



Middle Market
M&A
SurveyBook

2024 Survey of Key M&A Deal Terms

Introduction

Seyfarth Shaw LLP is pleased to present the 10th edition of its Middle Market M&A SurveyBook (“2023/2024 Survey”), which analyzes key transaction terms from over 130 middle market private target acquisition agreements signed in 2023 and the first half of 2024.^{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.

The 2023/2024 Survey focuses on key deal terms, including those comprising the “indemnity package” included in most 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 the relative leverage of the parties. 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 impact of the use of representation and warranty (“R&W”) insurance in private middle market M&A transactions, we have continued to track data from deals that included R&W insurance separately from deals where no R&W insurance was utilized. Approximately 57% of the transactions reviewed for the 2023/2024 Survey included R&W insurance, compared to approximately 58% in 2022/2023. 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 when R&W insurance is utilized. 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. With respect to “no survival” private target acquisitions in which, similar to public company M&A transactions, the representations and warranties of the seller terminate at closing, data from SRS Acquiom showed a material decrease in “no survival” deals for the first time in several years when R&W insurance is used, while “no survival” deals for transactions not involving R&W insurance remained stable. In the scenario of a “no survival” deal, recourse to R&W insurance is typically a buyer’s primary (or exclusive) remedy.

The 2023/2024 Survey again considers 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.

As generally predicted, US middle market M&A activity was down in 2023 and overall M&A activity was down to mixed into the first half of 2024.³ In 2023, middle market M&A activity experienced a notable decline due to several challenges, including high interest rates, inflation, and geopolitical uncertainties.^{4,5} These factors led to a 17% contraction in deal volume overall.⁶

While top-quality “A” assets commanded major interest and competition, market-clearing bids were less frequent than in prior years and fewer deals closed as buyers were more disciplined in engaging in transactions.⁷ Buyers refused to overextend themselves to acquire target companies, possibly coinciding with buyers moving to lower levels of the middle market amid market uncertainty.⁸

Global M&A experienced similar trends in the first half of 2024 with declines in deal volume overall.⁹ However, lower middle market activity was a bright spot with add-on acquisitions significantly outpacing platform deals, and signs of stabilization and stronger performance in the middle market.^{10,11} In addition, EBITDA multiples,

which dropped below historical levels in 2022 and fluctuated throughout 2023, demonstrated a sudden increase into the start of 2024.¹² Nevertheless, the first half of 2024 again saw buyers, including private equity firms, being more selective, conducting thorough due diligence, and bidding (and closing) on fewer deals.¹³

In light of the drop in M&A activity, the market for R&W insurance is exceedingly accessible and buyer-favorable, resulting in broadened coverage, lower retentions, and more limited exclusions.¹⁴ Relatedly, M&A insurers continue to look to diversify their R&W adjacent offerings, with a growing focus on contingent risk and tax coverage to further shift risk away from deal parties and facilitate deals.¹⁵

While deal professionals are certainly not predicting the record-breaking M&A activity seen in the now-distant “COVID year” of 2021, there are indications that the second half of 2024 and into 2025 will see a rebound.¹⁶ The positive outlook is driven by several factors, including: (1) pent-up demand, particularly in the private equity sector, after two years of lower M&A activity;^{17,18} (2) strategic necessity as companies increasingly turn to M&A to accelerate growth and adapt to marketplace changes such as the rise of artificial intelligence;^{19,20} (3) improved alignment between buyers and sellers after purchase price multiples following the pandemic became detached from fundamentals;²¹ and (4) the recent 0.5% cut in interest rates by the US Federal Reserve and the expectation that it will further reduce interest rates in the months ahead. On the other hand, political uncertainty in a US presidential election year, global unrest in the Middle East and Eastern Europe, deal valuation gaps, and policy uncertainty if further interest rate cuts do not materialize, could hinder dealmakers and markets.

We hope that you find the information presented in our 2023/2024 Survey valuable, and we welcome the opportunity to further discuss our findings with you.

¹ This edition surveys deals signed in both 2023 and the first half of 2024 and compares those deals against deals signed in 2022 and the first half 2023.

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 Boston Consulting Group. M&A Insights H1 2024: The Recovery Continues July 9, 2024

⁴ PWC. 2024 Mid-Year Outlook: Global M&A Industry Trends

⁵ McKinsey & Company. Top M&A trends in 2024: Blueprint for success in the next wave of deals

⁶ EY-Parthenon Deal Barometer. M&A outlook signals rebounding US deal market activity in 2024

⁷ Capstone Partners. Middle Market M&A Valuations Index

⁸ See footnote 7

⁹ KPMG Corporate Finance LLC. Quarterly Insights: H1 2024

¹⁰ Growth TV. Association for Corporate Growth (Forvis Mazars Capital Advisors, GF Data) Q2 2024: Is the M&A Rebound Finally Here?

¹¹ Business Wire. “U.S. Middle Market Performance Remains Consistent” July 9, 2024

¹² Kreisler Miller. Private Company M&A Trending Multiples through March 2024

¹³ Lincoln International. Moving Through the Market: 2024 M&A Trends

¹⁴ Pitchbook. Q2 2024 Global M&A Report

¹⁵ See footnote 14

¹⁶ See footnote 6

¹⁷ See footnote 4

¹⁸ Forbes. Navigating The M&A Upswing: 2024 Trends

¹⁹ See footnote 4

²⁰ See footnote 18

²¹ See footnote 6

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Resources for More Information



Suzanne Saxman
Practice Group Chair
Chicago
(312) 460-5646
ssaxman@seyfarth.com



Andrew Lucano
Practice Group Chair
New York
(212) 218-6492
alucano@seyfarth.com



Aaron Gillett
Partner
Chicago
(312) 460-5992
agillett@seyfarth.com



Alessandra Audy
Associate
Chicago
(312) 460-5149
aaudy@seyfarth.com



Moshe Berliner
Associate
New York
(212) 218-5268
mberliner@seyfarth.com



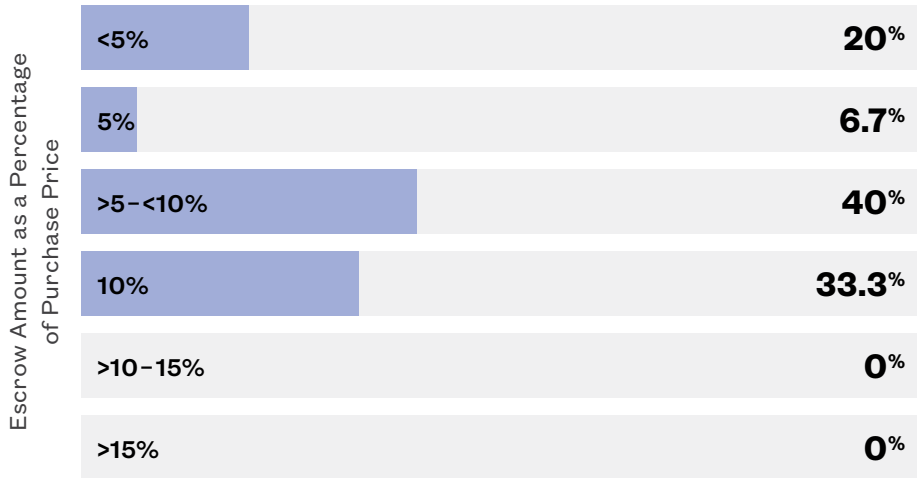
Ryan Boylan
Associate
New York
(212) 218-5252
rboylan@seyfarth.com



