

YEAR	2020 -21	2022 -23	2024 -25
FINANCIAL PROVISIONS¹			
Post-Closing Purchase Price Adjustments			
Includes adjustment provision	93%	92%	90%
Includes estimated payments at closing	82%	82%	82%
Buyer prepares closing balance sheet	94%	97%	94%
Includes separate escrow ²	47%	53%	58%
Paid only if exceeds threshold	10%	19%	15%
Earnouts			
Includes earnout ³	20%	26%	18%
Includes buyer's covenant to run business consistent with past practice	21%	17%	14%
Includes covenant to run business to maximize earnout	8%	0%	5%
Includes right of buyer to operate post-closing in buyer's discretion	33%	50%	38%
Includes express disclaimer of fiduciary relationship	8%	25%	19%
Earnout accelerates on change in control	33%	21%	29%
Buyer can offset indemnity payments against earnout payment			
Express yes	58%	58%	52%
Includes Termination Fees ⁴	22%	20%	25%
PERVASIVE QUALIFIERS			
Definition of Material Adverse Effect ("MAE")			
Use of "prospects" included	7%	10%	3%
Includes buyer's ability to operate target's business post-closing	2%	0%	1%
Includes target's ability to consummate contemplated transaction	73%	69%	70%
Expressly provides that an existing fact/condition could constitute an MAE			1%
Includes reference to dollar threshold	0%	1%	0%
Includes reference to duration	1%	3%	3%
Includes carve outs	98%	94%	94%
Includes carve outs qualified by disproportionate effect	96%	93%	94%
Includes relational language in carve outs, such as "resulting from", etc.	72%	77%	77%
MAE is Forward-Looking	95%	93%	93%
Knowledge Includes Identified Persons	98%	99%	99%
TARGET'S REPRESENTATIONS AND WARRANTIES			
Deal with "fair presentation" representation			98%
Deal with "compliance with law" representation			100%
Deal with "no undisclosed liabilities" representation			96%

Deal with "#MeToo" representation			58%
Deal with "privacy" and "cybersecurity" representation			89%
COVENANTS⁵			
Notice of Breaches of Representations, Warranties & Covenants			
Silent	44%	40%	36%
Target expressly required to notify buyers of breaches	56%	60%	64%
Operation in the Ordinary Course			
Includes such covenant provision	98%	100%	98%
Buyer is expressly precluded from unreasonably withholding consent to actions that would violate:			
ordinary course covenants	60%	64%	68%
target's negative covenants	73%	71%	75%
Includes No Shop/No Talk	87%	90%	83%
CONDITIONS TO CLOSING			
Accuracy of Target's Representations			
How accurate must they be?			
At signing:			
In all respects	2%	2%	9%
In all material respects	20%	26%	25%
MAE	78%	72%	66%
At closing:			
In all respects	2%	2%	2%
In all material respects	21%	23%	18%
MAE	77%	74%	80%
Buyer's MAC Condition			
Stand-alone MAC condition only	37%	29%	37%
Back Door MAC condition only	14%	9%	5%
Both	45%	55%	56%
Neither	4%	7%	2%
Includes No Legal Proceedings Challenging the Transaction	50%	46%	35%
Includes Appraisal Right	70%	81%	63%
SANDBAGGING			
Sandbagging Provision			
Includes pro-sandbagging	29%	19%	28%
Includes anti-sandbagging	2%	5%	4%
Scope of Sandbagging			
Indemnification rights only	75%	62%	56%
Indemnification and walk rights	25%	38%	44%
INDEMNIFICATION			
Express No Survival ⁶		30%	41%
Limited to Out-of-Pocket Damages	6%	11%	4%
Indemnification for Claims "IF TRUE"			
Actual breach only			73%
Includes alleged breaches		17%	27%
Basket⁷			
Basket provision			
No basket	10%	11%	4%
First dollar	13%	20%	26%
Combination	3%	1%	3%

* Remainder of 100% total is: options not assumed, silent, or indeterminable.

¹ Certain data points and trend observations reference the American Bar Association Business Law Section's [2025 Private Target Deal Points Study](#).

² When the indemnity escrow amount is relatively small, it is often more efficient to establish a separate escrow for purchase price adjustments.

