

2012
Edition

PRACTICAL LAW COMPANY®



Reverse Break-up Fees and Specific Performance

A Survey of Remedies in Leveraged Public Deals

 A PLC^{WHAT'S} MARKET STUDY



Central Question of the Study

How do buyers and target companies allocate the risk of financing failure, using the various tools at their disposal:

- Pre-termination equitable remedies.
- Post-termination fees or damages:
 - What size fee is typical as a percentage of the deal value and as a multiple of the target company's corresponding break-up fee.
 - Whether deal size impacts the choice of remedy or the size of the fee.
 - The language distinctions that govern whether payment of a fee limits any further remedies, and when we can predict to see that type of limitation.
- Closing conditions.
- Financing covenants – their wording and their interplay with the equitable remedies.
- Provisions included for the benefit of the lenders.





New in this Year's Study

- Focus entirely on debt-financed deals
 - Deals with no debt follow traditional, strategic model
- Separate analysis of equitable and monetary remedies
- “Xerox” provisions
- Review of how agreements define “willful” for post-termination liability





Study Sample

STUDY SAMPLE AT A GLANCE 86 Merger Agreements

55 with Strategic Buyers:

- 15 in Q1'11, 18 in Q2'11, 10 in Q3'11, 12 in Q4'11.
- 6 of the buyers were portfolio companies of private equity investors and received new equity commitments as part of their financing.
- 1 deal involved a rollover with existing stockholders.
- 35 buyers offered all-cash consideration, 12 offered a mix of cash and stock, 7 offered a cash/stock election, 1 offered all-stock consideration (and raised new debt to refinance the target company's existing debt).
- 15 were structured as front-end tender offers, including 1 with stock consideration.
- 1 was terminated before closing.

31 with Financial/Private Equity Buyers:

- 7 in Q1'11, 12 in Q2'11, 6 in Q3'11, 6 in Q4'11.
- 9 deals involved a rollover with existing stockholders, of which 3 were takeovers by existing management.
- 5 were structured as front-end tender offers.



The Remedy Categories

- Each agreement in the study is classified two ways:
 - The pre-termination equitable remedy available to the target company.
 - The post-termination fee or damages payable to the target company for breach by the buyer.





Pre-termination Enforcement

Four categories throughout the study:

- 1) **Full Specific Performance:** The target company has an unconditioned remedy of specific performance to enforce all of the buyer's obligations under all circumstances. This includes enforcement of the buyer's obligations to draw down the debt financing (and equity financing, when applicable) and close the transaction.
- 2) **Conditional Specific Performance:** The target company can enforce the buyer's obligations to draw down the financing and close the transaction, but the right of enforcement is conditioned on the availability of the debt financing.





Pre-termination Enforcement

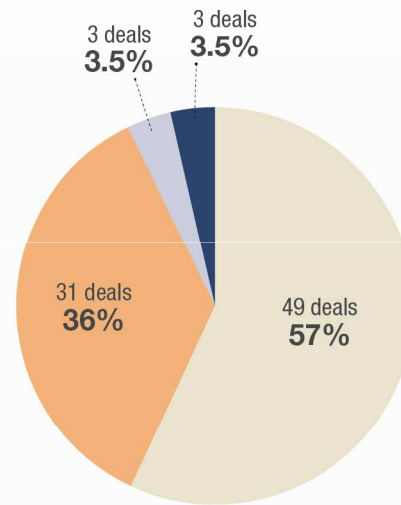
- 3) **Limited Specific Performance:** The target company has no right of specific performance to enforce the buyer's obligation to close the transaction. It does, however, have a right to enforce the financing.
- 4) **No Specific Performance:** The target company has no right of specific performance. Its only remedy is to receive a reverse break-up fee or sue for damages.



