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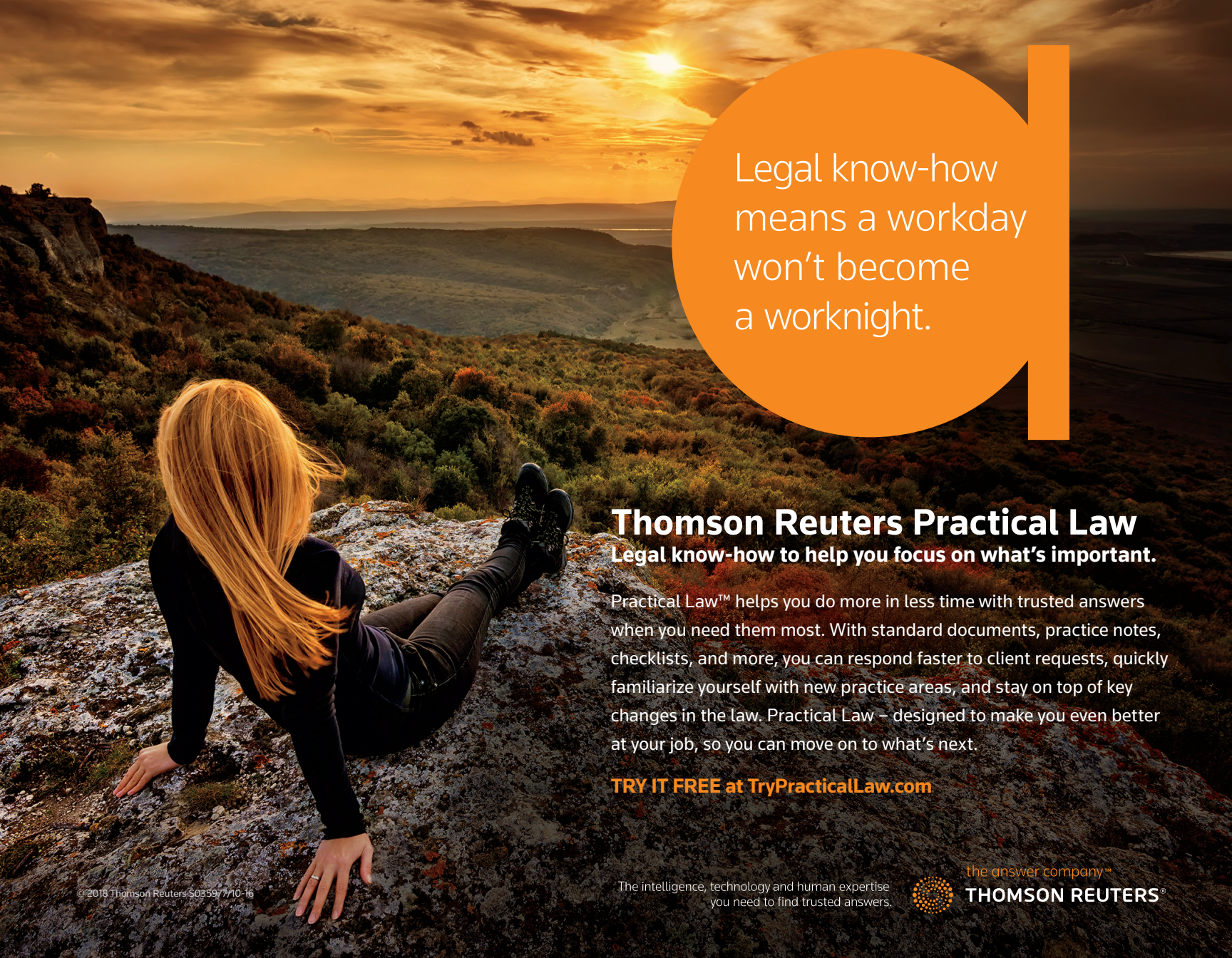
REVERSE BREAK-UP FEES AND SPECIFIC PERFORMANCE

A SURVEY OF REMEDIES IN LEVERAGED
PUBLIC DEALS 2018 EDITION



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STUDY OVERVIEW



SUMMARY

This is the ninth annual edition of Practical Law's survey of reverse break-up fees, specific performance, and other tools for risk allocation in leveraged public M&A deals. The study examines the remedies available to public target companies for a buyer's failure to close a transaction supported with new debt financing due to the buyer's breach of the merger agreement or a financing failure.

The use of leverage in public M&A deals has been in a slow but steady decline since reaching a record high in the second half of 2015. As a result, this year's study examines a somewhat smaller sample of leveraged deals than had been available in recent years. The study sample this year consists of 77 leveraged public deals entered into in 2017 with an equity value of \$100 million or more, compared to 91 such deals entered into in 2016 and 85 in 2015. Despite the decline from recent highs, the study sample still exceeds the 75 leveraged deals reached in 2014, 59 deals in 2013, and 68 in 2012.

Of the 77 surveyed deals, 56 were entered into with strategic buyers. This figure is down from the 66 strategic leveraged deals reached in 2016, 67 entered into in 2015, and 60 in 2014. The 56 deals, however, still make for a significant sample size compared to other previous years. For example, only 29 strategic leveraged deals were reached in 2013 and 45 in 2012.

As for private equity buyouts and other financial-buyer leveraged deals with an equity value of \$100 million or more, 2017 saw 21 such deals, compared with 25 entered into in 2016, 18 in 2015, and 15 in 2014.

SIZE OF REVERSE BREAK-UP FEES

In 2017, 31 agreements (18 with financial buyers and 13 with strategic buyers) contained a reverse break-up fee that acts as an ultimate cap on the buyer's potential damages—an increase from the 30 such agreements in 2016 and 21 in each of 2015 and 2014. The average size of these reverse break-up fees was 6.76% of the deal's equity value, up from 6.39% in 2016, 6.07% in 2015, 5.91% in 2014, and 6.51% in 2013. Notably, though, one deal with a 29.20% reverse break-up fee skews the results; excluding that one deal, the average size of the reverse break-up fees agreed to in 2017 would be 6.01%. Remarkably, the median reverse

break-up fee in 2017 was the same as it was in 2016 and 2015: exactly 6.00% of equity value. Seventeen of the 31 fees were at least double the size of the target company's break-up fee, a somewhat smaller proportion than the 19 of 30 fees in 2016 and 13 of 21 fees in 2015. Only one fee was more than triple the target company's corresponding break-up fee. Seven of the reverse break-up fees were exactly double the target company's break-up fee.

The amount of each reverse break-up fee in the study, along with other details such as each surveyed deal's pre-termination and post-termination remedy, is included in *Table A* of the Appendix to the study.

