

Key Trends In Midstream Oil And Gas Deals: Part 1

By **Greg Krafka** (September 20, 2018, 2:50 PM EDT)

The Private Target Mergers & Acquisitions Deal Points Studies, which are prepared by the M&A Market Trends Subcommittee of the Mergers & Acquisition Committee of the American Bar Association's Business Law Section, have been a key resource for M&A attorneys for over a decade. These studies, which are generally published every few years,[1] provide statistical information concerning certain key deal terms in publicly available acquisition agreements involving the acquisition of private target companies or assets by public companies.

When findings of the most recent ABA deal points study happen to be consistent with the argument they are making to opposing counsel, counsel in an M&A transaction will sometimes refer to the ABA deal points study when arguing that certain terms requested by opposing counsel are "off-market." For the opposing counsel who is willing to engage in this kind of argument, a familiar rejoinder is that there is something different or particular about the transaction at hand, such that, to the extent that a group of comparable transactions are to be used for comparison purposes, only precedent transactions sharing certain similarities should be considered — for example, transactions involving target companies in a certain industry or industry segment.

This two-part article attempts to engage these arguments — with respect to the midstream oil and gas industry sector — by identifying, in a systematic manner, "what's market" concerning certain deal terms in midstream oil and gas acquisition agreements. Specifically, this article provides statistical information concerning certain deal terms (described in more detail below) in 56 publicly-available acquisition agreements involving the acquisition of midstream oil and gas assets or companies.

In preparing the midstream oil and gas M&A deal points study referenced in this article, the author reviewed how these deal terms were summarized by Practical Law Company for each of these 56 deals. As we will see, while the findings of the study concerning the selected deal terms were generally broadly consistent with the findings of the Private Target Mergers & Acquisitions Deal Points Study (including transactions from 2016 and H1 2017) produced by the ABA's M&A Market Trends Subcommittee,[2] there are some noteworthy differences, as will be discussed in more detail below.

The first part of this article provides some background information concerning the author's midstream M&A study. The second part of this article summarizes some of the findings of this study, concerning, among other things, certain financial provisions, representations and warranties, indemnification terms



Greg Krafka

and dispute resolution provisions. Due to size constraints, this article does not contain all of the findings from the study, and a full version of the study can be obtained upon request from the author.

Overview of Midstream M&A Study

Background and Methodology

The ABA study analyzed 139 acquisition agreements from a variety of industries, and the author's midstream M&A study analyzes 56 acquisition agreements in the midstream oil and gas industry.[3] The table below contains additional information concerning transactions covered by these two studies.

	Midstream M&A Study	ABA Study[4]
Transaction Value Range	\$50M–\$1,000M	\$30M–\$500M
Average Transaction Value	\$318.6M	\$176.6M
Time Period Covered	2013–2017	2016–first half of 2017
Percentage Which Were Asset Deals	26.8 percent	13.7 percent

Additional information about the ABA study, including its methodology and other matters, is set forth in the ABA study.[5] Due to time constraints, the midstream M&A study does not cover all of the deal terms that are analyzed in the ABA study. In addition, in several instances, the midstream M&A study does not analyze deal terms in as much detail as does the ABA study.

While efforts were made to ensure that selected deal terms were defined, used and tabulated similarly by the author, the M&A Market Trends Subcommittee and Practical Law Company (so as to make “apples to apples” comparisons), human judgment has inevitably been exercised, and there may be instances where deal terms were defined, used and tabulated somewhat differently by the author, the M&A Market Trends Subcommittee and Practical Law Company.

The author is not a member of the M&A Market Trends Subcommittee, and neither the American Bar Association nor the Practical Law Company had any involvement in his midstream M&A study. The author’s analysis and conclusions as contained in this article are solely those of the author, and do not reflect the views of the American Bar Association, Practical Law Company or Winstead PC.

“Populations” Referenced in Midstream M&A Study

The midstream M&A study provides data on selected deal terms for each of the following “populations” listed below.[6]

- **ABA study** — Data points with this label are taken from the ABA study.
- **Midstream (combined)** — Data points with this label cover all 56 midstream acquisition agreements which are the subject of the author's study.

- **Unrelated** — Data points with this label cover the 31[7] of the 56 midstream acquisition agreements which involved buyers and sellers which appeared to be unrelated third parties.
- **Related** — Data points with this label cover the 25[8] of the 56 midstream acquisition agreements which involved buyers and sellers which were affiliates or were related in a meaningful way (e.g., a drop-down acquisition from an upstream company to its MLP, or buyers and sellers which are controlled by a common private equity sponsor).
- **Gathering and Processing ("G&P")** — Data points with this label cover the 25[9] of the 56 midstream acquisition agreements where most of the value of the acquired assets (or target company(ies)) were gathering lines, compressor stations, processing plants and other midstream assets generally associated with gathering and processing operations.
- **Logistics and Marketing ("L&M")** — Data points with this label cover the 31[10] of the 56 midstream acquisition agreements where most of the value of the acquired assets (or target company(ies)) were transportation pipelines, fractionation plants, storage plants, salt caverns, petroleum product terminals and other similar assets.

Some Key Findings from the Midstream M&A Study

Financial Provisions

Acquisition agreements oftentimes have post-closing purchase price adjustment provisions, which generally provide that the base purchase price for the acquisition of the target company/assets may potentially be adjusted after the closing as set forth in the acquisition agreement.

Typically, the acquisition agreement will set forth what items may be measured when determining whether there is to be a purchase price adjustment; the procedures relating to asserting that a party is entitled to a purchase price adjustment; and a purchase price adjustment dispute resolution procedure, among other matters.

The percentages of deals in the ABA study, midstream (combined), unrelated, related, G&P and L&M populations with post-closing purchase price adjustment provisions were 86.0 percent, 64.3 percent, 93.5 percent, 28.0 percent, 80.0 percent and 51.6 percent, respectively.[11] Probably the most noteworthy point here is that while post-closing purchase price adjustment provisions were less common in the midstream (combined) population than in the ABA study (being present in 64.3 percent and 86.0 percent of the transactions, respectively), once the nature of the parties to the midstream deals is taken into account, it can be seen that post-closing purchase price adjustment provisions were actually more common in midstream M&A deals between unrelated parties (93.5 percent) than in the ABA study (86.0 percent).