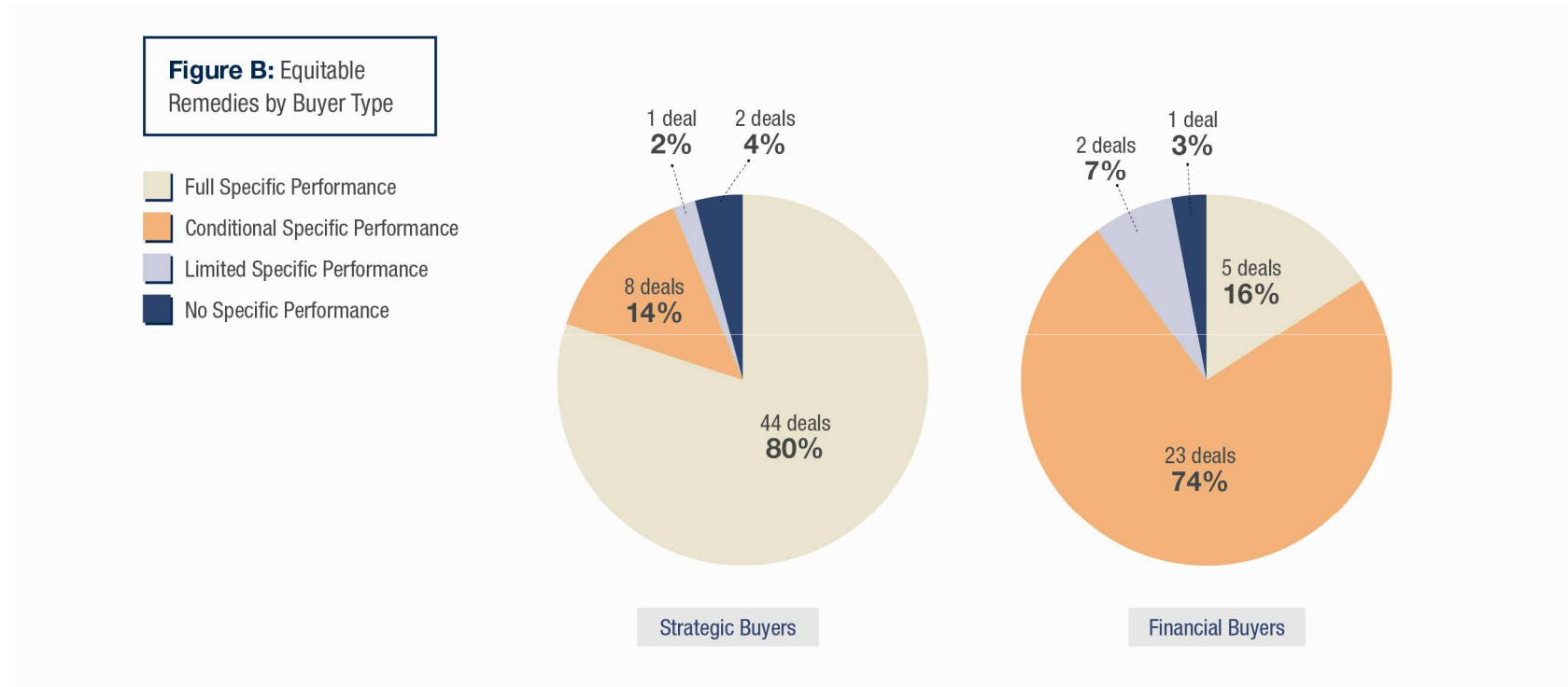
Review of Equitable Remedies

Figure A: Equitable Remedies
Across All Transactions

- Full Specific Performance
- Conditional Specific Performance
- Limited Specific Performance
- No Specific Performance



Review of Equitable Remedies





Post-termination Remedies

Five categories throughout the study:

- 1) **No RBF, Full Damages:** The agreement does not include any fee that the buyer would pay for breach or financing failure. Liability survives termination for any breach (or material breach), without any limitation for knowledge or intent. The buyer can be sued for damages even if its breach was not willful.
- 2) **No RBF, Damages for Willful Breach:** The agreement does not include any pre-determined fee that the buyer would pay for breach or financing failure. Liability survives termination for any “willful,” “knowing” or “intentional” breach, but does not survive if the breach was not willful.





Post-termination Remedies

- 3) **RBF, Uncapped Damages for Willful Breach:**
The buyer pays a reverse break-up fee or expense reimbursement if it breaches the agreement or fails to close. The fee caps the buyer's damages for non-willful breaches or a financing failure that it did not cause. The buyer remains exposed to unlimited damages for willful breach.
- 4) **RBF, Cap on Damages:** The buyer pays a reverse break-up fee for breach or failure to close. The fee caps the buyer's damages in all instances, including if the buyer willfully breached the agreement.





Post-termination Remedies

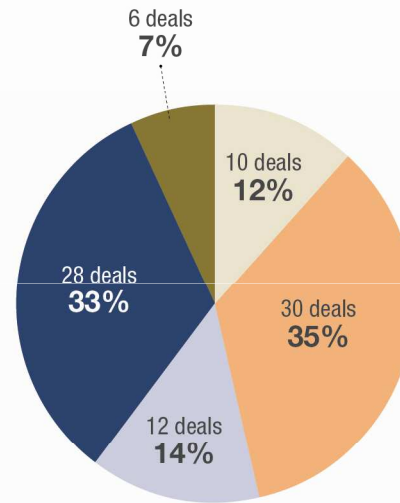
- 5) **Two-tier Reverse Break-up Fee:** The buyer pays a lower reverse break-up fee for non-willful breaches or financing failure (or both) and a higher fee for willful breaches or when the financing is available.
- Throughout the study, references to reverse break-up fees are to those paid for breach or financing failure. Not for antitrust failure or fiduciary outs.
 - But: *Table A* in the Appendix notes every agreement in the study that has that type of reverse break-up fee.