REMEDY MODELS

As observed in previous editions of the study, the market around the terms for allocating financing risk continues to consolidate. For the most part, and consistent with prior years, buyers in 2017 agreed to one of the following two general models for remedies for buyer breach in leveraged deals:

- A pre-termination right of the target company to enforce the buyer's obligations unconditionally, combined with damages that survive termination for willful breach (or, in some cases, for all breaches) or for failure to close when required. The study refers to this combination of remedies as the "Strategic model."
- A pre-termination enforcement right to cause the buyer to close that is conditioned on the availability of the debt financing, combined with a reverse break-up fee that caps damages for willful breach in the event that the buyer fails to close because of a breach or financing failure. The study refers to this combination of remedies as the "Private Equity model."

The preference among strategic buyers for the Strategic model has generally been correlative with the involvement of strategic buyers in the leveraged public M&A market. In 2013, when strategic-buyer leveraged deal activity was at its ebb, the study found that strategic buyers had negotiated a Strategic model agreement in only 62 percent of their leveraged transactions. When strategic buyers returned to the leveraged M&A market, however, their traditional willingness to agree to the Strategic model of remedies returned as well. In 2014, strategic buyers

agreed to the traditional model in 80 percent of their leveraged deals, a figure that rose in 2015 to 82 percent and rose again in 2016 to 85 percent of strategic deals. However, the decrease in leveraged public M&A activity among strategic buyers in 2017 brought along a similar break in the trend toward uniformity among strategic buyers. In 2017, only 75 percent of strategic buyers agreed to the Strategic model of remedies. The rest negotiated a remedy model typical of private equity buyers.

The wider adoption of Private Equity model agreements among strategic buyers in 2017 is likely attributable at least to some degree to particular deal circumstances. Of the 13 strategic buyers who negotiated private-equity-style agreements, five were portfolio companies of private equity firms who obtained new equity financing in connection with their deals. Another three buyers were in fact consortiums of strategic and financial buyers working in tandem. Only the remaining five buyers did not fall into either of those categories.

As the study observed last year, the increasing prevalence of the Strategic model of remedies has made inroads into the private equity market as well. In each of 2013 and 2014, only seven percent of private equity and other financial buyers agreed to the Strategic model. This number jumped to 17 percent in 2015, which the study posited may have only been a function of the smaller sample size of financial deals (18 that year). With a somewhat larger sample size of buyouts in 2016 (25 leveraged deals with financial and private equity buyers), this figure did come down, with 12 percent of private equity and financial buyers agreeing to the Strategic model of remedies. The 2017 sample size of buyouts (21 leveraged deals with financial and private equity buyers), squarely between the 2015 and 2016 sample sizes, yielded a proportion of financial deals using the Strategic model of remedies between those two years' results, with 14 percent of financial and private equity buyers agreeing to Strategic model agreements in their leveraged buyouts.

ALLOCATING FINANCING RISK

Aside from the target company's equitable and monetary remedies for breach, a primary mechanism for allocating the risk of financing failure is the buyer's financing covenants. Target companies can increase their certainty of closing by negotiating detailed financing covenants with strong efforts standards and precise obligations that the buyer must

undertake to consummate the financing. In a similar vein, buyers can protect themselves from specific risks by negotiating closing conditions based on financial metrics such as minimum cash, minimum EBITDA, or maximum indebtedness. The study's review of these covenants and other provisions is discussed in "The Buyer's Financing Covenants" on page 35 and in the Appendix to the study in *Table B*.

Although the remedies for breach and the financing covenants are the primary mechanisms for allocating the risk of financing failure, other provisions throughout the merger agreement bear on financing risk as well. Examples of these provisions include the target company's financial-condition representations, the bring-down closing condition, and the definition of "Material Adverse Effect." These provisions should be given appropriate consideration when drafting and negotiating the merger agreement for a debt-financed transaction. In that vein, *Table B* in the Appendix to the study contains survey results for two ancillary issues:

- ***Does the merger agreement contain any financial-metric closing conditions?*** These can include minimum cash or minimum EBITDA, in addition to pure financing outs. This year's study found few agreements with any such conditions, which is not unusual in public M&A deals.
- ***In agreements where a remedy is keyed off of a financing failure, is the concept of a "financing failure" further defined?*** For example, an agreement can include objective criteria such as the credit rating for the financing. In spite of their intuitive appeal, the study continues to find few agreements that contain this degree of specificity.

LENDER-RELATED PROVISIONS

The study also examined the frequency of inclusion of "Xerox" provisions in merger agreements. These provisions, so named for the 2009 *Xerox/Affiliated Computer Services* merger agreement in which they were introduced, are included in merger agreements for the benefit of (and often at the behest of) the lenders, with the purpose of limiting the target company's recourse to them in the event of a financing failure. As the study has observed in recent years, these provisions are becoming the norm in leveraged deals, with a substantial majority containing all the typical "Xerox" provisions, including a non-recourse provision, a provision capping the lenders' potential liability to the payment of the

reverse break-up fee (when applicable), and litigation-related provisions providing for New York governing law and venue and waiver of trial by jury. Nearly all agreements with these provisions also included the appropriate bootstrapping, in which the lenders must consent to any adverse amendment to the merger agreement affecting those provisions and in which the lenders are made third-party beneficiaries of those provisions. These issues are discussed in detail in the “Lender-Related Provisions” on page 38 and in the Appendix to the study in *Table C*.

POST-TERMINATION LIABILITY

In merger agreements that do not contemplate the payment of a reverse break-up fee, the parties must decide to what extent liability for breach of the merger agreement survives termination. Much of the time, the parties make do with a standard of willful breach—a term that frequently goes undefined. Increasingly, however, the parties make explicit that a party can only be held to have willfully breached the agreement if it understood at the time of its action or omission that the consequence of its action or omission would be a breach of the agreement. On the other hand, other agreements make a pro-target exception, stating that the buyer’s failure to close when otherwise required is deemed to be a willful breach of the agreement. *Table D* in the Appendix to the study captures the various formulations for post-termination liability.



STUDY SAMPLE

This year’s study sample consists of all merger agreements for debt-financed acquisitions of US reporting companies (excluding REITs and debt-only issuers) tracked by What’s Market for the calendar year 2017. The determination of whether an acquisition was supported with debt financing is based on a review of the buyer’s representations and covenants in the merger agreement, as well as statements and disclosures made in other publicly filed documents. Deals are categorized as debt-financed if the buyer entered into new financing arrangements to finance the acquisition, or represented (whether in the merger agreement or in other public filings related to the transaction) that it intended to raise new debt to finance the acquisition. Other criteria for inclusion in the study sample are described in the Appendix to the study in *Table A*, which also provides the relevant data for every surveyed agreement.

