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# Reverse Break-up Fees and Specific Performance

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*A Survey of Remedies in Public Deals*

A <sup>PLC</sup>WHAT'S MARKET STUDY / 2011 EDITION



## Study Sample

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- This survey analyzes the remedies commonly available to target companies in public merger agreements for a buyer's failure to close the transaction due to a breach or financing failure.
- This year's study sample consists of all merger agreements tracked by *PLCWhat's Market* for the calendar year 2010. *PLCWhat's Market* summarizes merger agreements on an ongoing basis for acquisitions of US-domiciled, publicly traded companies (excluding REITs) with a signing value of at least \$100 million.

### STUDY SAMPLE AT A GLANCE: 181 Merger Agreements

#### 141 with Strategic Buyers

- 22 in Q1'10, 41 in Q2'10, 40 in Q3'10, 38 in Q4'10.
- 33 buyers used debt financing.
- 88 offered all-cash consideration, 23 offered all-stock consideration, 19 offered a mix of cash and stock, 11 offered a cash/stock election.
- 43 were structured as front-end tender offers, including 4 with stock consideration and 11 that were debt-financed.
- 4 were terminated before closing.

#### 40 with Financial/Private Equity Buyers

- 8 in Q1'10, 9 in Q2'10, 8 in Q3'10, 15 in Q4'10.
- 30 buyers used debt financing,\*\* 9 delivered equity commitments and/or guarantees for the full amount of the purchase price (including one deal that was debt-financed) and 2 represented to having available funds.
- 8 were structured as front-end tender offers, 4 of which were debt-financed.
- 4 were terminated before closing.



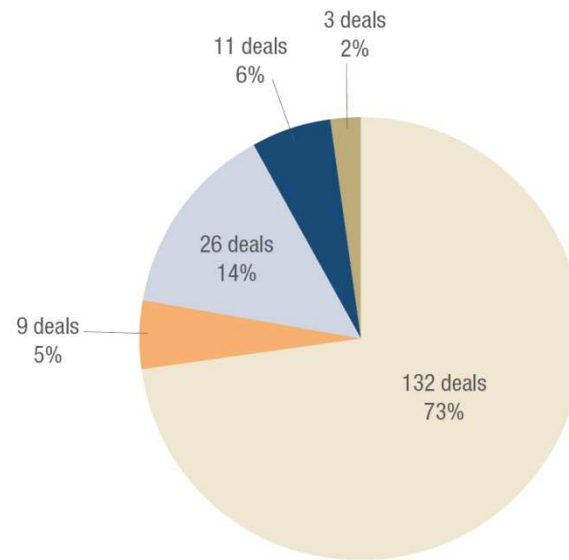


Overview

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**Figure A:** Incidence of Remedies Across All Merger Agreements in Study

- Specific Performance
- "Pure Option" RBF
- Financing Failure RBF
- Two-tier RBF
- Damages Only

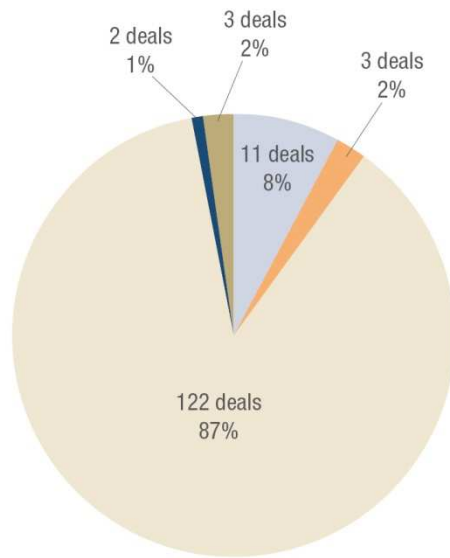




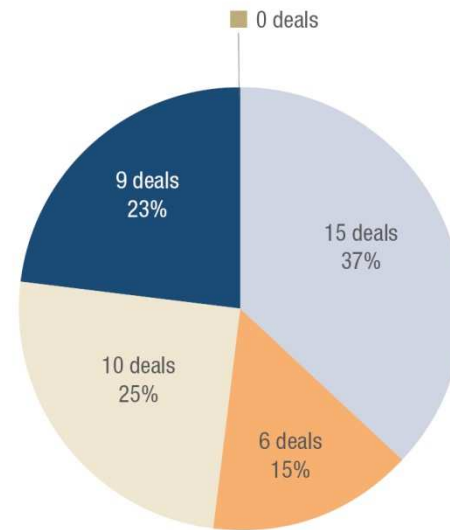
Impact of Type of Buyer on Choice of Remedy