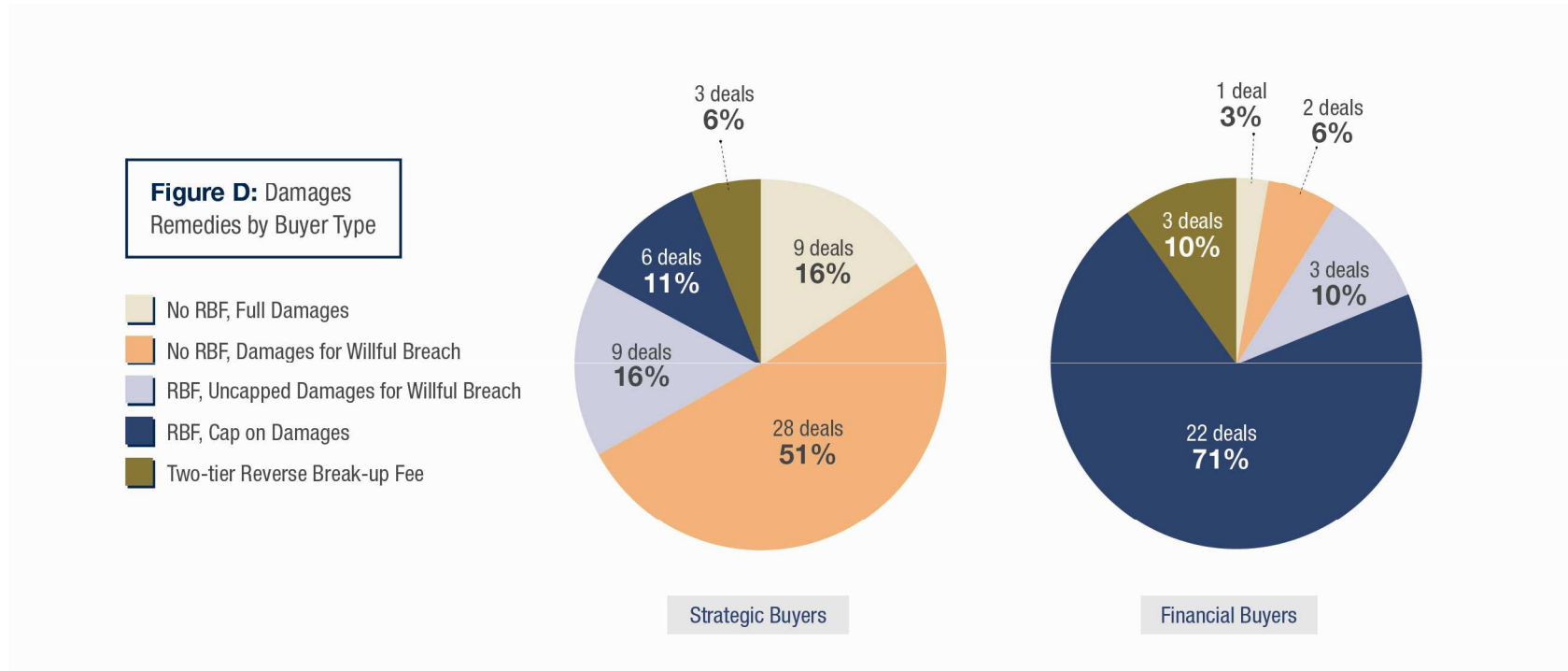
Review of Monetary Remedies

Figure C: Damages Remedies
Across All Transactions

- No RBF, Full Damages
- No RBF, Damages for Willful Breach
- RBF, Uncapped Damages for Willful Breach
- RBF, Cap on Damages
- Two-tier Reverse Break-up Fee



Review of Monetary Remedies





Review of Monetary Remedies

- Of the 30 agreements that have no reverse break-up fee but that have damages available only for willful breach:
 - 20 do not further define the standard beyond using the term “willful,” “knowing” or “intentional.”
 - 10 define “willful” as having actual knowledge that the act or failure to act would constitute a breach.
- Of the 12 agreements with a reverse break-up fee that only caps damages for non-willful breach, three define “willful” as actual knowledge that the act or failure to act constitutes a breach.
- *Table E* in the Appendix of the study provides the definition of willfulness in each agreement in the study, where applicable.





Remedy Models

To categorize the agreements by their overall approach to buyer breach, we can identify five general models:

- 1) **“Strategic” model.** Full specific performance, uncapped damages for willful breach.
- 2) **“Private Equity” model.** Reverse break-up fee caps damages, but target company has specific performance.



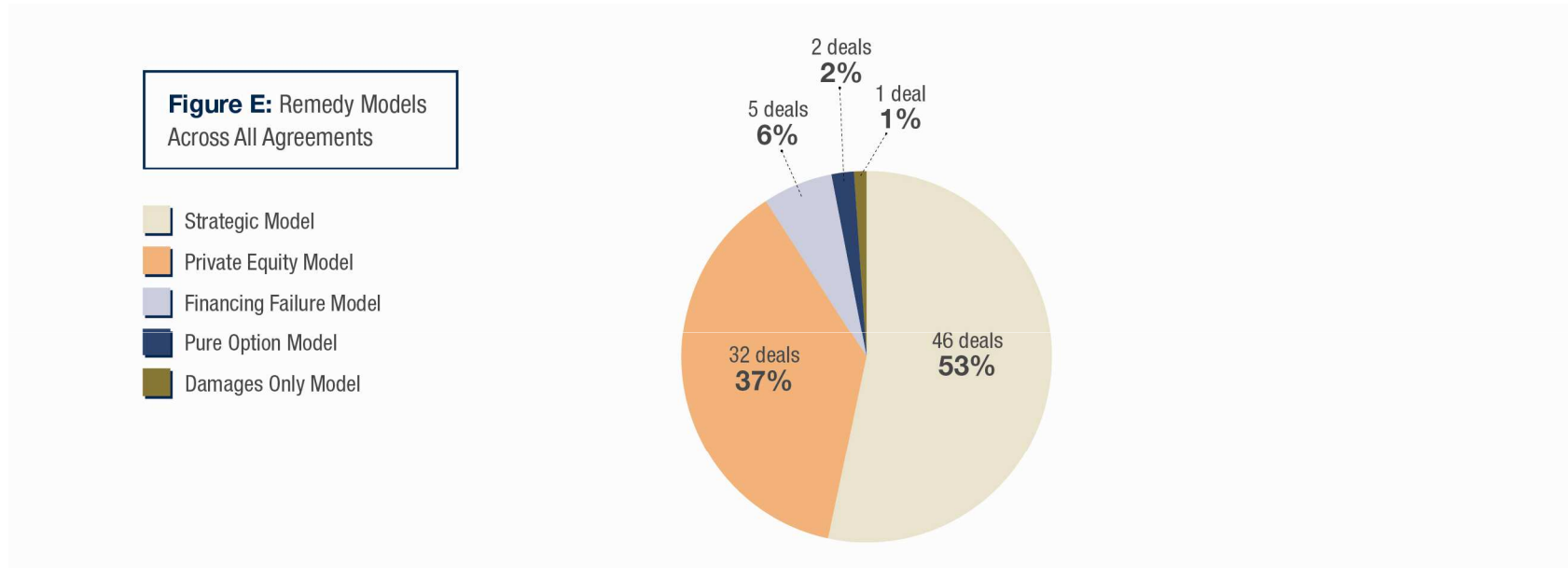


Remedy Models

- 3) **“Financing Failure” model.** RBF for non-willful breach, damages uncapped for willful breach, target company has conditional or limited specific performance.
- 4) **“Pure Option” model.** Reverse break-up fee caps damages, target company has no right to specific performance.
- 5) **“Damages Only” model.** No RBF and no specific performance. Just damages.



