

Deal Term Trends in Midstream Acquisitions

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Introduction

This study analyzes publicly available domestic midstream acquisition agreements, along with certain private agreements that Locke Lord has been involved in, entered into since January 1, 2015. The transaction values ranged from approximately \$7.5 million to \$9.3 billion



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1. “No Undisclosed Liabilities” Representation

Buyer-Favorable

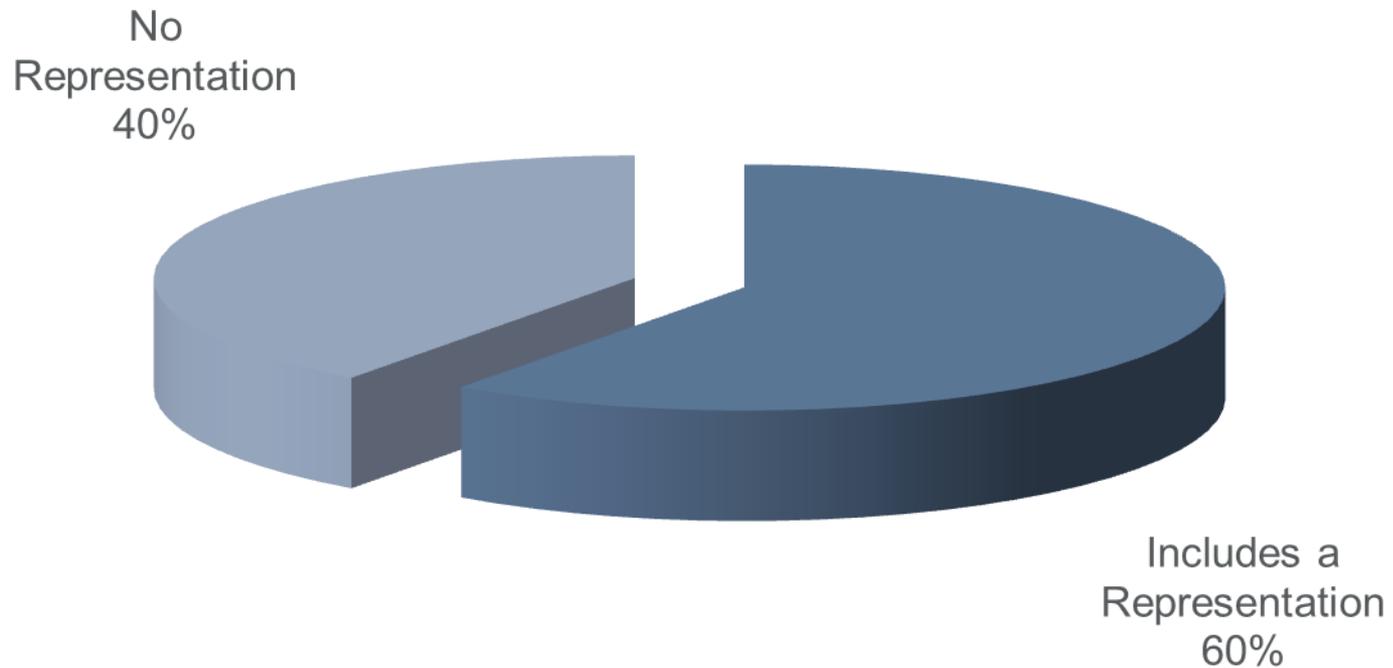
“There are no liabilities or obligation of the Target Group of any nature (whether known or unknown and whether accrued, absolute, contingent or otherwise) and there are no facts or circumstances that would reasonably be expected to result in any such liabilities or obligations, whether arising in the context of federal, state or local judicial, regulatory, administrative or permitting agency proceedings, other than (i) current liabilities incurred in the ordinary course of business, and (ii) liabilities or obligations (whether known or unknown and whether accrued, absolute, contingent or otherwise) [that would not, individually or in the aggregate, reasonably be expected to have a Target Entity Material Adverse Effect.”]

“No Undisclosed Liabilities” Representation

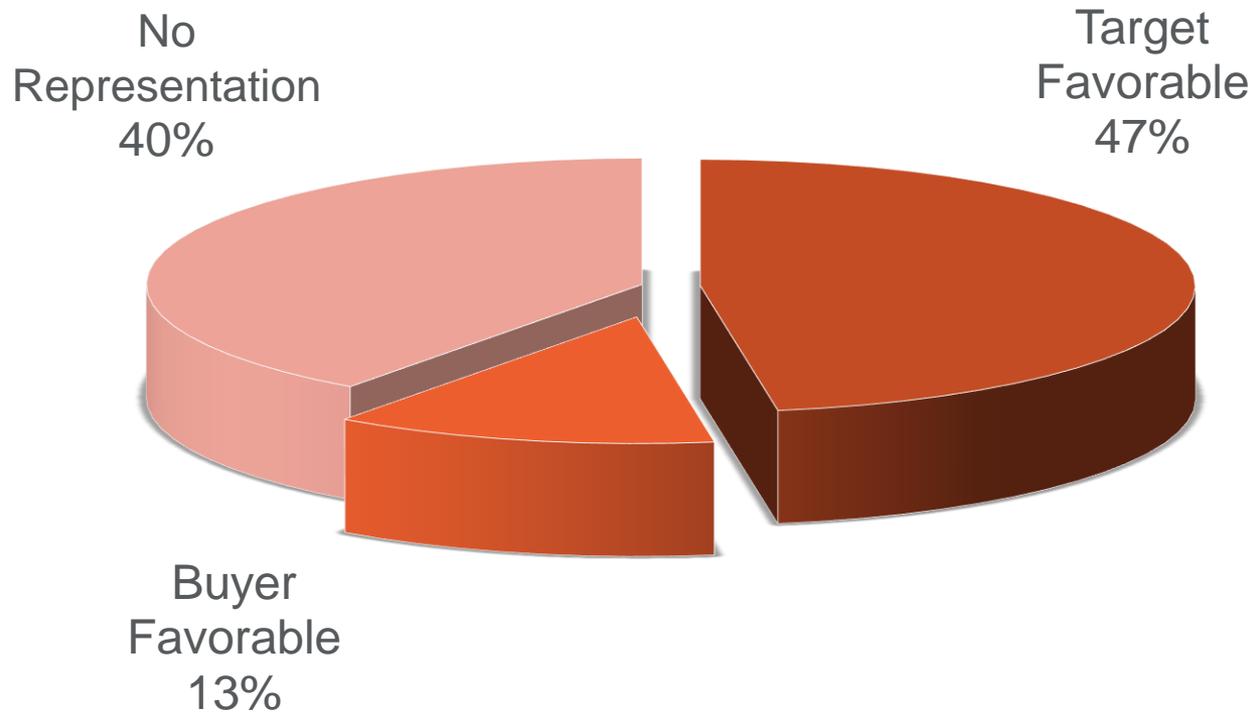
Target-Favorable

“Since December 31, 2016, the Acquired Companies have not incurred any obligation or liability of any type (whether accrued, absolute, contingent or otherwise) **that would be required under GAAP to be reflected on a consolidated balance sheet of the Acquired Companies** prepared in accordance with GAAP...”