A less common financial-related provision that is sometimes included in acquisition agreements is an earn-out provision. This type of provision generally provides that the seller may be entitled to additional compensation from the buyer, in the event that certain financial, operational or other performance targets are met over a given period of time following the closing of the transaction.

The percentages of deals in the ABA study, midstream (combined), unrelated, related, G&P and L&M populations with earn-out provisions were 28.0 percent, 8.9 percent, 12.9 percent, 4.0 percent, 8.0 percent, 8.0 percent and 9.7 percent, respectively.[12] Overall, earn-out provisions in midstream deals

were less common than in the deals covered by the ABA study.

As was the case in the findings concerning post-closing purchase price adjustment provisions, as between unrelated and related party deals in the midstream sector, it was more common to have earn-out provisions between unrelated parties.[13] This is not that surprising, considering that, as between unrelated parties and related parties, it is more often the case that with related parties (e.g., an E&P company and its MLP) there is more of a historical relationship between the parties, familiarity and comfort level with the assets and substantial ongoing commercial relationships and contracts (where much of the value lies) between the parties following the closing.

Certain Seller Representations and Warranties; Definition of Seller's Knowledge

Acquisition agreements (midstream or otherwise) oftentimes include extensive representations and warranties of the seller addressing specific matters, including corporate authorization to do the transaction; financial statements; title to the assets/equity being sold; compliance with laws; regulatory status; environmental, tax, labor and employment; employee benefits; intellectual property; and other matters.

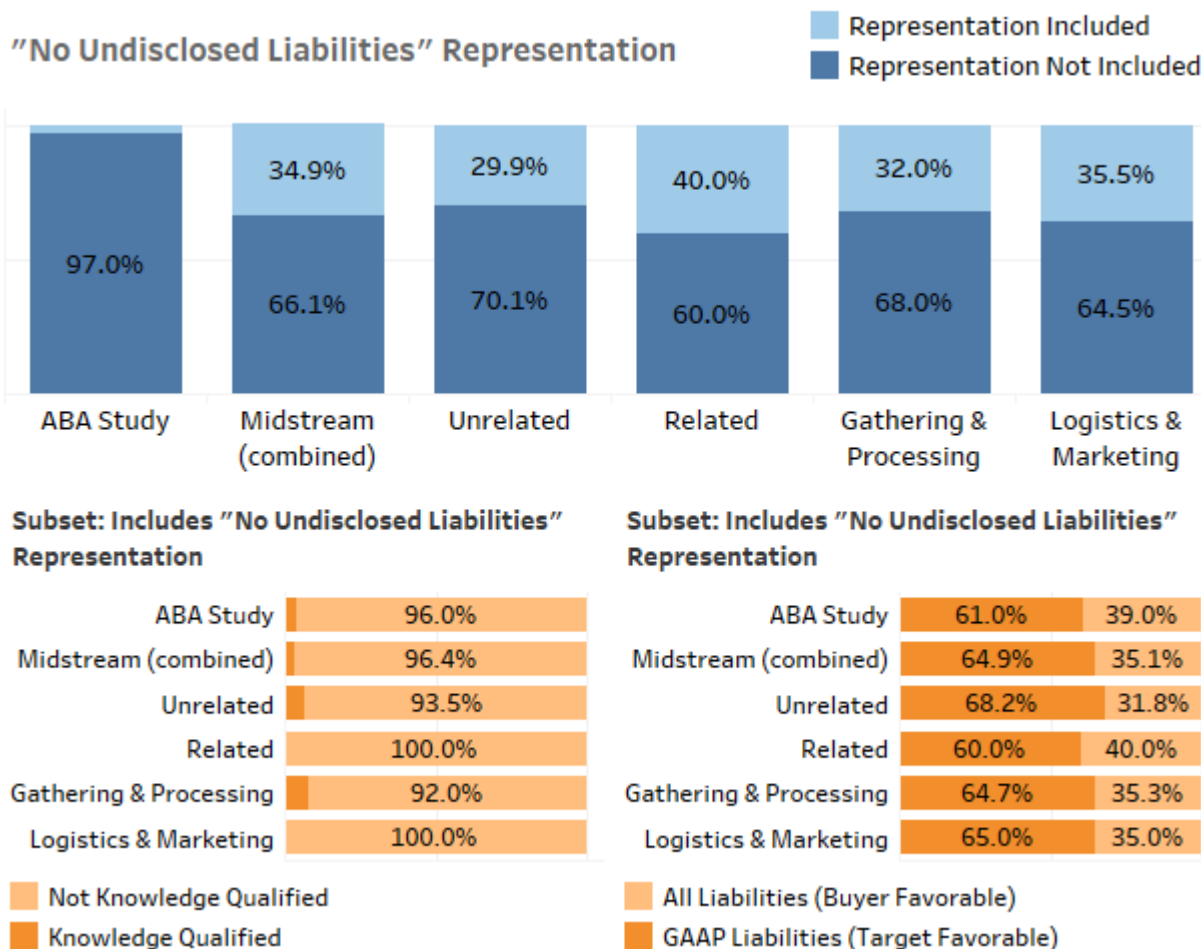
In addition to representations and warranties covering specific matters such as these, acquisition agreements will sometimes include broad, general representations and warranties which cover multiple matters. Two such kinds of broad, general representations and warranties were reviewed, and are discussed below.

Acquisition agreements will sometimes contain a “no undisclosed liabilities” representation and warranty of the seller, the purpose of which is to protect the buyer against any unknown liabilities which have not otherwise been covered in specific representations and warranties of the seller. There are two common formulations of the “no undisclosed liabilities” representation and warranty: A broader (more buyer-friendly) formulation, and a more narrow (seller-friendly) formulation.