STUDY SAMPLE AT A GLANCE: 77 MERGER AGREEMENTS	
56 with Strategic Buyers	21 with Financial/Private Equity Buyers
<ul style="list-style-type: none">■ 14 in Q1’17, 12 in Q2’17, 14 in Q3’17, 16 in Q4’17.■ Includes 3 deals in which the buyer group was a consortium of strategic and private equity buyers.■ 6 strategic buyers raised new equity financing from sponsors as part of the acquisition financing.■ 39 buyers offered all-cash consideration, 11 offered a mix of cash and stock, 3 offered a cash/stock/mix election, 3 offered all-stock consideration and raised new debt financing for refinancing purposes.■ 15 agreements were structured as front-end tender offers.■ 1 agreement was for a deal structured as a Reverse Morris Trust transaction.■ 2 deals were for the same target company, one an initial agreement and one a superior offer.■ 1 agreement was terminated for failure to obtain CFIUS approval.	<ul style="list-style-type: none">■ 4 in Q1’17, 10 in Q2’17, 3 in Q3’17, 4 in Q4’17.■ 3 deals were club deals among two or more financial or private equity buyers without involvement of a strategic buyer.■ 1 deal included an equity rollover with existing stockholders.■ 4 agreements were structured as front-end tender offers.■ 1 agreement was terminated for failure to obtain CFIUS approval.

THE REMEDY CATEGORIES

Each agreement in the study is analyzed for two sets of remedies: the pre-termination equitable remedy available to the target company to enforce the buyer's obligations; and the post-termination fee or damages payable to the target company by the buyer for breach or failure to close.

The pre-termination equitable remedies are classified into the following categories:

- **Full Specific Performance.** The target company has an unconditioned remedy of specific performance to enforce all of the buyer's obligations under all circumstances. This includes enforcement of the buyer's obligations to draw down the debt financing (and equity financing, when applicable) and close the transaction. For further discussion of this remedy, including the judicial enforcement of specific-performance provisions, see page 7.
- **Conditional Specific Performance.** The target company can enforce the buyer's obligations to fund the financing and close the transaction, but on condition that the proceeds of the debt financing are available. For further discussion of the conditionality and other details of this remedy, see page 8.
- **No Specific Performance.** The target company has no right of specific performance. If the buyer does not close, the target company's only recourse is to terminate the agreement and either accept payment of a reverse break-up fee or sue for monetary damages, depending on the agreement's post-termination remedy. No merger agreements surveyed in the last three years of the study have contracted away or remained silent on the target company's right of specific performance.

The post-termination monetary remedies are classified into the following categories:

- **No Reverse Break-Up Fee (RBF), Full Damages.** The agreement does not specify any predetermined fee that the buyer must pay for breach, financing failure, or other failure to close. Instead, liability survives termination for any breach or closing failure, even if the buyer lacks knowledge or willful intent. For further discussion of this remedy, see page 15.
- **No RBF, Damages for Willful Breach.** The agreement does not specify any predetermined fee that the buyer must pay for breach or closing failure. Liability survives termination for any "willful," "knowing," or "intentional" breach, but does not survive if the breach was not willful. For further discussion of this remedy, see page 16.
- **RBF, Uncapped Damages for Willful Breach.** The buyer pays a reverse break-up fee or expense reimbursement if it breaches the agreement or fails to close. The fee caps the buyer's damages for non-willful breach or a financing failure that it did not cause. But the buyer remains exposed to unlimited damages for its willful breach of the agreement. For further discussion of this remedy, see page 17.
- **RBF, Cap on Damages.** The buyer pays a reverse break-up fee for breach or failure to close. The fee caps the buyer's damages in all instances, including if the buyer willfully breached the agreement. For further discussion of this remedy, see page 18.
- **Two-Tier Reverse Break-up Fee.** The buyer pays a lower reverse break-up fee for non-willful breaches or financing failure and a higher fee for willful breaches or when the buyer fails to close despite the availability of the debt financing. The higher fee functions as an ultimate cap on damages. For further discussion of this remedy, see page 18.

PRE-TERMINATION ENFORCEMENT



FULL SPECIFIC PERFORMANCE

The “Full Specific Performance” category of pre-termination enforcement captures agreements that provide the target company with a right to enforce all of the buyer’s obligations, including the buyer’s financing covenants regarding the debt financing, the obligation to draw down the equity financing (when applicable), and the obligation to close the transaction when the closing conditions have been satisfied. In these agreements, the target company’s enforcement right is unconditioned; even if the debt financing becomes unavailable, the target company can still enforce the buyer’s obligation to close if the closing conditions have otherwise been satisfied.

EXAMPLE: Merger agreement between Campbell Soup Company and Snyder’s-Lance, Inc., dated December 18, 2017

Section 7.8. Specific Enforcement. (a) The parties agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached. It is accordingly agreed that the parties shall be entitled to an injunction or injunctions to prevent breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement in any court specified in Section 7.7, without bond or other security being required, this being in addition to any other remedy to which they are entitled at law or in equity. The parties further agree not to assert that a remedy of specific performance is unenforceable, invalid, contrary to Law or inequitable for any reason, nor to assert that a remedy of monetary damages would provide an adequate remedy for any such breach.

(b) Each of the parties agrees that it will not oppose the granting of an injunction, specific performance and other equitable relief on the basis that (i) the other party has an adequate remedy at law or (ii) an award of specific performance is not an appropriate remedy for any reason at law or equity. Any party seeking an injunction or injunctions to prevent breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement shall not be required to provide any bond or other security in connection with any such order or injunction.

This excerpted provision is a common form of a broadly drafted Full Specific Performance remedy. In it, the parties agree that a breach of the merger agreement would cause irreparable harm, that they are therefore entitled to specific performance, that they will not oppose the granting of an injunction, and that they waive any requirement to post a bond or other security.

Although this language is typical to many public merger agreements, the Delaware Court of Chancery recently cast some doubt on its effectiveness. In *AM General Holdings LLC v. Renco Group, Inc.*, the Chancery Court denied a preliminary injunction to grant an LLC member certain informational rights, even though the LLC agreement provided that “any party by whom this Agreement is enforceable shall be entitled to specific performance” and that “each party waives any objection to the imposition of such relief” (2015 WL 9487922, at *3 (Del. Ch. Dec. 29, 2015), *reargument denied sub nom.* 2016 WL 787929 (Del. Ch. Feb. 19, 2016)). The decision explained that contractual parties “cannot in advance agree to assure themselves” of a right to an injunction “and thereby impair the Court’s exercise of its well-established discretionary role in the context of assessing the reasonableness of interim injunctive relief” even though they stipulate that a breach of the contract would constitute irreparable harm.