“No Undisclosed Liabilities” Representation



“No Undisclosed Liabilities” Representation



2. Material Adverse Change Condition (“MAC Condition”)

- MAC Condition clause provides purchasers with an “out” in the event of an unforeseen material adverse business or economic change affecting the target company or assets between the signing of the definitive agreement and the consummation of the transaction.
- A broadly defined MAC Condition is more favorable to a buyer while a narrowly defined MAC Condition is more favorable to a seller.

Example 1

“No Material Adverse Effect in the Seller shall have occurred or is occurring” since [specified date].

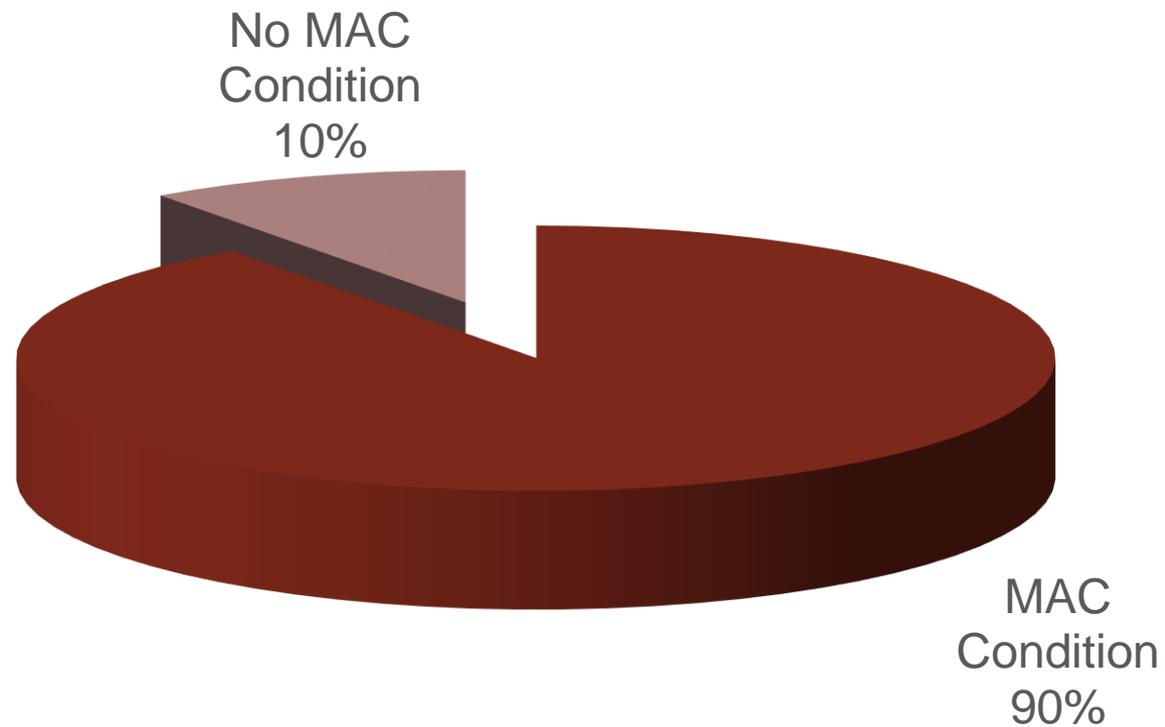
Example 2

Representation that there is an “Absence of Changes” in the condition of the Seller since [specified date].

PLUS

A “Bring Down” formulation of “Accuracy of Representations” Condition

MAC Condition



MAC Condition

(Various Formulations – Quantified MAC)

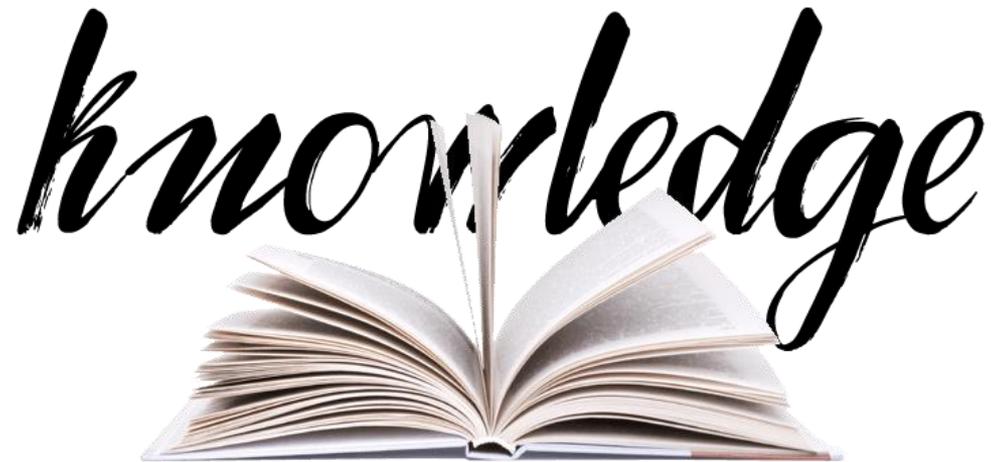
“**Material Adverse Effect**” means any material adverse change, circumstance, effect or condition (a) in or relating to the Purchased Assets or the assets, financial condition, results of operations, or business of any Party, or that materially impedes the ability of any Party to consummate the transactions contemplated hereby or (b) **results or would result in Indemnified Costs to a Party in excess of [\$_____]**, other than any change, circumstance, effect or condition in the gathering, processing, treatment, refining or pipelines industries generally (including any change in the prices of crude oil, natural gas, natural gas liquids, feedstocks or refined products or other hydrocarbon products, or the transportation or processing of any such materials or substances, industry margins or any regulatory changes or changes in Applicable Law) or in United States or global economic conditions or financial markets in general.

- In our study, we found about 10% of midstream/pipeline acquisitions contain quantified MAC Conditions.

3. Knowledge Investigation Standards

“Actual Knowledge”

“Knowledge” shall mean the present actual knowledge, **without investigation**, of the individuals listed on Schedule 1.1.”