Simplified examples of each of these formulations (with language noting key differences in italics) are as follows:

- **Broader (more buyer-friendly) formulation:** Except as set forth in Section [] of the Disclosure Schedule or as otherwise set forth on the Balance Sheet or reflected in the notes thereto, *neither [TARGET] nor the Subsidiaries have any material obligations, liabilities or commitments of any nature whatsoever* (whether accrued, absolute, contingent, unliquidated or otherwise, whether due or to become due), *other than* (a) liabilities which have arisen after [DATE] and prior to the date hereof, in the ordinary course of business, consistent with past practices, or (b) liabilities incurred after the date hereof in accordance with or after consent by [BUYER] pursuant to Section [].
- **More narrow (seller-friendly) formulation:** *The Assets are not subject to any Liability that would be required by U.S. GAAP to be reflected on a consolidated balance sheet of [TARGET] (or required to be described in the notes thereto), except Liabilities that are* (a) reflected in the Interim Financial Statements, (b) incurred since the Balance Sheet Date in the ordinary course of business consistent with past practice or (c) required to be incurred pursuant to this Agreement or the other Transaction Documents or otherwise in connection with the transactions contemplated hereby or thereby.

The following graphs summarize, for each population: (1) the percentage of deals having either of these types of representation and warranty; and (2) among the subset of deals that do include either of these types of representation and warranty, whether the representation and warranty is the seller/target-favorable formulation or buyer-favorable formulation, and whether the representation and warranty is qualified by the seller's knowledge.[14]



Acquisition agreements will sometimes contain a "10b-5" or "full disclosure" representation and warranty. Simplified examples of each type of this representation and warranty are as follows:

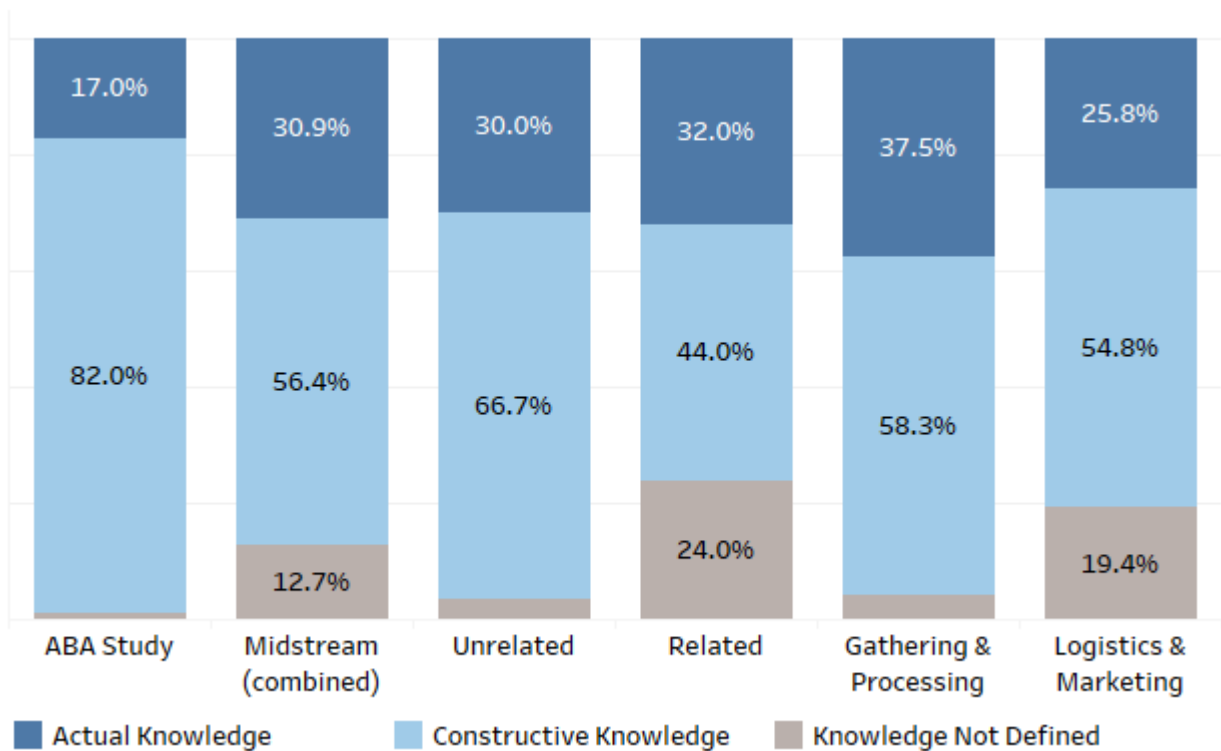
- 10b-5 formulation:** No representation or warranty or other statement made by [Seller] in this Agreement, the Ancillary Documents, the certificates delivered pursuant to this Agreement or otherwise in connection with the transactions contemplated by this Agreement contains any untrue statement of material fact or omits to state a material fact necessary to make the statements in this Agreement or therein, in light of the circumstances in which they were made, not misleading.
- Full disclosure formulation:** Seller does not have Knowledge of any fact that has specific application to Seller (other than general economic or industry conditions) and that may

materially adversely affect the assets, business, prospects, financial condition or results of operations of Seller that has not been set forth in this Agreement or the Disclosure Letter.[15]

The percentages of deals in the ABA study, midstream (combined), unrelated, related, G&P and L&M populations having either of the 10b-5 or full disclosure formulation were 26.0 percent, 10.7 percent, 3.2 percent, 20.0 percent, 4.0 percent and 16.1 percent, respectively.[16] As can be seen, each of these formulations of representations and warranties were less common in the midstream (combined) population (and, in particular, in the unrelated population) than in the transactions covered by the ABA study.

Certain representations and warranties of the seller in an acquisition agreement are oftentimes qualified by the “knowledge” of the seller. In the vast majority of agreements, there will be a definition of the seller’s knowledge, and a common negotiating point between buyers and sellers is what this definition entails. There are two general approaches that can be used: (1) an “actual knowledge” approach (which is more favorable to the seller), which typically provides that knowledge means the actual knowledge, without investigation or further inquiry, of one or more identified key management persons of the seller; and (2) a “constructive knowledge” approach (which is more favorable to the buyer), which typically provides that knowledge means the knowledge, after due inquiry and investigation, of one or more identified key management persons of the seller.

The following graph illustrates, for each population, the percentage of deals having a constructive knowledge definition, an actual knowledge definition or no definition of knowledge.[17]



While it was most common to use a constructive knowledge approach in each of the populations, it was relatively more common in the midstream populations, as compared with the ABA Study, to use an actual knowledge approach (and, in effect, to allocate more risk of unknown liabilities to the buyer).