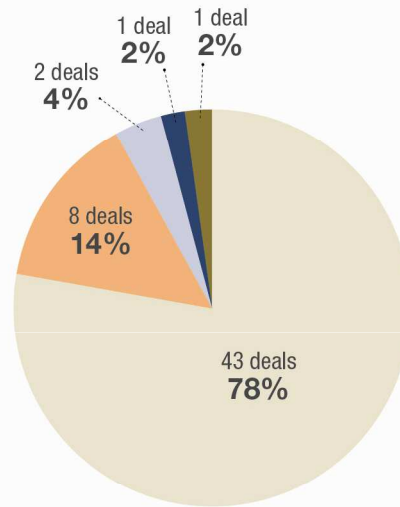
Remedy Models



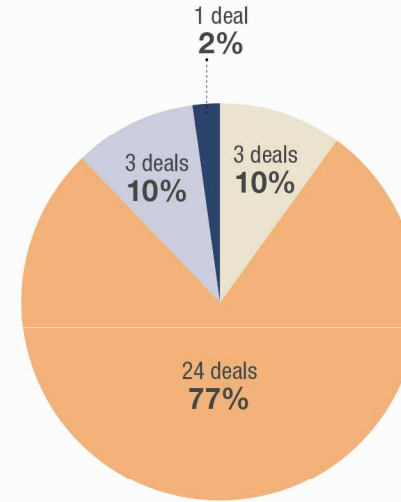
Remedy Models

Figure F: Remedy Models by Buyer Type

- Strategic Model
- Private Equity Model
- Financing Failure Model
- Pure Option Model
- Damages Only Model