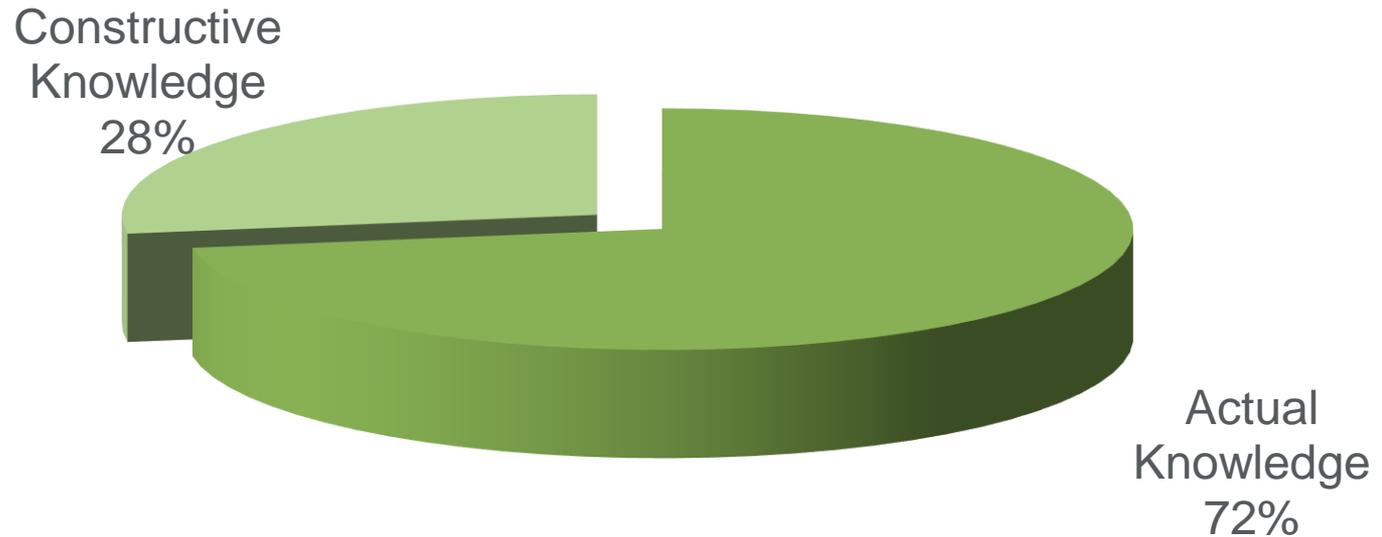


Knowledge Investigation Standards

“Constructive Knowledge”

“Knowledge”...(ii) when used in the phrase “to Buyer’s Knowledge” or similar phrases means, and shall be limited to, the actual knowledge, of the Persons set forth on Exhibit D-2, **after reasonable inquiry** of those Persons employed by Buyer or its Affiliates **who would reasonably be expected to have knowledge of the fact, event or circumstance in question.**”

Knowledge Investigation Standards



Whose Knowledge?

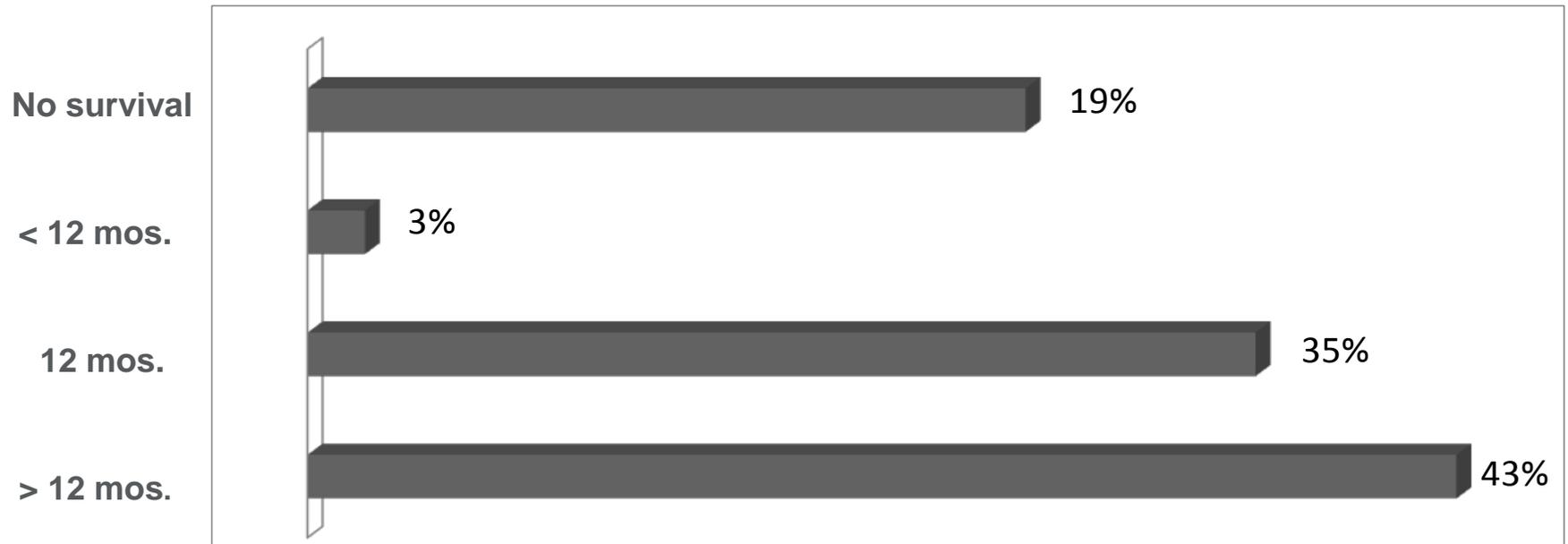
“Seller’s Knowledge” shall mean the current and actual knowledge (without any duty of investigation) of **[individual]***, acting in his capacity as representative of Seller (the “Seller Representative”).”

*Parties negotiate who’s knowledge is relevant.

4. Time Limitation for Assertion of Claims

“All representations and warranties contained in this Agreement **will survive for 18 months after the Closing Date**; *provided, however*, that the (a) representations and warranties under Section 3.12 (Taxes) (the “Tax Representations”) shall survive the Closing for the applicable Tax statute of limitations and any extension or waivers thereof in effect at Closing, plus 30 days and (b) the Fundamental Representations and Warranties (other than the Tax Representations) and Fraud Claims shall survive indefinitely.”