**Figure G: Remedies for Strategic and Financial Buyers**

- Specific Performance
- “Pure Option” RBF
- Financing Failure RBF
- Two-tier RBF
- Damages Only



Strategic Buyers



Financial Buyers

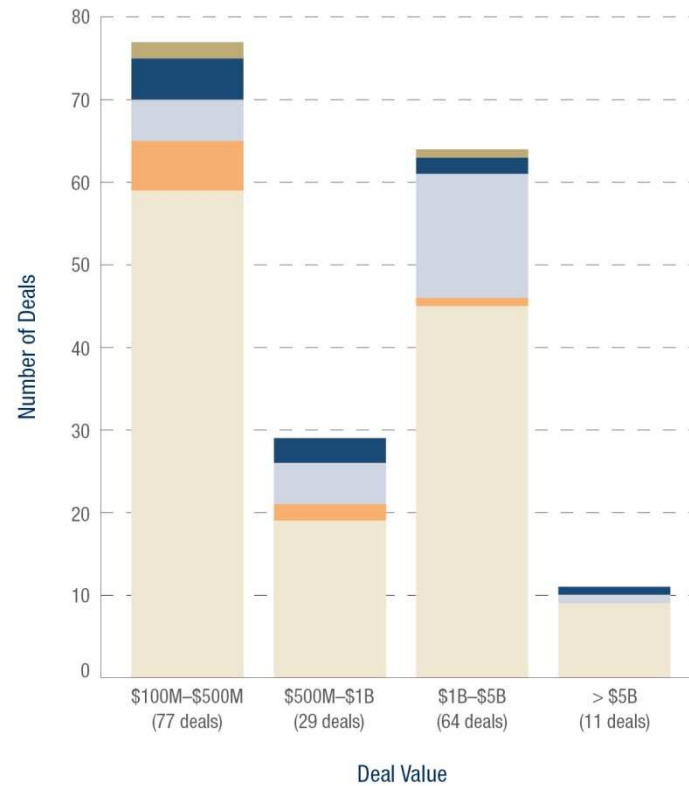




## Impact of Deal Value on Choice of Remedy

**Figure I: All Remedies,  
by Deal Value**

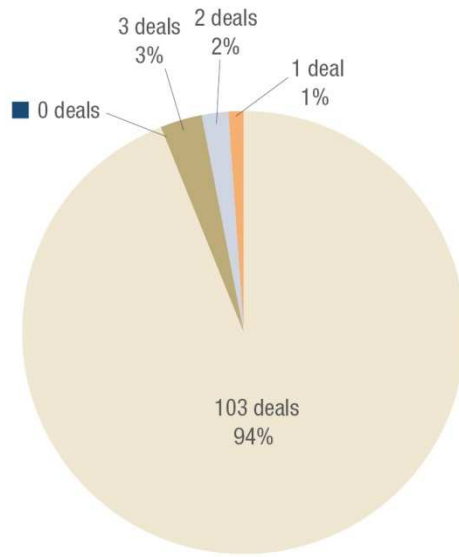
- Specific Performance
- "Pure Option" RBF
- Financing Failure RBF
- Two-tier RBF
- Damages Only