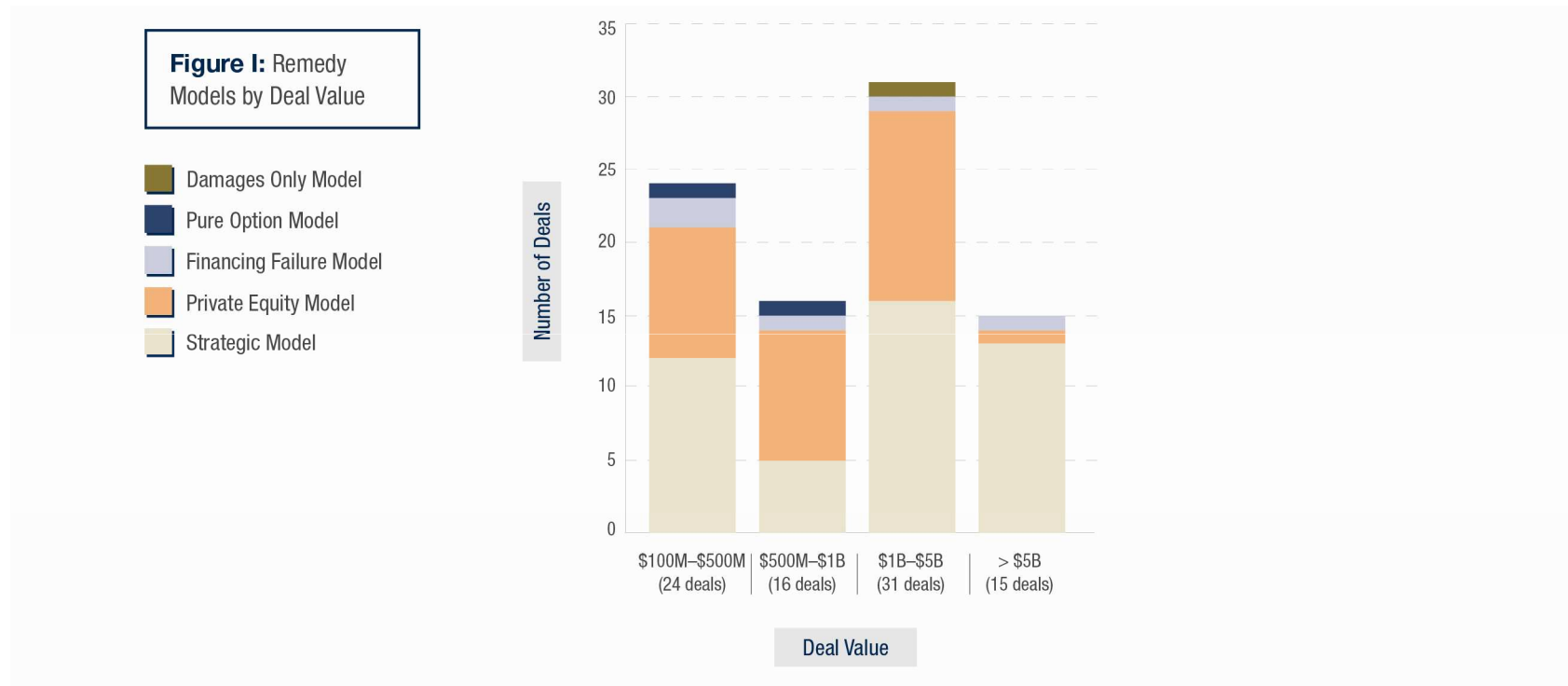
Strategic Buyers



Financial Buyers



Impact of Deal Value on Choice of Remedy





Size of Reverse Break-up Fees

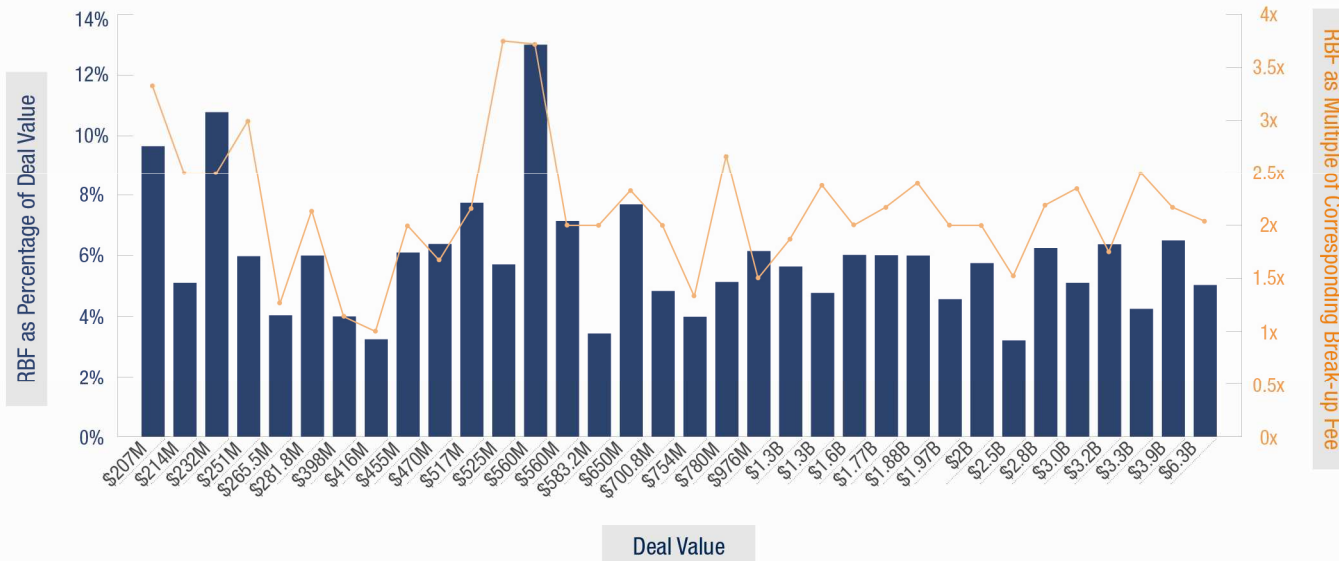
- The next figures measure the sizes of reverse break-up fees using two metrics:
 - As percentages of the respective deal values.
 - As multiples of the target companies' corresponding break-up fees.
- *Table D* in the Appendix of the study also gives each fee's percentage of the buyer's equity commitment, where applicable.



Size of Reverse Break-up Fees

Figure J-1: Size of Reverse Break-up Fees: Cap on Damages

- RBF as Percentage of Deal Value
- RBF as Multiple of Corresponding Break-up Fee

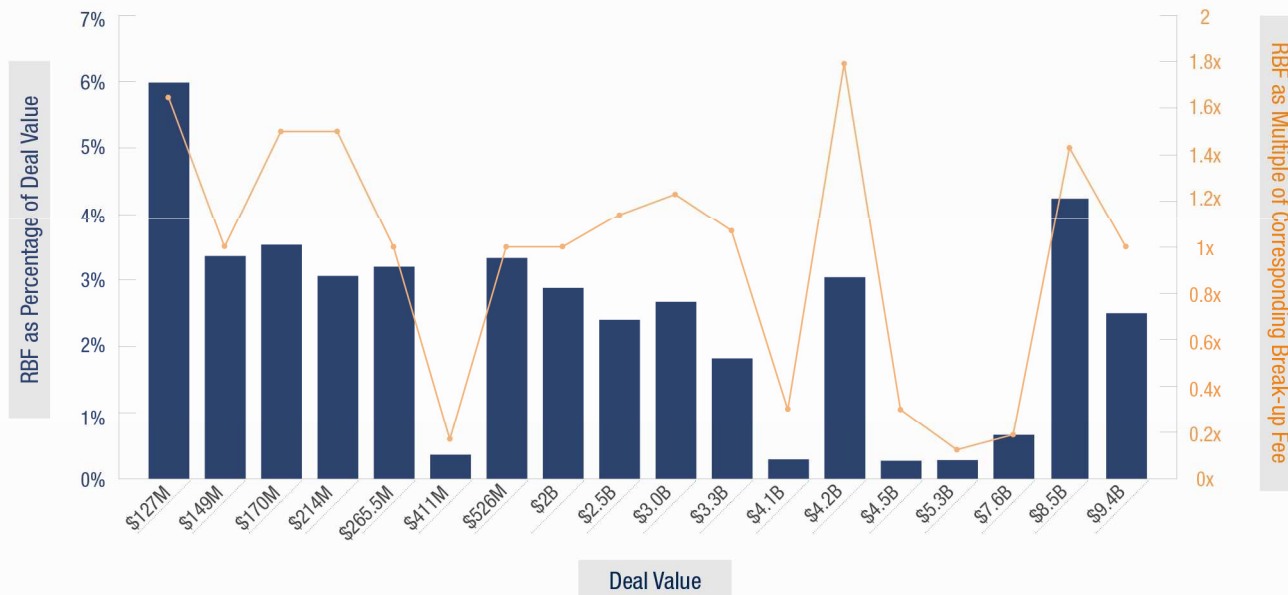




Size of Reverse Break-up Fees

Figure J-2: Size of Reverse Break-up Fees: Non-willful Breach

■ RBF as Percentage of Deal Value
 ■ RBF as Multiple of Corresponding Break-up Fee





The Financing Covenants

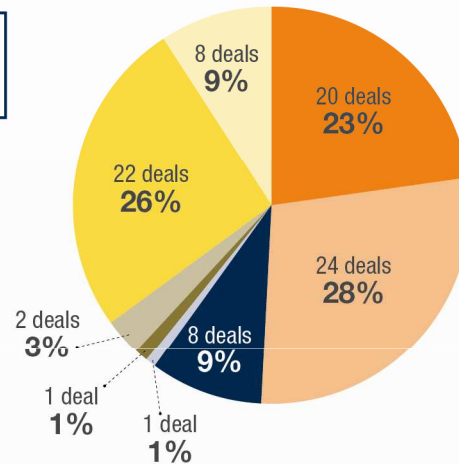
- Agreements for debt-financed acquisitions frequently contain detailed financing covenants with standard buyer obligations.
- The study analyzes three provisions that tend to vary across agreements:
 - The buyer's efforts standard.
 - The obligation on the buyer to "cause the lenders to fund" and/or "enforce its rights."
 - Explicit litigation obligation.