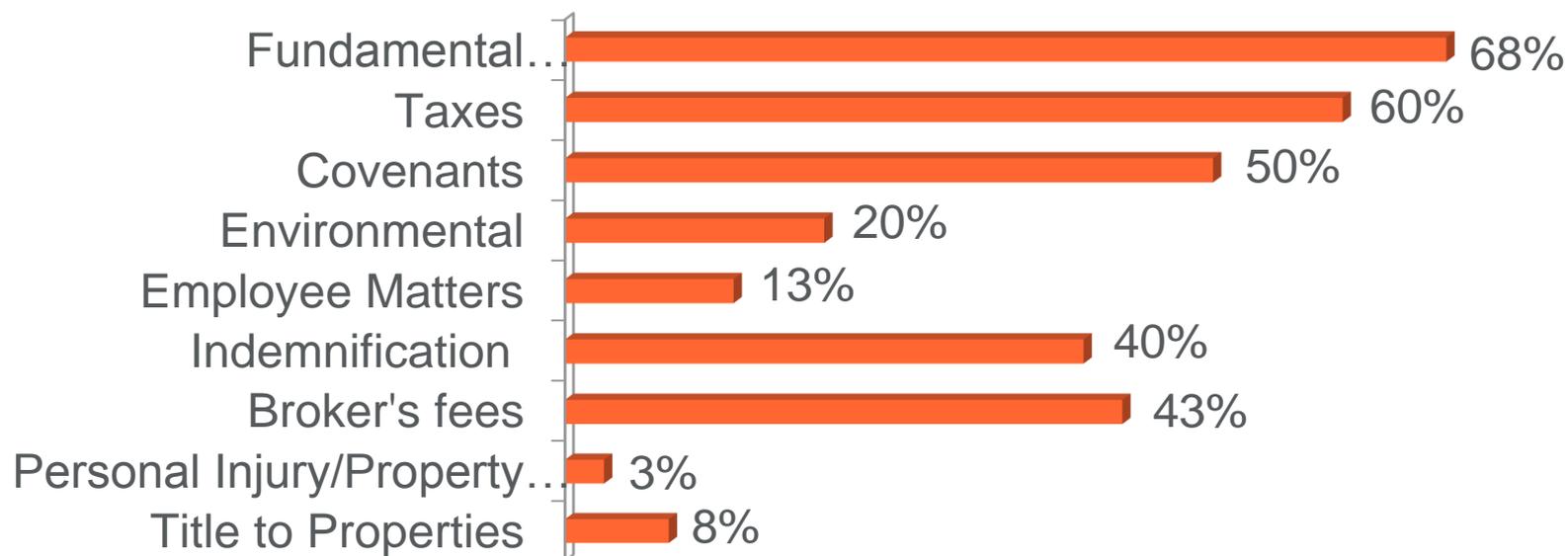
Survival/Time Limitation for Assertion of Claims*



* Time periods that apply to representations on a general basis; does not take into account longer periods that may be assigned to specific representations (see “Carveouts to Survival Limitations”).

- The average survival period for transactions reviewed for this presentation that have closed in the past year is approximately 11 months.

Carveouts to Survival Limitations



* Examples of Fundamental Representations include representations regarding due authorization, title to equity, enforceability, no violation of the law and other matters

5. Baskets

True Deductible

Example 1: “No Seller indemnifying Party will have any liability **until the aggregate amount of all Losses**, not including any De Minimis Losses, actually incurred by the Buyer Indemnified Parties with respect to such matters **exceeds [__]% of the Purchase Price** (the "***Deductible***"), in which case the Buyer Indemnified Parties shall have the right to seek indemnification for all Losses in excess of, but not including, the Deductible.”

Example 2: “The Seller Indemnified Persons will be entitled to be indemnified for Damages, but **only if and to the extent that the aggregate amount of all such Damages exceeds [\$_____]**. The Seller Indemnified Persons will be entitled to be indemnified for Damages, but only if and to the extent that the aggregate amount of all such Damages exceeds [\$_____].”

Baskets (cont'd)

“Tipping” Basket

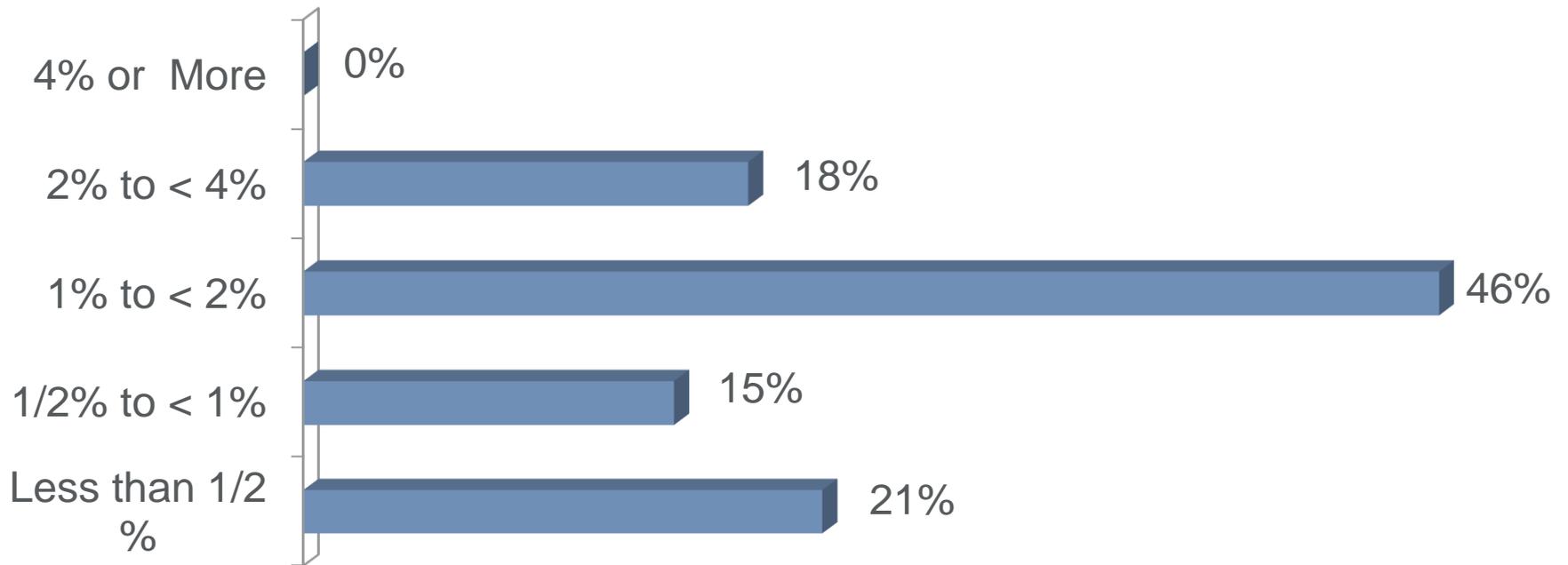
“Sellers shall not be required to indemnify Buyer for Losses until the aggregate amount of all such Losses exceeds [\$_____] (the “Threshold”) in which event Sellers shall be responsible for the **aggregate amount of all Losses, regardless of the Threshold.**”

Minimum Size for Individual Claims

“Seller shall not have any liability for any indemnification until and **unless the amount of an individual Claim exceeds [\$_____] (the “Threshold”).** Seller shall not have any liability for any indemnification until and unless the aggregate amount of the liability for all Claims exceeding the Threshold exceeds [\$_____] (the “Deductible”)...”