The decision in *Renco* can perhaps be distinguished from typical public merger transactions because a failure to close a merger likely represents a clearer case of irreparable harm than does a lack of access to certain company information. The *Renco* decision itself allows that contractual stipulations that a breach should be deemed to impose the risk of irreparable harm “can be helpful when the question of irreparable harm is a close one.” And in fact, the Chancery Court famously did enforce a specific performance obligation to exert reasonable best efforts to close the financing for a transaction in the *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.* litigation (965 A.2d 715, 749-763 (Del. Ch. 2008)). For these reasons, parties to merger transactions likely do not have to be overly concerned that provisions for specific performance will be deemed unenforceable. However, counsel can consider softening the language of these provisions by stipulating that the parties are entitled to seek specific performance, rather than declaring that they are entitled to it.

CONDITIONAL SPECIFIC PERFORMANCE

The “Conditional Specific Performance” category of pre-termination enforcement refers to agreements that provide the target company with a right to enforce all of the buyer’s obligations, including the obligation to close when required, on condition that the proceeds of the debt financing are available.

EXAMPLE: Merger agreement for the acquisition of PharMerica Corporation by Kohlberg Kravis Roberts & Co. L.P. and Walgreens Boots Alliance, Inc., dated August 1, 2017

Section 12.13. Specific Enforcement... (a) The parties hereto agree that irreparable damage would occur if any provision of this Agreement were not performed in accordance with its terms, and that monetary damages, even if available, would not be an adequate remedy therefor. Accordingly, **subject, in the case of specific enforcement of Parent’s and Merger Sub’s obligations to consummate the Merger (and/or draw down the proceeds of the Equity Financing) only, to Section 12.13(b),** the parties hereto acknowledge and hereby agree that in the event of any breach or threatened breach by the Company, on the one hand, or Parent or Merger Sub, on the other hand, of any of their respective covenants or obligations set forth in this Agreement or the Commitment Letters, the Company, on the one hand, and Parent or Merger Sub, on the other hand, shall be entitled to an injunction or injunctions to prevent or restrain breaches or threatened breaches of this Agreement or the Commitment Letters by the other (as applicable), and to specifically enforce the terms and provisions of this Agreement or the Commitment Letters to prevent breaches or threatened breaches of, or to enforce compliance with, the covenants and obligations of the other (as applicable) under this Agreement or the Commitment Letters...

(b) Notwithstanding anything herein to the contrary, (1) in no event shall the Company be entitled to enforce or seek to enforce specifically Parent’s and Merger Sub’s obligations to consummate the Merger if a Debt Financing Failure has occurred

and (2) the Company shall be entitled to enforce or seek to enforce specifically Parent’s and Merger Sub’s obligations to consummate the Merger (and/or draw down the proceeds of the Equity Financing) if and only if (i) all conditions in Section 10.01 and Section 10.02 have been satisfied (other than conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction of those conditions at the Closing) at the time the Closing is required to occur pursuant to Section 3.01(b), (ii) the Debt Financing provided for by the Debt Commitment Letters is available for immediate drawdown in accordance with its terms if the Equity Financing is funded at the Closing and (iii) the Company has irrevocably confirmed in writing that if specific performance is granted, then the Company will take such actions to ensure that Closing will occur...

The practical result of the conditionality to specific performance is that the target company can only get to the closing if the debt-financing proceeds are funded. In previous years, the study observed several variations in the drafting of the conditions to enforcement in the Conditional Specific Performance category. Primarily, merger agreements could be distinguished based on which obligations the target company could enforce unconditionally and which obligations were enforceable depending on the funding of the debt financing, as follows:

- In most merger agreements, as in the excerpt above, enforcement of both the equity financing and the closing was conditioned on the availability of the debt financing.
- In other agreements, only enforcement of the equity financing was explicitly conditioned on the availability of the debt financing, while enforcement of the closing was not.
- Some agreements that conditioned enforcement of the equity financing and closing on the availability of the debt financing separately conditioned the obligation to draw down the debt financing on the availability of the equity financing.

Merger agreements also sometimes varied based on how broadly the condition of the availability of the debt financing was drafted:

- Some agreements simply stated that the debt financing must have been available for drawing down.
- More often, as in the excerpt above, agreements would list out the conditions in greater detail: satisfaction of the buyer's closing conditions; availability of the debt financing; and confirmation from the target company of its readiness to close.

On the basis of these drafting distinctions, the agreements in the Conditional Specific Performance category could be subdivided in previous years into as many as seven variations. However, as the market has consolidated around the most typical contractual approaches, many of the least common variations have fallen out of usage. In the 2016 survey of merger agreements for debt-financed deals entered into in 2015, the number of variations fell to five; in last year's survey of debt-financed deals entered into in 2016, the study observed only four variations. This year, all but one deal with Conditional Specific Performance followed the most common variation, in which the obligations to close the merger and, if applicable, the equity financing are conditioned on satisfaction of the buyer's closing conditions, the

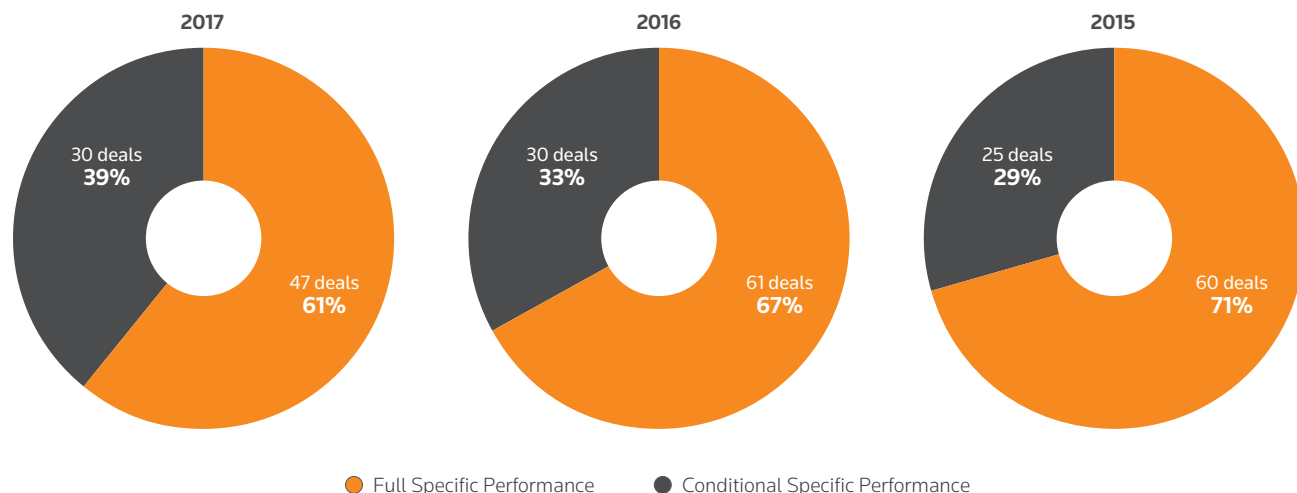
availability of the debt financing, and confirmation from the target company of its readiness to close. Only one agreement, for the *Internet Brands, Inc./WebMD Health Corp.* deal, also separately conditioned the buyer's obligation to enforce the debt financing on conditions reciprocal to those limiting enforcement of the equity financing and closing.