The Financing Covenants

Figure K: Formulations of Financing Covenants across All Agreements



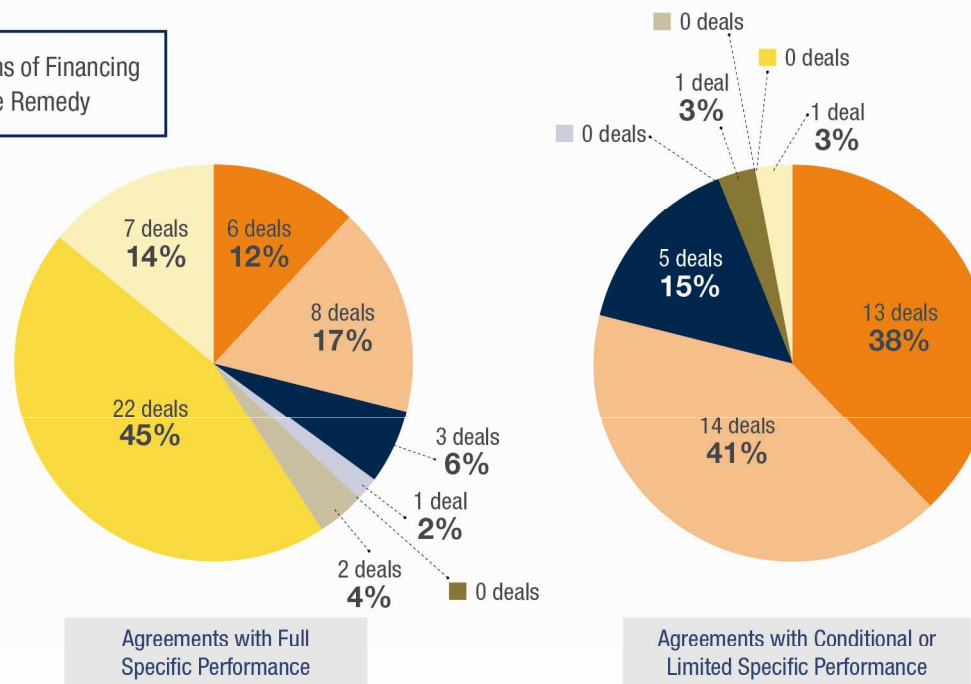
- Reasonable Best Efforts with Obligation to Cause the Lenders to Fund and Explicit Obligation to Litigate Against the Lenders
- Reasonable Best Efforts with Obligation to Cause the Lenders to Fund, but No Explicit Obligation to Litigate Against the Lenders
- Reasonable Best Efforts with No Obligation to Cause the Lenders to Fund and No Explicit Obligation to Litigate Against the Lenders
- Commercially Reasonable Efforts with Obligation to Cause the Lenders to Fund and Explicit Obligation to Litigate Against the Lenders
- Commercially Reasonable Efforts with Obligation to Cause the Lenders to Fund, but No Explicit Obligation to Litigate Against the Lenders
- Commercially Reasonable Efforts with No Obligation to Cause the Lenders to Fund and No Explicit Obligation to Litigate Against the Lenders
- No Covenant at All, Just a Representation
- Best Efforts/All Actions





The Financing Covenants

Figure L: Formulations of Financing Covenants, by Equitable Remedy



- Reasonable Best Efforts with Obligation to Cause the Lenders to Fund and Explicit Obligation to Litigate Against the Lenders
 - Reasonable Best Efforts with Obligation to Cause the Lenders to Fund, but No Explicit Obligation to Litigate Against the Lenders
 - Reasonable Best Efforts with No Obligation to Cause the Lenders to Fund and No Explicit Obligation to Litigate Against the Lenders
 - Commercially Reasonable Efforts with Obligation to Cause the Lenders to Fund and Explicit Obligation to Litigate Against the Lenders
- Commercially Reasonable Efforts with Obligation to Cause the Lenders to Fund, but No Explicit Obligation to Litigate Against the Lenders
 - Commercially Reasonable Efforts with No Obligation to Cause the Lenders to Fund and No Explicit Obligation to Litigate Against the Lenders
 - No Covenant at All, Just a Representation
 - Best Efforts/All Actions





“Xerox” Provisions

- Payment of RBF caps the lenders’ liability
 - 34 out of 86 (40%) include it. Almost all agreements in “Private Equity” and “Financing Failure” models. Neither “Pure Option” model agreement.
- No recourse to the lenders
 - 29 out of 86 (34%)
- Exclusive forum
 - 48 out of 86 (56%): New York
 - 10 out of 86 (12%): Delaware
 - Two provided for choice of New York or Delaware





“Xerox” Provisions

- Waiver of jury trial: 54 out of 86 (63%)
- No amendments to “Xerox” provisions adverse to the lenders without their consent
 - Out of 60 that included an exclusive-forum provision, 15 (25%) included a consent provision
- Lenders are third-party beneficiaries of the relevant provisions
 - Practically all agreements with a “Xerox” provision include third-party-beneficiary language (see *Table C* in the Appendix)





ACCESS THE STUDY

www.plcdealstudy.com

practicallaw.com | 646.562.3405

Copyright © 2012 Practical Law Publishing Limited and Practical Law Company, Inc. All Rights Reserved.





