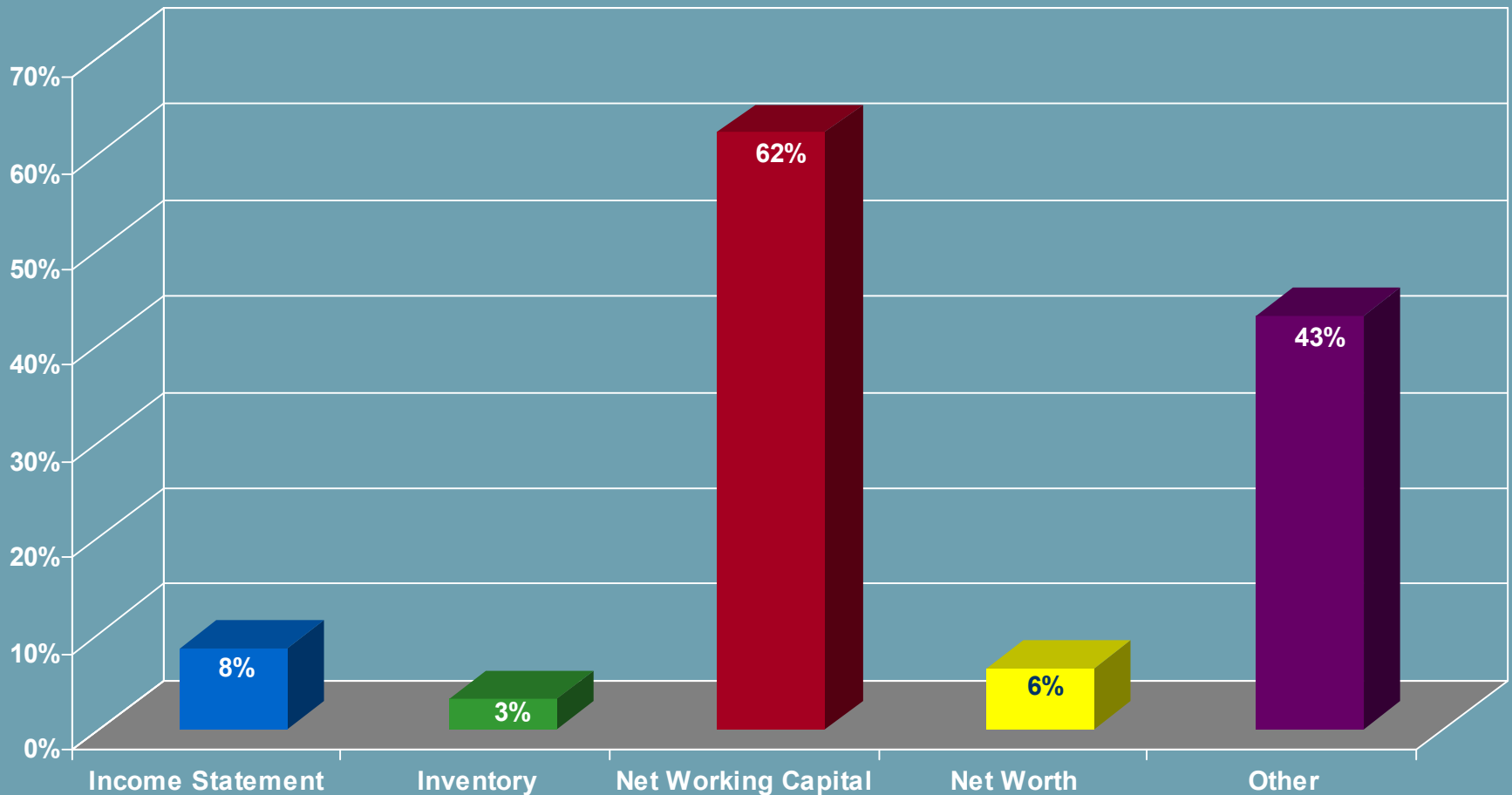
8



# Typical Purchase Price Adjustments

How Often are the Most Typical Purchase Price Adjustments Used?

9



# One-Way or Two-Way?

Was Purchase Price Adjustment One-Way or Two-Way?

10





# Indemnification

# Cap on General Indemnity Claims

Example

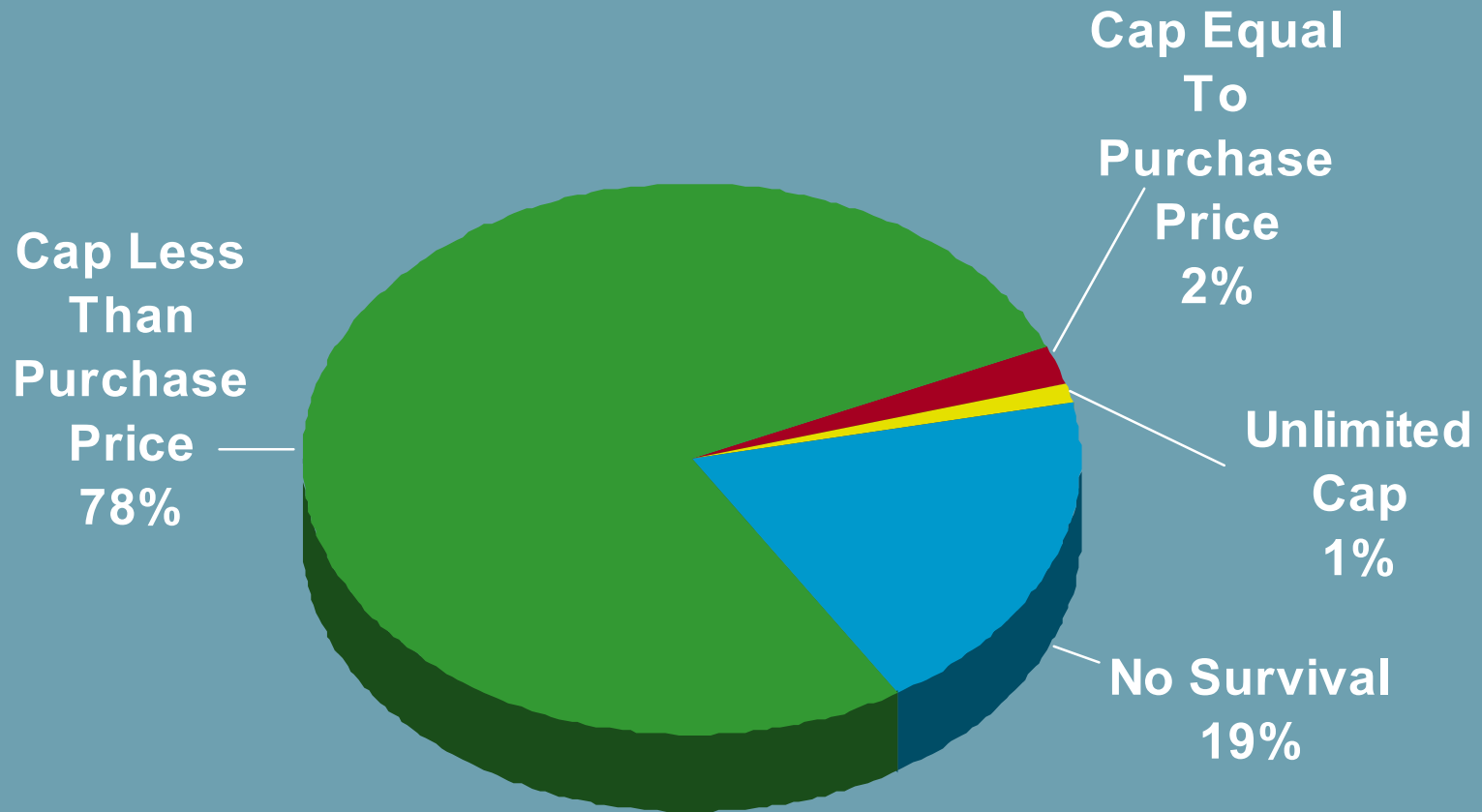
12

- The Buyer Indemnified Persons will not be entitled to recover more than an aggregate of \$xx,xxx,xxx (the “Cap”) from the Sellers with respect to all Losses indemnifiable pursuant to this Section.

# Cap on General Indemnity Claims

Where Do Cap Amounts Typically Fall?

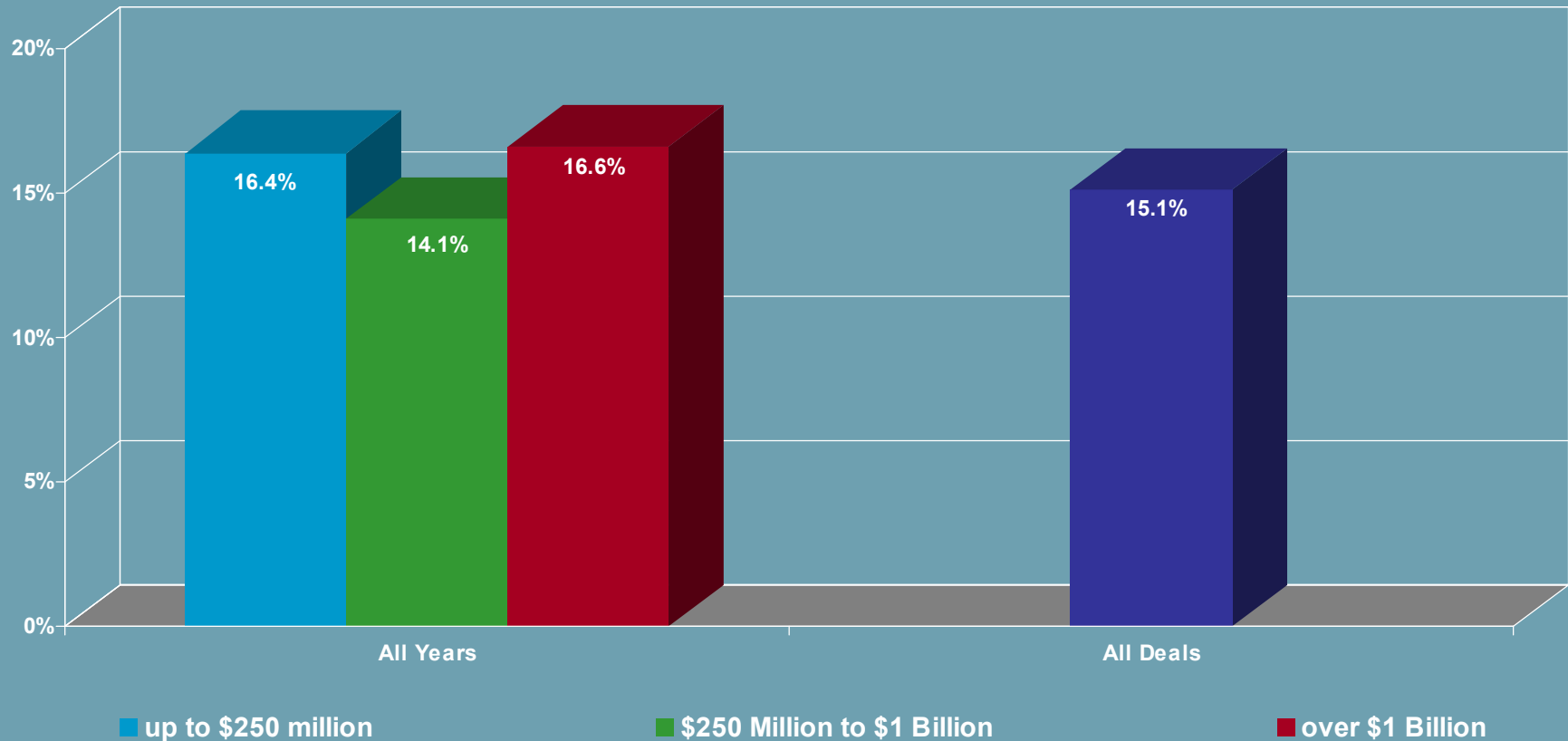
13



# Cap on General Indemnity Claims

What is Average Cap as a Percentage of Purchase Price?  
(Excludes No Survival and Unlimited Cap Deals)

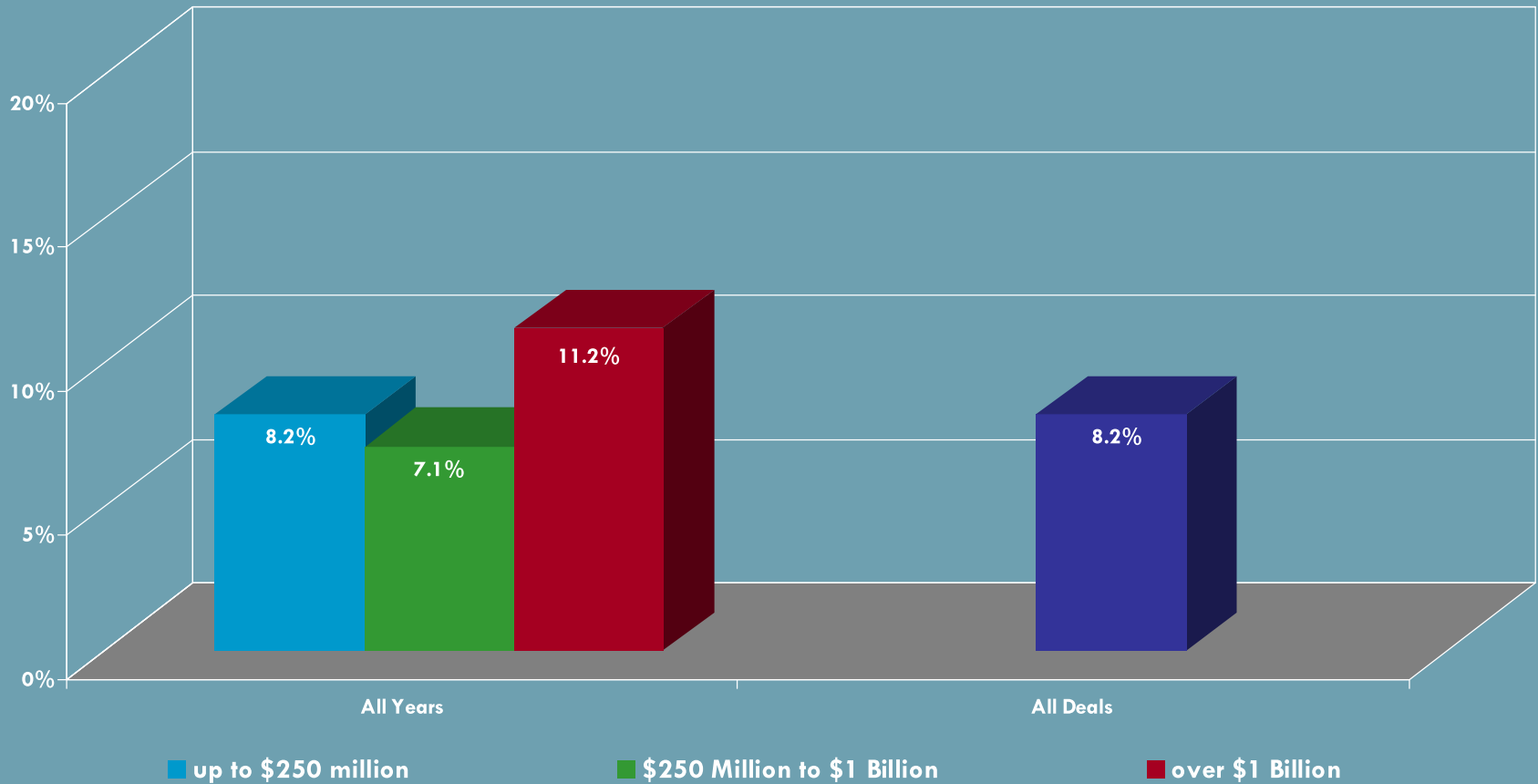
14



# Adjusted Cap on General Indemnity Claims

Adjusted to Exclude Any Cap Over 20%

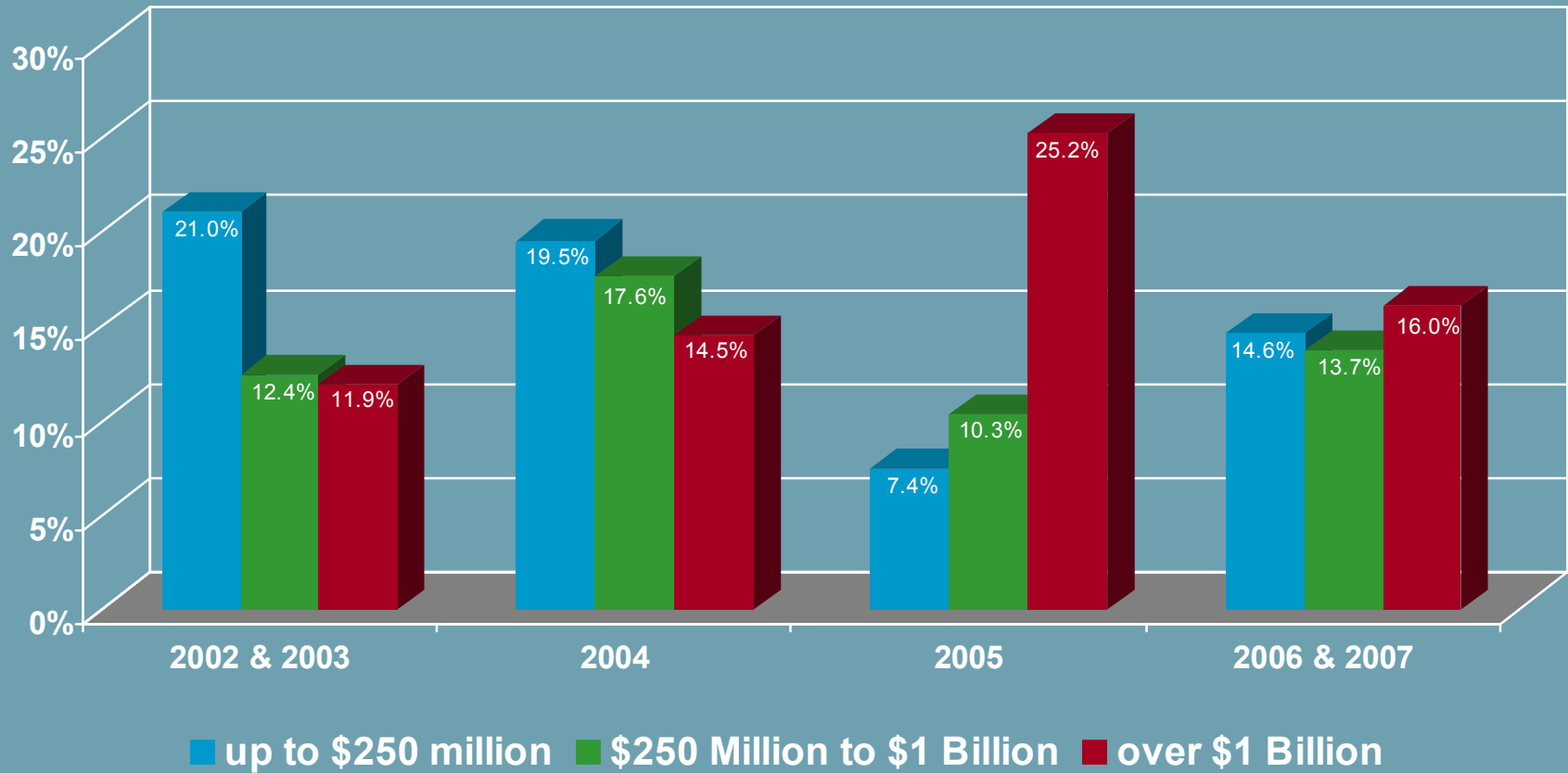
15



# Cap on General Indemnity Claims by Year

What is Average Cap as a Percentage of Purchase Price in Each Year?  
(Excludes No Survival and Unlimited Cap Deals)