Keyi Wang
Associate
Seattle
(206) 946-4974
kwang@seyfarth.com

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 2023 and the first half of 2024 (“2023/2024”) for the non-insured deals surveyed was approximately 8% of the purchase price (which is generally unchanged as compared to the period of 2022 and first half of 2023 (“2022/2023”)).
- Approximately 80% of non-insured deals had an indemnity escrow amount of between 5% and 10% (which is consistent with approximately 78% for 2022/2023), with approximately 27% of non-insured deals having an indemnity escrow amount of 5% or less (as compared to approximately 28% in 2022/2023). With all non-insured deals having escrow amounts of 10% or less, it is evident that the market continues to remain favorable to sellers with respect to this deal term.

IMPORTANT NOTE: Data included under “no R&W insurance” sections reflect 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 agreement. Data included under “R&W insurance” sections reflect deals where R&W insurance was used, as confirmed by the acquisition agreement.

Indemnity Escrow Amount

R&W INSURANCE

Escrow Amount as a Percentage of Purchase Price	<5%	100%
	5%	0%
	>5 - <10%	0%
	10%	0%
	>10 - 15%	0%
	>15%	0%

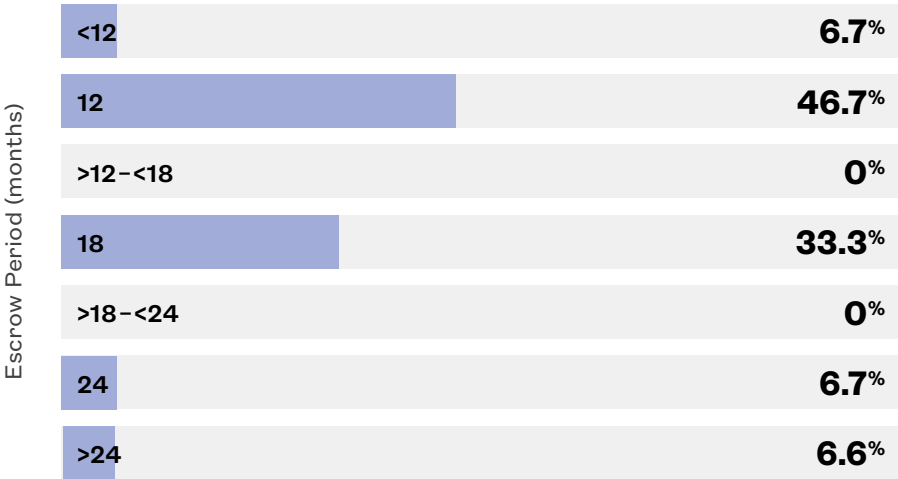
Percentage of Deals Surveyed Providing for Indemnity Escrow

OBSERVATIONS

- The median indemnity escrow amount in 2023/2024 for the insured deals surveyed was 1% of the purchase price (which is consistent with 2022/2023). It is plain to see the dramatic impact that R&W insurance has on the indemnity escrow amount (1% for insured deals, as compared to approximately 8% for non-insured deals).
- All insured deals had an indemnity escrow amount of less than 5%, and approximately 80% had an indemnity escrow amount of 1% or less. This is consistent with the prevailing R&W insurance structure of including a retention (deductible) equal to approximately 1% or less of deal value.

Indemnity Escrow Period

NO R&W INSURANCE



Percentage of Deals Surveyed Providing for Indemnity Escrow

OBSERVATIONS

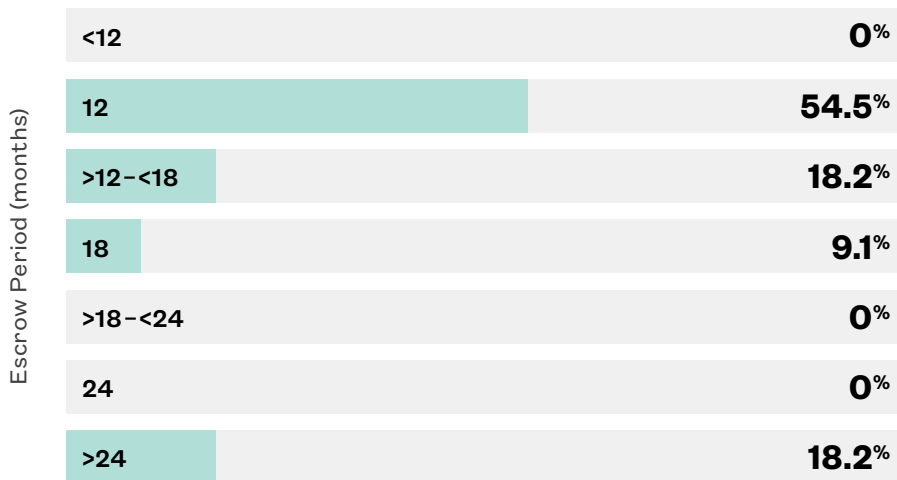
Of the non-insured deals surveyed which provided for an indemnity escrow:

- Approximately 80% of such deals had an indemnity escrow period of 12-18 months. However, without taking the Unique Deals (as defined below) into account, all of such deals had an indemnity escrow period of 12-18 months, which is consistent with 2022/2023.
- Approximately 7% of such deals had an indemnity escrow period of less than 12 months. However, without taking the Unique Deals into account, none of such deals had an indemnity escrow period of less than 12 months, which is consistent with 2022/2023.
- The median indemnity escrow period of such deals was 12 months. This reflects a decrease from 13.5 months during 2022/2023.

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 82% of such deals had an indemnity escrow period of 12-18 months. However, without taking the Unique Deals into account, all of such deals had an indemnity escrow period of 12-18 months, which is consistent with 2022/2023.
- None of the deals had an indemnity escrow period of less than 12 months, which is consistent with 2022/2023.
- The median indemnity escrow period of such deals was 12 months. This is consistent with 2022/2023.