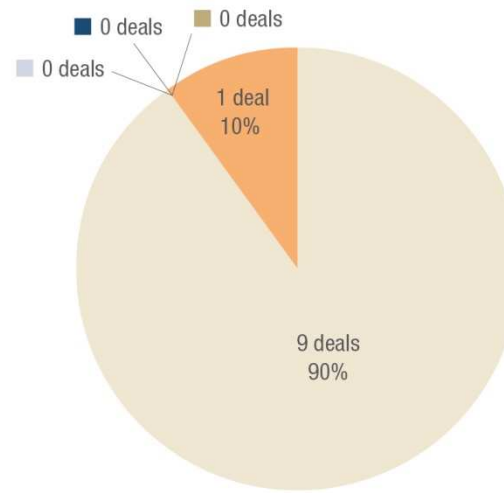


## Impact of Financing on Choice of Remedy

**Figure L: Strategic vs. Financial Buyers in Deals with No Debt Financing**



Strategic Buyers



Financial Buyers

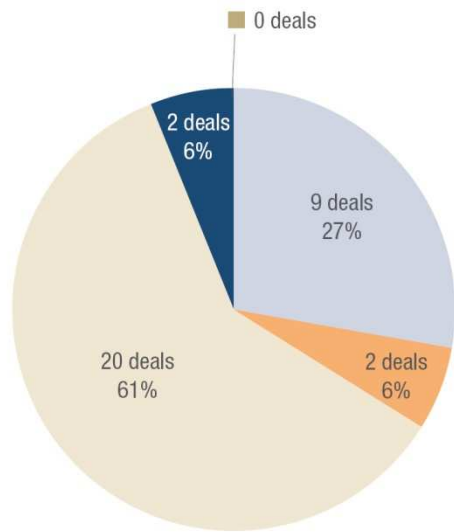




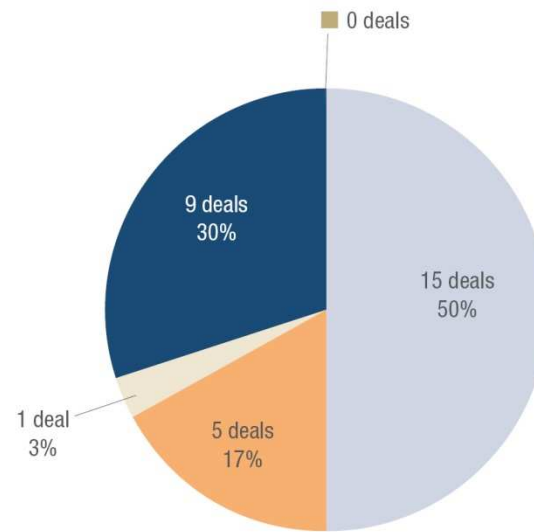
Impact of Financing on Choice of Remedy

**Figure M: Strategic vs. Financial Buyers in Debt-financed Deals**

- Specific Performance
- “Pure Option” RBF
- Financing Failure RBF
- Two-tier RBF
- Damages Only