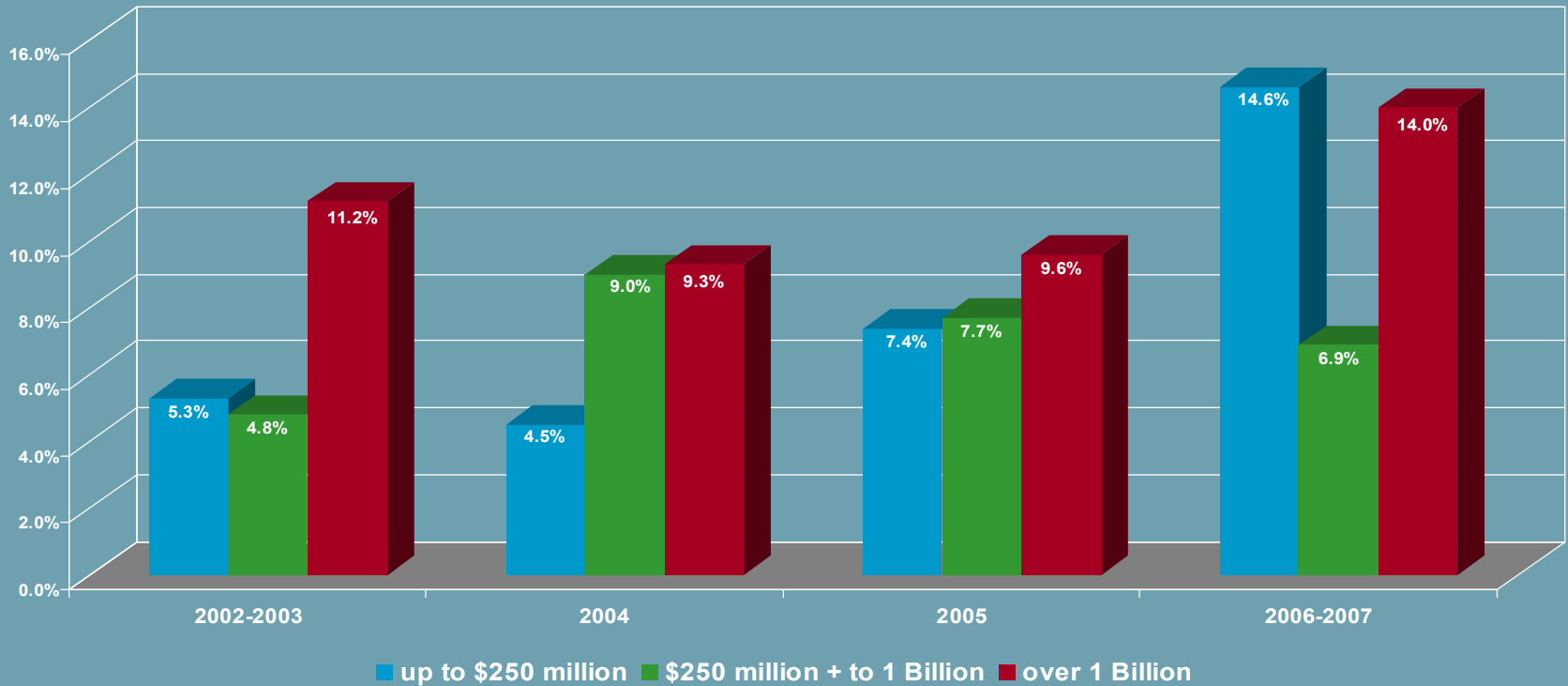
16



# Adjusted Cap on General Indemnity Claims By Year

Adjusted to Exclude Caps Above 20%

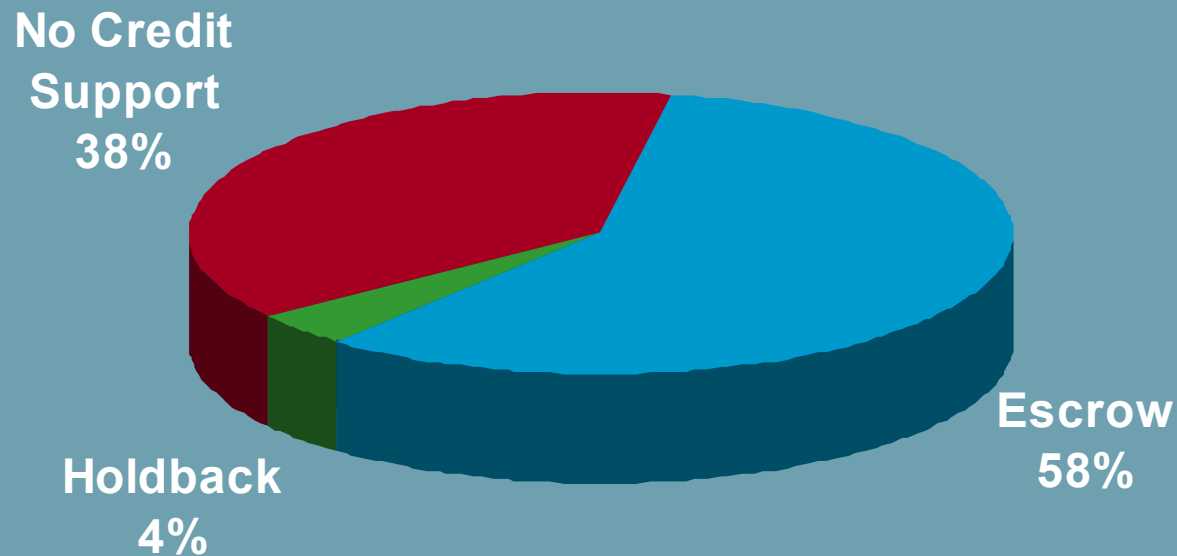
17



# Escrow to Support Indemnification

What Percentage of Deals Include an Escrow or Holdback to Support Indemnity Claims?  
(Excludes No Survival Deals)

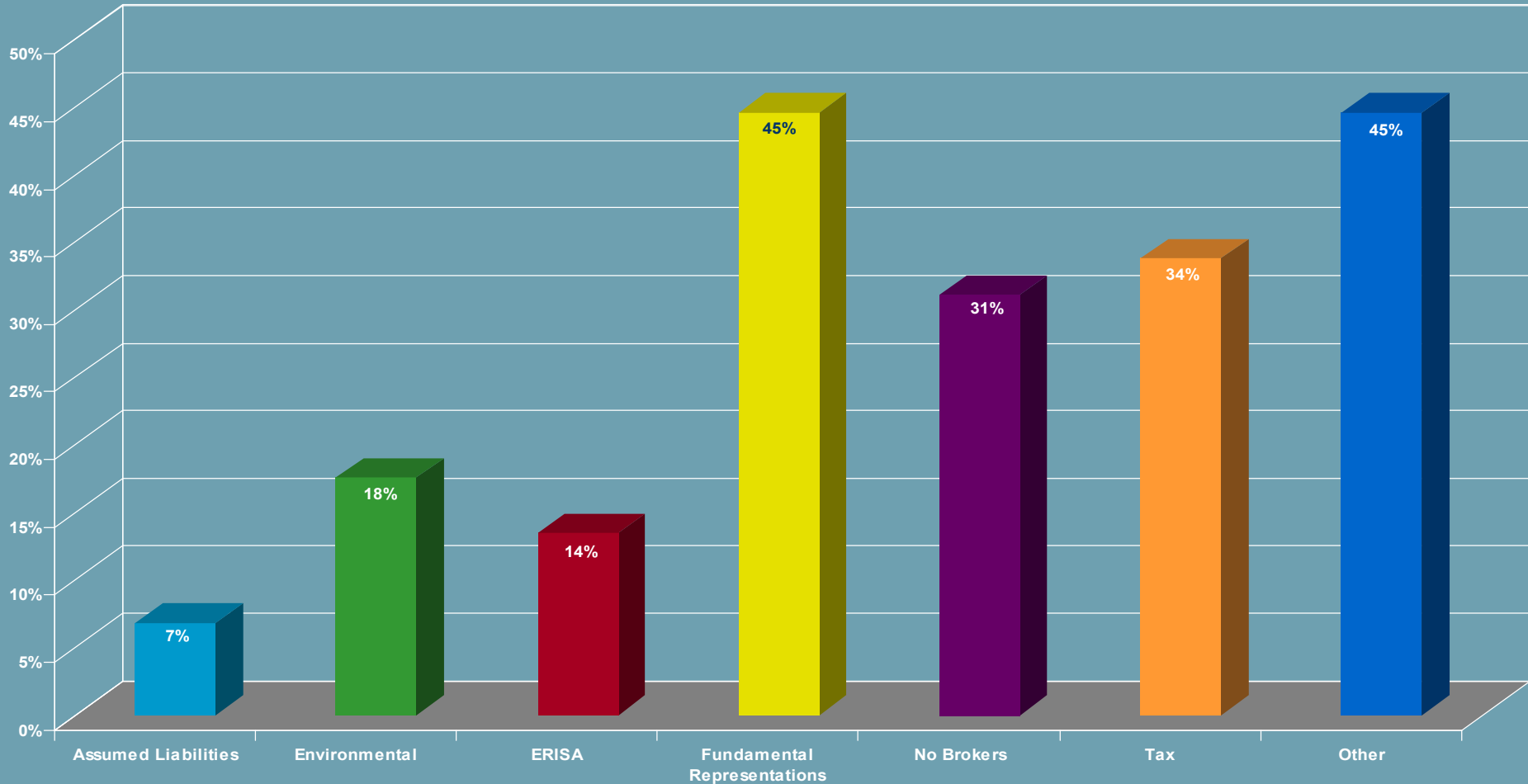
18



# Carve-Outs from Indemnity Caps

What are the Typical Carve-Outs from the Cap on Indemnification?

19



# Indemnity Threshold (“Basket”)

Example of Deductible and Dollar-One Thresholds

20

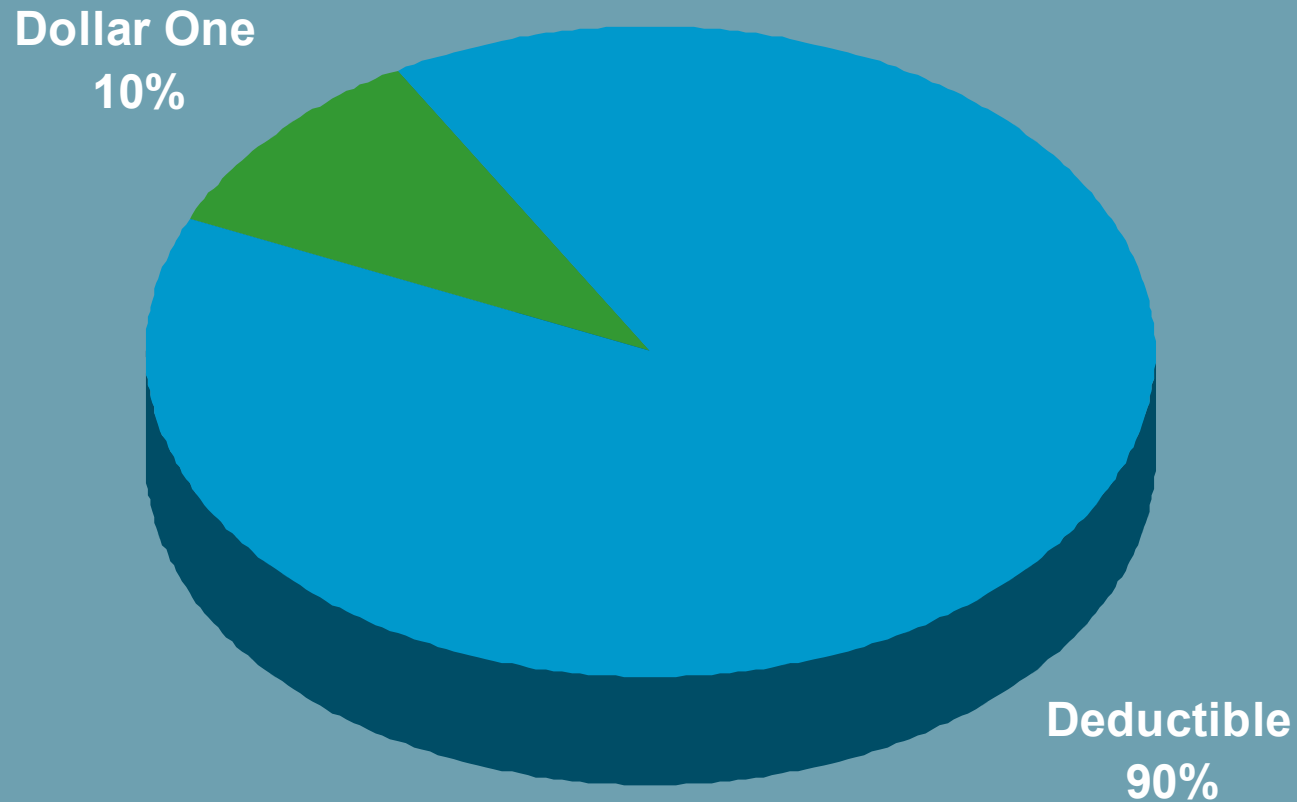
- **Deductible.** Sellers will have no liability (for indemnification or otherwise) with respect to the matters described in clause (d) of Section 10.2 until the total of all Damages with respect to such matters exceeds \$\_\_\_\_\_, *and then only for the amount by which such Damages exceed \$\_\_\_\_\_.*
- **Dollar-One.** Sellers will have no liability (for indemnification or otherwise) with respect to the matters described in clause (d) of Section 10.2 until the total of all Damages with respect to such matters exceeds \$\_\_\_\_\_ *but then shall be liable for all such Damages.*

(Source: ABA Model Stock Purchase Agreement)

# Dollar One vs. Deductible

What Percentage of Deals with a Threshold Include Dollar One or a Deductible?

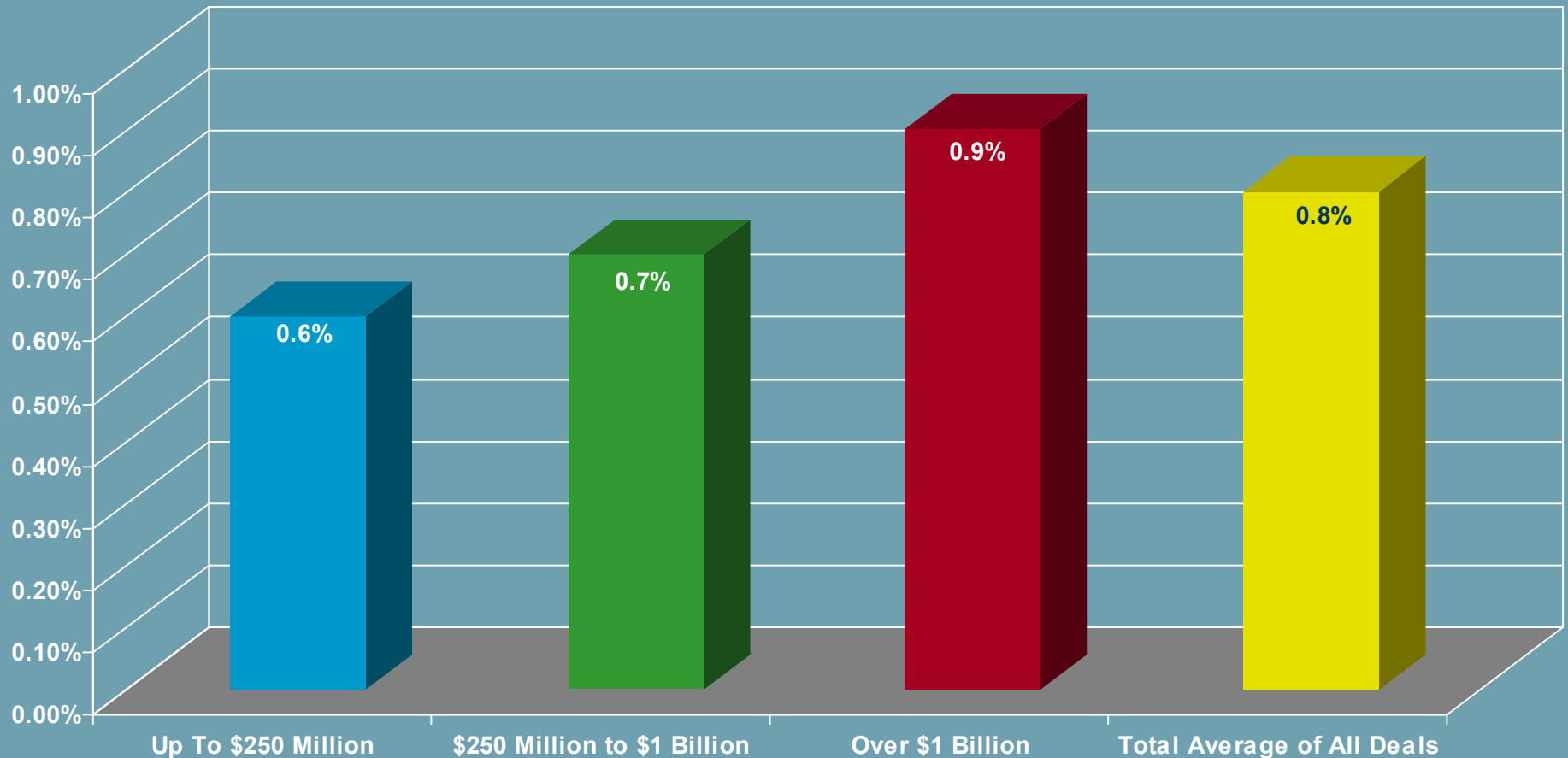
21



# Thresholds as Percentage of Purchase Price

How Large are Thresholds as a Percentage of Purchase Price?