Trends in Indemnity Escrow Usage & No Survival Deals from SRS Acquiom

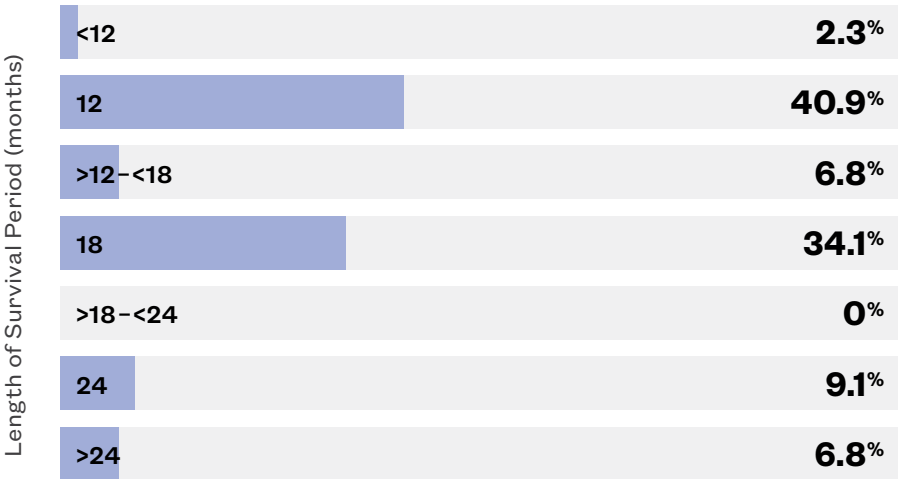
In recent years, our surveys have identified trends pointing to fewer deals involving an indemnity escrow and more deals involving no survival of the general representations and warranties. These trends appear to be particularly prevalent in deals utilizing R&W insurance. However, for deals in 2023/2024 not utilizing R&W insurance, there was an uptick in indemnity escrow usage and a decrease in “no survival” deals. In looking to analyze these trends further, we partnered with SRS Acquiom (“SRS”), a provider of seamless M&A solutions, 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	2020	68%	32%
	2021	65%	35%
	2022-1H 2023	67%	33%
	2023-1H 2024	64%	36%
No R&W Insurance Identified	2020	75%	25%
	2021	70%	30%
	2022-1H 2023	80%	20%
	2023-1H 2024	68%	32%
R&W Insurance Identified	2020	59%	41%
	2021	59%	41%
	2022-1H 2023	47%	53%
	2023-1H 2024	54%	46%

	YEAR	REPS SURVIVE	NO SURVIVAL
All Deals	2020	78%	22%
	2021	74%	26%
	2022-1H 2023	75%	25%
	2023-1H 2024	85%	15%
No R&W Insurance Identified	2020	88%	12%
	2021	83%	17%
	2022-1H 2023	90%	10%
	2023-1H 2024	91%	9%
R&W Insurance Identified	2020	64%	36%
	2021	63%	37%
	2022-1H 2023	52%	48%
	2023-1H 2024	75%	25%

Representation & Warranty General Survival Period

NO R&W INSURANCE



Percentage of Deals Surveyed

OBSERVATIONS

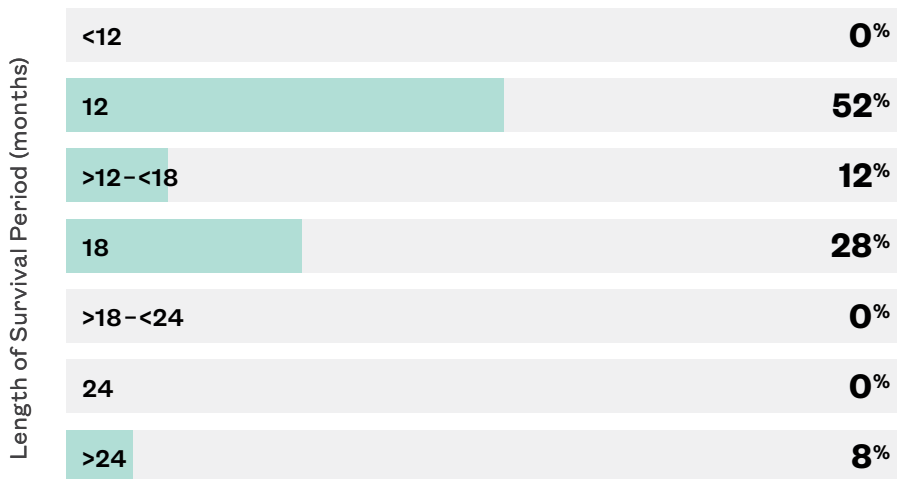
- The median general survival period for non-insured deals surveyed was 16.5 months, which is consistent with 2022/2023. The vast majority (approximately 82%) of non-insured deals surveyed had a survival period of 12-18 months in 2023/2024, which is consistent with the length of the majority of indemnity escrow periods in 2023/2024. Putting aside “no survival” deals, our survey demonstrates that it is unusual to have survival periods of less than 12 months.
- Approximately 16% of non-insured deals had survival periods of greater than 18 months, which is generally consistent with 2022/2023. 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



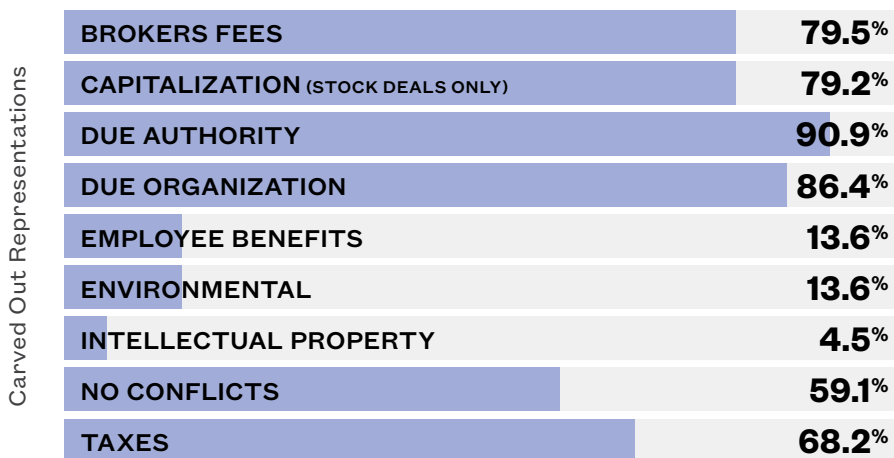
Percentage of Deals Surveyed

OBSERVATIONS

- The median general survival period for insured deals surveyed was 12 months, which is a slight decrease from 14 months in 2022/2023. This is also consistent with the median indemnity escrow period of 12 months for insured deals in 2023/2024. The vast majority (approximately 92%) of insured deals surveyed had a survival period of 12-18 months in 2023/2024, which is generally consistent with the length of the majority of indemnity escrow periods in 2023/2024.
- Approximately 8% of insured deals had survival periods of greater than 18 months, which is a decrease from approximately 15% in 2022/2023. However, this is 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 14% in 2023/2024. This represents a decrease from approximately 26% in 2022/2023 but is generally consistent with approximately 15% in the period of 2020 and 2021 (“2020/2021”).