The **second part of this article** will examine indemnification and alternative dispute resolution sections in acquisition agreements, and offer some key takeaways from the midstream M&A study.

Greg Krafska is a shareholder at Winstead PC.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] ABA Deal Points Studies have been published by the M&A Market Trends Subcommittee in 2018, 2015, 2013, 2011, 2009, 2007 and 2006.

[2] Members of the Mergers and Acquisitions Committee of the American Bar Association's Business Law Section can obtain a copy of the Private Target Mergers & Acquisitions Deal Points Study (Including Transactions from 2016 and H1 2017) at <https://apps.americanbar.org/dch/committee.cfm?com=CL560003>.

[3] Three considerations used when selecting the midstream acquisition agreements which were the subject of the author's midstream M&A study were: (1) the midstream acquisition agreement needed to have a transaction summary page prepared by Practical Law Company; (2) transactions where the assets being acquired were not easily categorized as being primarily gathering and processing assets or logistics and marketing assets (as such terms are described under the "Populations' Referenced in Midstream M&A Study" heading of this article) were excluded; and (3) an objective was to have a large enough sample size of transactions, such that one could have a measure of confidence that the findings concerning the deal terms for a given population in the study generally accurately represent the deal terms in the larger universe of midstream acquisition agreements. With the goal in mind of increasing the sample size (which ended up being 56 deals) of midstream M&A deals which were the subject of the midstream study, the transaction value range (being \$50M–\$1,000M for the midstream study, as compared with \$30M–\$500M for the ABA study) and the time period during which a deal signed or closed (being 2013–2017 for the midstream study, as compared with 2016–first half of 2017 for the ABA study) were broadened. When considering the findings of the midstream study and comparing them with comparable data points from the ABA study, one should consider whether, in a given instance, the somewhat varying transaction value range and time period covered between the midstream study and the ABA study may have played a role. For example, the ABA Deal Points Studies noted trends over the years with respect to certain deal terms. One of the most striking examples of this relates to materiality scrape provisions (discussed in the second part of this article), which have become more common over the years. According to the ABA study, materiality scrape provisions were in 14 percent of the deals reviewed in 2004, 22 percent in 2006, 24 percent in 2008, 49 percent in 2010, 28 percent in 2012, 70 percent in 2014 and 85 percent in 2016-2017. See ABA study at slide 87.

[4] See ABA study, slides 5 and 6, for the information in this column.

[5] See, e.g., ABA study at pages 3 and 5.

[6] Inevitably, some judgment was involved in whether to include a deal in the midstream study and, once it was included, in which category to place the deal (i.e., unrelated or related, and G&P or L&M).

[7] Of this 31, 17 (or 54.8 percent) concerned the acquisition of gathering and processing assets and 14 (or 45.2 percent) concerned the acquisition of logistics and marketing assets

[8] Of this 25, 8 (or 32.0 percent) concerned the acquisition of gathering and processing assets and 17 (or 68.0 percent) concerned the acquisition of logistics and marketing assets.

[9] Of this 25, 17 (or 68.0 percent) involved unrelated buyers and sellers and eight (or 32.0 percent) involved related buyers and sellers.

[10] Of this 31, 14 (or 45.2 percent) involved unrelated buyers and sellers and 17 (or 54.8 percent) involved related buyers and sellers.

[11] For more information on the ABA study data point, see ABA study at slide 12.

[12] For more information on the ABA study data point, see ABA study at slide 18. The data point from the ABA study includes three deals in which the earn-out provisions were not publicly available.

[13] In the five of the 56 midstream deals which had an earn-out provision, the maximum potential earn-out payments as a percentage of the base purchase price were, respectively, 12.0 percent, 12.5 percent, 13.9 percent, 25.3 percent and 165.5 percent.

[14] For more information on the ABA study data points in the table, see ABA study at slide 40.

[15] See the American Bar Association's Model Asset Purchase Agreement.

[16] For more information on the ABA study data point, see ABA study at slide 43. The ABA study provided separate data points for acquisition agreements having the 10b-5 formulation only (19 percent), the 10b-5 and full disclosure formulations (6 percent) and the full disclosure formulation only (1 percent). In the ABA data point to which this footnote relates, these three figures are combined into the 26.0 percent figure.

[17] For more information on the ABA study data points in the table, see ABA study at slide 34.

Key Trends In Midstream Oil And Gas Deals: Part 2

By **Greg Krafka** (September 21, 2018, 9:50 AM EDT)

The Private Target Mergers & Acquisitions Deal Points Studies, which are prepared by the M&A Market Trends Subcommittee of the Mergers & Acquisition Committee of the American Bar Association's Business Law Section, have been a key resource for M&A attorneys for over a decade. These studies, generally published every few years, provide statistical information concerning key deal terms in publicly available agreements for the acquisition of private target companies or assets by public companies.

When findings of the most recent ABA deal points study happen to be consistent with the argument they are making to opposing counsel, counsel in an M&A transaction will sometimes refer to the ABA deal points study when arguing that certain terms requested by opposing counsel are "off-market." For opposing counsel, a familiar rejoinder is that there is something different or particular about the transaction at hand, such that only precedent transactions sharing certain similarities should be considered as precedent — for example, transactions involving target companies in a certain industry or industry segment.

This two-part article attempts to engage these arguments — with respect to the midstream oil and gas industry sector — by identifying "what's market" concerning certain deal terms in midstream oil and gas acquisition agreements. Specifically, this article provides statistical information concerning deal terms in 56 publicly-available agreements involving the acquisition of midstream oil and gas assets or companies.

In preparing the midstream oil and gas M&A deal points study referenced in this article, the author reviewed how these deal terms were summarized by Practical Law Company for each of these 56 deals. While the findings of the author's study concerning the selected deal terms were generally consistent with the findings of the most recent ABA study, there are some noteworthy differences.

The first part of this article provided some background information concerning the author's midstream M&A study, and discussed its findings concerning certain financial provisions, and representations and warranties. This installment review the study's findings concerning indemnification terms and dispute resolution provisions. A full version of the study can be obtained upon request from the author.