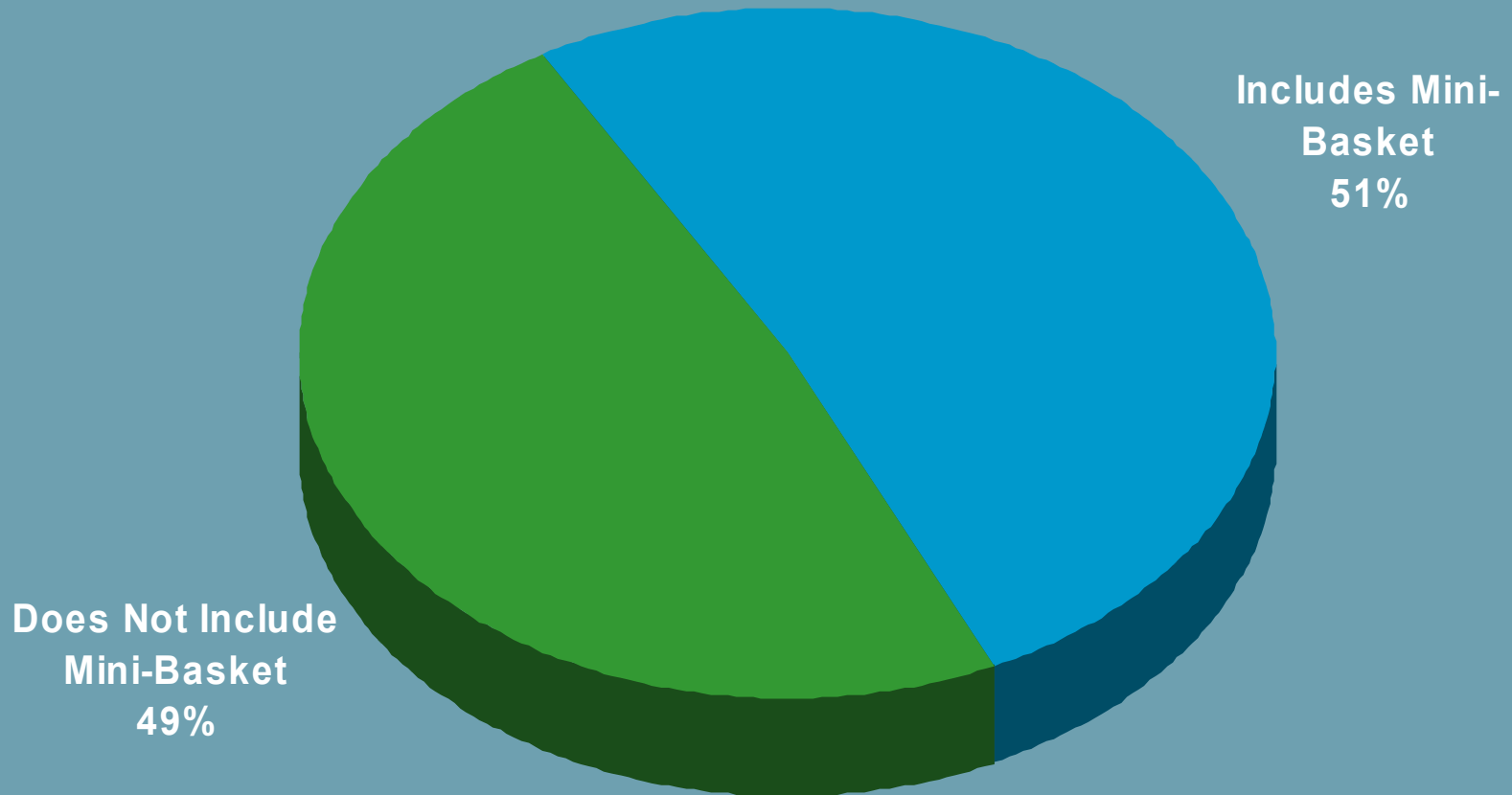
22



# Mini-Basket

What Percentage of Deals Include a “*De Minimis*” Amount for Each Indemnifiable Claim?

23

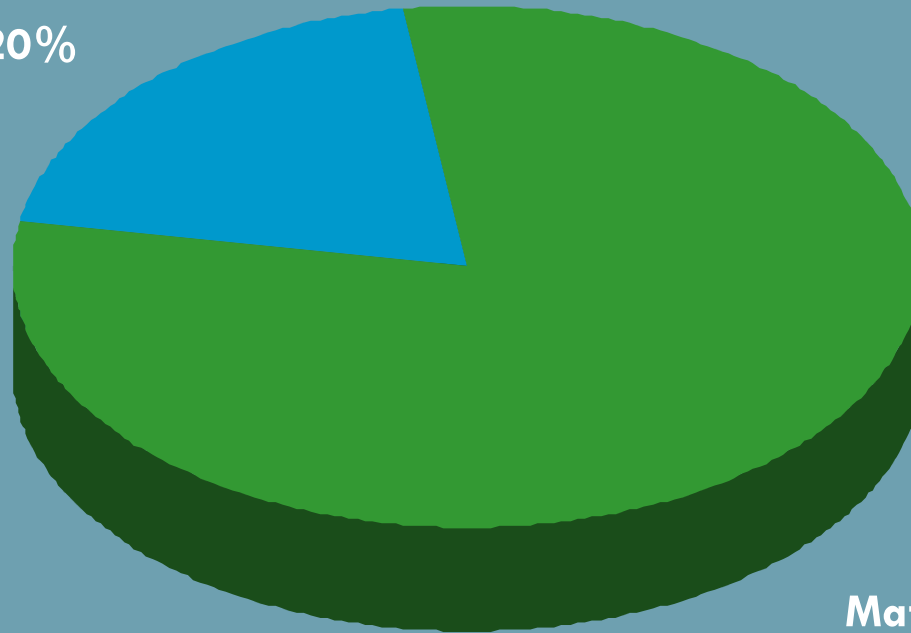


# Materiality Read-Out

What Percentage of Deals “Read Out” Materiality from Indemnification Claim?

24

**Materiality  
Read-Out  
20%**

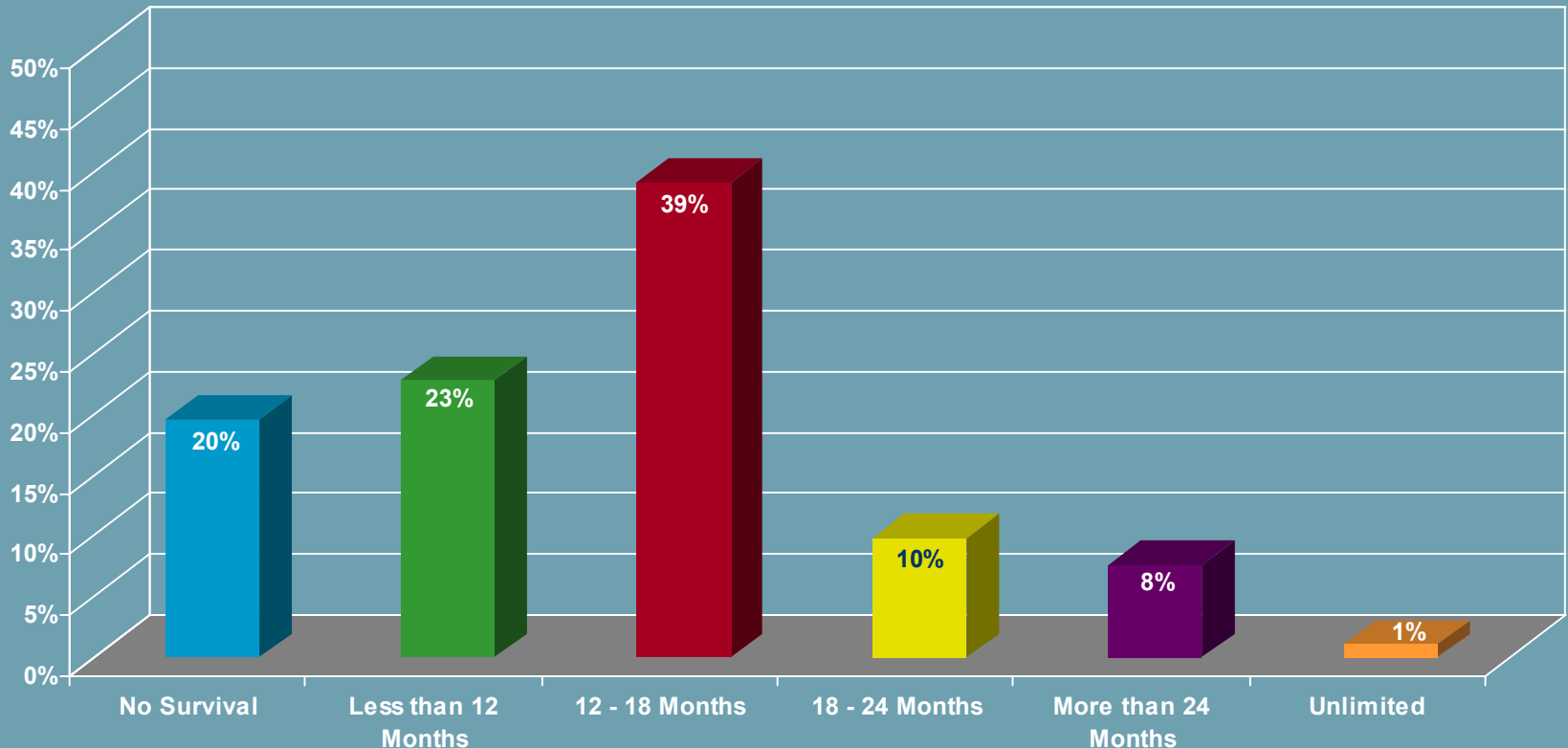


**Materiality  
Threshold Must  
Be Satisfied  
80%**

# Survival of General Indemnity Claims

How Long is the Survival Period for General Indemnity Claims?

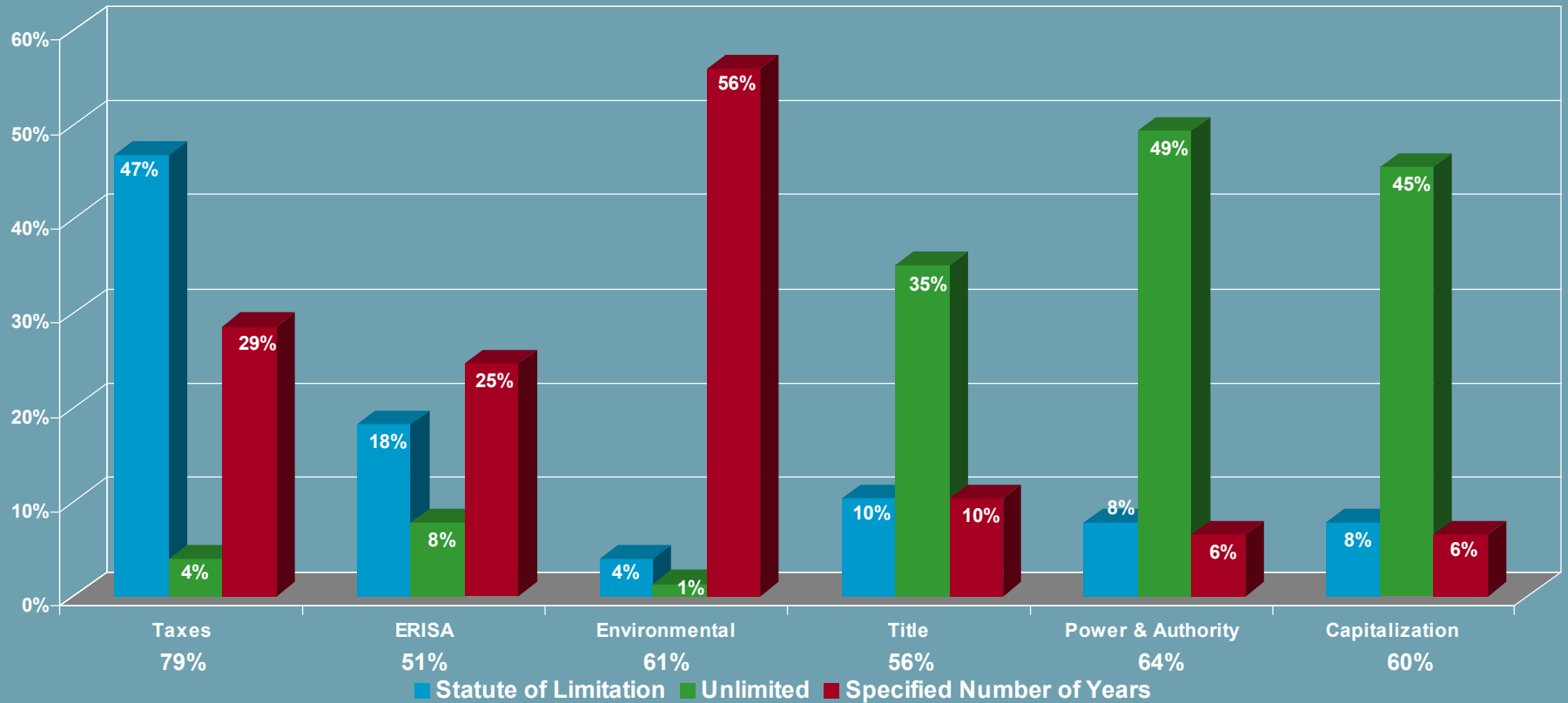
25



# Survival Carve-Outs

What are the Typical Survival Carve-Outs?

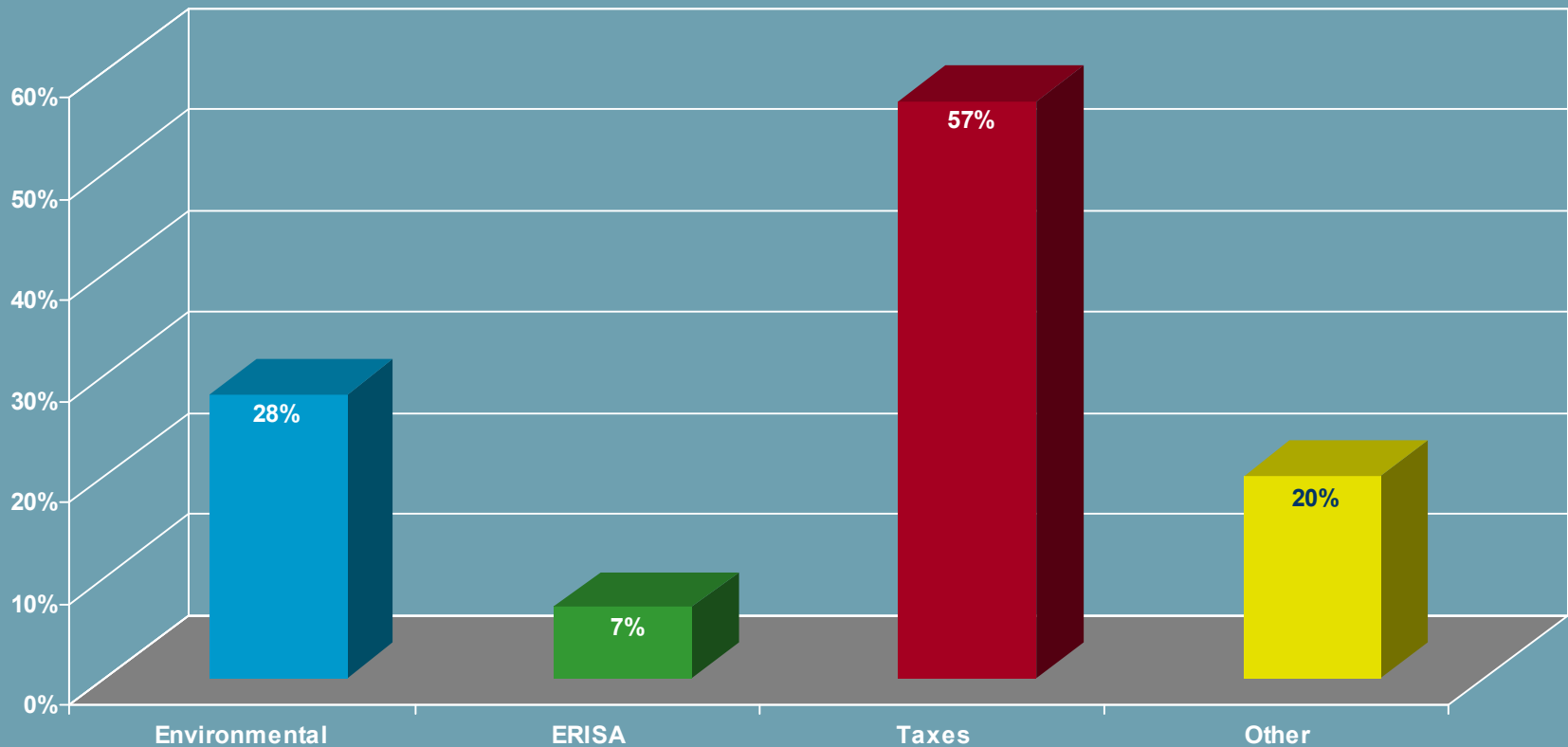
26



# Stand-Alone Indemnities

What are the Typical Stand-Alone Indemnities?  
(Excludes No Survival Deals)