[Go to PLC homepage](#)



US Home

PLC Law Firm

PLC Law Department

Search

PLC for Law Firms

New to PLC? [CLICK HERE FOR A FREE TRIAL!](#)

Practice Areas

- ▶ [Corporate & Securities](#)
- ▶ [Employee Benefits & Executive Compensation](#)
- ▶ [Finance](#)
- ▶ [Intellectual Property & Technology](#)
- ▶ [Labor & Employment](#)
- ▶ [Additional Practice Areas](#)

Most Popular

- 1 [IP Rights Clauses for Employee Agreements \(Long-form\)](#)
- 2 [Departing Employee Checklist](#)
- 3 [Defined Contribution Health Plans: Overview](#)
- 4 [Fraudulent Conveyances in Bankruptcy: Overview](#)
- 5 [Back to Basics Guide](#)

What Are You Working On?

Let us know what you're working on and we'll help.



[Get Help Now](#)

Free Webinar

A Practical Guide to Negotiating ERISA Service Provider Agreements



[Register Today](#)

Features



What's Market

Summarized deal terms and customized, comparative reports.

[Search What's Market](#)



Cross-border

Resources for doing deals and conducting business internationally.

[View Cross-border](#)



Glossary

Legal and business terms.

[Search the Glossary](#)

Actions

- ▶ [View your Account](#)
- ▶ [Sign up for Legal Updates by E-mail or RSS Feed](#)
- ▶ [Request Training](#)
- ▶ [Request Free Trial](#)
- ▶ [Contact Us](#)
- ▶ [Password Reminder](#)



Practical Law The Journal

▶ [Current Issue](#)



About Us

▶ [Watch the Video](#)



Our Team

▶ [Meet our Experts](#)





PLC What's Market: The Latest Deals Analyzed and Compared

New to PLC? [CLICK HERE FOR A FREE TRIAL!](#)

Browse Summaries and Review Market Trends by Topic

- ▶ [Public Merger Agreements](#)
- ▶ [Private Acquisition Agreements](#)
- ▶ [Credit Agreements: Comprehensive Deal Database](#)
- ▶ [Credit Agreements: Detailed Analysis of Selected Deals](#)
- ▶ [Executive Employment Agreements](#)
- ▶ [Initial Public Offerings](#)
- ▶ [Follow-on Equity Offerings](#)

Meet the What's Market Team
Our quality starts with our people.



[Meet Our Experts](#)

Search tips:

- You can use the search box on the left to find advisors (legal or financial) or specific parties
- A free text search searches across the whole What's Market database; you can then filter by deal type

Search What's Market Summaries

Search

What's Market Analysis

- ▶ [Risk Factor Practice Notes](#)
- ▶ [Reverse Break-up Fees and Specific Performance: A Survey of Remedies in Leveraged Public Deals \(2012 Edition\)](#)
- ▶ [2011 Year-end Trends in Large Cap and Middle Market Loan Terms](#)
- ▶ [Change in Control Protection in a Say on Pay World](#)

Recent Summaries

- ▶ [USG Corporation Executive Vice President and Chief Financial Officer Employment Agreement April 16, 2012](#)
- ▶ [Enphase Energy, Inc. IPO \\$53.8 million - April 4, 2012](#)
- ▶ [Clovis Oncology, Inc. Follow-on Equity Offering \\$75 million - April 3, 2012](#)

About PLC What's Market



- ▶ [Scope and Thresholds](#)
- ▶ [Guide to Search and Comparison](#)





[What's Market homepage](#)

Tailor your search results

Deal type

Public Merger Agreements (573)

Industry sector

[Services \(123\)](#)

[Computer and electronic equipment \(58\)](#)

[Pharmaceuticals and biotechnology \(57\)](#)

[Medical devices and healthcare \(48\)](#)

[Banking and financial services \(42\)](#)

[Oil and gas \(36\)](#)

[+ More](#)

Consideration

[All cash \(392\)](#)

[All stock \(79\)](#)

[Cash and stock \(64\)](#)

All results > Deal type: [Public Merger Agreements](#)

"Public Merger Agreements"

Search

573 results found for "Public Merger Agreements" in 0.09 seconds.

[Sort by date](#) / [Sort by relev](#)

Compare 0 results selected (Compare up to 50)

Select all results on this page

Clear

[Lee Equity Partners and The Edelman Financial Group Inc. merger](#)

Public Merger Agreements | \$258 million

April 16, 2012

[Fanatics, Inc. and Dreams, Inc. merger](#)

Public Merger Agreements | \$183 million (including \$25 million in assumed debt).

April 13, 2012

[Danaher Corporation tender offer for X-Rite, Incorporated](#)

Public Merger Agreements | \$625 million (including assumed debt and net of cash).

April 10, 2012

[Genstar Capital and eResearchTechnology, Inc. merger](#)

Public Merger Agreements | \$400 million

April 9, 2012

[Spectrum Pharmaceuticals and Allos Therapeutics, Inc. merger](#)

Public Merger Agreements | \$206 million (including \$98 million in acquired cash and excluding contingent value rights).