Strategic Buyers



Financial Buyers

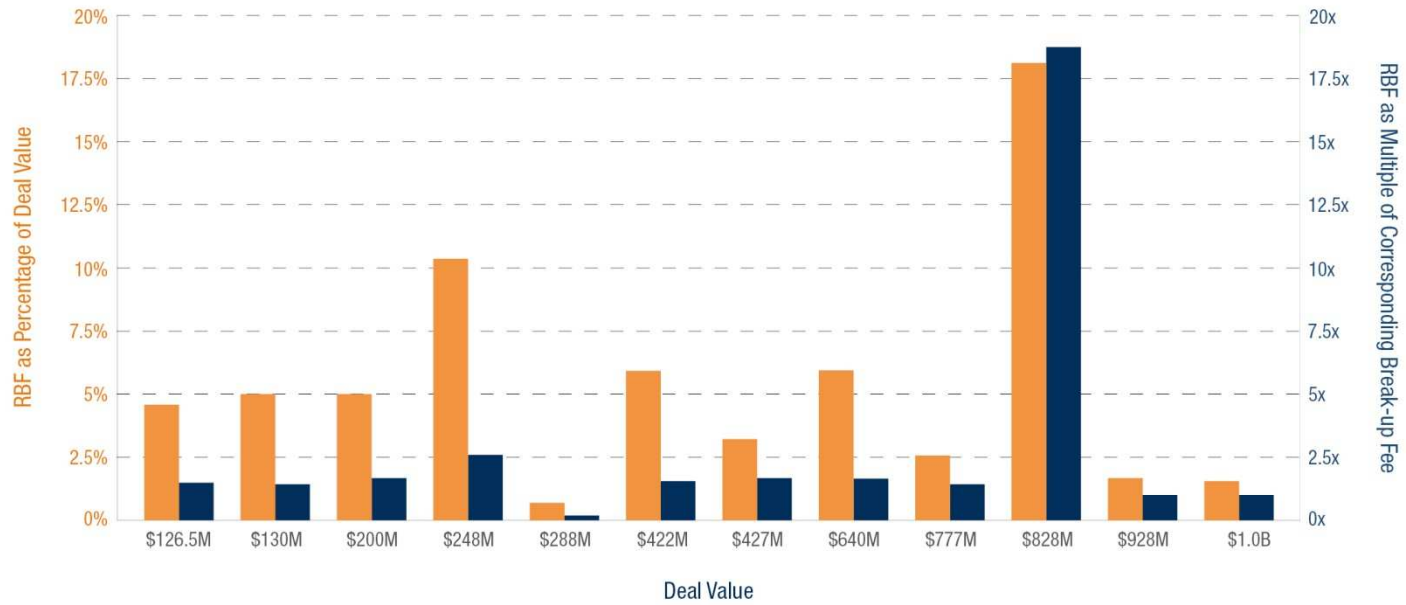




## Size of Reverse Break-up Fees

**Figure N-1:**  
“Absolute Cap”

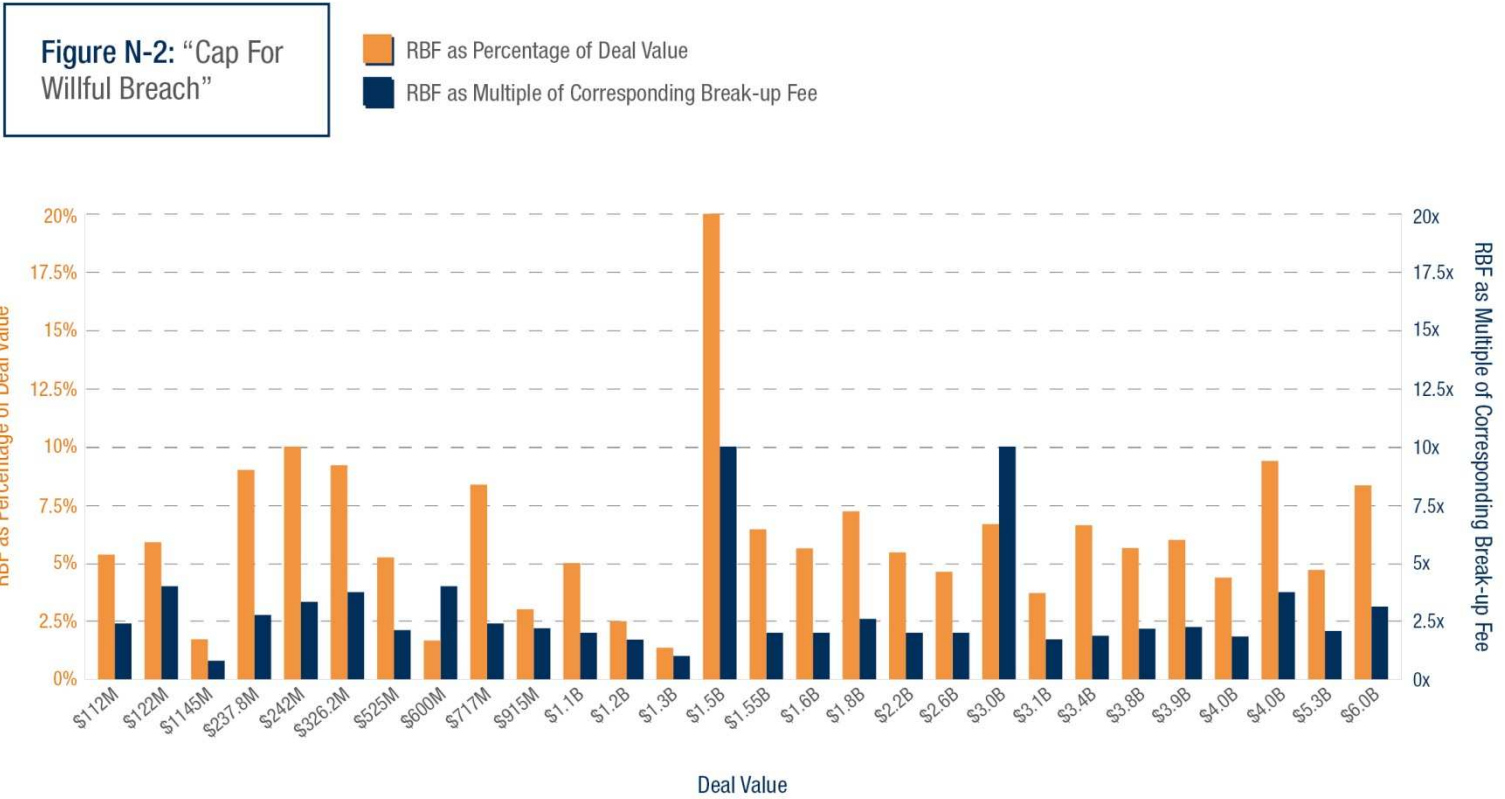
- RBF as Percentage of Deal Value
- RBF as Multiple of Corresponding Break-up Fee