27

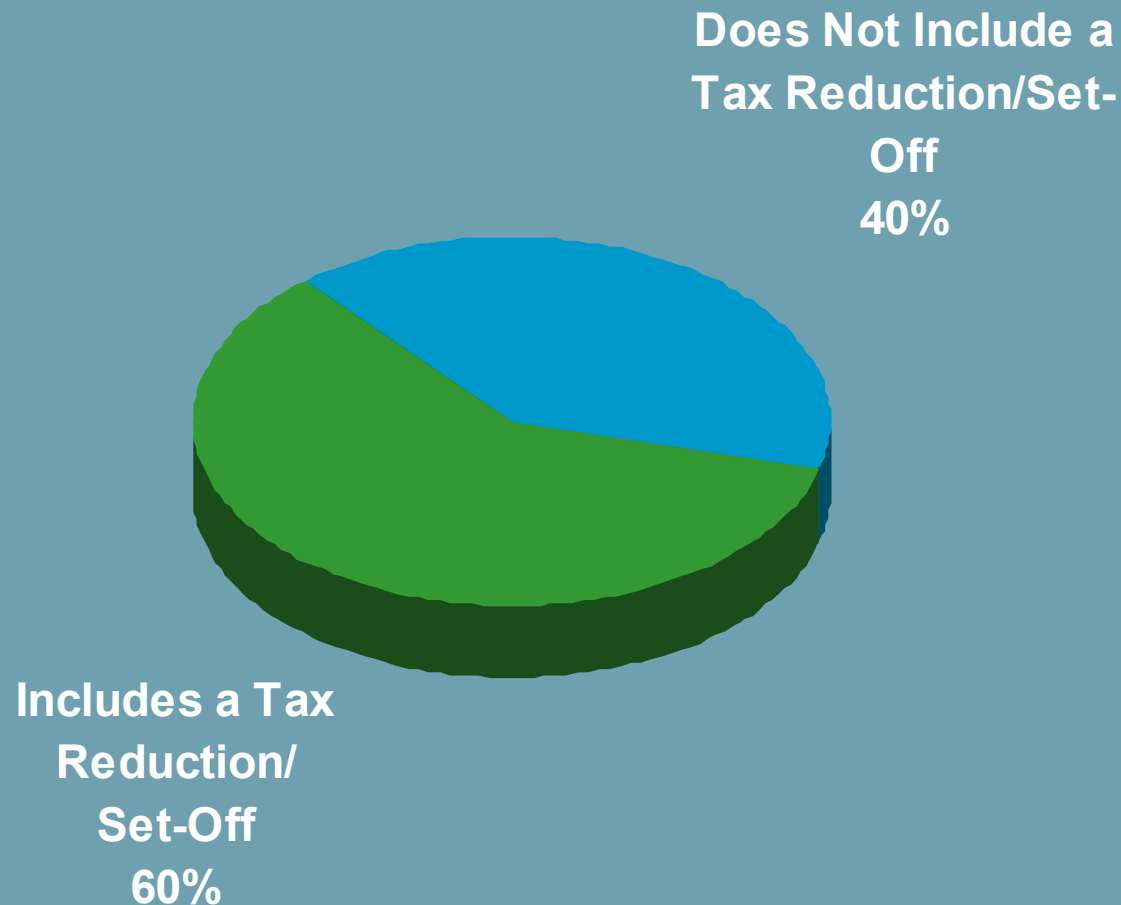


Other Stand-Alone Indemnities Included: Non-Assumed Liabilities, Brokers' Fees, Employee Matters, Title Defects, and Particular Litigation

# Set-Off for Tax Benefits of Indemnity Claim

What Percentage of Deals Include a Reduction or Set-Off for Tax Benefits Related to an Indemnity Claim?

28

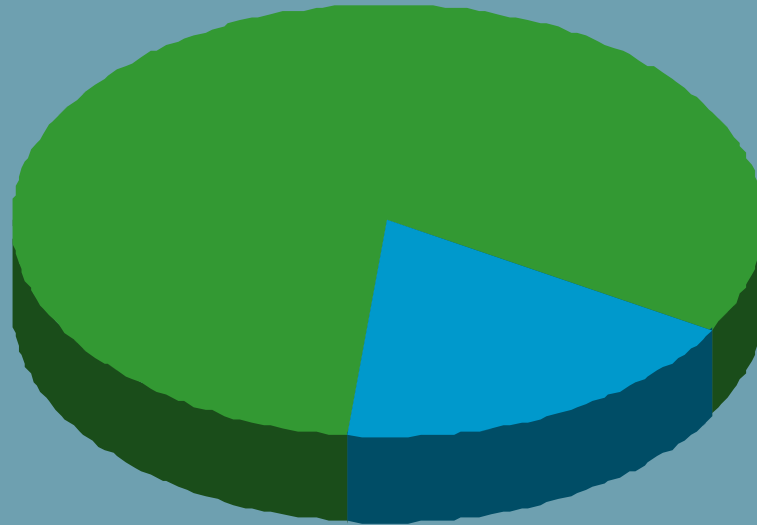


# Set-Off for Insurance Proceeds

What Percentage of Deals Include a Reduction or Set-Off for Insurance Proceeds Received for Claimed Item?

29

Includes an  
Insurance  
Reduction/Set-Off  
82%

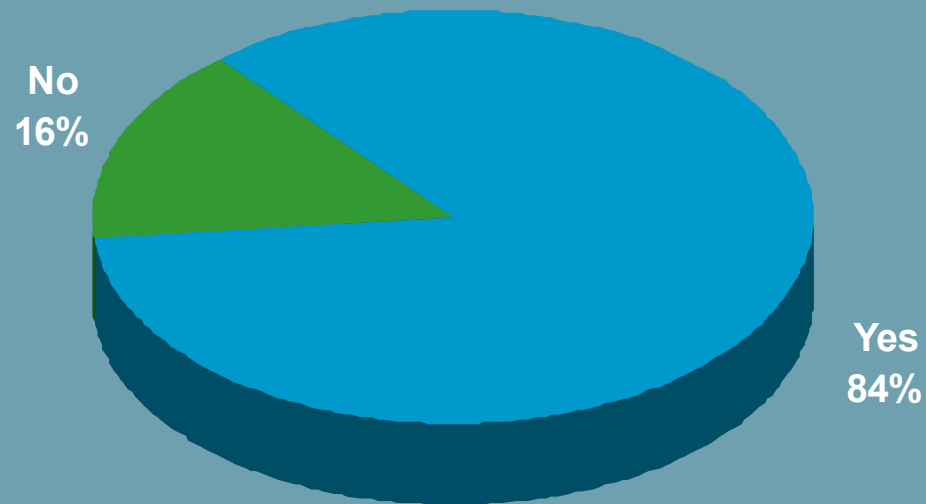


Does Not Include an  
Insurance  
Reduction/Set-Off  
18%

# Indemnification as Exclusive Remedy

Was Indemnification the Exclusive Remedy for Most Types of Claims?

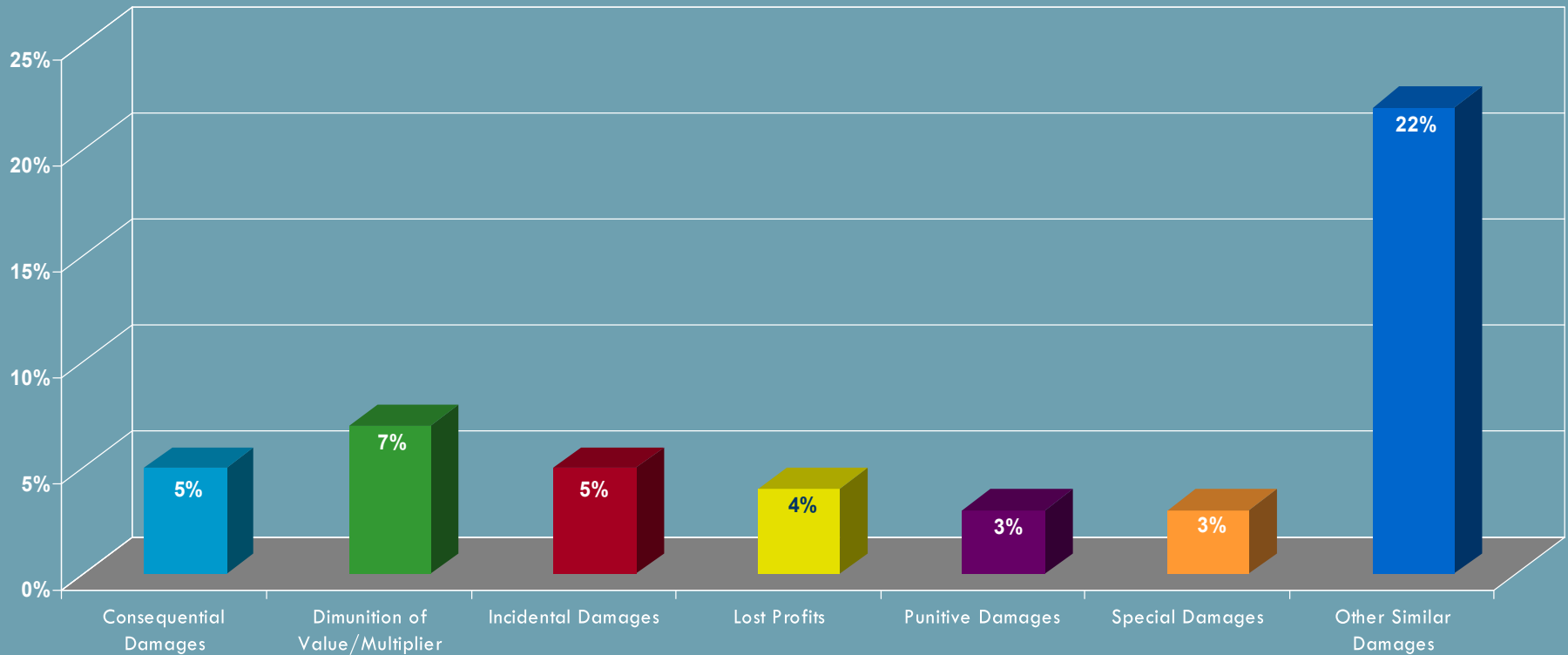
30



# Included Types of Damages

What Types of Damages are Specifically Included in Indemnification?

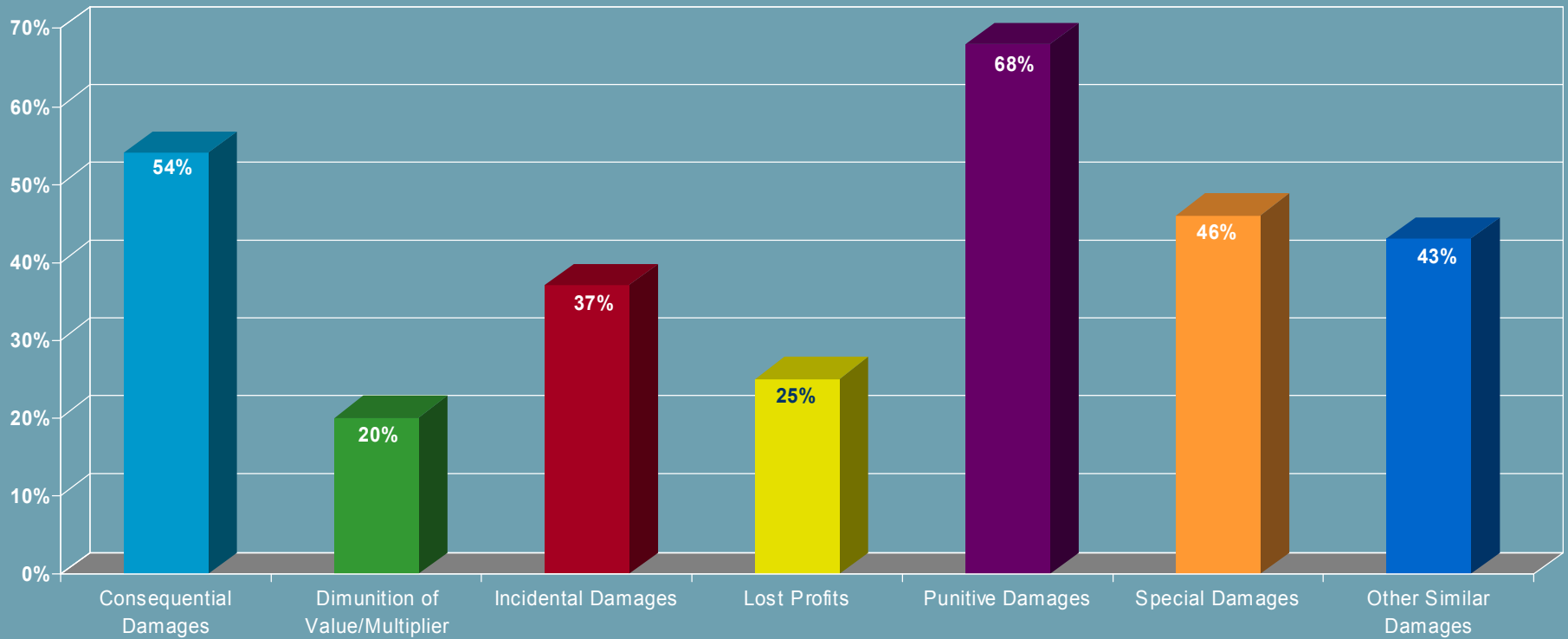
31



# Excluded Types of Damages

What Types of Damages are Explicitly Excluded from Indemnification?

32

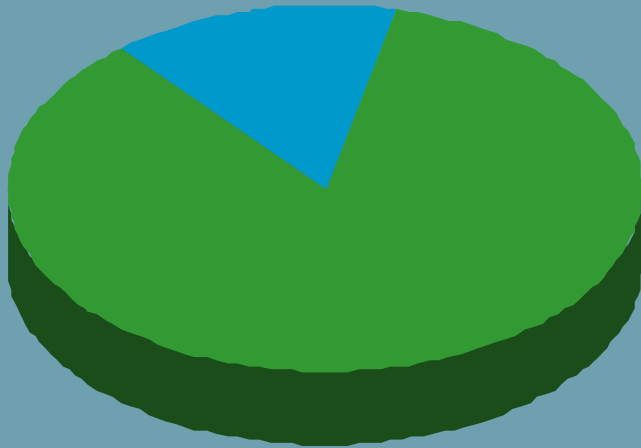


# Alternative Dispute Resolution

33

What Percentage of Deals Utilize ADR Mechanisms?

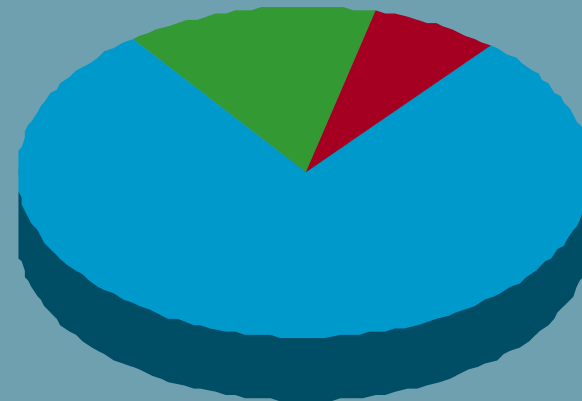
Includes ADR  
15%



Does Not  
Include ADR  
85%

What Type of ADR Did those Deals Use?

Mediation  
14%



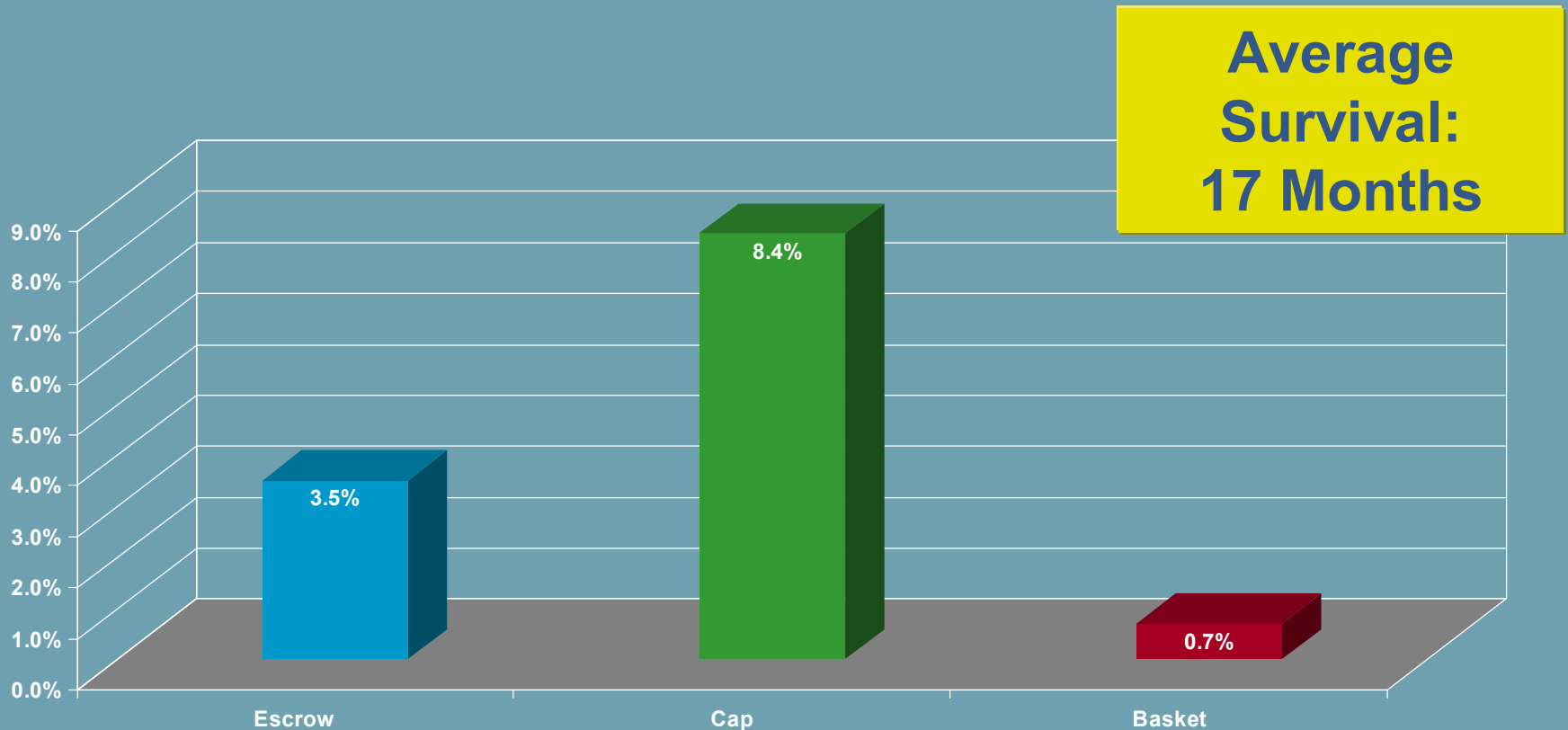
Binding  
Arbitration  
79%

Mediation Then  
Binding  
Arbitration  
7%

# Private Equity Sellers - Indemnification Issues

(As a Percentage of Enterprise Value)

34





# Closing Conditions

# Bring-Down of Representations and Warranties as Closing Condition

Example: MAE Bring-Down

36

- All of Sellers' representations and warranties in this Agreement must have been accurate in all material respects as of the date of this Agreement, and must be accurate in all material respects as of the Closing Date as if made on the Closing Date, without giving effect to any supplement to the Disclosure Letter; provided, however, that this condition shall be deemed to have been satisfied unless the impact of all inaccuracies of representations and warranties (without giving effect to qualifications of materiality or similar qualifiers) would be reasonably likely to have a Material Adverse Effect.