ANALYSIS OF EQUITABLE REMEDIES

Figure A: Pre-Termination Enforcement Across All Transactions, 2015–2017 illustrates the frequency with which parties agree to Full Specific Performance or Conditional Specific Performance across the entire study sample in each of the last three years.

Previous years' studies have observed that Full Specific Performance is the most common equitable remedy in leveraged deals, even though third-party financing creates a rationale for conditioning specific performance on the availability of the debt-financing proceeds. This remained true in 2017, with 61 percent of all buyers agreeing to unconditional enforcement of their obligations. As a general matter,

FIGURE A Pre-Termination Enforcement Remedies Across All Transactions, 2015–2017



Full Specific Performance dominates in any year in which strategic buyers substantially outnumber financial buyers. As strategic buyers took up a smaller portion of the overall market for leveraged public M&A deals in 2017, the portion of agreements with Full Specific Performance similarly fell.

Figure A also illustrates by omission that in the last three years, no target companies in leveraged public deals have agreed to have no right of specific performance against the buyer. The “No Specific Performance” approach had already been in decline, with only one deal in each of 2014 and 2012 staying silent on the target company’s right of enforcement and one deal in 2013 explicitly prohibiting the target company from seeking specific performance. Since 2014, not a single surveyed deal has failed to give the target company some right of enforcement of the buyer’s obligation to close.

Figure B: *Pre-Termination Enforcement Remedies by Buyer Type, 2017* illustrates the sharp divergence between strategic and financial buyers on the terms of specific performance that they will agree to in leveraged deals. Strategic buyers agreed to Full Specific Performance in 75 percent of their deals. Though a substantial number of strategic transactions provided for Conditional Specific Performance, many of those transactions were with nontraditional strategic buyers. Three of the 14 transactions classified in the study as strategic were acquisitions by consortiums of strategic and financial buyers working in tandem, including:

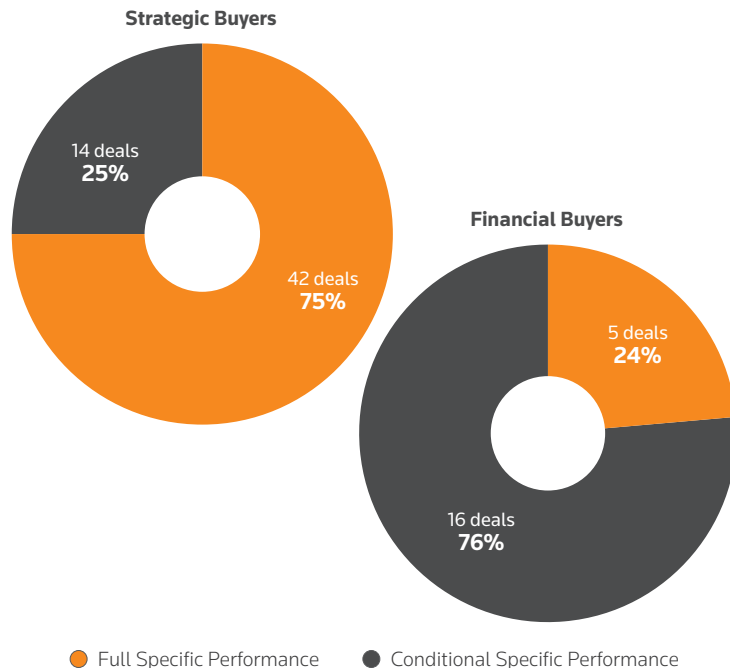
- The acquisition of Kindred Healthcare, Inc. by the group of Humana Inc., TPG Capital, and Welsh, Carson, Anderson & Stowe.
- The acquisition of PharMerica Corporation by Kohlberg Kravis Roberts & Co. L.P. and Walgreens Boots Alliance, Inc.
- The acquisition of Intrawest Resorts Holdings, Inc. by Aspen Skiing Company, L.L.C. in tandem with KSL Capital Partners.

Another four strategic buyers were private equity portfolio companies that obtained new equity financing from their sponsors to help finance their acquisitions:

- *Arby’s Restaurant Group, Inc. (Roark Capital)/Buffalo Wild Wings, Inc.*
- *Zenith Energy U.S., L.P. (Warburg Pincus)/Arc Logistics Partners LP.*

FIGURE B

Pre-Termination Enforcement Remedies
by Buyer Type, 2017



- *Internet Brands, Inc. (Kohlberg Kravis Roberts & Co. L.P.)/WebMD Health Corp.*
- *Avantor, Inc. (Broad Street Capital Partners)/VWR Corporation.*

The remaining seven transaction with strategic buyers that agreed to Conditional Specific Performance, like all the transactions in the study sample, are identified in the Appendix to the study in Table A. Of note, one of those transactions, for the acquisition of IXIA by Keysight Technologies, Inc., contemplates a reverse break-up fee of 29.20% of the deal’s equity value. A fee that high may provide so powerful an incentive

to close that it can arguably be considered something close to Full Specific Performance.