## Size of Reverse Break-up Fees

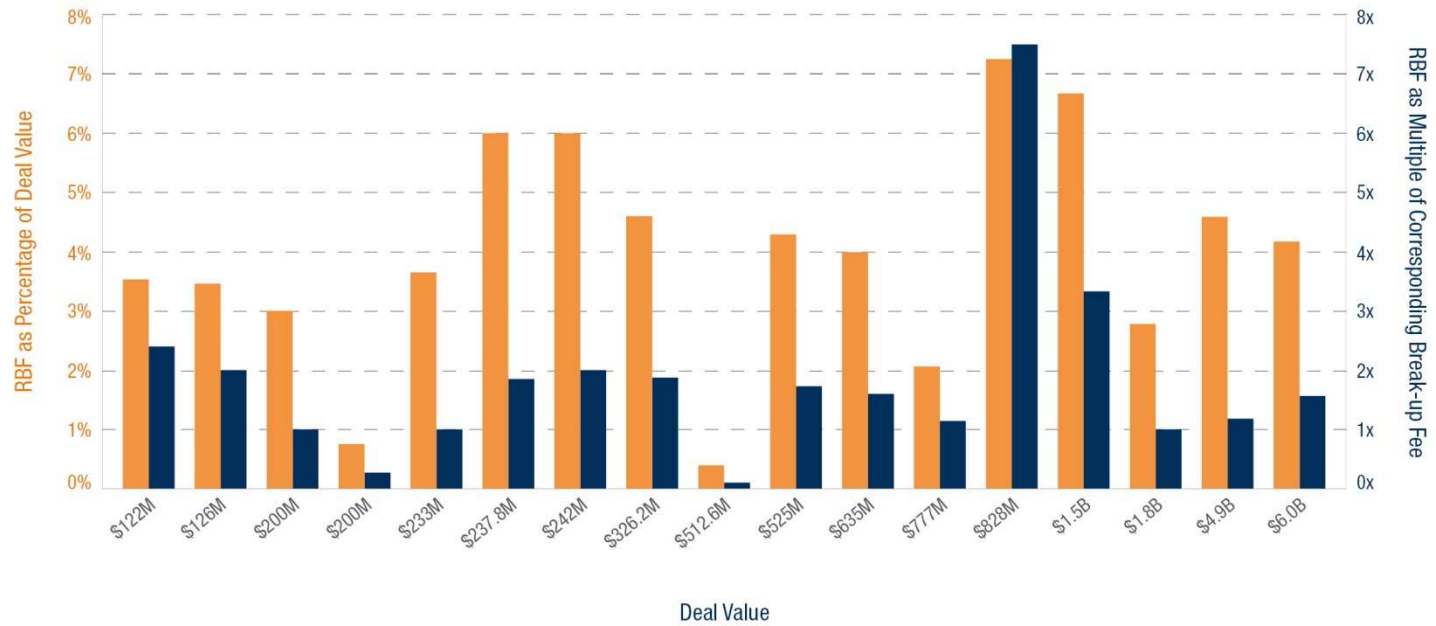




## Size of Reverse Break-up Fees

**Figure N-3: “Cap For Non-willful Breach”**

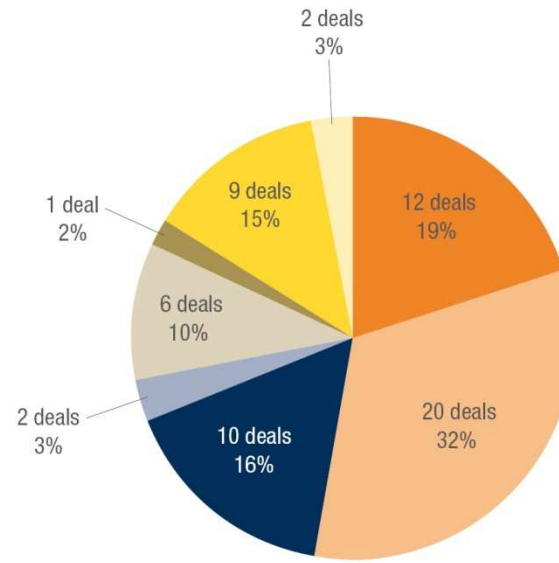
- RBF as Percentage of Deal Value
- RBF as Multiple of Corresponding Break-up Fee