# Bring-Down of Representations and Warranties as Closing Condition

Example: Materiality Bring-Down (No Double-Counting)

37

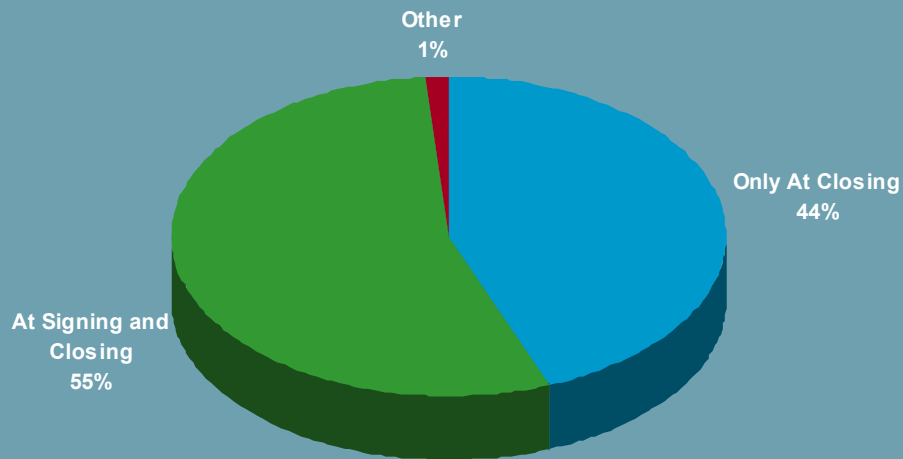
- Each of the representations and warranties made by the Shareholders in this Agreement that are not qualified as to materiality or Material Adverse Effect shall be true and correct **in all material respects** and each of the representations and warranties of the Shareholders that are qualified as to materiality or Material Adverse Effect shall be true and correct **in all respects**.

# Bring-Down of Representations and Warranties as Closing Condition

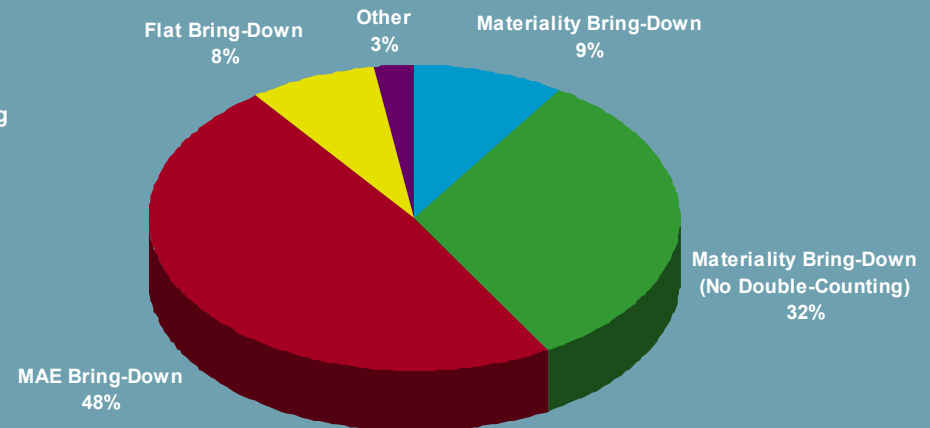
What Are Typical Bring-Down Formulations?

38

## When Made?



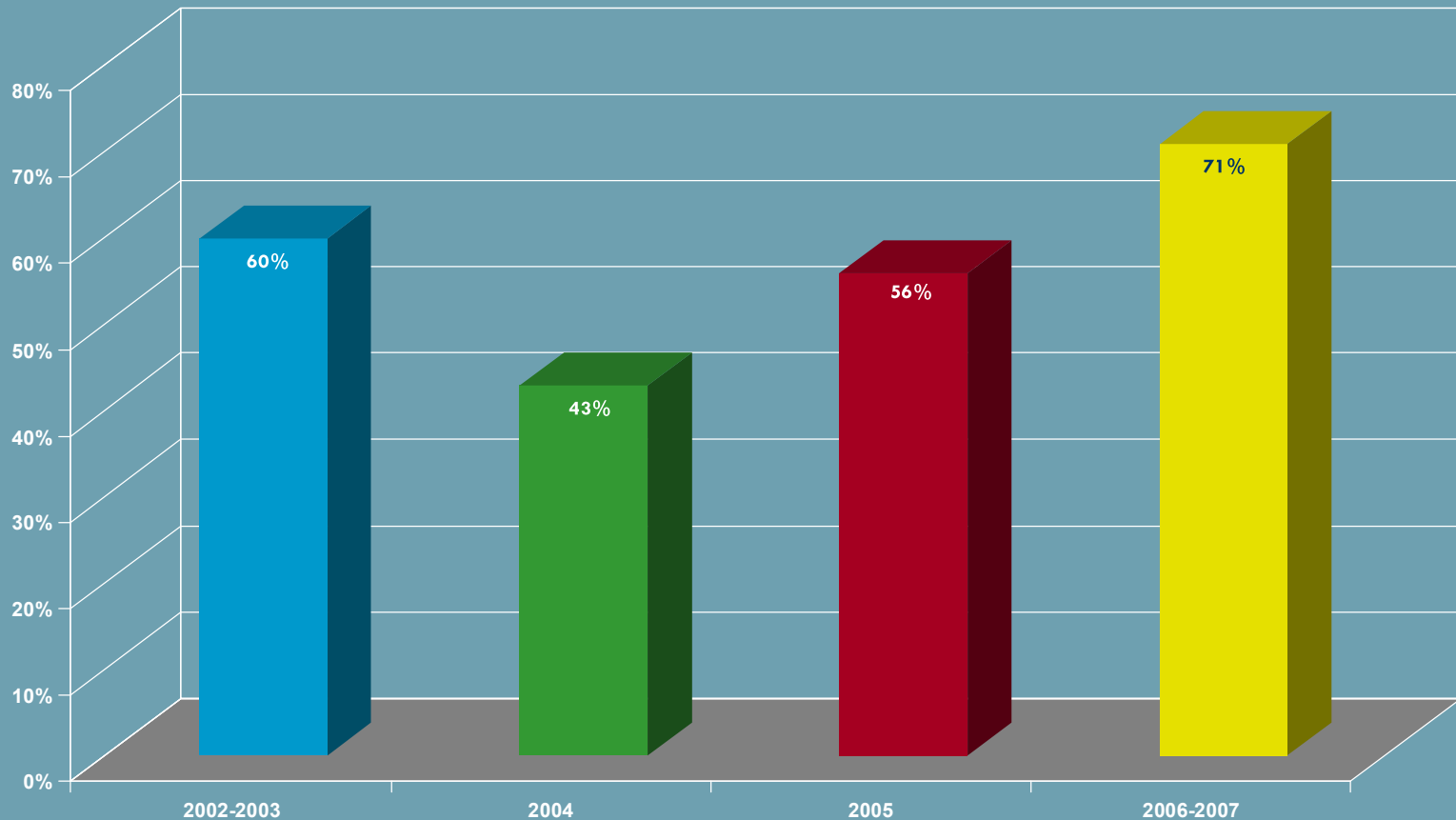
## Level of Materiality?



# MAE Bring-Down Broken Down by Years

What Percentage of Deals in Each Year Use MAE Bring-Down?

39



# Express No MAC Closing Condition

Example

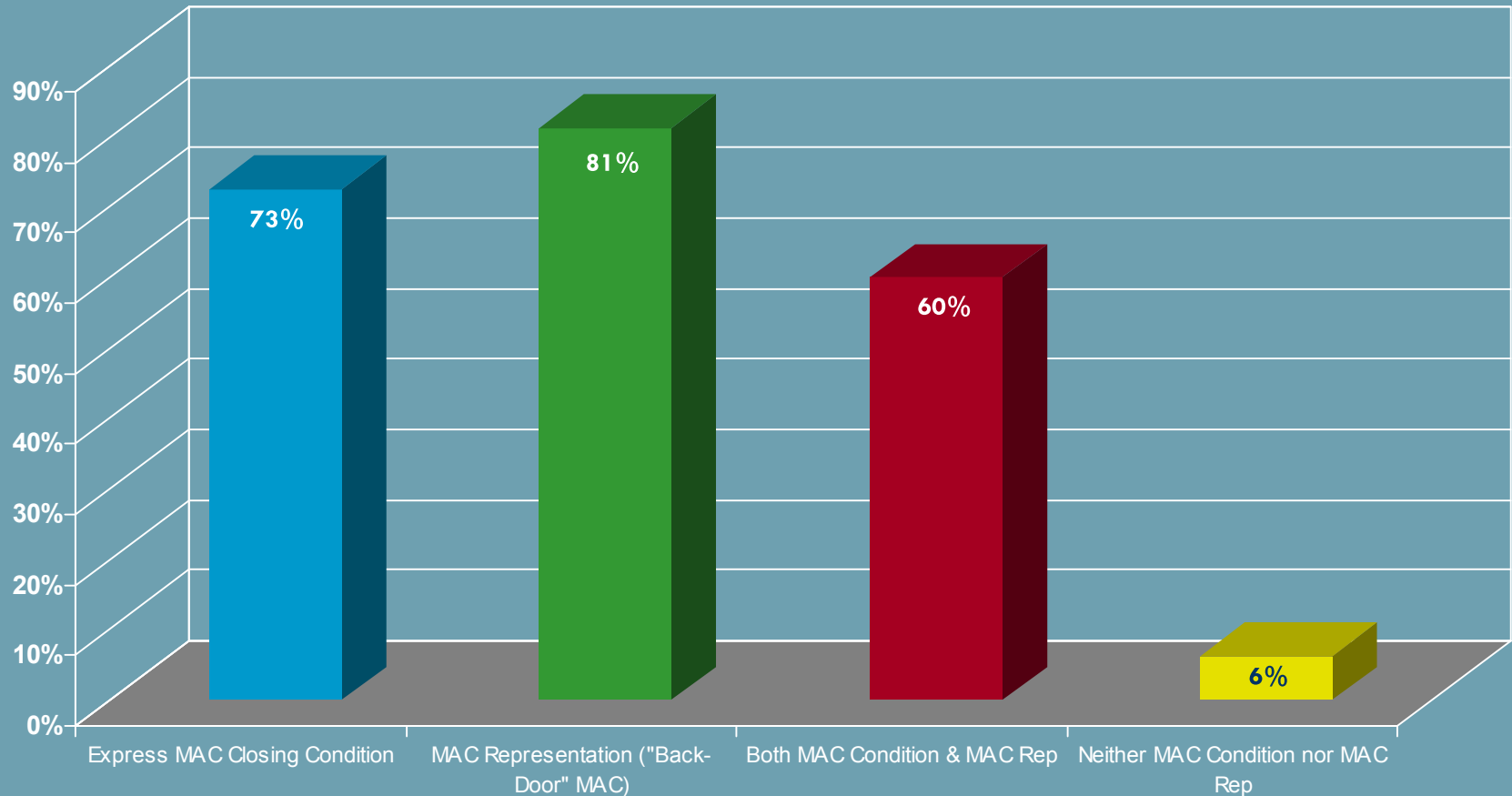
40

- Since the date of this Agreement, there shall not have occurred any condition, change or event that has had or would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.

# Express and “Back-Door” MACs

What Percentage of Deals Use Express MAC Closing Condition or So-Called “Back-Door” MAC?

41



# “Material Adverse Effect” or “Material Adverse Change”

Example

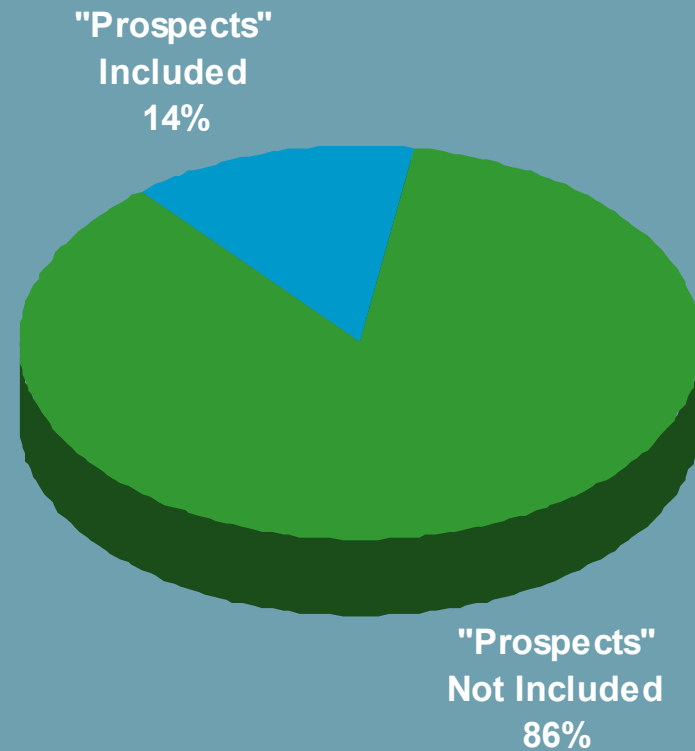
42

- “Material Adverse Effect” means any change, development, effect or condition that, individually or in the aggregate, has had, or is reasonably likely to have, a material and adverse effect on the business, properties, assets, liabilities, condition (financial or otherwise), **prospects** or results of operations of the Company and its subsidiaries, taken as a whole; ...

# Material Adverse Effect

What Percentage of Deals with MAE Definition Include the Term "Prospects"?

43



# Material Adverse Effect “Carve-Outs”

## Example

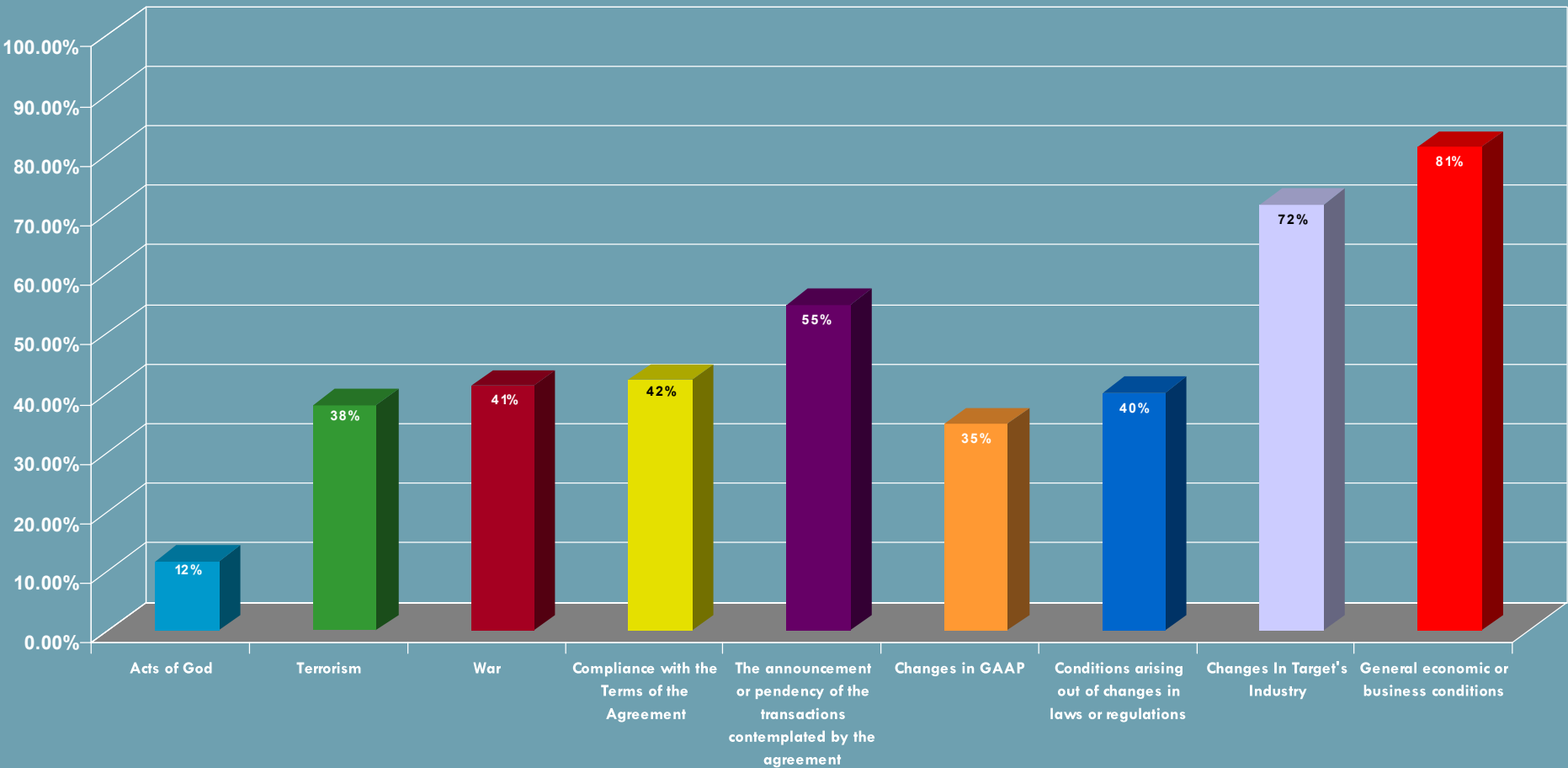
44

- ... provided, however, that none of the following shall be taken into account in determining whether there has been a Material Adverse Effect: (1) the effects of changes that are generally applicable to the industry and markets in which the Company and its subsidiaries operate, (2) the effects of changes that are generally applicable to the United States economy or securities markets or the world economy or international securities markets or (3) any effects on the employees, suppliers, licensors or customers of the Company and its subsidiaries directly resulting from the public announcement of this Agreement, the transactions contemplated hereby or the consummation of such transactions;

# MAE Carve-Outs

What are the Typical Carve-Outs to the MAE Definition?

