Global Private M&A Guide - Limited External Content - United States of America

Agreeing to the acquisition agreement → Limitations on liability

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# What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: A cap can range from 1%-100% of the purchase price. The average cap amount has declined over the years due to the increased use of representations and warranties insurance. This is because caps are generally higher in deals without representations and warranties insurance than in deals that include representations and warranties insurance.

# Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: Caps commonly apply to indemnification obligations in the whole agreement (although breach of seller's/target's covenants are often carved out of the cap). Other limitations on liabilities (e.g., baskets) commonly apply only to the representations and warranties. Specific representations and warranties (particularly fundamental representations and warranties) or other items in the agreement (such as special indemnities) may have different cap amounts.

# What are the common exceptions to the cap?

Frequency/market practice: Fraud is usually excluded from the cap. Certain fundamental representations and warranties (e.g., authority, capitalization, title to assets/equity and due organization) are also commonly excluded. Tax and specific areas of concern are often excluded, or may have specific higher caps. Breaches of seller's/target's covenants and the brokers'/finders' fee representation are also often carved out of the cap.

# Is a deductible or basket common?

Frequency/market practice: Very common. Baskets in the US can be structured either as deductibles or tipping baskets. In a deal with a deductible, the indemnifying party is only liable for losses over a stated amount. If the parties agree to a tipping basket, the indemnifying party is liable for the total amount of losses once they exceed a specified threshold.

# Is a de minimis common?

Frequency/market practice: Very common.

# How long does seller liability survive?

Frequency/market practice: A general survival of 12-24 months is common.

# Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: It is common to carve out fraud. In addition, tax, employee benefits and environmental matters are commonly carved out and often survive until the expiration of the applicable statute of limitations. Other representations and warranties often carved out include authority, no conflict, capitalization, due organization, title of assets/equity and brokers'/finders' fees.

# Is warranty insurance common?

Frequency/market practice: Fairly common. While representations and warranties insurance was previously used primarily in the private equity space, it has been increasingly and widely adopted among strategic buyers as well As demand for representations and warranties insurance and the number of insurers has increased over the years, insurers have been more willing to offer representations and warranties insurance for alternative deal structures, such as carve-outs and public-to-private transactions, for example.

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