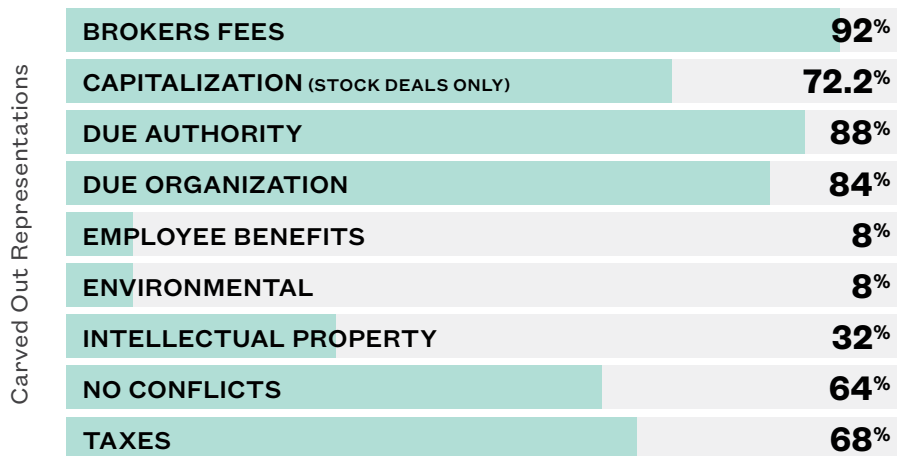
No Conflicts: The percentage of non-insured deals that carved out representations and warranties regarding no conflicts was approximately 59% in 2023/2024. This demonstrates a trend of increasing carveouts for no conflicts representations over the last few years (approximately 45% in 2022/2023 and approximately 44% in 2020/2021).

Environmental: The percentage of non-insured deals that carved out representations and warranties regarding environmental matters was approximately 14% in 2023/2024. This demonstrates a trend of decreasing carveouts for environmental representations over the last few years (approximately 18% in 2022/2023 and 26% in 2020/2021).

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

Taxes: The percentage of insured deals surveyed that carved out representations and warranties regarding taxes was 68% in 2023/2024. This represents a decrease from 85% in 2022/2023, but is generally in line with prior years (approximately 73% in 2022/2021).

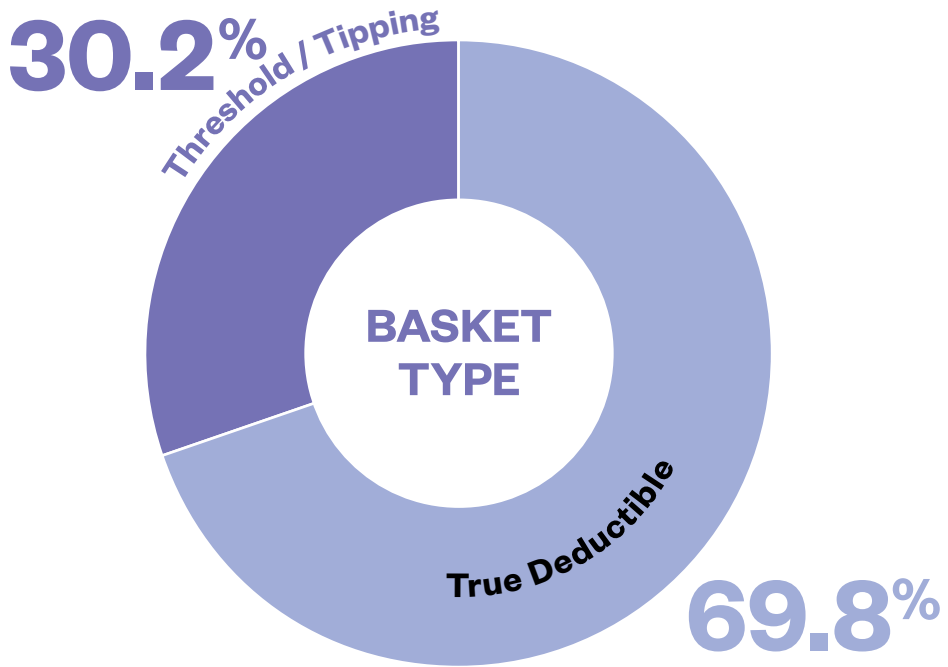
No Conflicts: The percentage of insured deals that carved out representations and warranties regarding no conflicts was 64% in 2023/2024. Similar to non-insured deals, this demonstrates a trend of increasing carveouts for no conflicts representations over the last few years (approximately 50% in 2022/2023 and 35% in 2020/2021).

R&W Insurance Policy Coverage of Fundamental Representations: As compared to prior years, with limited exceptions, the frequency of carve outs in insured deals have generally continued to increase in 2023/2024. This may reflect a greater leniency by R&W insurance carriers to treat more representations and warranties as “fundamental,” prompting buyers to seek increased use of carve outs in their purchase agreements thereby taking advantage of R&W insurance policy expansion of fundamental representations.

In insured deals, the R&W insurance policy generally provides six years of coverage for fundamental representations and warranties (as opposed to three years for general representations and warranties).

Indemnity Basket Type

NO R&W INSURANCE



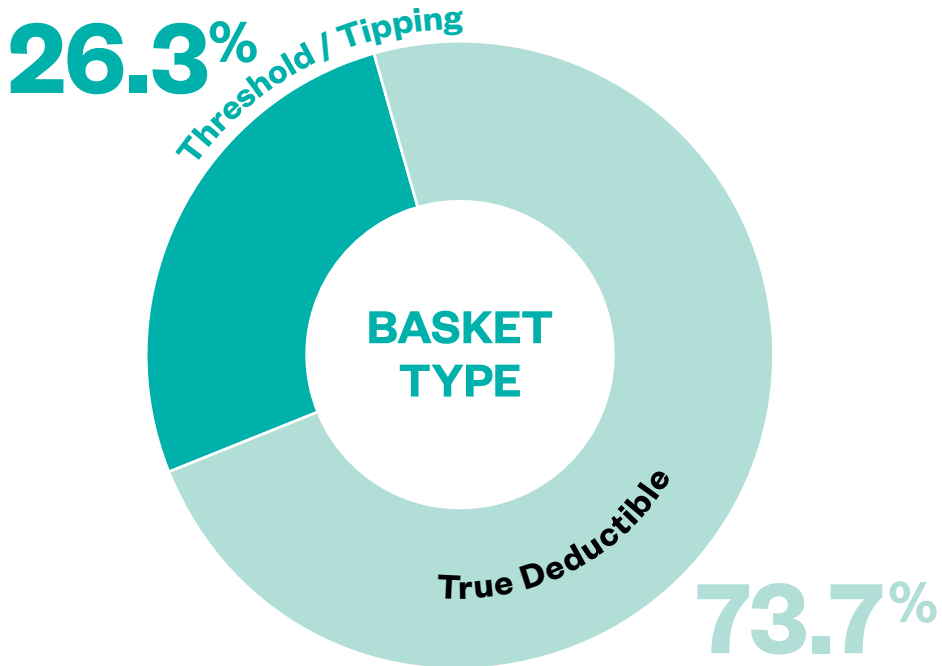
OBSERVATIONS

- Approximately 98% of non-insured deals surveyed provided for an indemnity basket, which is consistent with high percentages in prior years.
- Of the non-insured deals providing for an indemnity basket, approximately 30% were structured as threshold/tipping baskets, which is an increase from approximately 17% in 2022/2023, but consistent with prior years, and approximately 70% were structured as deductible baskets, which is a decrease from approximately 83% in 2022/2023, but is consistent with prior years. The higher percentage of non-insured deals providing for a threshold/tipping basket, rather than a deductible basket, reflects a more buyer-friendly environment with respect to this deal term.