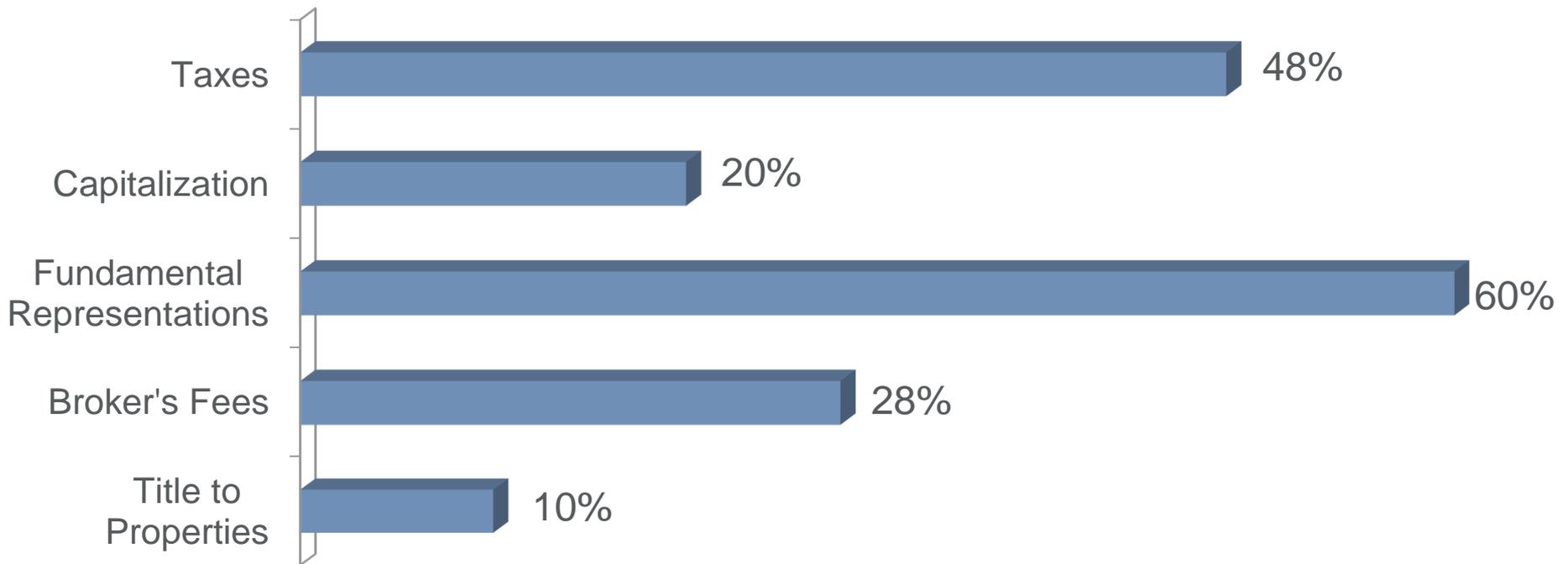
Baskets: As a Percentage of Deal Value

(Subset: Deals with Baskets)



6. Basket Carveouts

(Subset: Deals with Baskets)



* Examples of Fundamental Representations include representations regarding due authorization, title to equity, enforceability, no violation of the law and other matters