Financial buyers, by contrast, rarely commit themselves to Full Specific Performance in leveraged deals. In 2017, only five financial deals contemplated Full Specific Performance, including:

- *NRD Capital/Ruby Tuesday, Inc.*
- *Sino IC Capital Co. Ltd./Xcerra Corporation.*
- *JAB Holding Company/Panera Bread Company.*
- *New Mountain Capital, L.L.C./TRC Companies, Inc.*
- *Calamos Partners LLC/Calamos Asset Management, Inc.*

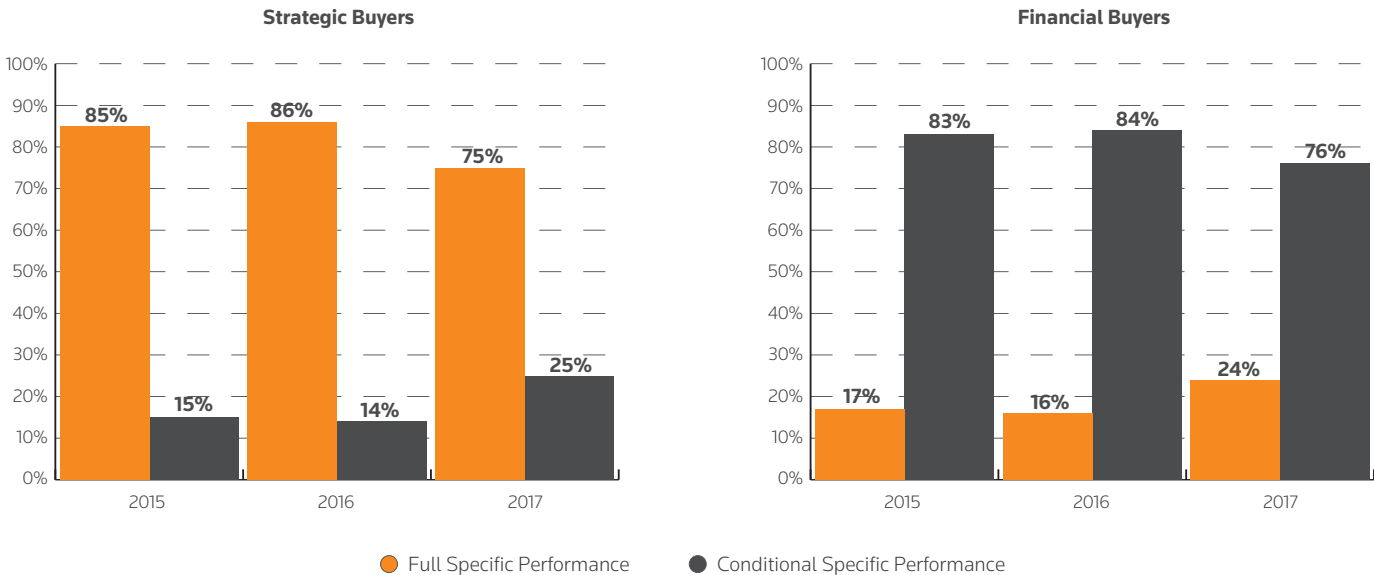
The willingness of some financial buyers to agree to a Full Specific Performance remedy is a continuation of their previous practice. NRD

Capital and JAB Holding Company have each agreed to Full Specific Performance in recent deals, NRD Capital in its 2015 acquisition of Frisch’s Restaurants, Inc. and JAB Holding Company in its 2016 acquisition of Krispy Kreme Doughnuts, Inc. and 2015 acquisition of Keurig Green Mountain, Inc. (By contrast, New Mountain Capital did negotiate Conditional Specific Performance in its 2015 leveraged buyout of Zep Inc.)

The acquisition of Calamos Asset Management was a going-private transaction, the vehicle for which was an entity controlled by the company’s founder and chairman and its CEO.

Figure C: Pre-Termination Enforcement Remedies by Buyer Type, 2015–2017 highlights the historical distinction in practice between strategic and financial buyers. Strategic buyers have traditionally been more willing than financial buyers to agree to close the transaction even if the lenders fail to fund. In 2015 and 2016, over 85 percent of strategic

FIGURE C Pre-Termination Enforcement Remedies by Buyer Type, 2015–2017



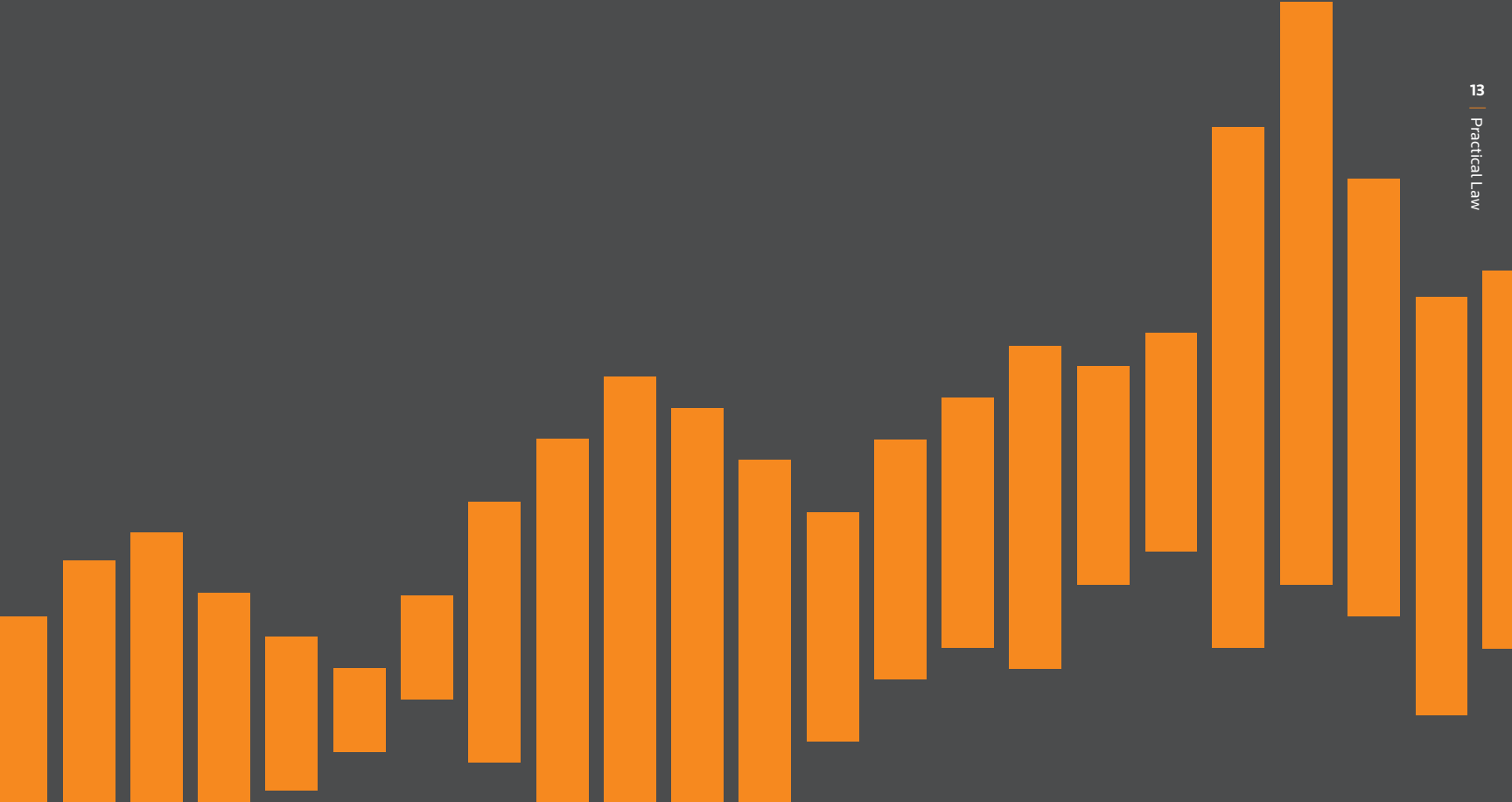
buyers in leveraged public deals agreed to Full Specific Performance. This percentage dropped a modest amount in 2017, to 75 percent.