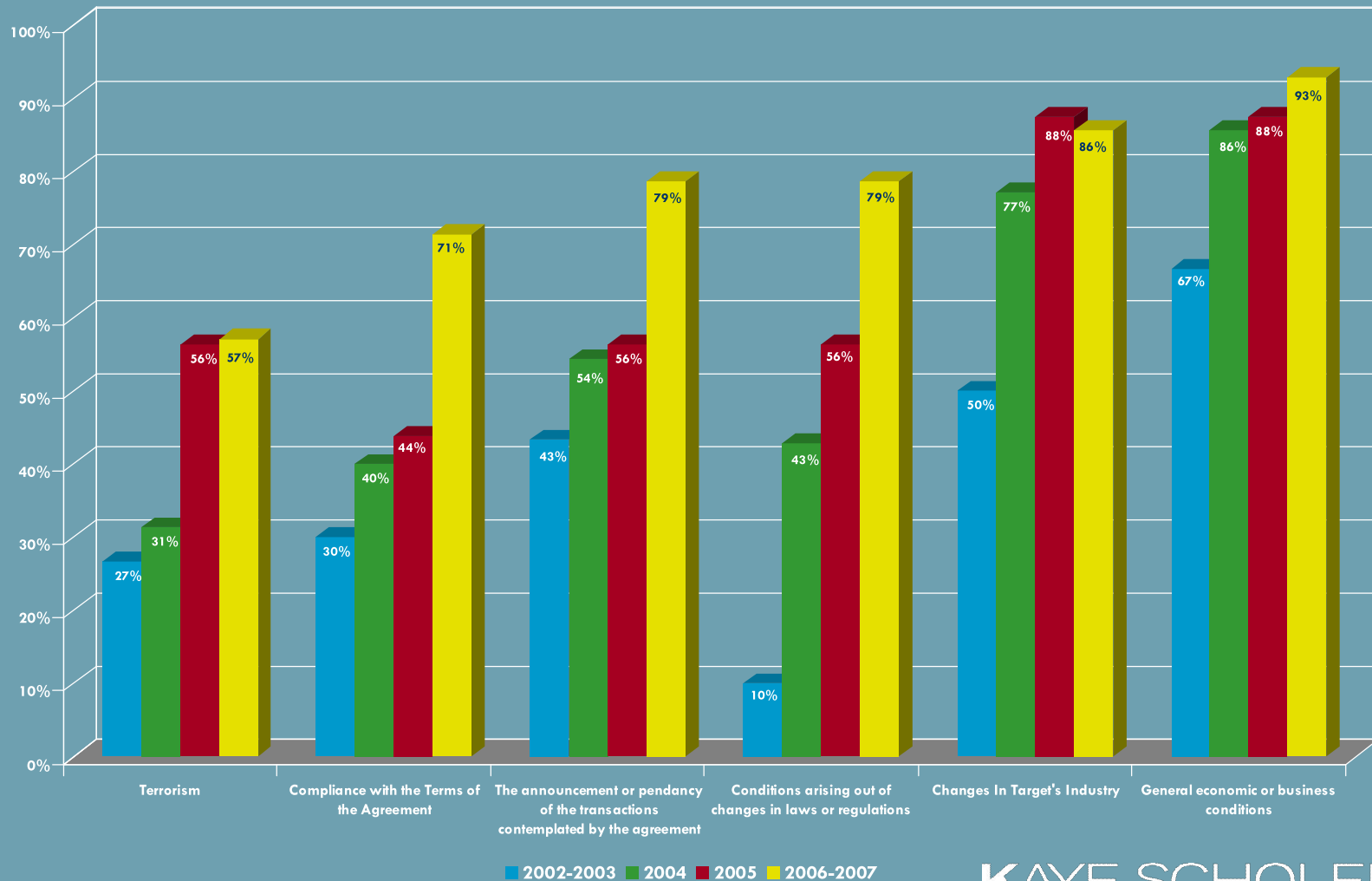
45



# MAE Carve-Outs By Year

What are the Trends for MAE Carve-Outs?

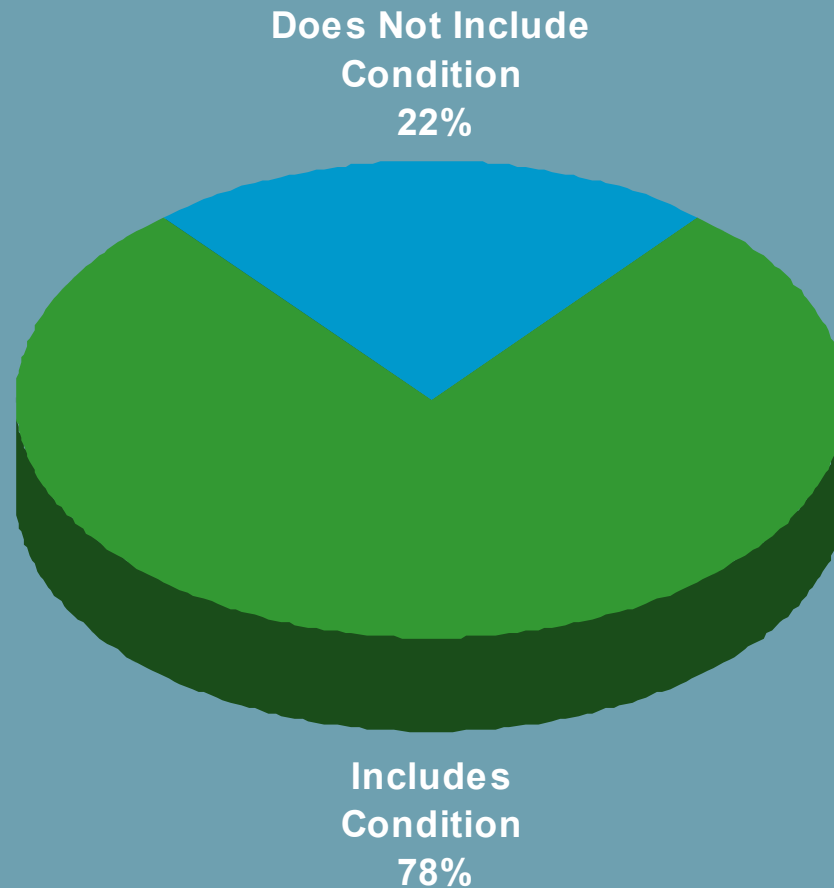
46



# Financing Outs

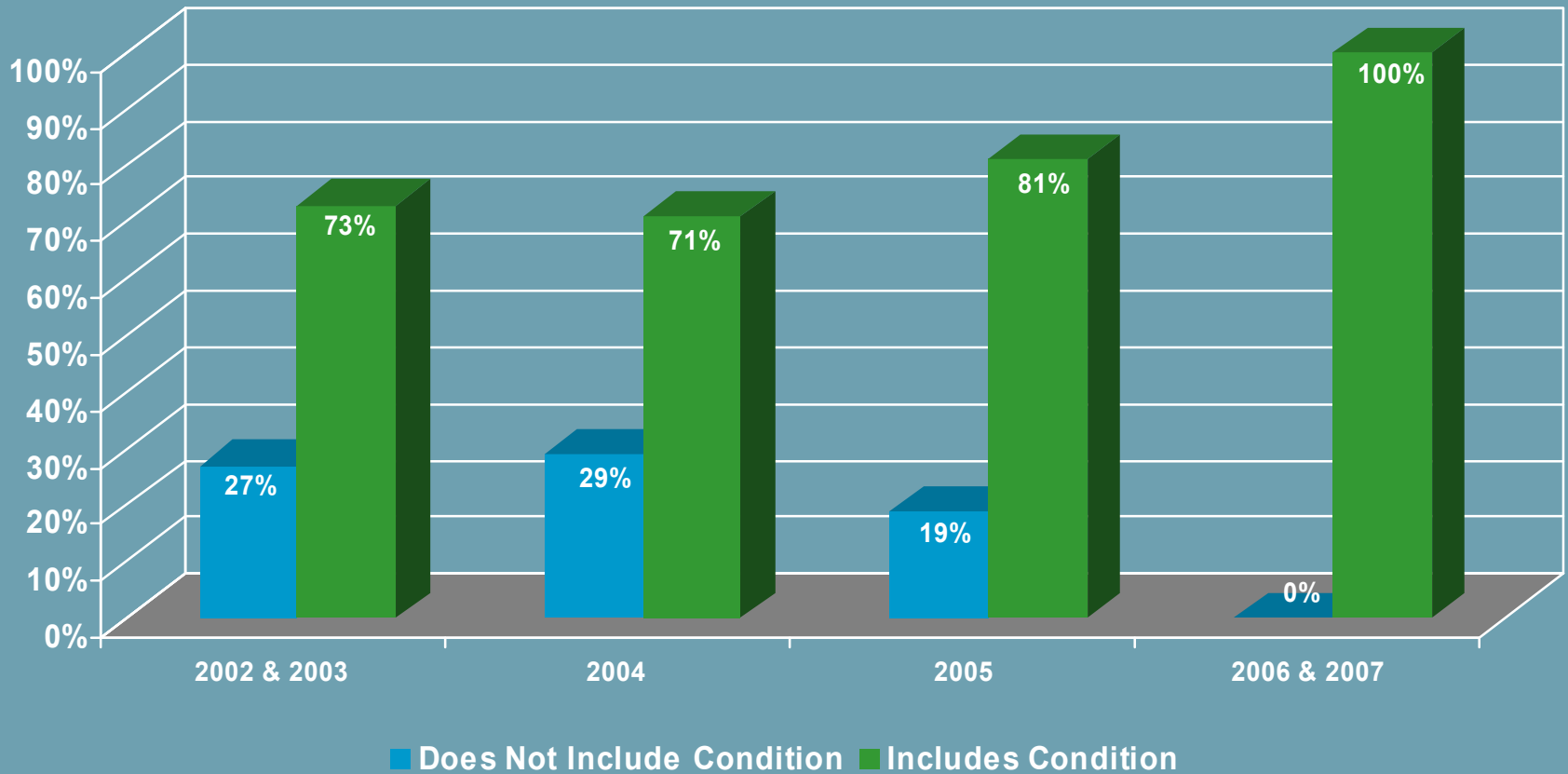
What Percentage of Deals Include a Condition that Buyer Receives Financing?

47



# Financing Outs Break-Down by Years

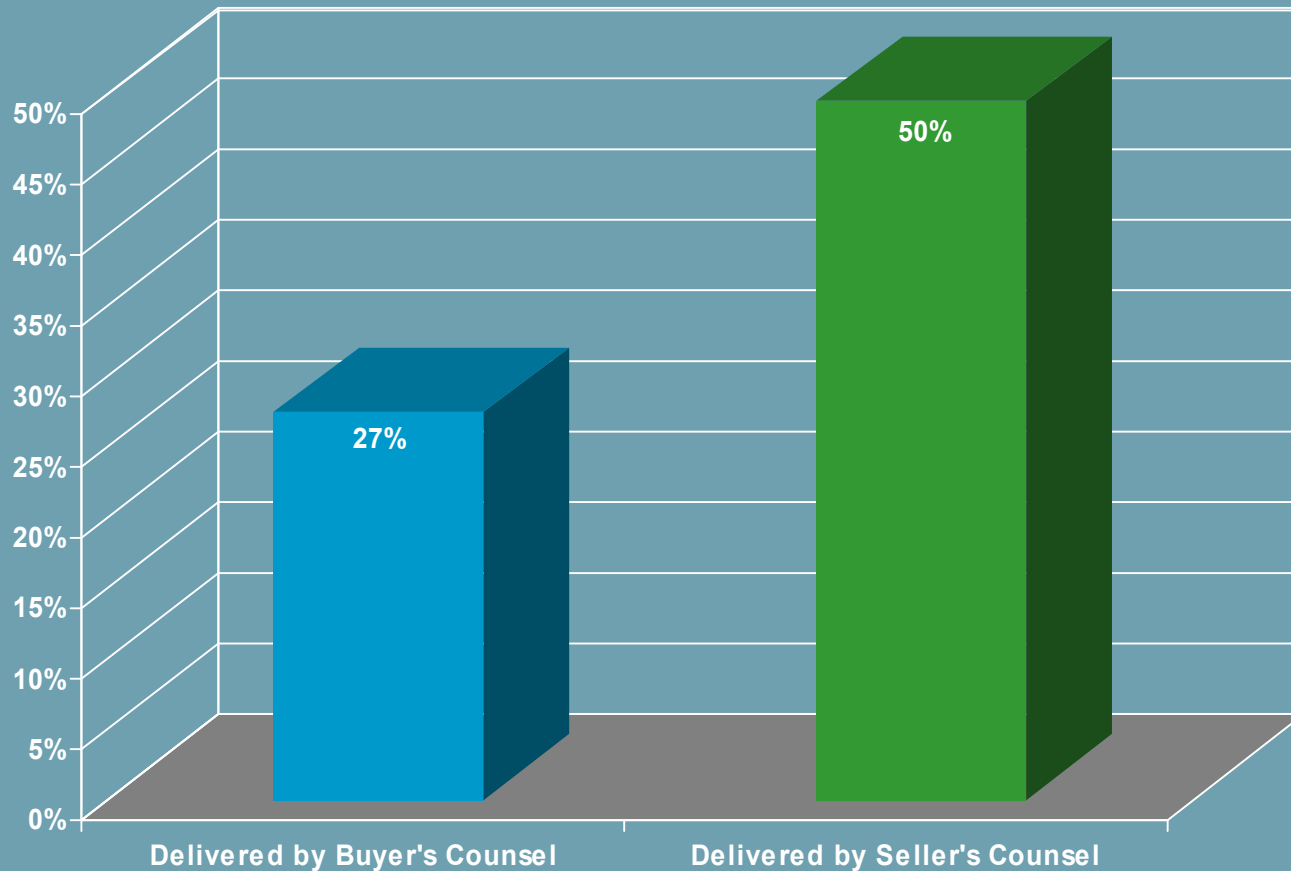
48



# Legal Opinion Condition

What Percentage of Deals Require the Delivery of a Buyer's or Seller's Counsel Legal Opinion?

49





# Seller's and Company's Representations and Warranties

# No Undisclosed Liabilities Representation

Example

51

- Except as set forth in the Disclosure Letter, the Acquired Companies have no liabilities or obligations of any nature (whether known or unknown and whether absolute, accrued, contingent, or otherwise) except for liabilities or obligations reflected or reserved against in the Balance Sheet or the Interim Balance Sheet and current liabilities incurred in the Ordinary Course of Business since the respective dates thereof.

(Source: ABA Model Stock Purchase Agreement)

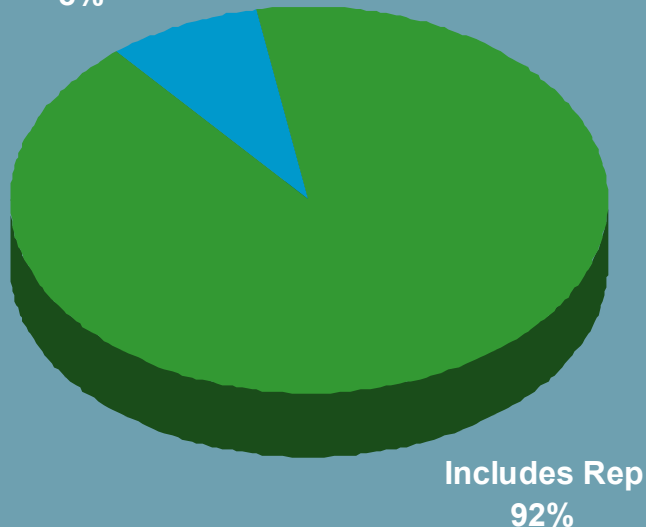
# No Undisclosed Liabilities Representation

What Percentage of Deals Include a “No Undisclosed Liabilities” Representation?

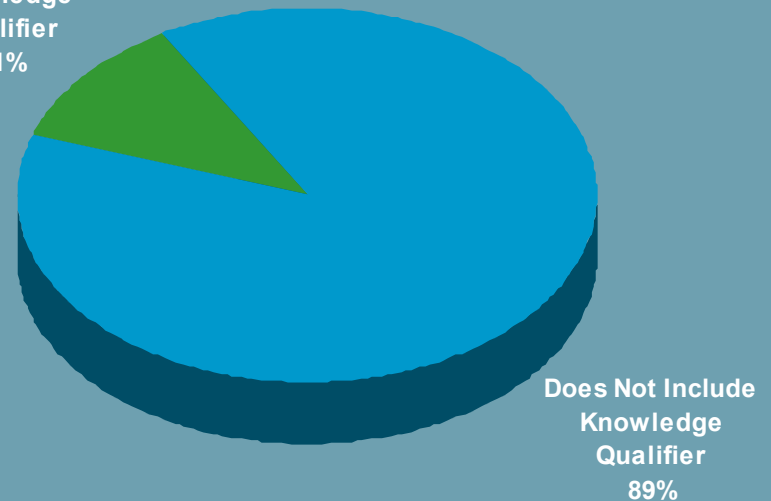
52

What portion is qualified by knowledge?