Indemnification

Indemnification — Survival Period

Indemnification sections in acquisition agreements typically contain survival period provisions, which set forth the time period during which indemnified parties may validly submit indemnification claims to the indemnifying party. In acquisition agreements, there is typically a "general" survival period for indemnification claims involving a breach of the indemnifying party's representations and warranties (aside from certain representations and warranties that are specifically carved out), and a separate survival period for "fundamental" representations and warranties (which cover, among other things, corporate authorization to execute, deliver and perform the acquisition agreement and (for an equity sale) a representation and warranty that the seller owns the equity interests being sold), which is generally for a much longer duration.

There are also oftentimes separate survival periods for claims involving breaches of representations and warranties of the indemnifying party involving certain statutory matters (e.g., statute of limitations plus 60 days for claims involving breaches of representations and warranties involving tax or employee

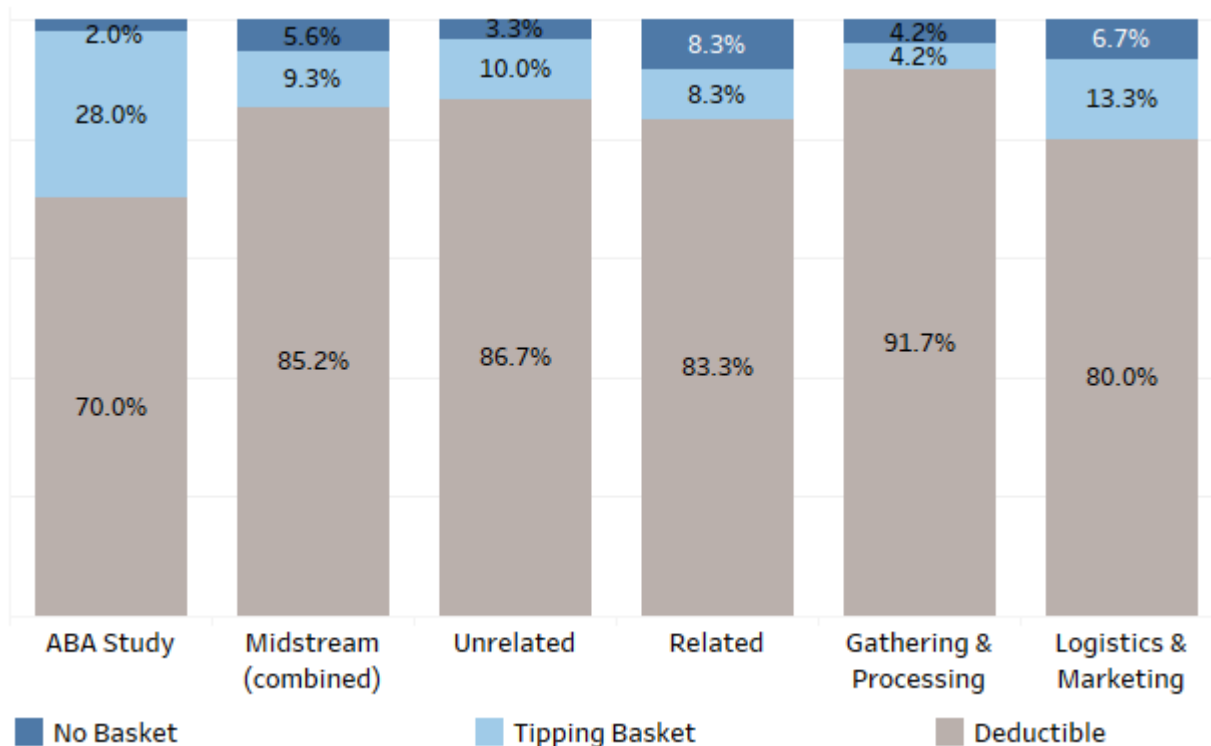
benefit matters), or post-closing covenants and agreements.

Generally speaking, the "unrelated" and "gathering and processing" populations in the study tended to have shorter indemnification survival periods than the "related" and "logistics and marketing" populations. The most commonly occurring survival period for the unrelated and G&P populations was 12 months, whereas the most commonly occurring survival period for the related and L&M populations (as well as in the ABA study) was 18 months.

Indemnification — Baskets and Caps

Acquisition agreements will typically provide that, prior to the indemnified party (most often the buyer) being entitled to making an indemnification claim, it must first incur losses above a certain amount (the indemnification basket). A term that is typically negotiated is whether the indemnification basket will be structured as a "deductible" (meaning that the indemnified party will only be able to recover losses in excess of the indemnification basket), or as a "tipping basket" (meaning that the indemnified party will be able to recover all or, less commonly, some other amount of losses that had been applied towards the basket).

The following graph illustrates, for each population, the percentage of deals having an indemnification basket structured as a deductible; having an indemnification basket structured as a tipping basket; or having no indemnification basket.[1]



While it was most common to structure the indemnity basket as a deductible in each of the populations, it was relatively more common to do so in the midstream populations, as compared with the ABA study.

Thus, this deal term (and several other indemnification deal terms, as we will see below) tends to be more seller-friendly in the midstream populations than in the ABA study population.

The amount of the indemnification basket is also clearly an important deal term, which is subject to negotiation. The average indemnity basket, as a percentage of the transaction value, was 0.79 percent, 0.93 percent, 1.06 percent, 0.78 percent, 1.04 percent and 0.85 percent for the ABA study, midstream (combined), unrelated, related, G&P and L&M populations, respectively.[2]

Aside from the related population, the midstream populations (and particularly the unrelated and G&P populations) had higher indemnity basket amounts than did the ABA study population. Only 5.0 percent of the transactions in the ABA study had an indemnity basket that was higher than 1.0 percent of the transaction value, whereas the percentages of transactions in the midstream (combined), unrelated, related, G&P and L&M populations that had an indemnity basket that was higher than 1.0 percent of the transaction value were 18.0 percent, 28.5 percent, 4.5 percent, 27.2 percent and 10.7 percent, respectively. Here again, this deal term tended to be more seller-friendly in the midstream populations than in the ABA study population.