## The Financing Covenants

**Figure 0:** Formulations of Financing Covenants



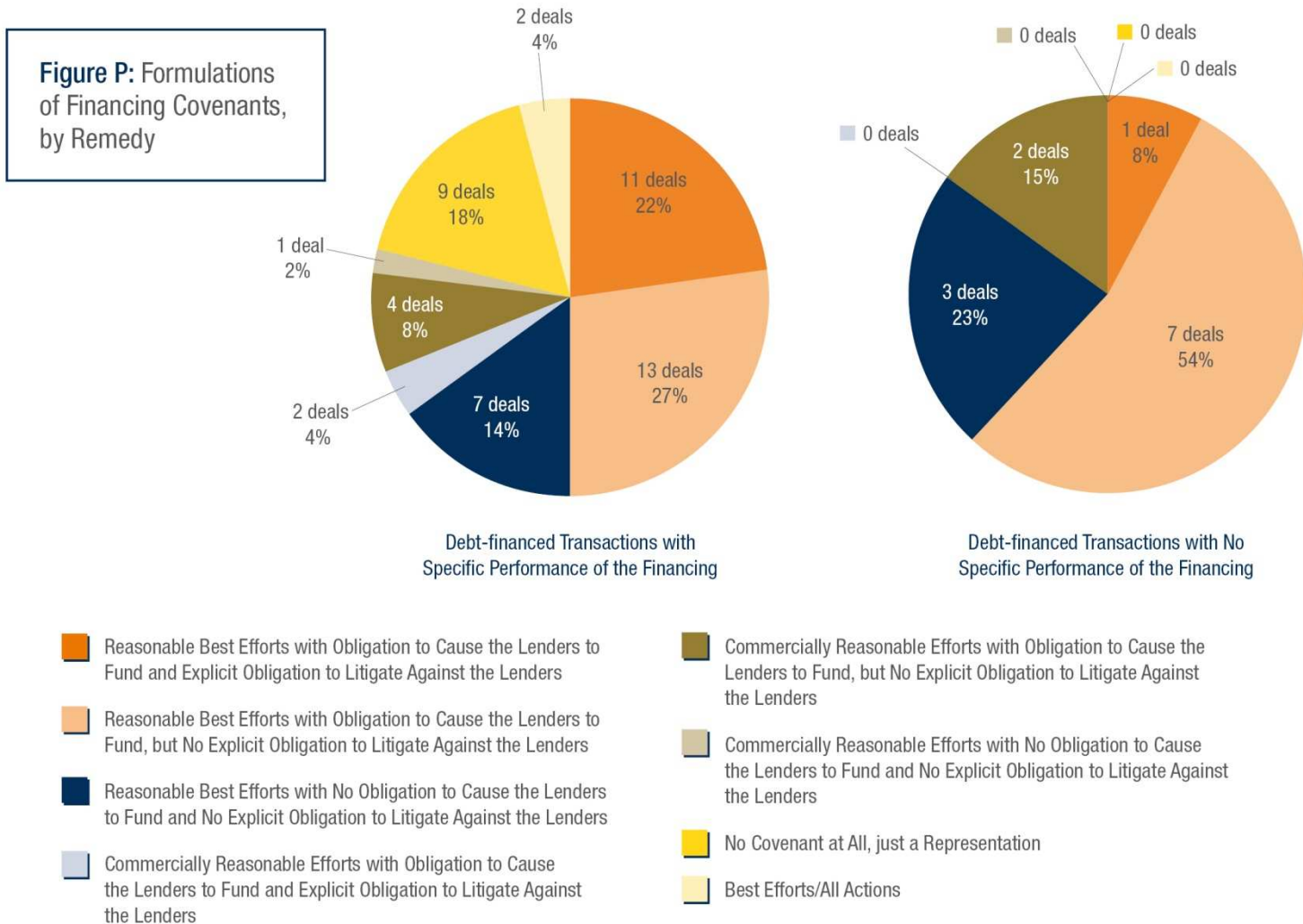
All Debt-financed Transactions

- 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



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