Does Not  
Include Rep  
8%



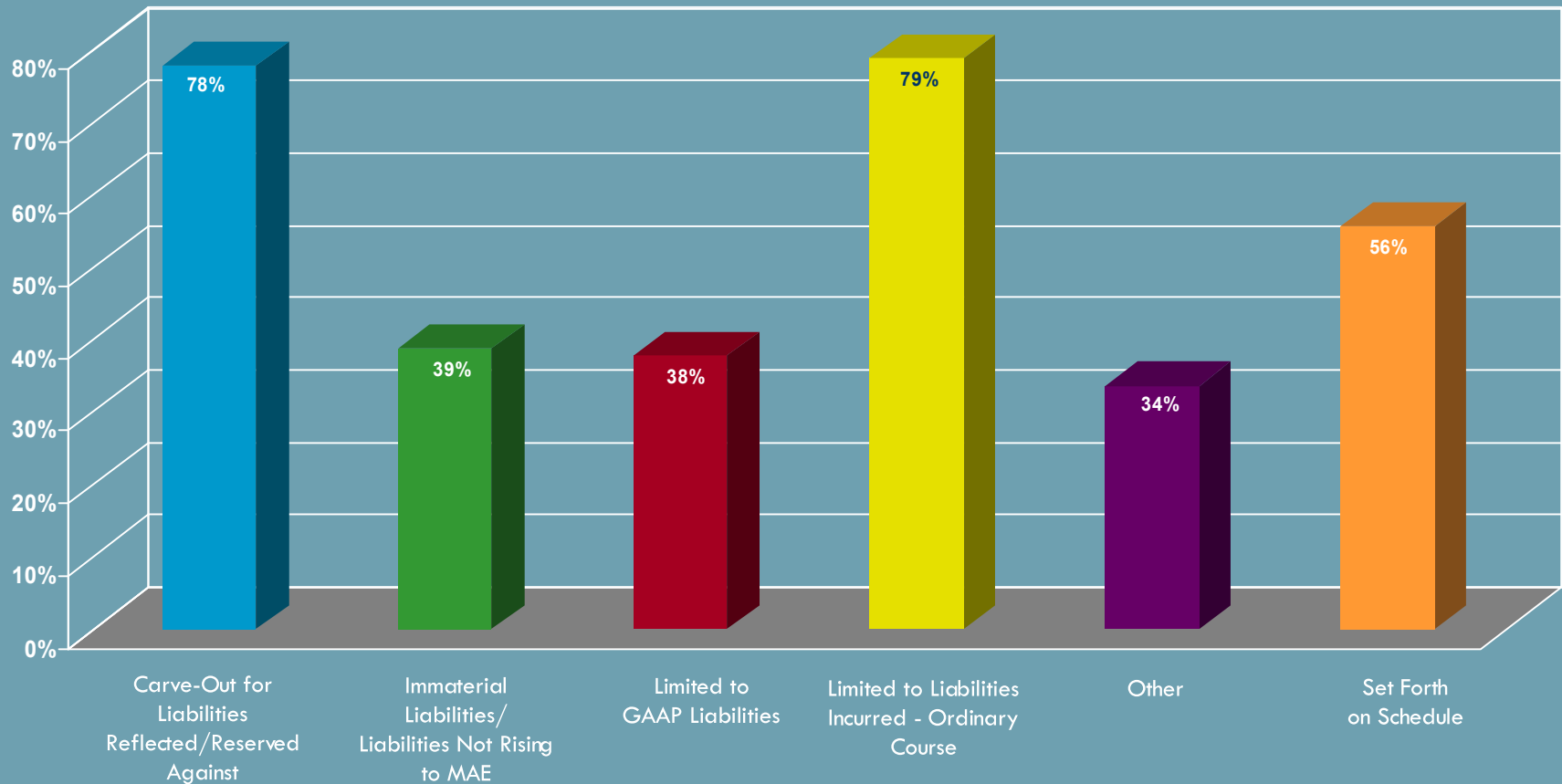
Includes  
Knowledge  
Qualifier  
11%



# No Undisclosed Liabilities Representation

What are Typical Carve-Outs from No Undisclosed Liabilities Representation?

53



# Full Disclosure (“10b-5”) Representation

Example

54

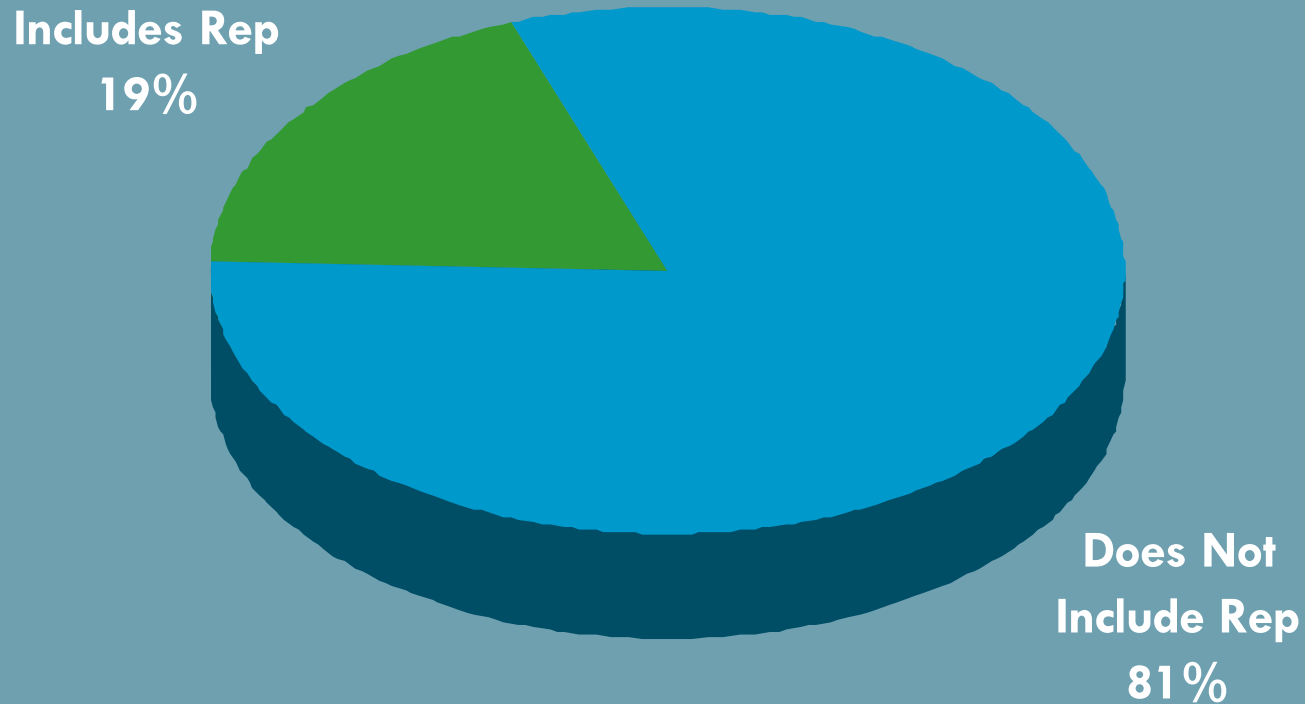
- No representation or warranty of Sellers in this Agreement and no statement in the Disclosure Letter omits to state a material fact necessary to make the statements herein or therein, in light of the circumstances in which they were made, not misleading.

(Source: ABA Model Stock Purchase Agreement)

# Full Disclosure (“10b-5”) Representation

What Percentage of Deals Include a “Full Disclosure” (“10b-5”) Representation?

55



# No Other Representations

Example

56

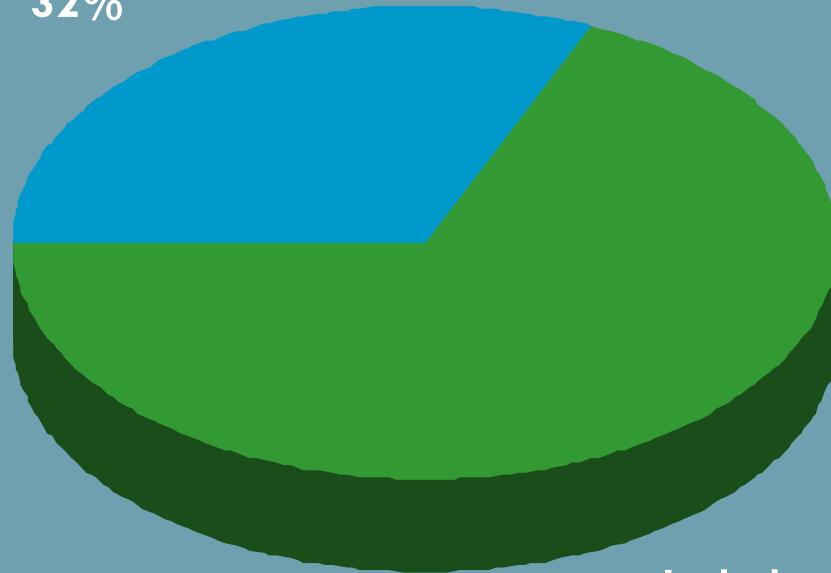
- Except for the representations and warranties of Seller contained in this Agreement and Seller's Schedules, Seller makes no express or implied representation or warranty to Buyer.

# No Other Representations

What Percentage of Deals Include a “No Other Representation” Rep?

57

Does Not  
Include Rep  
32%

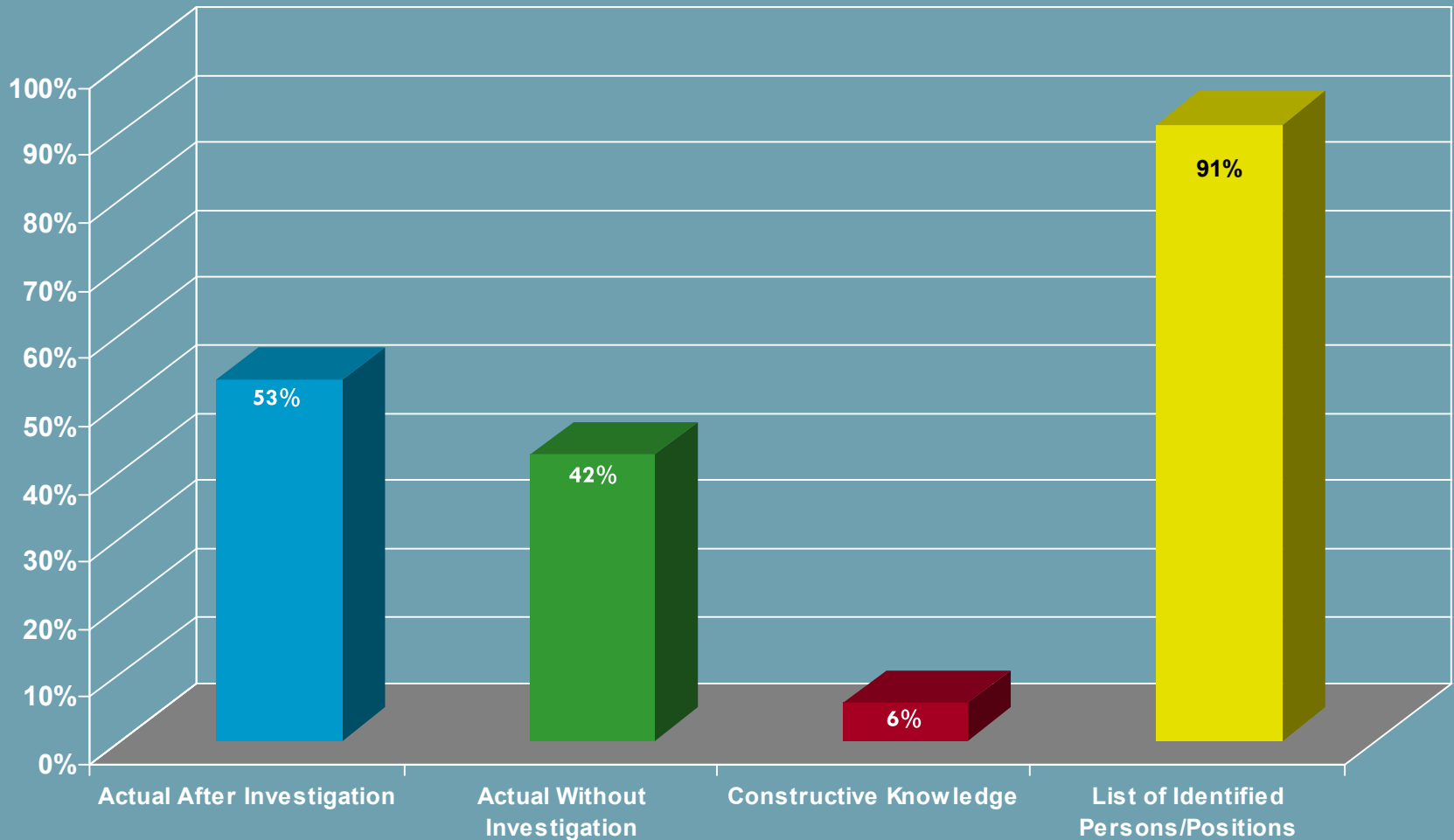


Includes Rep  
68%

# Knowledge Definition

What Standards Apply to Definition of Knowledge?

58





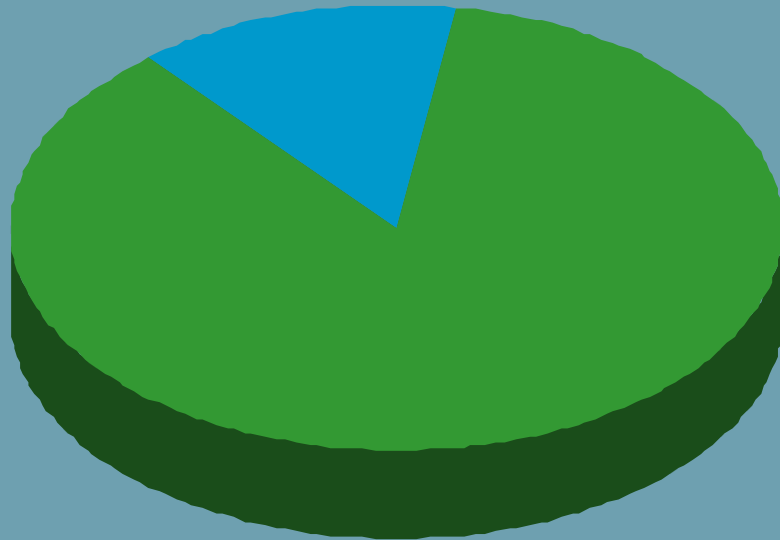
# Buyer's Representations and Warranties

# Financing Representation

What Percentage of Deals Include a Financing Representation by Buyer?

60

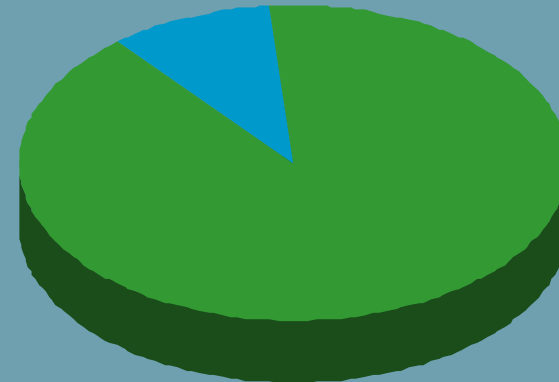
Does Not Include Rep  
14%



Includes Rep  
86%

Type of Financing Rep?

Current Ability to  
Finance the Deal  
10%



Description of How  
Deal will be Financed  
90%

# Buyer's Solvency Representation

Example

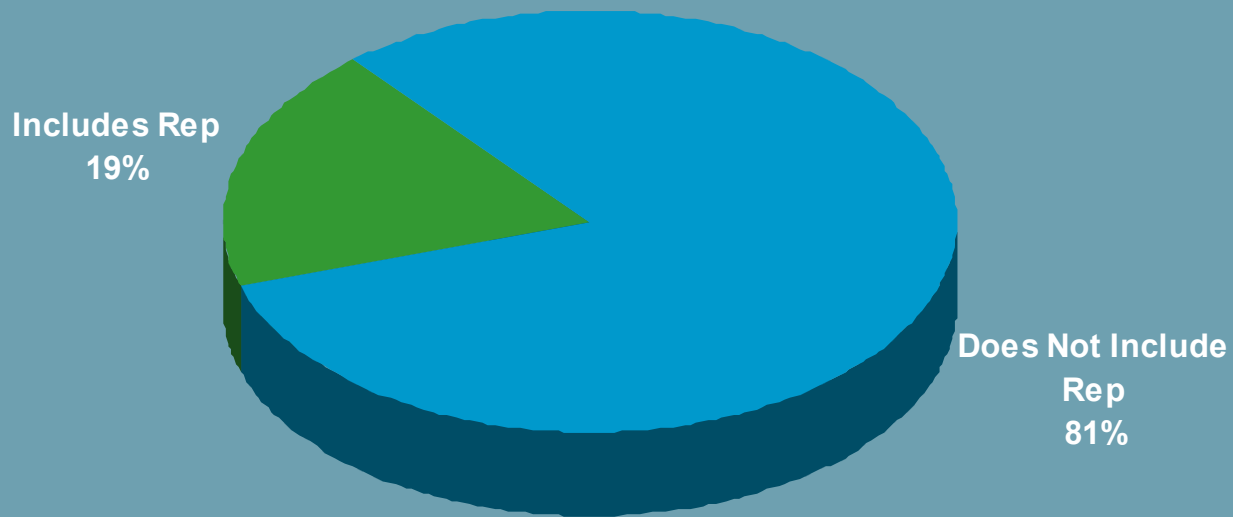
61

- Based on information heretofore provided by the Company to the Purchaser and assuming the accuracy of the Company's representations and warranties under this Agreement, immediately following the Closing, (a) the property of the Company, at a fair valuation, exceeds the sum of its debts (including contingent and unliquidated debts) and (b) the Company shall be able to pay its debts as they mature.