The explanation for the small dip among strategic buyers agreeing to Full Specific Performance might be a simple matter of statistical significance. Strategic buyers reached 67 and 66 leveraged public M&A deals in 2015 and 2016, respectively, compared to 56 such deals in 2017. In addition, in all three years, four of the strategic buyers obtained new equity commitments from private equity sponsors to help finance their deals, meaning that a greater percentage of strategic deals in 2017 involved private equity financing. Therefore, rather than conclude that underlying economic or market conditions drove the change in choice of enforcement remedy, the best explanation may be that the more leveraged deals strategic buyers agree to in a given year (particularly without the involvement of private equity financing), the more frequently the Full Specific Performance remedy is likely to be observed among those deals.

Financial buyers in 2017 stayed close to their traditional approach to specific performance, though as with strategic buyers, the percentages moved slightly out of their customary range. Seventy-six percent of financial buyers agreed to Conditional Specific Performance, below the 84 percent observed in 2016, 83 percent in 2015, 80 percent in 2014, and 87 percent in 2013. With only 21 financial-buyer deals in 2017, each outlier deal had an outsized effect on the study sample, making it difficult to call out the beginning of a new trend. The 24 percent of financial deals that contemplated Full Specific Performance is attributable to only five deals.

No leveraged deals in any of the last three years contemplated that the target company should have no right of specific performance against the buyer, including in leveraged buyouts by private equity buyers among whom this practice had once been more common.





POST-TERMINATION MONETARY REMEDIES



DAMAGES REMEDIES

When the buyer either fails to close the transaction despite satisfaction of its closing conditions or breaches the agreement so materially as to cause a failure of a closing condition, the target company can forego specific performance and terminate the agreement. In that instance, the agreement might obligate the buyer to pay a reverse break-up fee. While the fee sets a floor for the target company's compensation, it also usually acts as a cap on damages as well. In many deals, however, the agreement does not provide for payment of a reverse break-up fee, which leaves the target company with a remedy to bring suit for uncapped damages. Whether a damages remedy is available therefore turns on whether liability for breaches survives termination of the agreement. Some agreements provide that liability survives for any breach, but far more provide that liability survives only for willful breaches.

This may not be a serious issue in transactions that do not involve debt financing. In those deals, because the buyer is not relying on the actions of third parties to provide the funds for the acquisition, its failure to close in spite of satisfaction of the closing conditions can be considered willful.

In debt-financed acquisitions, however, the buyer can argue in good faith that its breach was not willful if a financing failure occurred in spite of its contractually specified efforts to cause the lenders to fund. The target company may counter that the buyer's argument only proves that its motives were pure, but that its intent was still to breach the agreement if it did not close. But at a minimum, the buyer will have staked out a plausible position for defending against a post-termination damages claim for willful breach. If the buyer argues the point successfully, the target company may be left with no remedy in the event of a financing failure if the merger agreement provides that post-termination liability survives only for willful breach. While the target company will often have an unconditional right to enforce the buyer's obligations before terminating the agreement (which is especially common when the agreement does not limit damages with a reverse break-up fee), as a practical matter post-termination damages may be the only true available option if the buyer simply does not have the funds to pay the merger consideration.

To test for how frequently dealmakers consider the issue of post-termination liability for non-willful breach, the study divides all agreements that do not provide for a reverse break-up fee into two categories: "No Reverse Break-Up Fee, Full Damages" and "No Reverse Break-Up Fee, Damages for Willful Breach."

NO REVERSE BREAK-UP FEE, FULL DAMAGES

There are two general ways in which merger agreements can provide that uncapped damages are available post-termination for any breach, including for non-willful breaches. The first approach is to state in the "Effect of Termination" section of the merger agreement that liability survives for all breaches or all material breaches, without qualifying the breach with any component of willfulness. This form of the remedy is identified in *Table A* in the Appendix to the study as "No RBF, Full Damages v1." This approach has become relatively uncommon, with only one agreement in this year's study using it, just as only one agreement did in 2016. This compares to five agreements in 2015, four in 2014, and three in 2013 that took this approach.

EXAMPLE: Merger agreement between Sonaca S.A., Sonaca USA Inc., and LMI Aerospace, Inc., dated February 16, 2017

Section 8.02. Effect of Termination. (a) In the event of termination of this Agreement by either the Company or Parent as provided in Section 8.01, this Agreement shall forthwith become void and have no effect, without any liability or obligation on the part of any party hereto or its respective Affiliates, directors, officers, employees, shareholders, partners, members or other Representatives, other than pursuant to [...]; **provided, that except as otherwise set forth in Section 8.02(b) and Section 8.02(c), no such termination of this Agreement shall relieve or otherwise affect the liability of any party hereto for any material breach of this Agreement by such party prior to such termination.**

The second approach reflects an explicit effort to answer the question of whether the buyer's failure to close when required because of a lack of financing (or for any other reason) should be considered a willful breach. In agreements following this approach, the "Effect of Termination" section provides explicitly that the buyer's liability for failure to close when the closing conditions are otherwise satisfied survives termination, regardless of the buyer's subjective, good-faith efforts to close. This form of the remedy is identified in *Table A* as "No RBF, Full Damages v2."