IMPORTANT NOTE: The calculations on pages 15 and 16 only include deals with indemnity baskets that limit indemnity obligations for breaches of general representations and warranties, and therefore do not include “no survival” deals where general representations and warranties do not survive the closing.

Indemnity Basket Type

R&W INSURANCE

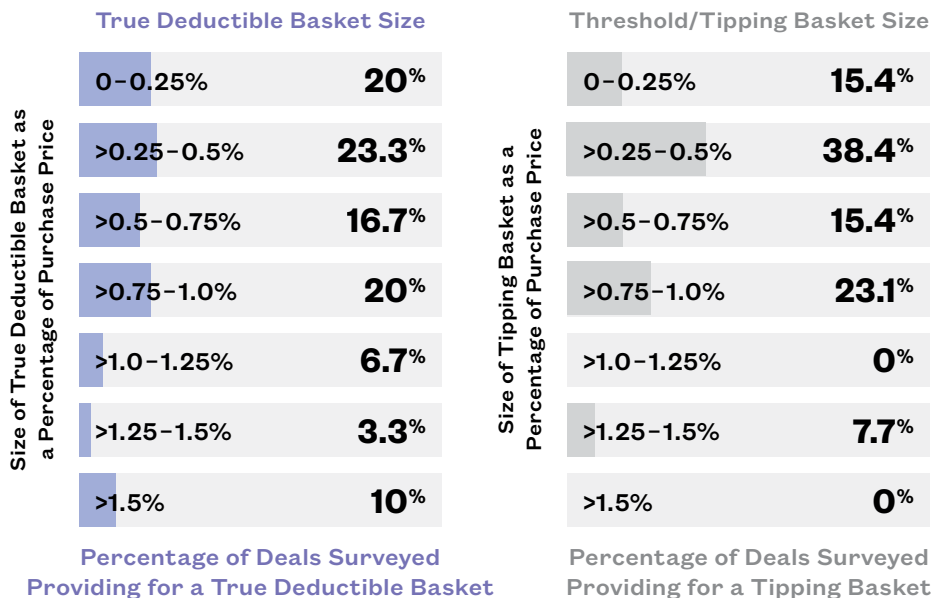


OBSERVATIONS

- 76% of insured deals surveyed provided for an indemnity basket, which is a decrease from 2022/2023 and demonstrates a trend of decreasing use of baskets in insured deals over the last few years (approximately 85% in 2022/2023 and 94% in 2020/2021).
- Of the insured deals providing for an indemnity basket, approximately 26% were structured as threshold/tipping baskets, which is an increase from prior years (approximately 6% in 2022/2023 and 12% in 2021/2022), and approximately 74% were structured as deductible baskets, which is a decrease from prior years (approximately 94% in 2022/2023 and 88% in 2020/2021). The higher percentage of insured deals providing for a threshold/tipping basket, rather than a deductible basket, is a buyer-friendly deal term.

Indemnity Basket Size

NO R&W INSURANCE



OBSERVATIONS

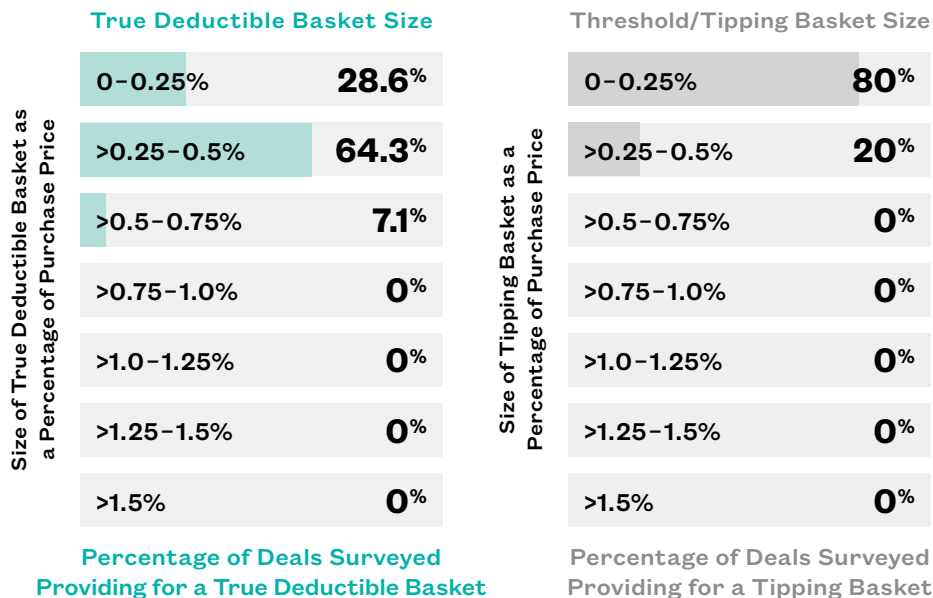
- The median basket size in non-insured deals surveyed in 2023/2024 was 0.6% of the purchase price, which is slightly higher than 0.5% in 2022/2023.
- The median basket size in non-insured deals with a deductible basket was 0.6% of the purchase price, consistent with 2022/2023. 80% of non-insured deals with a deductible had a basket size of 1% or less (as compared to approximately 73% in 2022/2023) and 60% of such deals had a deductible basket of 0.75% or less (which is consistent with 2022/2023).
- The median basket size in non-insured deals with a tipping basket was 0.5%, consistent with 2022/2023. However, approximately 31% of non-insured deals with a tipping basket had a basket size greater than 0.75% (as compared to none in 2022/2023).

IMPORTANT NOTES: The calculations on pages 17 and 18 only include deals with indemnity baskets that limit indemnity obligations for breaches of general representations and warranties, and therefore do not include “no survival” deals where general representations and warranties do not survive the closing.

A limited number of the deals surveyed, which such deals are included in the calculations on page 17, had a true deductible basket size in excess of 1.25% 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

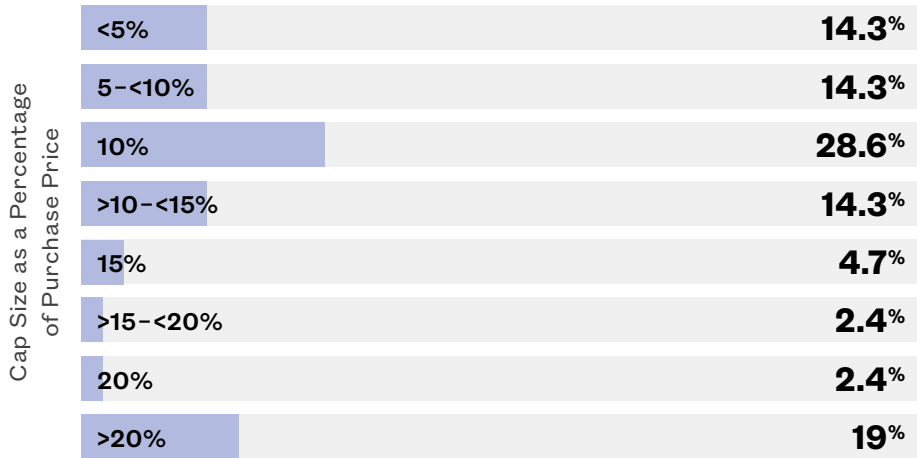


OBSERVATIONS

- The median basket size in insured deals surveyed in 2023/2024 was 0.3%, as compared to 0.5% in 2022/2023.
- The median basket size in insured deals with a deductible basket was 0.4% of the purchase price, as compared to 0.5% in 2022/2023. Approximately 93% of insured deals surveyed with a deductible had a basket size of 0.5% or less (as compared to approximately 69% in 2022/2023) and all of such deals had a basket size of 0.75% or less (as compared to approximately 88% in 2022/2023).
- The median basket size in insured deals with a tipping basket was 0.1% of the purchase price, as compared to 0.5% in 2022/2023. All insured deals surveyed in 2023/2024 with a tipping basket had a basket size of 0.5% or less, consistent with 2022/2023.

