

SUMMARY

CLAIMS 'IF TRUE': MARKET TRENDS

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- According to the ABA M&A Committee's Private Target Deal Points Study, of the deals covered in 2022 and the first quarter of 2023:
 - 83% limited indemnification for *actual* breaches of the reps and warranties; and
 - 17% included indemnification for *alleged* breaches (the "if true" concept).
- However, this might be understating how much the "if true" concept is included in deals.
 - A purchase agreement might include the "if true" concept within a broader indemnification right for certain third-party claims.
 - For example, a purchase agreement might give the buyer the right to indemnification for any third-party claims that relate to the business of the seller during the pre-closing period.
 - The purchase agreement might also include additional bases for indemnification beyond breaches of reps and warranties, such as claims related to excluded assets or excluded liabilities.
- While the ABA Study looked for various ways the "if true" concept could be included, it's possible that the number of deals that provide indemnification for alleged claims could be higher.

The rest of the video includes interviews with ABA M&A Committee members Joanna Lin from McDermott Will & Emery and Jessica Pearlman from K&L Gates.