# Buyer's Solvency Representation

What Percentage of Deals Include a Buyer's Solvency Representation?

62



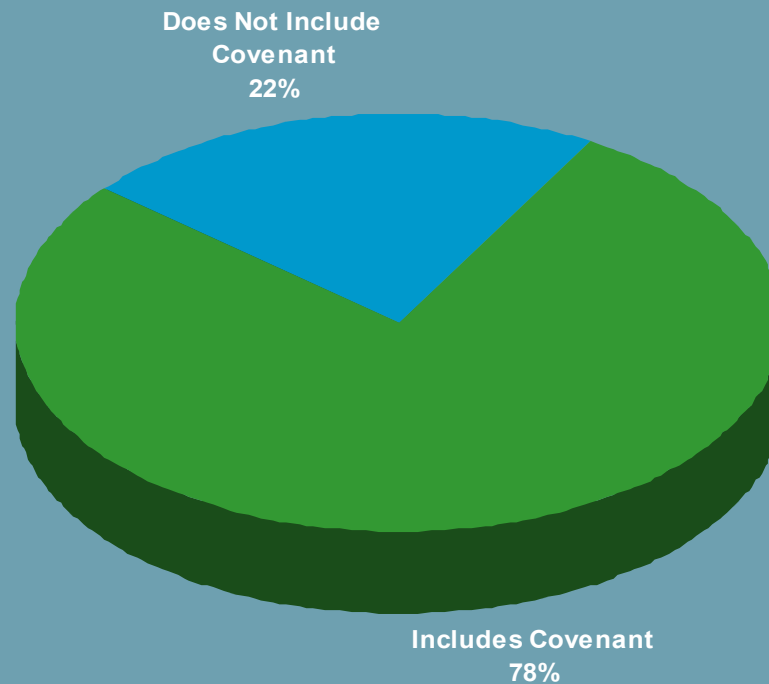


# Covenants

# No-Shop/Exclusivity Covenant

What Percentage of Deals Include an Express “No Shop/Exclusivity Covenant”?

64



# Non-Compete and Non-Solicit Covenants

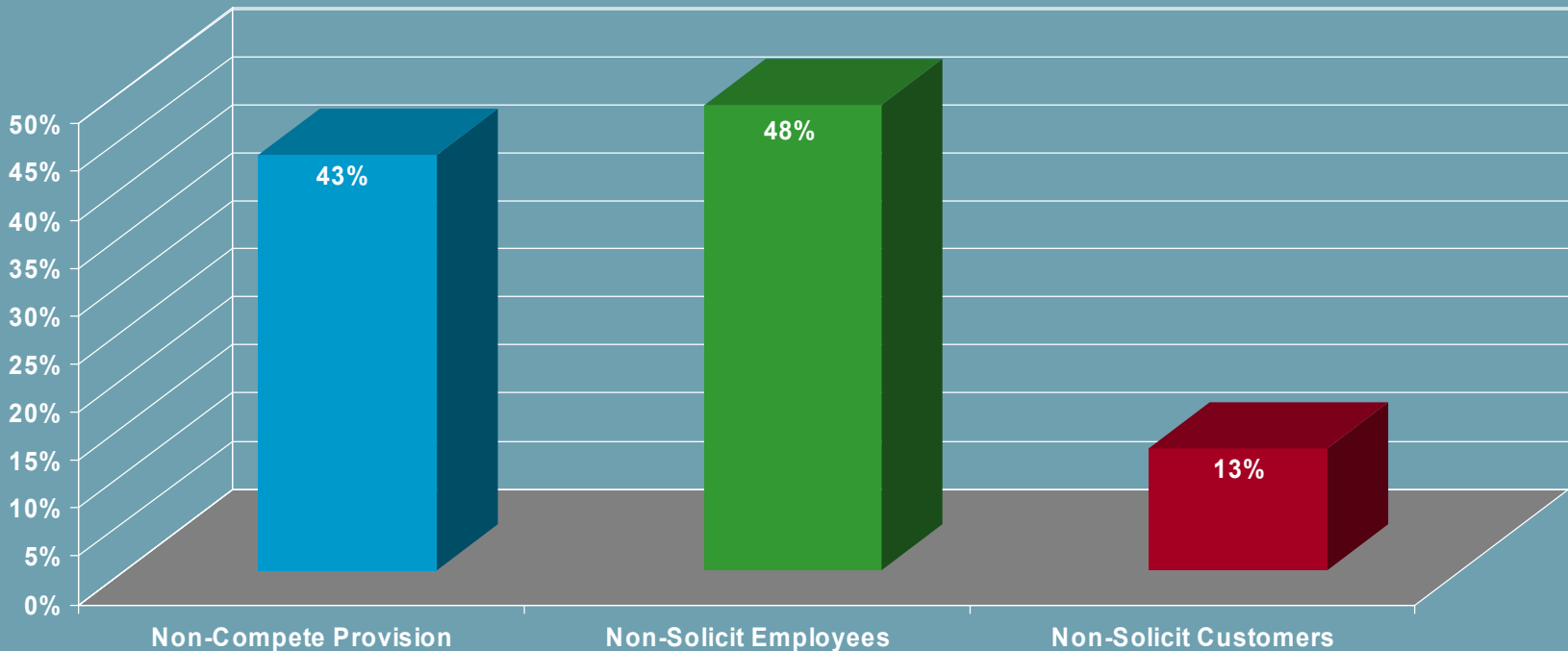
What Percentage of Deals Have Non-Compete or Non-Solicit Covenants and, if Limited by Time, How Long are Average Limits?

65

Average Length:  
38 Months

Average Length:  
28 Months

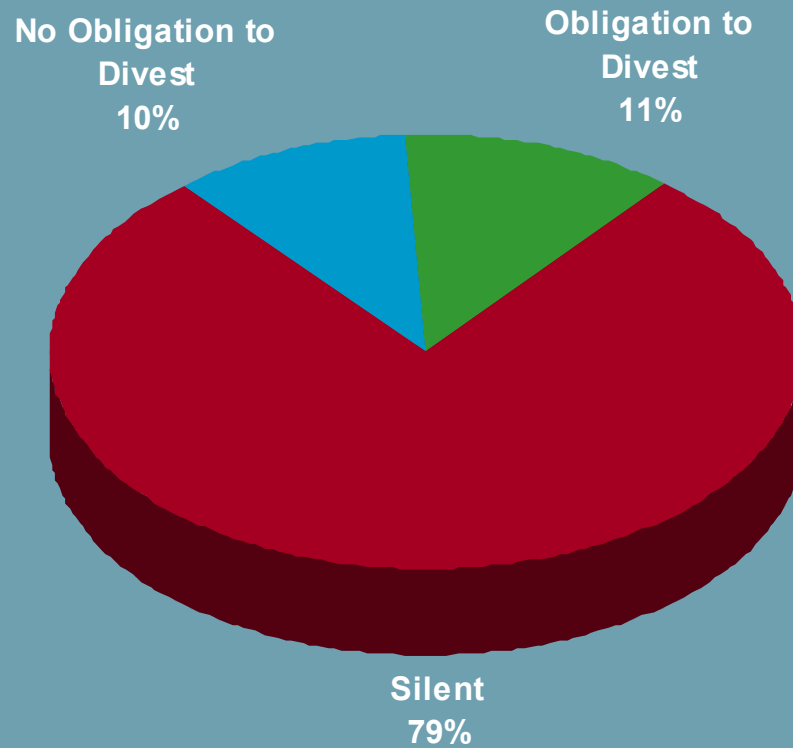
Average Length:  
35 Months



# HSR Obligation to Divest

What Percentage of Deals with an Express Obligation to Clear Hart-Scott-Rodino Include or Negate an Obligation to Divest Assets?

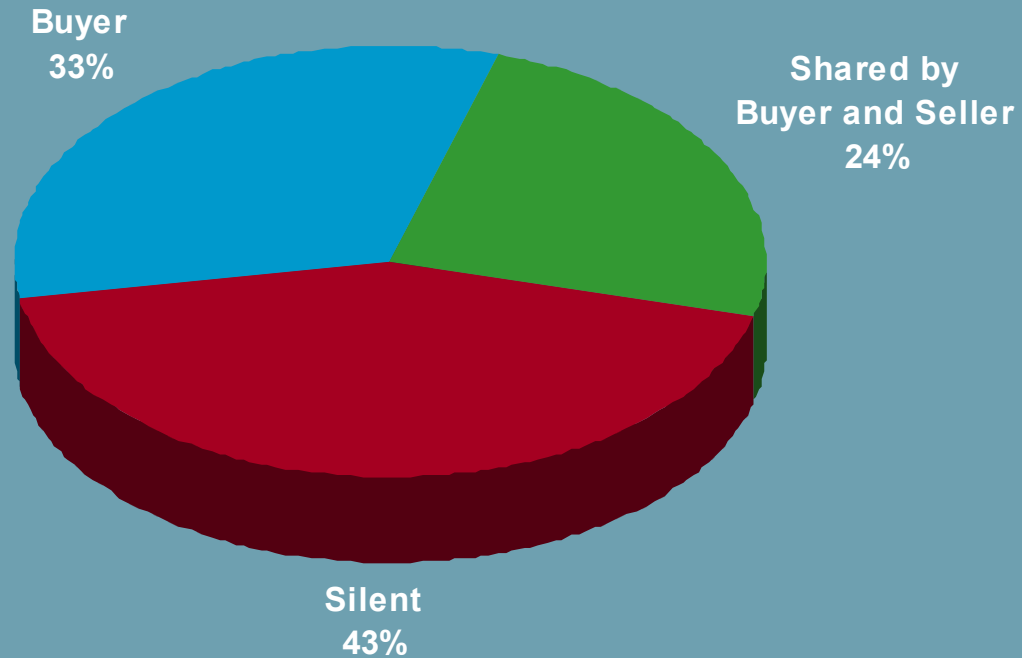
66



# HSR Covenant

Who Pays the HSR Fee?

67





# Updating and “Sandbagging”

# Covenant to Update

## Example

69

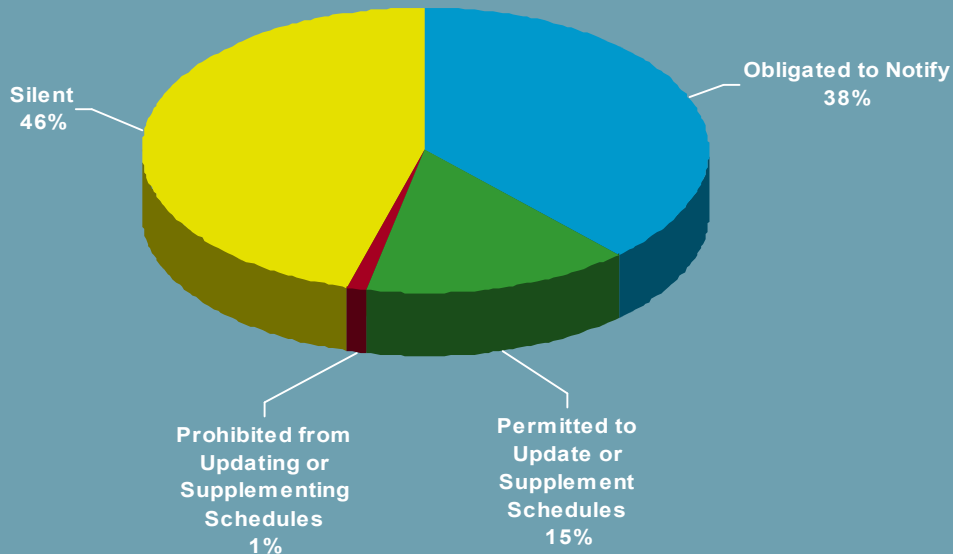
- Between the date of this Agreement and the Closing Date, each Seller will promptly notify Buyer in writing if such Seller or any Acquired Company becomes aware of any fact or condition that causes or constitutes a Breach of any of Sellers' representations and warranties as of the date of this Agreement. Should any such fact or condition require any change in the Disclosure Letter, if the Disclosure Letter were dated the date of the occurrence or discovery of any such fact or condition, Sellers will promptly deliver to Buyer a supplement to the Disclosure Letter specifying such change.

(Source: ABA Model Stock Purchase Agreement)

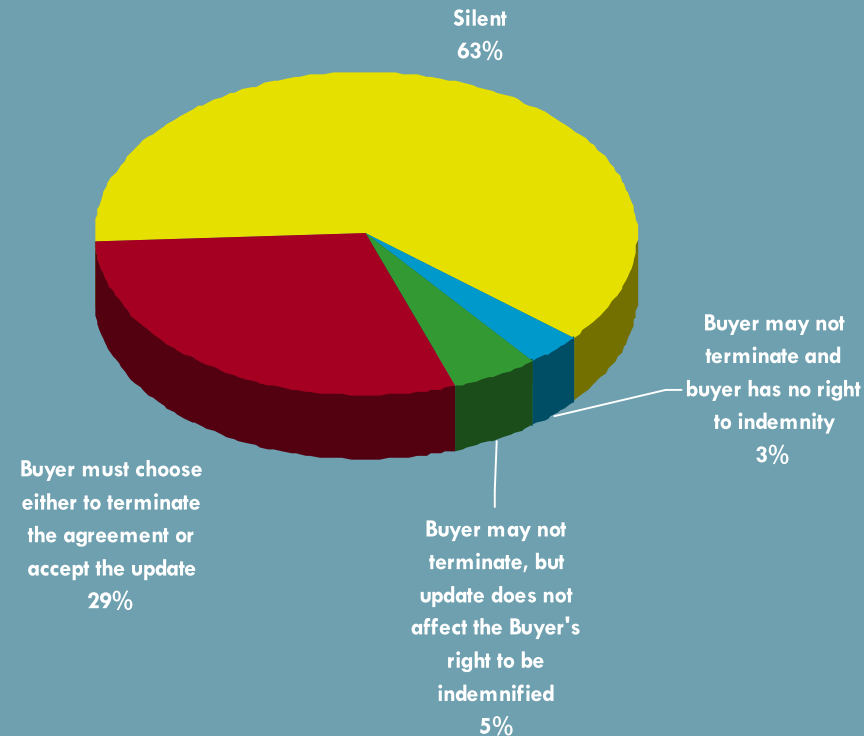
# Covenant to Update

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## What Percentage of Deals Requires Seller to Update its Schedules or Advise of Breach of Representation?



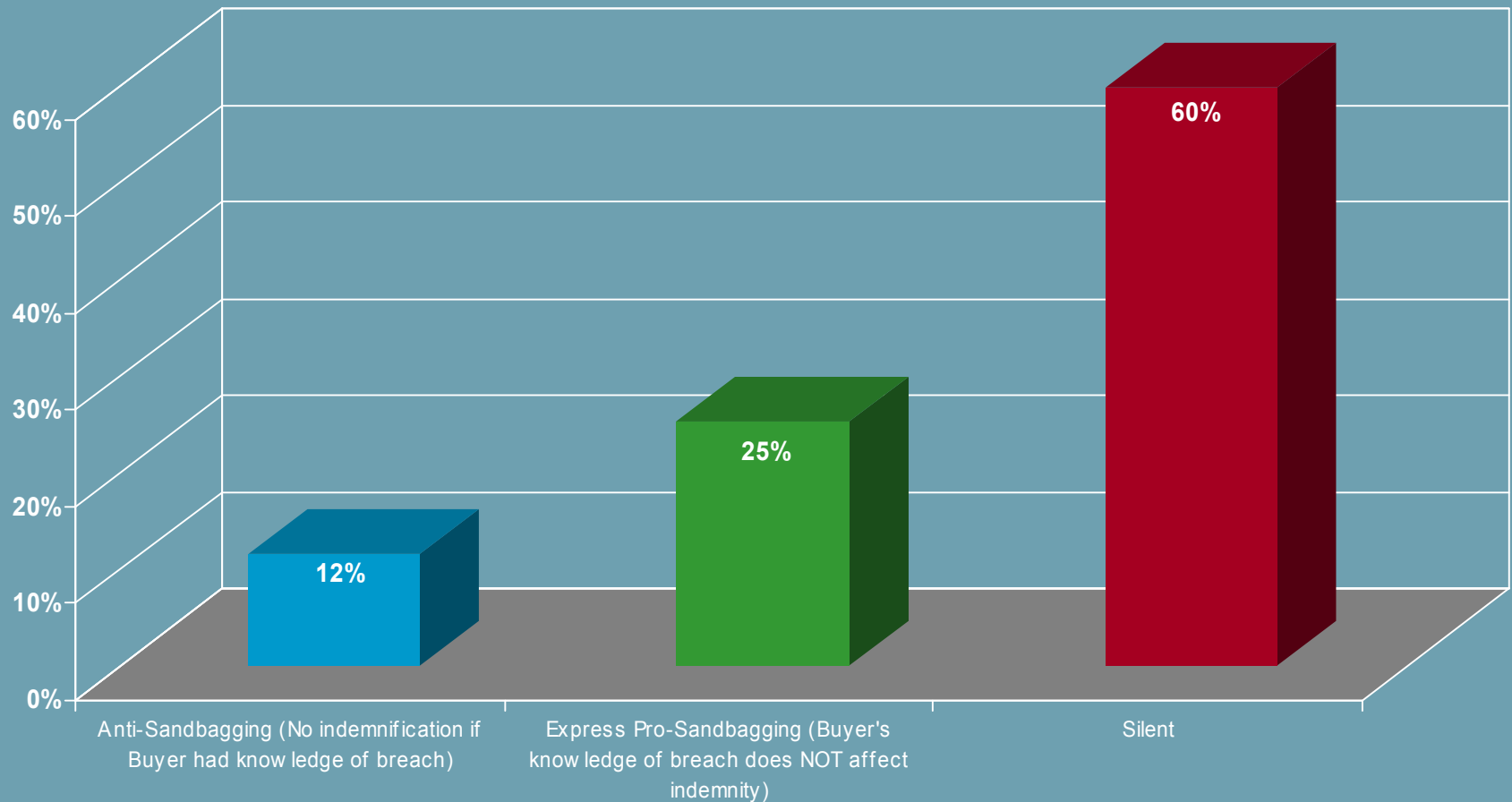
## What is the Effect of Updating?



# Sandbagging and Anti-Sandbagging

What are Typical Provisions with Respect to Sandbagging?

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