Indemnity Cap Size

NO R&W INSURANCE



Percentage of Deals Surveyed Providing for Indemnity Cap

OBSERVATIONS

- Approximately 96% of non-insured deals surveyed in 2023/2024 provided for an indemnity cap, which is slightly higher than 2022/2023.
- The median indemnity cap for non-insured deals was approximately 10%, which is consistent with prior years.
- Approximately 57% of non-insured deals had an indemnity cap of 10% or less (as compared to approximately 71% in 2022/2023), and approximately 76% had an indemnity cap of 15% or less (as compared to approximately 80% in 2022/2023).

IMPORTANT NOTES: The calculations on pages 19 and 20 only include deals with indemnity caps that limit indemnity obligations for breaches of general representations and warranties, and therefore do not include “no survival” deals where general representations and warranties do not survive the closing.

A limited number of the deals surveyed, which such deals are included in the calculations on pages 19 and 20, had an indemnity cap greater than 20% 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 Cap Size

R&W INSURANCE

Cap Size as a Percentage of Purchase Price	<5%	95.8%
	5-<10%	0%
	10%	0%
	>10-<15%	0%
	15%	0%
	>15-<20%	0%
	20%	0%
	>20%	4.2%

Percentage of Deals Surveyed Providing for Indemnity Cap

OBSERVATIONS

- Approximately 96% of insured deals surveyed in 2023/2024 provided for an indemnity cap, which is generally consistent with approximately 95% in 2022/2023.
- The median indemnity cap for insured deals was 0.4%, which is slightly lower than the 0.5% median in 2022/2023.
- Approximately 96% of insured deals had an indemnity cap of 5% or less (as compared to approximately 79% in 2022/2023). Lower indemnity caps for insured deals may reflect a downward trend in R&W policy retention amounts.
- 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 0.4% for insured deals, as compared to 10% for non-insured deals) 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 2023/2024 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 with actual knowledge (as opposed to constructive knowledge and/or recklessness), and the percentage of deals that limited fraud to the representations and warranties made in the acquisition agreement (as opposed to in any information provided in the due diligence process).

NO R&W INSURANCE	R&W INSURANCE
Fraud Exception	
<p>Approximately 89% of non-insured deals surveyed in 2023/2024 included fraud exceptions to certain indemnity provisions of the agreement, as compared to approximately 84% in 2022/2023.</p>	<p>All insured deals surveyed in 2023/2024 included fraud exceptions to certain indemnity provisions of the agreement, which is consistent with 2022/2023.</p>
Fraud Defined	
<p>Of the non-insured deals that included a fraud exception, approximately 67% of such deals defined the term “fraud,” which is generally consistent with 2022/2023.</p> <p>Of the non-insured deals that defined the term “fraud,” approximately 91% of such deals limited fraud to those representations and warranties contained in the agreement (or in ancillary documents delivered in connection with the agreement) only, as compared to approximately 81% in 2022/2023.</p> <p>Of the non-insured deals that defined the term “fraud,” approximately 88% of such deals included a requirement of actual knowledge of falsity (as opposed to constructive knowledge) and/or expressly excluded fraud based on recklessness or similar fraud in the fraud definition, which is generally consistent with 2022/2023.</p>	<p>Of the insured deals that included a fraud exception, approximately 96% of such deals defined the term “fraud,” as compared to approximately 90% in 2022/2023.</p> <p>Of the insured deals that defined the term “fraud,” approximately 93% of such deals limited fraud to those representations and warranties contained in the agreement (or in ancillary documents delivered in connection with the agreement) only, as compared to approximately 73% in 2022/2023.</p> <p>Of the insured deals that defined the term “fraud,” approximately 97% of such deals included a requirement of actual knowledge of falsity (as opposed to constructive knowledge) and/or expressly excluded fraud based on recklessness or similar fraud in the fraud definition, as compared to approximately 93% in 2022/2023.</p>

Following are a few examples of fraud definitions based on the agreements reviewed for the 2023/2024 Survey, ordered from most to least seller protective.

- **“Fraud”** means a knowing and intentional fraud by a party in the making of any representation or warranty expressly set forth in Article 2 or Article 3 of this Agreement; provided that (i) such representation or warranty was materially false or materially inaccurate at the time such representation or warranty was made, (ii) the party making such representation or warranty and such party’s Knowledge Persons set forth on Schedule 1.1 had actual knowledge (and not imputed or constructive knowledge), without any duty of inquiry or investigation, that such representation or warranty was materially false or materially inaccurate when made, and (iii) such party had the specific intent to deceive the other party and induce such other party to enter into this Agreement. “Fraud” shall not include any cause of action, including fraud, based on constructive or imputed knowledge, negligence or recklessness.
- **“Fraud”** means actual and intentional (but not constructive or reckless) fraud with respect to the making of the representations and warranties set forth in Article II (with respect to the Seller Parties) and Article III (with respect to Buyer).
- **“Fraud”** means, with respect to a Person, actual and intentional misrepresentation of a material existing fact (and not constructive fraud, equitable fraud, promissory fraud, unfair dealings fraud, negligent misrepresentation, recklessness, or any form of fraud premised on recklessness or negligence), or participation in or actual knowledge of such actual and intentional misrepresentation of a material existing fact by such Person.
- **“Fraud”** means fraud under Delaware common law.

Choice of Governing Law

The 2023/2024 Survey results revealed that while Delaware law continues to be the most popular “governing law” choice, the percentage of deals choosing Delaware law has decreased as compared to 2022/2023.

NO R&W INSURANCE	R&W INSURANCE
Of the non-insured deals surveyed in 2023/2024, the governing law for 61% of such deals was Delaware (as compared to 69% in 2022/2023), 11% was New York (as compared to 2% in 2022/2023), and 28% was a jurisdiction other than Delaware or New York (as compared to 29% in 2022/2023).	Of the insured deals surveyed in 2023/2024, the governing law for 89% of such deals was Delaware (as compared to 95% in 2022/2023), 6% was New York (as compared to 2% in 2022/2023), and 5% was a jurisdiction other than Delaware or New York (as compared to 3% in 2022/2023).

