

SUMMARY

INDEMNIFIABLE LOSSES: MARKET TRENDS

Indemnifiable Losses: Market Trends

- The treatment of indemnifiable losses in publicly filed acquisition agreements was looked at in the 2021 ABA M&A Committee's Private Target Deal Points Study.
 - The study reviewed how loss is defined and looked at the types of damages included.
- The data shows that losses are rarely limited to *out-of-pocket damages* – only 6% of the time in 2020 to 2021.
- Most deals were silent on *diminution* in value – 80% in the 2021 study.
 - There was an increase in the number of deals that expressly excluded diminution in value. It was expressly excluded from:
 - 9% of deals in the 2019 study; and
 - 15% of deals in the 2021 study.
- 61% of deals in 2020 and 2021 were also silent on *incidental damages*.
 - This was a decrease of 21 percentage points from the 2019 study.
 - 27% of deals expressly excluded incidental damages.
- *Punitive damages* are routinely excluded.
 - 82% of the deals in the 2021 study expressly excluded punitive damages, with 14% silent.
- With *consequential damages*, there was a decrease in the number of deals that were silent, from 65% in the 2019 study to 58% in 2021.
 - 32% expressly excluded consequential damages, a figure that was up to over 50% at the beginning of the 2010s.
- The 2019 study was the first time that the deal points study analyzed the number of agreements that included *recovery for lost profits* and the number of agreements that allowed damages to be *calculated based on a multiple*.
 - Since then, the study has shown that the majority of deals were silent on both these issues.
- One note about the percentages of deals that exclude consequential, incidental and punitive damages, and lost profits:
 - The Deal Points studies do not analyze the number of deals that contain a common exception to that exclusion, which is that those types of damages are recoverable if they're included in a third-party claim that's covered by the indemnification provisions of the agreement.

The rest of the video includes interviews with ABA M&A Committee members Leigh Walton from Bass, Berry & Sims and Scott Whittaker from Stone Pigman Walther Whitmann.