Acquisition agreements typically provide that the seller will only be required to indemnify the buyer up to a certain amount (referred to as the indemnity cap), subject to certain limitations. Typically, the “fundamental” representations and warranties of the seller and certain other matters are carved out from the scope of the “general” indemnity cap, and aside from the general indemnity cap, there may be separate indemnity caps as to other matters (e.g., up to the value of the purchase price for breach of the “fundamental” representations and warranties of seller, or up to a certain figure for certain kinds of indemnified losses — e.g. losses relating to environmental matters).

The average general indemnity caps, as percentages of the transaction values, were 12.20 percent, 13.99 percent, 10.76 percent, 17.79 percent, 12.08 percent and 15.38 percent for the ABA study, midstream (combined), unrelated, related, G&P and L&M populations, respectively.[3]

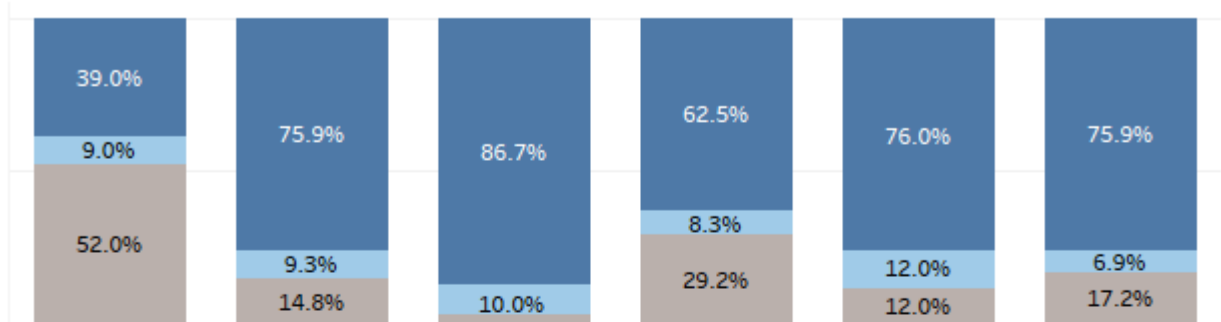
Escrow Amount; Damage Limitations; Sandbagging; Materiality Scrape

In order to help provide the indemnified party (typically the buyer) some assurance that the indemnifying party will meet its indemnification (and certain other) obligations, acquisition agreements will sometimes provide that, for a certain period of time following the closing of the transaction, a certain amount of the purchase price will either be deposited into an escrow account or “held back” by the buyer.

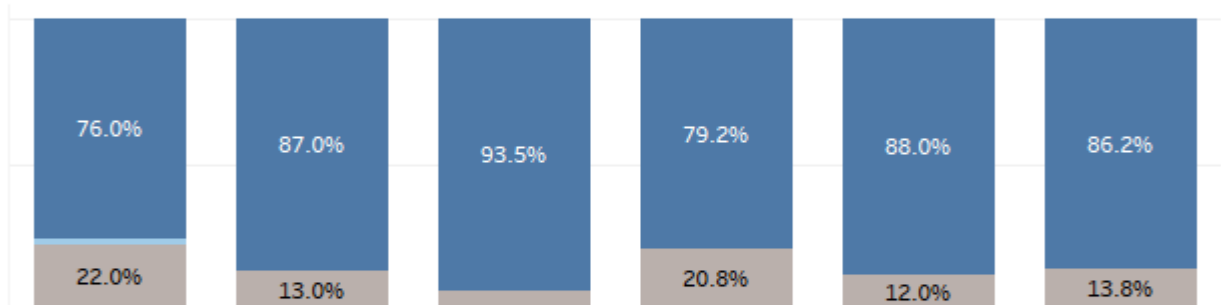
The average amount of the escrow account/holdback as a percentage of the purchase price was very similar in the ABA study and the midstream (combined), being 6.66 percent[4] and 6.42 percent, respectively. All of the midstream deals having escrow accounts/holdbacks were between unrelated buyers and sellers.

Acquisition agreements will oftentimes provide that the indemnified party will not be entitled to seek indemnification for certain kinds of damages. The following table illustrates, for each population, the percentage of deals where consequential damages, punitive damages and diminution in value were either expressly excluded, expressly included or were silent.[5]