Earnouts

Of the deals surveyed in 2023/2024, approximately 15% included earnouts, as compared to 17% in 2022/2023.

In addition, of the deals surveyed in 2023/2024 with earnouts:

- Approximately 50% of such deals provided for earnout amounts in excess of 30% of the purchase price.
- Approximately 30% 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 2023/2024, approximately 57% of such deals provided for the seller retaining attorney-client privilege after the closing of the transaction (as compared to approximately 69% in 2022/2023).

R&W INSURANCE

Of the insured deals surveyed in 2023/2024, approximately 85% of such deals provided for the seller retaining attorney-client privilege after the closing of the transaction (as compared to approximately 88% in 2022/2023).

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

Bring-Down

Of the deals surveyed in 2023/2024:

- Approximately 76% used a “Material Adverse Effect” qualifier for the representations and warranties bring-down closing condition, as compared to approximately 81% in 2022/2023.
- Approximately 17% used an “in all material respects” qualifier for the representations and warranties bring-down closing condition, as compared to approximately 13% in 2022/2023.

The high percentage of deals using the “Material Adverse Effect” qualifier for the representations and warranties bring-down closing condition is a seller-friendly term which increases certainty of closing for sellers.

Claims Insight from AON

As Insurer claims handling becomes more important to buyers of R&W insurance, Aon continues to track data on all claims made on Aon-brokered policies. To date, Aon has seen more than 1,000 claims on North American RWI policies since 2013 and insurers have paid Aon clients over \$1.25 billion and recognized over \$1.7 billion of total loss (including retentions). Moreover, only 13 claims have sought dispute resolution—with nine claims having gone to arbitration and four resulting in litigation.

In North America in 2023, Aon reported over 140 new claims from R&W clients and is handling over 225 active claims. However, the early data indicates that the average claim rate on R&W policies may be slightly lower in post- 2019 when compared to pre-2019. As the average claim rate between 2016—2021 sits at 17% compared to the historical average of 20%. While claim frequency is slightly down, Aon is not seeing this impact the frequency of significant claims, defined here as claims with the insured's initial loss calculation exceeding the policy retention, which has remained constant over the life of the product.

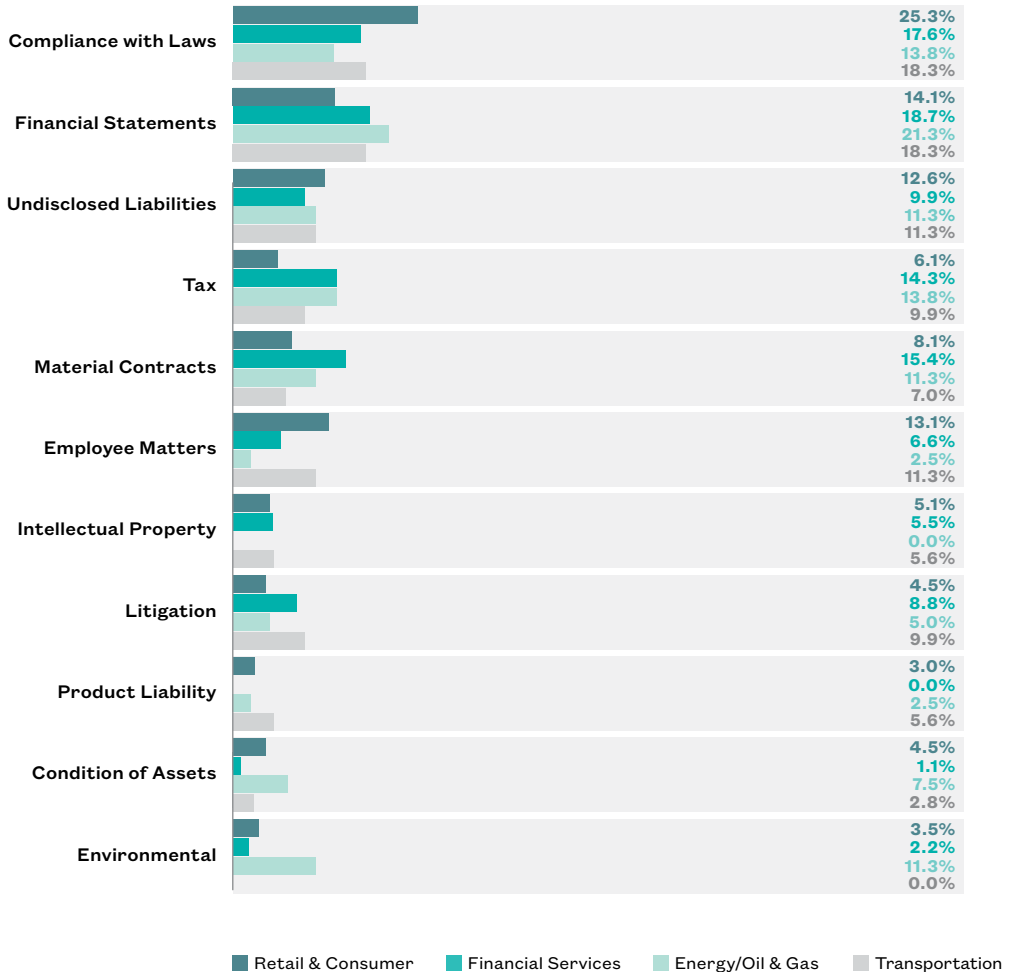
The chart on page 26 illustrates Aon's North American claims data with respect to breach frequency using the industry of the target company as the key variable. This year's analysis specifically focuses on four industries in particular: (i) retail & consumer; (ii) financial services; (iii) energy/oil & gas; and (iv) transportation.

The data suggests that companies in the transportation and retail & consumer industries are more likely to report a claim arising out of a breach of the compliance with laws representation in comparison to companies in the financial services and energy/oil & gas industries. Companies in the transportation and retail & consumer industries reported a breach of compliance with laws in approximately 18% and approximately 25% of the claims they filed, respectively. This trend is likely driven by the amount of hourly employees in the retail & consumer sector and the number of drivers in the transportation sector.

Another interesting trend made clear by the data when comparing the energy/oil & gas industry to the other sampled industries is that the energy/oil & gas industry is nearly twice as likely to cite a breach of the condition of assets representation. Given the nature of the energy/oil & gas sector, which can rely heavily on equipment either in the extraction, movement, or refining of natural resources, it is understandable that companies in this industry might have a greater risk exposure with respect to condition of asset claims.

