

M&A INSIGHT

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Caps and Baskets in Private Acquisitions: What's Market Q1 – Q3 2011

Sellers generally attempt to limit their liability under a purchase agreement by imposing caps, baskets and mini-baskets on their indemnification obligations for breaches of representations, warranties and covenants. Caps, generally subject to certain carve outs, provide a ceiling on a seller's liability to the buyer. Baskets and mini-baskets, on the other hand, are threshold limitations on whether a seller has liability to the buyer. Here is a snapshot of what was market for sellers in the 153 mergers and acquisitions that closed in the first three quarters of 2011.*

Baskets protect sellers by providing a dollar threshold that aggregate losses must meet before the seller is liable to the buyer. Baskets can be *tipping baskets*, meaning that once the basket is "full," the seller must indemnify the buyer from the first dollar of the buyer's losses, or *deductible baskets*, meaning that the seller must indemnify the buyer only for claims above the threshold amount.

Although deductible baskets were more popular than tipping baskets, the average deductible and tipping baskets were the same at **0.6%** of the transaction value.

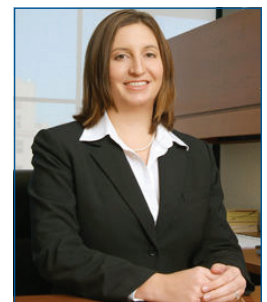
Mini-baskets protect the seller by providing that losses must exceed a specified minimum amount before they can be counted towards the general basket. For example, if the mini-basket is \$30,000 and the buyer experiences a loss of \$10,000, not only will the seller not be liable to the buyer for the loss, but also the \$10,000 will not be counted in determining whether the general basket has been filled.

*Based on publicly-filed documents for acquisitions of privately-held businesses with transaction values of \$25 million to \$500 million. Caps, baskets and mini-baskets typically do not apply to fundamental representations such as title, authority and capitalization.



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For more information on indemnification caps and baskets and other mergers & acquisitions trends and issues, please contact Jen, Lisa or one of the other attorneys in our Mergers & Acquisitions Practice Group



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BY THE NUMBERS CAPS

% of deals with caps **94.7%**
17.6% Average cap size
(% of transaction value)

BASKETS

% of deals with baskets **92.0%**
59.1% of which were deductible baskets
40.9% of which were tipping baskets
Average basket size
(% of transaction value) **0.6%**

MINI-BASKETS

% of deals with mini-baskets **32.7%**
3.4% Average mini-basket
(% of basket amount)