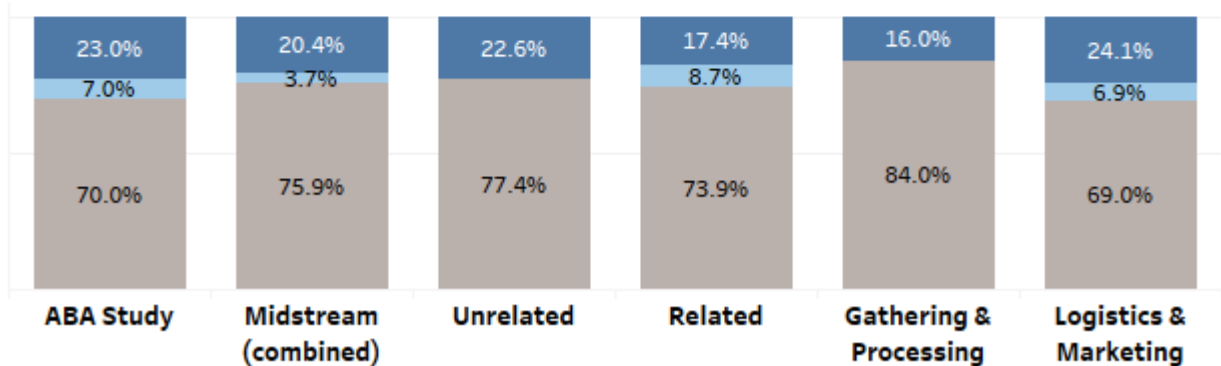
Consequential Damages



Punitive Damages



Diminution in Value



Expressly Excluded

Expressly Included

Silent

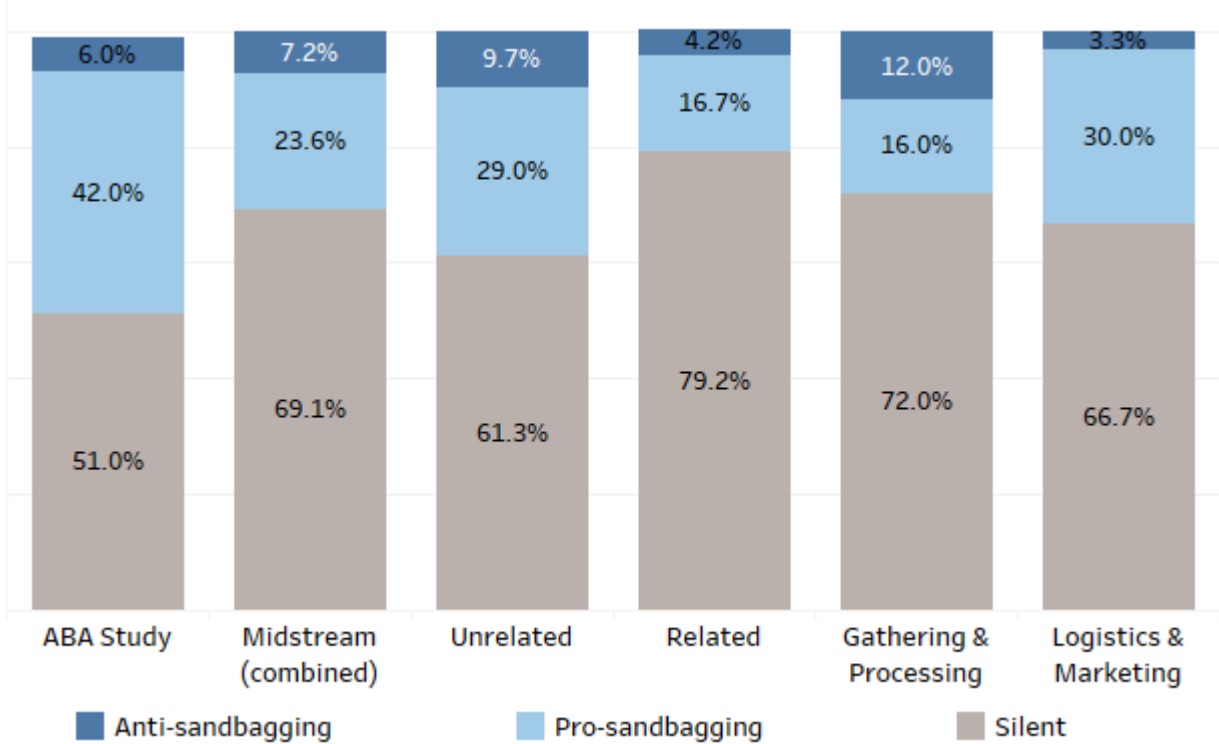
While the findings with respect to punitive damages and diminution in value were broadly consistent with the findings in the ABA study, this was not the case with consequential damages. In the ABA study, the acquisition agreement was most commonly silent with respect to consequential damages; but in the midstream populations, consequential damages were most commonly excluded.

Acquisition agreements will sometimes include “pro-sandbagging” provisions, which generally provide that the representations and warranties of the indemnifying party, and the indemnified party's right to indemnification with respect thereto, shall not be affected by reason of any investigation made by the

indemnified party, or by reason of the fact that the indemnified party knew or should have known that any such representation or warranty was or might be inaccurate. Less commonly, an acquisition agreement may include an “anti-sandbagging” provision, which generally provides that if a party closes the transaction with actual knowledge of the breach of any representation, warranty, agreement or covenant by the other party, then the representation, warranty, agreement or covenant which is breached at the closing date will be deemed waived by such party, and such party will no longer be able to bring an indemnification claim with respect to such breach.

Oftentimes, the acquisition agreement will be silent on this point (i.e., no pro- or anti-sandbagging provision), in which case the governing law of the acquisition agreement will need to be considered when determining the parties’ indemnification rights/obligations in the event that a party closes a transaction with knowledge of the breach of a representation or warranty of the other party.

The following graph illustrates, for each population, the percentage of deals having a pro-sandbagging provision, having an anti-sandbagging provision or being silent on this matter.[6]



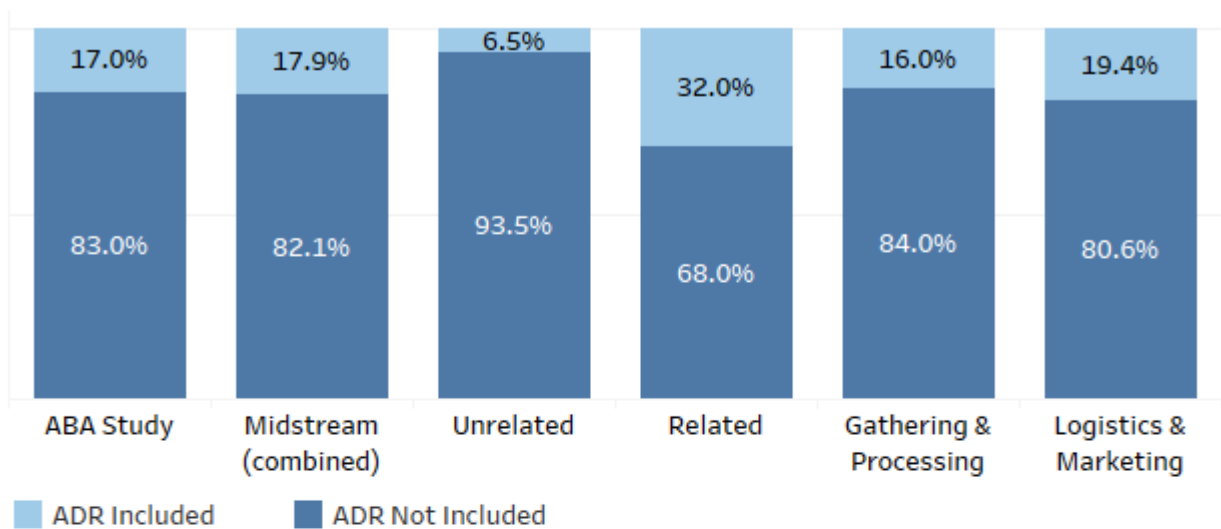
Acquisition agreements will sometimes include a “materiality scrape” provision, which generally provides that, when determining whether a representation or warranty has been breached for purposes of making an indemnification claim and when determining the amount of losses suffered by any indemnified party, each representation and warranty contained in the acquisition agreement shall be read without giving effect to any "material," "materiality" or "Material Adverse Effect” qualifications that may be contained in any such representation or warranty.