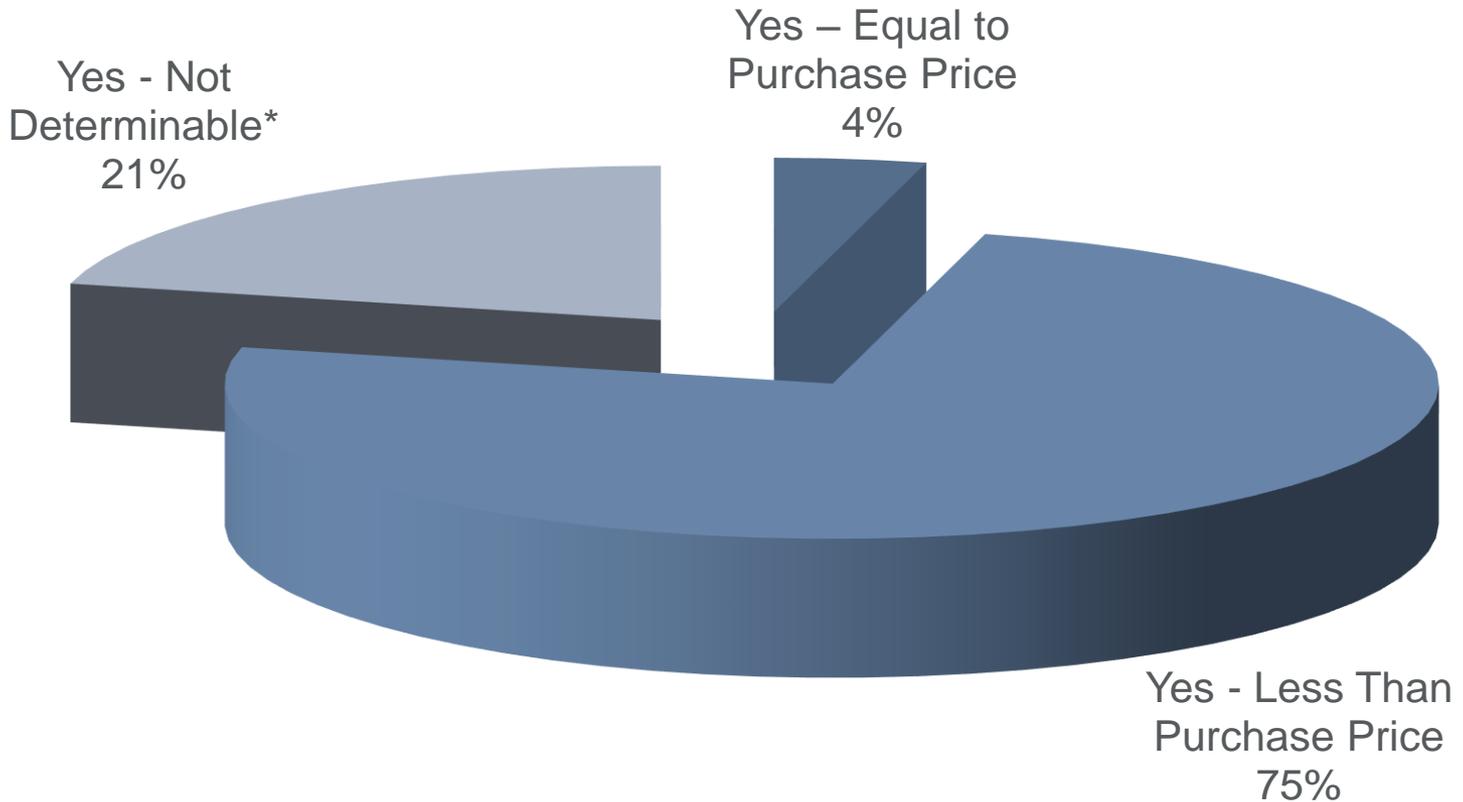
7. Caps

A “cap” is the upper dollar limit of the seller’s indemnification obligations to the buyer. It is the total amount of losses and damages a buyer is entitled to recover from the seller. In negotiating an indemnification cap, a seller will clearly seek the lowest cap possible, while a buyer will seek a high cap or no cap at all.

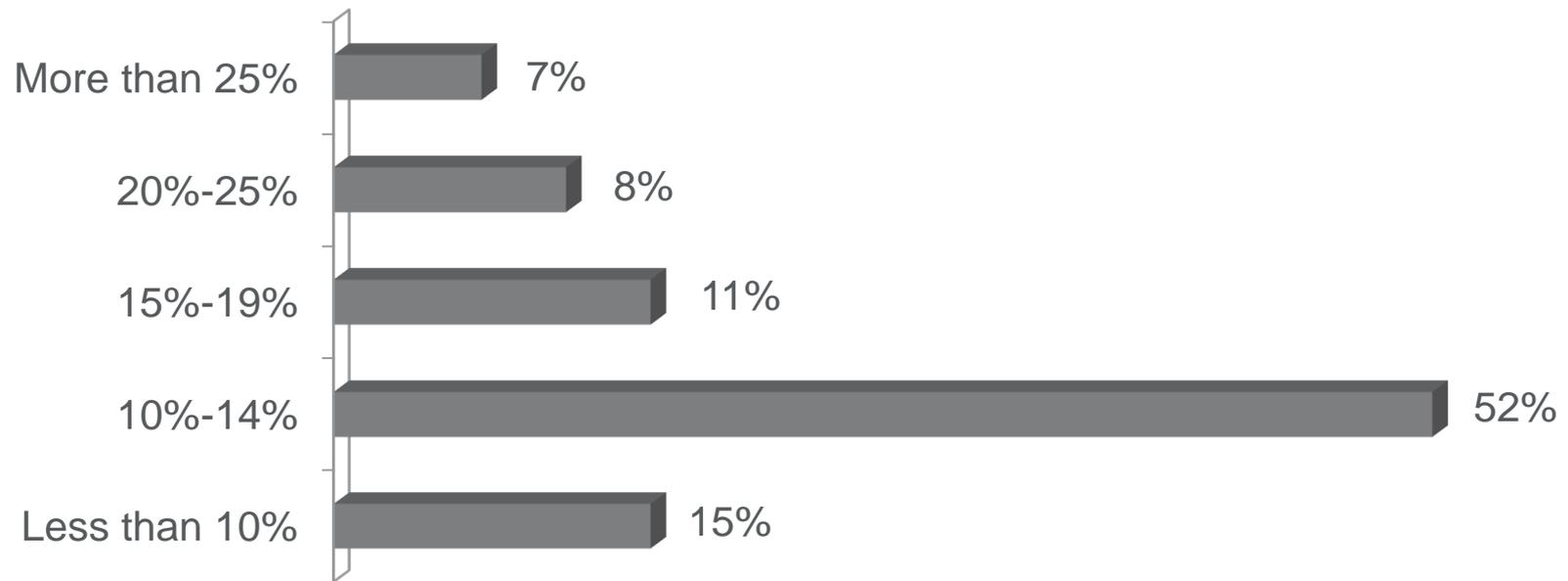
Example

“In no event shall Buyer’s aggregate liability to the Seller’s Indemnified Parties exceed [\$ _____ or specified percentage of the Purchase Price] (the “Ceiling Amount”).”