April 4, 2012



Tender offer

No (407)

Yes (166)

Buyer type

Strategic (453)

Financial (120)

Debt financing

No (321)

Yes (252)

Go-shop

No (504)

Yes (69)

Break-up fee

Less than 3% (297)

3% - 4% (249)

Greater than 4% (55)

None (28)

Reverse break-up fee

None (347)

Less than 3% (88)

3% - 4% (77)

4% - 6% (71)

Greater than 6% (39)

Date

2010 (181)

2011 (157)

2009 (100)

2008 (96)

2012 (28)

2007 (11)

Value

\$100 million - \$500 million (223)

\$1 billion - \$5 billion (193)

\$500 million - \$1 billion (98)

Over \$5 billion (67)





[What's Market homepage](#)

Tailor your search results

Deal type

Public Merger Agreements (573)

Industry sector

[Services \(123\)](#)

[Computer and electronic equipment \(58\)](#)

[Pharmaceuticals and biotechnology \(57\)](#)

[Medical devices and healthcare \(48\)](#)

[Banking and financial services \(42\)](#)

[Oil and gas \(36\)](#)

[More](#)

Consideration

[All cash \(392\)](#)

[All stock \(79\)](#)

[All results](#) > Deal type: [Public Merger Agreements](#)

"Public Merger Agreements"

Search

573 results found for "Public Merger Agreements" in 0.09 seconds.

[Sort by date](#) / [Sort by relev](#)

[Compare](#) 50 results selected (Compare up to 50)

Select all results on this page

Clear

[Lee Equity Partners and The Edelman Financial Group Inc. merger](#)

Public Merger Agreements | \$258 million
April 16, 2012

[Fanatics, Inc. and Dreams, Inc. merger](#)

Public Merger Agreements | \$183 million (including \$25 million in assumed debt).
April 13, 2012

[Danaher Corporation tender offer for X-Rite, Incorporated](#)

Public Merger Agreements | \$625 million (including assumed debt and net of cash).
April 10, 2012

[Genstar Capital and eResearchTechnology, Inc. merger](#)

Public Merger Agreements | \$400 million
April 9, 2012

[Spectrum Pharmaceuticals and Allos Therapeutics, Inc. merger](#)





Select the terms you wish to compare and click "Compare" ✕

Compare 4 terms selected

18	<input checked="" type="checkbox"/>	Nature of financing
19	<input checked="" type="checkbox"/>	Financing condition
20	<input type="checkbox"/>	Go-shop
21	<input type="checkbox"/>	No-shop
22	<input type="checkbox"/>	Fiduciary out and matching rights
23	<input type="checkbox"/>	Definition of acquisition proposal
24	<input type="checkbox"/>	Definition of superior proposal
25	<input type="checkbox"/>	Post-merger board of directors structure
26	<input type="checkbox"/>	Director, officer or controlling stockholder commitments (voting and/or equity)
27	<input type="checkbox"/>	Insurance and indemnification of directors and officers
28	<input checked="" type="checkbox"/>	Break-up fee and fee as a % of the total deal value
29	<input checked="" type="checkbox"/>	Reverse break-up fee and fee as a % of the total deal value
30	<input type="checkbox"/>	Termination rights and consequences
31	<input type="checkbox"/>	Express limitations of remedies

Compare 4 terms selected





Deal comparison

[Change comparison](#) |
 [Change layout](#) |
 Export this summary to
 [Word](#) |
 [Excel](#)

Deal	Nature of financing	Financing condition	Break-up fee and fee as a % of the total deal value	Reverse break-up fee and fee as a % of the total deal value
Spectrum Pharmaceuticals and Allos Therapeutics, Inc. merger	Cash on hand and debt financing commitments from Bank of America, N.A. and Merrill Lynch, Pierce, Fenner & Smith Incorporated.	None	\$7.5 million (3.64%). Interest accrues on unpaid amounts from the due date at the lower of (i) the prime rate of Bank of America, N.A. plus 350 basis points or (ii) the maximum rate permitted by law. Section 8.3	None
Genstar Capital and eResearchTechnology, Inc. merger	Debt financing commitments (\$224 million) from Credit Suisse AG, Credit Suisse Securities (USA) LLC, Jefferies Finance LLC and Citizens Bank of Pennsylvania. Debt and equity financing commitments (up to \$97.4 million of debt financing and up to \$40 million of equity financing) from CDP-Genstar Mezzanine Opportunities, L.P. Equity financing commitments (up to \$110 million) from Sponsors.	None	\$11 million (2.75%) and an expense reimbursement of up to \$2.9 million. Interest accrues on unpaid amounts from the due date at the prime rate as published in The Wall Street Journal. Section 10.02	\$20 million (5.00%). Interest accrues on unpaid amounts from the due date at the prime rate as published in The Wall Street Journal. Section 10.02
Fanatics, Inc. and Dreams, Inc. merger	Equity financing commitment from Insight Venture Partners.	None	\$5.5 million (3.01%). Section 7.3	None
Lee Equity Partners and The Edelman Financial Group Inc. merger	Debt financing commitments (\$189,947,784) from undisclosed lenders. Equity financing commitments (\$132 million) from Sponsors. Receivables purchase commitment from Fortress Credit Corp. (the Receivables Purchaser).	None	\$4 million (1.55%) or \$8 million (3.10%) and an expense reimbursement of up to \$1 million or up to \$2 million. Interest accrues on unpaid amounts from the due date at the prime rate as published in The Wall Street Journal. Section 9.4	\$16 million (6.20%). Interest accrues on unpaid amounts from the due date at the prime rate as published in The Wall Street Journal. Section 9.4





About Practical Law Company

- Online, practical know-how for law firms and law departments
- Request a free trial: ustrials@practicallaw.com
- Study statistics and findings generated using ^{PLC}What's Market
- Other PLC resources:
 - How-to guides and checklists
 - Annotated model documents
 - Cross-border guidance, and more

practicallaw.com | 646.562.3405

Follow us on Twitter [@PLCCorpSecUS](https://twitter.com/PLCCorpSecUS)   

Copyright © 2012 Practical Law Publishing Limited and Practical Law Company, Inc. All Rights Reserved.