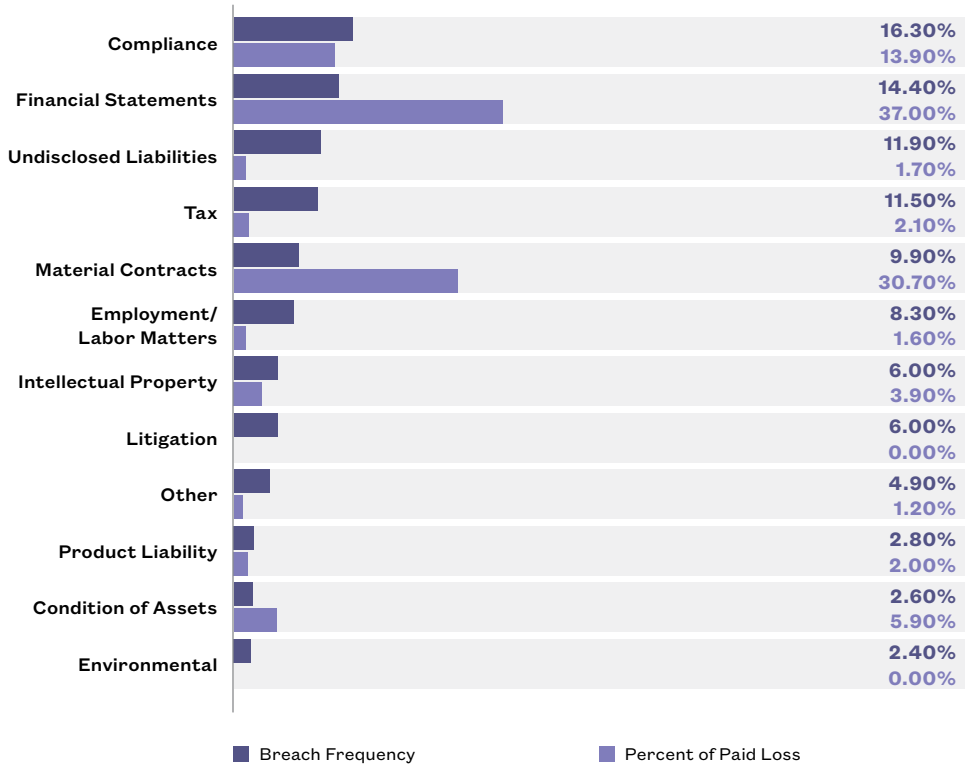
The Aon data shows that risks can vary across industries, and it would be prudent for dealmakers to pay attention to those breach types which tend to be the drivers of claims.

Breach Type by Industry



Claims Insight from AON

Frequency by Type of Breach versus Percentage of Total Paid Loss Attributable to Each Breach



Analyzing the data from 2015-2023, the most common breach type reported by Aon clients, as illustrated above, is compliance with laws representation, followed by financial statements, undisclosed liabilities, tax, and material contracts. This is the second year in a row where the Aon data shows compliance with laws as the most frequent breach category, surpassing financial statements, which historically had been the most-cited breach.

When looking at the amount of loss paid by breach type, Aon continues to see claims alleging a financial statements breach as the main driver of loss followed closely by material contracts claims. Financial statements breaches comprise approximately 14% of all claims but have accounted for 37% of all recovery, material contracts breaches comprise approximately 10% of all claims but have accounted for approximately 31% of all amounts recovered, while compliance with laws breaches comprise approximately 16% of all claims and now account for approximately 14% of all amounts recovered (up from approximately 9% a year prior). The rise in compliance with laws payments is most likely due to an increased regulatory environment

and rising defense costs combined with lower retentions. Also notable is the increase in the amount of loss attributable to intellectual property claims, which has nearly doubled after accounting for 2023 data, as well as condition of assets claims, which continue year after year to have a loss severity more than double their corresponding claims frequency.

2024 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 HSR filing fee; and observe a 30-day waiting period before closing so that the agencies can review the deal for potential anticompetitive effects. Effective March 6, 2024, transactions with a value greater than \$478 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 \$119.5 million but less than \$478 million are generally reportable if one party to the transaction has annual net sales or total assets valued at \$23.9 million or more and the other party has annual net sales or total assets valued at \$239 million or more. HSR reporting thresholds are adjusted annually and are tied to changes in the U.S. gross national product.

The HSR rules provide four additional reporting thresholds: in 2024, parties must report the acquisition of (a) voting securities valued at \$239 million or greater but less than \$1.195 billion; (b) voting securities valued at \$1.195 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 \$2.39 billion; and (d) 50% of the voting securities of an issuer if valued at greater than \$119.5 million. As required by the Merger Filing Fee Modernization Act of 2022, the FTC revised the HSR filing fee thresholds in 2024, so that HSR filing fees are now assessed on a six-tier range between \$30,000 (for transactions valued at less than \$173.3 million) and \$2.335 million (for transactions valued at \$5.365 billion or more) depending on the size of the transaction.

On October 10, 2024, the FTC announced new rules for the premerger notification form and reporting process under the HSR Act to take effect in early 2025. The new rules expand the scope of information that transacting parties must disclose with their premerger notification form, and will become effective 90 days after publication of the final rule in the Federal Register. The FTC also announced that it will lift its suspension on the ability of parties to request early termination of the 30-day waiting period once these new rules become effective. For more information on the new rules, click here: [FTC Issues New Rules for HSR Premerger Notification Filings | Seyfarth Shaw LLP](#).

Preparing for the Corporate Transparency Act

Under the Corporate Transparency Act (CTA) which became effective on January 1, 2024, entities formed before 2024 must submit their initial report disclosing specific beneficial ownership information to the US Department of Treasury's Financial Crimes Enforcement Network by January 1, 2025.¹

Unless covered by an exemption, the CTA requires corporations, limited liability companies, limited partnerships, statutory trusts, and any other US or foreign entity created or registered to do business in the US by the filing of a document with a Secretary of State (or similar office under state or Indian Tribal law) to (1) file an initial report disclosing information regarding the entity and its beneficial owners², and (2) update the report to disclose any change to previously reported information within a specified time period.

With this deadline to file initial reports for entities formed prior to 2024 drawing near, it is essential to determine if your company's entities are subject to the reporting requirements of the CTA and, if so, to understand the necessary disclosures that need to be made in order to comply with the CTA. Failure to submit these reports within the specified time periods can result in significant civil and criminal penalties.

Visit www.seyfarth.com/trends/corporate-transparency-act.html for the latest resources on the CTA and strategies for ensuring compliance.

¹ Entities formed in 2024 have 90 days to submit their initial report, and entities formed on or after January 1, 2025, will have 30 days to submit their initial report.

² Entities formed on or after January 1, 2024 need to additionally submit information about the individuals who created the entity or registered it to do business in the U.S.

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.

Seyfarth's Leading Middle Market M&A Practice

The Legal 500

Recognized as a leading 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.

Seyfarth's M&A practice provides domestic and cross-border advice on a wide range of complex M&A and other corporate transactions and applies a constructive and proven approach to a broad range of clients, from public and privately held companies to private equity firms and family-owned businesses, with a sweet spot in middle market transactions.

We approach each transaction with a comprehensive grasp of our client's business and objectives, and understand that M&A matters frequently involve aspects of many legal disciplines. Seyfarth offers a cross-departmental, core team of attorneys across our platform to address virtually every issue arising in a transaction, including tax, real estate, labor and employment, employee benefits, intellectual property, privacy and data security, environmental, and antitrust matters. In this way, our clients receive full attention from dedicated, focused business attorneys and reap the benefits of a full-service law firm.

Learn more
about our team:



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