Caps

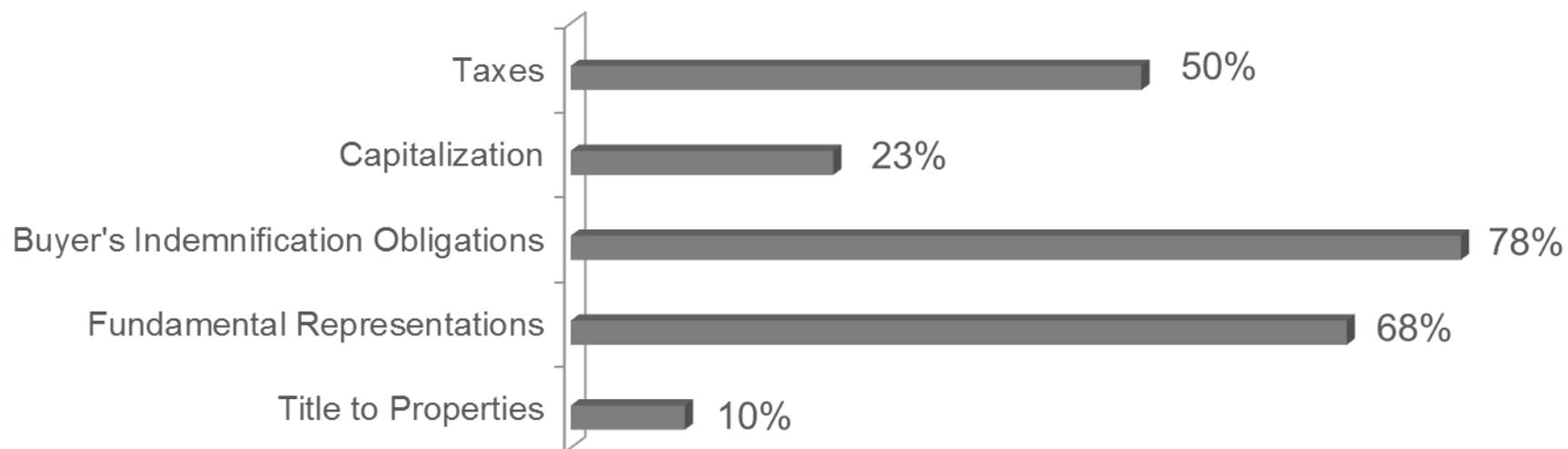


Cap Amounts*



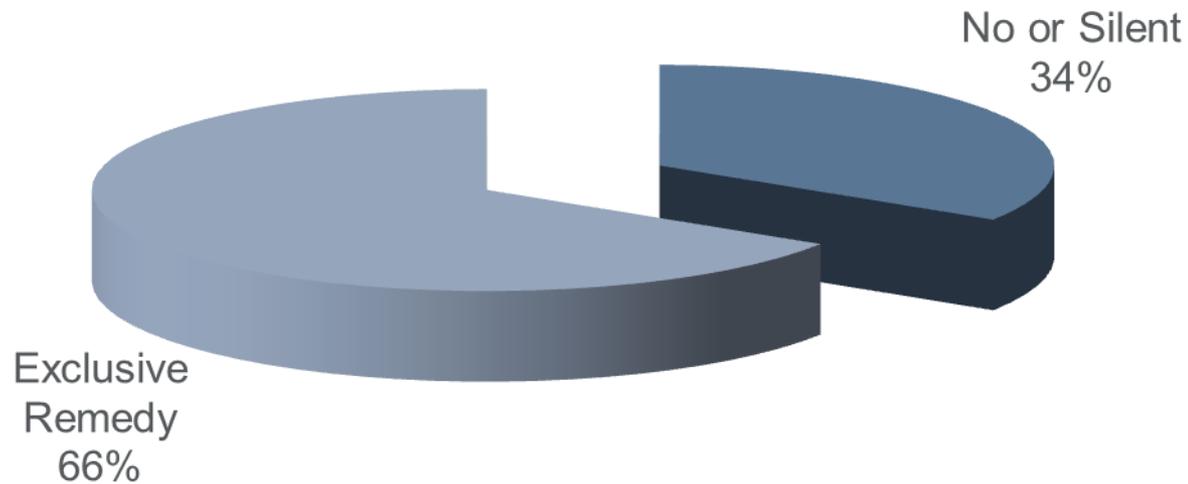
The average cap size for transactions reviewed for this presentation is 15%

Cap Carveouts



* Examples of Fundamental Representations include representations regarding due authorization, title to equity, enforceability, no violation of the law and other matters

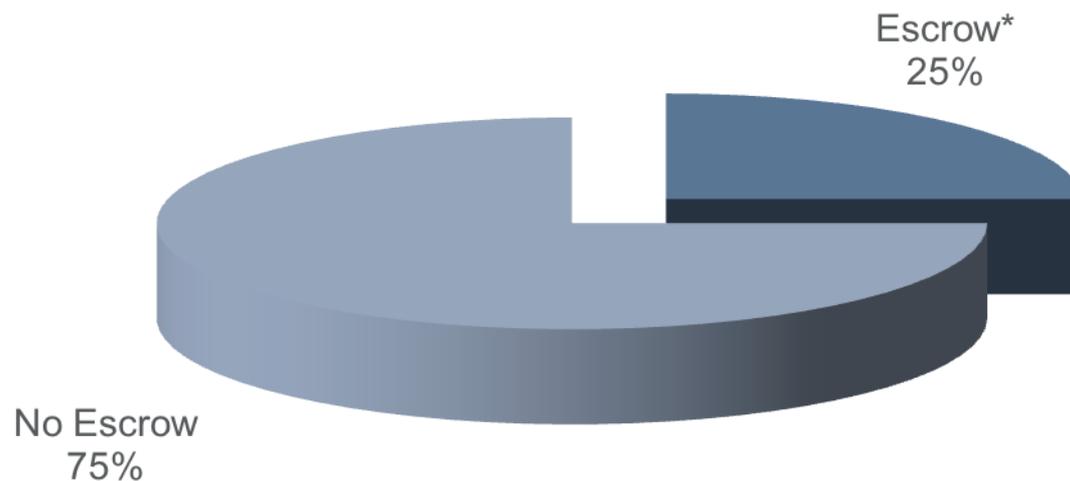
8. Indemnification as the Exclusive Remedy



Indemnification as the Exclusive Remedy - Carveouts



9. Escrows



* Of the transactions with Escrows, the Escrow was the sole source of recovery in 50% of the transactions

Escrow Size

(Subset – Deals with Escrows)

Those transactions with an Escrow all had an escrow amount of approximately 10% of the transaction value. The duration of the escrow varied from 12 to 18 months.

10. Our Watch/Your Watch

(Subset – Asset Transactions)

- Of those asset transactions reviewed for this presentation, 55% of the asset transactions had a general “our watch/your watch” provision, whereas the others did not.
- Several of the agreements include “our watch/your watch” provisions for specific issues relevant to that particular transaction, whether it be an environmental, tax or employment issue.
- For example, 27% of the asset transaction included specific provisions related to taxes and environmental issues, and 9% included a specific provision on employment issues.

11. Sandbagging

- Where a party may seek indemnification for the other party's breach of the merger agreement even if the nonbreaching party had knowledge of the breach prior to closing.