The percentages of deals in the ABA study, midstream (combined), unrelated, related, G&P and L&M

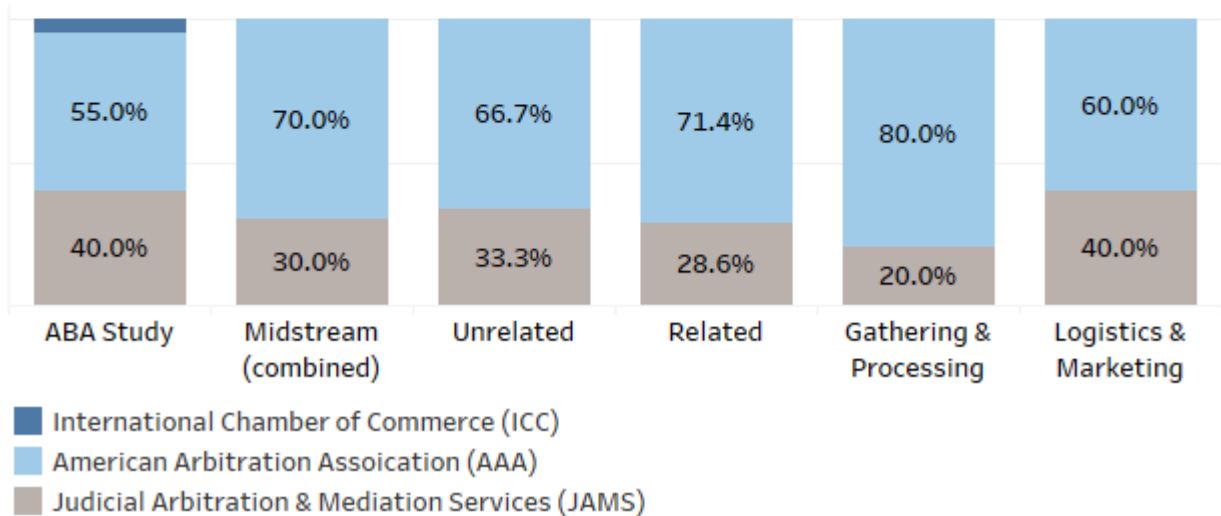
populations having a materiality scrape were 85.0 percent, 71.2 percent, 64.5 percent, 81.0 percent, 79.2 percent and 64.3 percent, respectively.[7] As can be seen in the preceding sentence, it was relatively less common in the midstream populations (as compared to the ABA study) to include pro-sandbagging and materiality scrape provisions.

Alternative Dispute Resolution

The following graphs summarize: (1) for each population, the percentage of acquisition agreements having an alternative dispute resolution provision which generally addresses disputes arising under the agreement (as opposed to provisions which specifically address more narrow areas of dispute, e.g. post-closing purchase price adjustments); and (2) for the subset of each population which had an ADR provision, which set of arbitration rules was used for arbitrations.[8]



Subset: Deals With General ADR Provisions



Takeaways

Based on a review of certain deal terms in the midstream acquisition agreements covered in the author's midstream M&A study and comparable data points from the ABA study, the acquisition agreements which were the subject of the midstream M&A study generally allocated more of the risks (especially unknown risks) to the buyer.

For example, the midstream acquisition agreements were less likely to include 10b-5/full disclosure and “no undisclosed liabilities” representations and warranties of the seller, and more likely to limit the definition of seller’s knowledge to the actual knowledge (and not constructive knowledge) of specified individuals.

In addition, the midstream acquisition agreements generally had more “seller-friendly” indemnification terms in certain respects, including: The indemnity basket was more likely to be structured as a deductible; the indemnity basket as a percentage of transaction value was generally higher; they were more likely to exclude consequential damages from indemnifiable losses; they were less likely to include a pro-sandbagging provision; and they were less likely to include a materiality scape.

Greg Krafka is a shareholder at Winstead PC.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] For each population, only deals with indemnification survival provisions were included in the calculations. For more information on the ABA study data points in the table, see ABA study at slide 80. The ABA study provided separate data points for deals where the indemnified party is entitled to be indemnified from the first dollar of loss (i.e., able to collect all of the damages that had been applied against the basket), or “first dollar” indemnification baskets, and baskets where the indemnified party is entitled to recover some portion (but not all) of the basket once the basket amount has been exceeded, or “combination” baskets. In the ABA study, the first dollar baskets and combination baskets comprised 26 percent and 2 percent of the deals, respectively; in the graph to which this footnote relates, they are consolidated into the 28 percent tipping basket figure.

[2] For each population, only deals with indemnity baskets (the amount of which was not redacted out) were included in the calculations. For more information on the ABA study data point, see ABA study at slide 82. The ABA study also provides the average indemnity basket for deals having representation and warranty insurance (0.84 percent) and for deals not having representation and warranty insurance (0.77 percent). The 0.79 percent figure noted above for the ABA study covers both categories of deals (i.e., both deals which do not have representation and warranty insurance and those that do have it). Representations and warranty insurance was rarely used in the midstream deals which were reviewed, and separate data points were not provided on this matter in the author's study.

[3] For each population, only deals with determinable indemnity caps were included in the calculations. For more information on the ABA study data point, see ABA study at slide 89. The ABA study also provided the average indemnity cap for deals having representation and warranty insurance (5.77 percent) and deals not having representation and warranty insurance (14.70 percent). The 12.20 percent figure noted above for the ABA study covers both categories of deals (i.e., both deals which do

not have representation and warranty insurance and those that do have it). Representations and warranty insurance was rarely used in the midstream deals which were reviewed, and separate data points were not provided on this matter.

[4] See ABA study at slide 102.

[5] For each population, only deals with indemnification survival provisions were included in the calculations. For more information on the ABA study data points in the table, see ABA study at slides 77-78.

[6] For more information on the ABA study data points, see ABA study at slide 66.

[7] For each population, only deals with indemnity baskets were included in the calculations. For more information on the ABA study data point, see ABA study at slide 87.

[8] For more information on the ABA study data points in the table, see ABA study at slide 115.