³ Certain Delaware decisions are viewed as giving buyers meaningful flexibility after closing, which may reduce the certainty and perceived value of earn-out payments for sellers. In addition, during the 2024-2025 AI-driven market, many target companies lacked mature revenue or earnings metrics, and a number of large transactions functioned more as acqui-hires or pre-revenue acquisitions, making earn-out based pricing less relevant. Earnouts became less prevalent.

⁴ Market data suggests that termination fees are relatively rare in private company transactions, though they may appear in deals involving material antitrust, financing, or CFIUS risk, or in certain transaction structures tied to stockholder approval or superior proposals.

⁵ "Covenants" and "Conditions to Closing" Sections include deferred closing deals only.

⁶ This increase is likely related to the increase in RWI deals.

⁷ Basket as a percentage of transaction value: 65% are set at 0.5% or less; 27% fall between 0.5% and 1%; 6% fall between 1% and 2%; and 2% exceed 2%.

Deductible	75%	67%	67%
Includes Eligible Claim Threshold	38%	24%	21%
Includes Materiality Scrape	92%	79%	87%
Caps			
Cap provision			
Silent	1%	0%	1%
Yes, but not determinable	14%	11%	9%
Yes - equal to purchase price	1%	3%	7%
Yes - less than purchase price	84%	86%	83%
Amounts as % of transaction value ⁸			
Minimum	0.38%	0.13%	0.02%
Maximum	100%	100%	100%
Third Party Claims			
Indemnifying party can control defense of third-party claims	94%	90%	86%
Includes exceptions to indemnifying party's ability to control defense	84%	84%	85%
Includes limits on ability of defending party to settle claims	96%	93%	94%
Indemnifying party is responsible for indemnified party's defense costs for claims on which it ultimately prevails			
Yes	5%	7%	11%
No	4%	1%	9%
Indemnification as exclusive remedy	97%	89%	89%
Escrow/Holdbacks as % of Transaction Value			
Minimum	0.36%	0.38%	0%
Maximum	15%	29.55%	22%
Reductions Against Buyer's Indemnification Claims			
Required buyers mitigate losses			
Expressly included	56%	69%	56%
Expressly excluded	1%	3%	1%
REPRESENTATION AND WARRANTIES INSURANCE ("RWI")			
RWI Contemplated by Definitive Agreement			
RWI references RWI ⁹	65%	55%	63%
Expressly obtained at signing	51%	40%	52%
RWI Acquisition/Payment			
Who acquires RWI?			
Seller	5%	3%	1%
Buyer	95%	97%	99%
Who pays for RWI?			
Buyer only	46%	51%	51%
Target only	8%	2%	2%
Both	25%	36%	38%
RWI Closing Conditions			
None	58%	60%	49%
To seller's obligations only	28%	38%	46%
To buyer's obligations only	5%	0%	1%
Both	10%	2%	3%
Includes Post Closing Covenant to Maintain RWI Policy	36%	64%	80%
RWI as Buyer's Sole Source of Recovery			
Yes, but for non-fundamental reps	25%	22%	28%
Yes, for all reps	38%	49%	46%
Express no	23%	10%	8%
Other	9%	17%	11%

Buyer's Obligation to First Pursue RWI Claims	56%	53%	42%
DISPUTE RESOLUTION			
Post-Closing Representation of Shareholders			
Includes express permission to represent target shareholders post-closing	82%	68%	82%
Conflict waiver included	43%	90%	65%
Attorney-Client Privilege Carve Out			
Yes; not limited	1%	6%	5%
Yes; limited to deal-related communication	80%	71%	71%
Includes Waiver of Jury Trial	93%	94%	96%
Alternative Dispute Resolution ("ADR")¹⁰			
Includes ADR	7%	6%	9%
Mediation then arbitration	38%	14%	0%
Arbitration	63%	86%	100%
Identified arbitrator/mediator			
International Chamber of Commerce	50%	29%	8%
Judicial arbitration & mediation	50%	57%	54%
American Arbitration Association	0%	14%	38%

⁸ Cap as a percentage of transaction value: 33% are set less than 1%; 5% fall between 1% and 5%; 8% fall between 5% and 10%; 14% are set at 10%; 17% fall between 10% and 15%; 5% fall between 15% and 25%; 10% fall between 25% and 50%; and 8% are set at purchased price.

⁹ Increased RWI usage may reflect shifting buyer-seller dynamics and the continued expansion and competitiveness of the RWI market.

¹⁰ In 2024-2025, most agreements remain silent on ADR fee allocation (62%), while 21% split fees evenly and only 8% adopt a loser-pays structure.