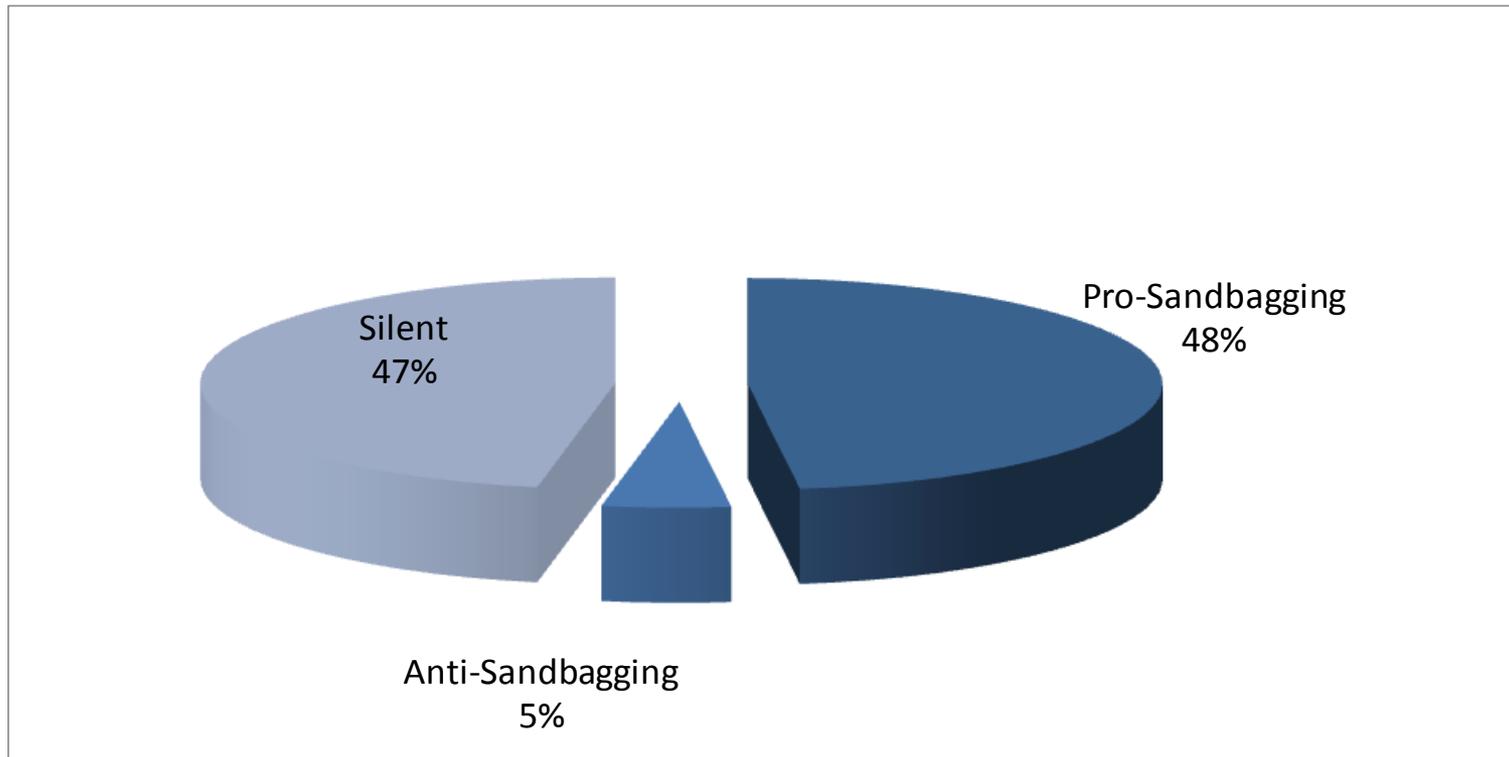
Pro-Sandbagging

“The right to indemnification or other remedy based upon any such representation, warranty, covenant, or obligation **will not be affected by...any investigation conducted or any Knowledge acquired at any time**, whether before or after the execution and delivery of this Agreement...”

Anti-Sandbagging

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

11. Sandbagging



12. Other Issues

Earnouts

- An earnout is a risk-allocation mechanism used in an M&A transaction whereby a portion of the purchase price is deferred and is calculated based on the performance of the acquired business over a specified time period following the closing of the transaction. Examples include revenue targets, receipt of regulatory approvals, etc.

Rep & Warranty Insurance

- Of the midstream transactions, from 2015 – 2017, reviewed for this survey, only 3% included a provision concerning representations and warranties insurance.

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Practices

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Education

J.D., with high honors,
The University of Texas
School of Law, 1988
Chancellors
Order of the Coif
Texas Law Review

B.A., *summa cum laude*,
Southern Methodist
University, 1984
Phi Beta Kappa

Bar Admissions

Texas, 1988

Bill Swanstrom serves as Co-Chair of the Firm's Energy Practice Group. Bill has over 25 years of experience working with energy companies in their significant acquisition, divestiture, project development and finance activities. He also has substantial experience in energy private equity transactions, representing both investors and companies. He is a regular speaker and writes on energy M&A and project development issues. Bill has been recognized in *Chambers USA* as "an incredibly talented lawyer who is an excellent resource for clients."

Representative Experience

- Represented Saddle Butte Rockies Midstream, LLC and affiliates in its \$638.5 million acquisition by Black Diamond Gathering, LLC, a newly formed joint venture by Noble Midstream Partners LP and Greenfield Midstream, LLC
- Represented Medallion Gathering & Processing, LLC in its sale to an affiliate of Global Infrastructure Partners for a cash purchase price of \$1.825 billion
- Represented American Midstream Partners LP in its merger with JP Energy Partners LP to create a combined midstream platform. The combined partnership creates a diversified midstream business operating in leading North American basins
- Represented Targa Resources Corp. in its acquisition of 100 percent of the membership interests of Outrigger Delaware Operating LLC, Outrigger Southern Delaware Operating LLC and Outrigger Midland Operating LLC from Outrigger Energy LLC for initial cash consideration of \$565 million plus potential earnout
- Represented Lucid Energy Group II, LLC in the acquisition of all outstanding stock of Agave Energy Holdings Inc. and the purchase of certain assets from Agave Energy Company for an undisclosed value
- Represented NextEra Energy Partners, LP in its \$2.1 billion acquisition of NET Midstream

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Mike Blankenship is a Partner in the Houston office of Locke Lord LLP where he focuses his practice on corporate finance and securities law, including securities offerings, special purpose acquisition companies (SPACs) offerings and transactions, private equity, mergers and acquisitions, and general corporate representation. He regularly counsels public companies on strategic transactions, capital markets offerings and general corporate and securities law matters. Mike represents both issuers and underwriters in U.S. and international capital markets transactions, including initial public offerings, and advises on corporate governance and securities market regulation.

Representative Experience

- Represented master limited partnership in its \$1.2 billion initial public offering of common units
- Represented underwriters in the \$1.4 billion initial public offering of limited partnership
- Represented retail energy services company in its \$54 million initial public offering of common stock
- Represented exploration and production company in its \$48 million offering of common stock
- Represented exploration and development company in its \$742 million public offering of common stock
- Represented master limited partnership in its launch of a \$74 million at-the-market (ATM) public offering of common units
- Represented master limited partnership in its launch of a \$400 million ATM public offering of common units

Practices

Capital Markets
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Corporate Governance
Mergers & Acquisitions
Private Equity & Venture
Capital

Education

J.D., *cum laude*, Rutgers
University School of Law,
2008
Order of the Coif

M.B.A., Finance, Syracuse
University – Martin J.
Whitman School of
Management, 2005

B.A., Distinction in
Economics, University of
Rochester, 2003

Bar Admissions

Texas, 2014
California, 2009
New York, 2009