EXAMPLE: Merger agreement between Coach, Inc. and Kate Spade & Company, dated May 7, 2017

Section 8.6. Effect of Termination. In the event of termination of this Agreement, this Agreement shall immediately become void and have no effect, without any Liability on the part of Parent, Purchaser or the Company; provided, that: [...] (b) subject to Section 8.7(c), **no such termination shall relieve any party from any Damages resulting from a Willful and Material Breach of this Agreement prior to any termination**, in which case the non-breaching party shall be entitled to all rights and remedies available at Law or in equity. In the case of any Damages sought by the Company from Parent or Purchaser, including for any failure to consummate any of the Transactions when required to do so by this Agreement, the Company may seek to have such Damages, notwithstanding anything to the contrary contained in Section 9.11 or any other provision of this Agreement, take into account the consideration that would have otherwise been payable to the stockholders and equity holders of the Company pursuant to this Agreement or the loss of market value or stock price of the Company (including its Common Stock) and implied value of any equity awards.

Section 9.1. Certain Definitions. For purposes of this Agreement: ... (vv) "Willful and Material Breach" means a willful and deliberate act or a willful and deliberate failure to act (including a failure to cure), in each case that is the consequence of an act or omission by a party that knows that the taking of such act or failure to take such act would or would reasonably be expected to cause a breach

of this Agreement (regardless of whether breaching was the object of the act or failure to act), **it being understood that such term shall include, in any event, the failure to consummate the Offer or the Merger when required to do so by this Agreement.**

This formulation of the damages remedy rose sharply in 2015 and has remained somewhat popular since then. In 2015, nine agreements, all with strategic buyers, took this approach to the damages remedy, compared to two agreements in 2014 and one in 2013. Eight buyers in 2016, all strategic, also agreed to the "No RBF, Full Damages v2" post-termination remedy. This year's study found that 12 buyers, again all strategic, agreed to this remedy structure in 2017. Of the 12, four agreed to pay a fiduciary reverse break-up fee under circumstances similar to the target company's break-up fee, and two of those four also agreed to pay a reverse break-up fee for antitrust or other regulatory failure. Fiduciary and regulatory reverse break-up fees are not the subject of this study, but every agreement contemplating such a fee is noted in *Table A*.

Table D: Post-Termination Liability in Leveraged Public Deals in the Appendix to the study provides the formulation of each surveyed agreement's definition of "willful breach," where applicable.

NO REVERSE BREAK-UP FEE, DAMAGES FOR WILLFUL BREACH

The remedy of damages for willful breach, the most common monetary remedy in agreements that do not contemplate debt financing, is also observed in many debt-financed acquisitions.

EXAMPLE: Merger agreement between Meredith Corporation and Time Inc., dated November 26, 2017

Section 10.2 Effect of Termination. In the event of the termination of this Agreement by either Parent or the Company as provided in Section 10.1, written notice thereof shall forthwith be given by the terminating Party to the other Party specifying the provision hereof pursuant to which such termination is made. In the event of the termination of this Agreement in compliance with Section 10.1, this Agreement shall be terminated and this Agreement shall

forthwith become void and have no effect, without any liability or obligation on the part of any Party (or any stockholder, director, officer, employee, agent, consultant or Representative of such Party), other than the Confidentiality Agreement and other than this Section 10.2, Section 10.3 and Article XI, which provisions shall survive such termination; **provided, however, that, subject to the limitations set forth in Section 11.12, nothing in this Section 10.2 shall relieve any Party from liability for Willful Breach of this Agreement prior to such termination** or the requirement to make the payments set forth in Section 10.3. No termination of this Agreement shall affect the obligations of the Parties contained in the Confidentiality Agreement.

Section 1.1 Definitions. “Willful Breach” means a deliberate act or a deliberate failure to act, taken or not taken with the actual knowledge that such act or failure to act would, or would reasonably be expected to, result in or constitute a material breach of this Agreement, regardless of whether breaching was the object of the act or failure to act.

Twenty-eight agreements in this year’s study gave the target company the right to pursue damages for willful breach only, with no reverse break-up fee payable. On a percentage basis, this is down from the 43 out of 91 agreements in 2016 and 38 agreements out of 85 in 2015 that provided for the “No RBF, Damages for Willful Breach” remedy, as discussed below. The formulation of the standard for liability for each agreement with a post-termination damages remedy is recorded in *Table D* in the Appendix to the study.

All but two of the 28 agreements were with strategic buyers. The two financial buyers that agreed to this remedy come from the group of five financial buyers that also agreed to Full Specific Performance: JAB Holding Company, which acquired Panera Bread Company, and Calamos Partners LLC in its take-private of Calamos Asset Management, Inc. The low number of financial buyers agreeing to the “No RBF, Damages for Willful Breach” remedy tracks closely to previous years, when three financial buyers in 2016, two financial buyers in 2015, and one in 2014 agreed to it.

Of the 26 strategic buyers who agreed to this remedy:

- Three agreed to pay a fiduciary reverse break-up fee under circumstances reciprocal to the triggers for the target company’s break-up fee.
- One agreed to pay a reverse break-up fee in the event of a failure to obtain the necessary regulatory approval.
- Three agreed to both a fiduciary reverse break-up fee and a regulatory reverse break-up fee.

Fiduciary and regulatory reverse break-up fees are not the subject of this study, but every agreement contemplating such a fee is noted in *Table A* in the Appendix to the study.

REVERSE BREAK-UP FEES

The study divides all agreements that provide for a reverse break-up fee into one of two general categories, based on whether the fee functions as an ultimate cap on the damages payable by the buyer. All references to reverse break-up fees throughout the study are to fees that are payable for breach, financing failure, or other failure to close when the closing conditions have been met. Fiduciary and regulatory reverse break-up fees are not discussed in the study in depth, but are noted when payable for each applicable agreement in *Table A* in the Appendix to the study.

REVERSE BREAK-UP FEE, UNCAPPED DAMAGES FOR WILLFUL BREACH

In the first general category, the buyer must pay a reverse break-up fee or reimburse the target company’s expenses under certain delineated circumstances, yet the buyer remains liable for willful breach over and above the amount of the payment. This remedy can be expressed in one of two ways. In some agreements, the buyer pays a reverse break-up fee or reimburses the target company’s expenses up to a negotiated amount when the buyer commits any breach or otherwise fails to close, but the payment does not cap the buyer’s damages if it willfully breached the agreement. These agreements are categorized in *Table A* in the Appendix to the study as “RBF Uncapped v1.” Other agreements specify that the fee is payable in the specific instance of a financing

failure but that damages remain uncapped for willful breach. These agreements are categorized in *Table A* as “RBF Uncapped v2.”

Only five buyers in the 2017 study sample agreed to pay a reverse break-up fee that does not cap damages for willful breach, three of them using the “RBF Uncapped v1” remedy formulation and two using the “RBF Uncapped v2” formulation. The five total agreements represent 6.5% of the 77 surveyed agreements, continuing a downward trend observed in recent years following 10 percent in 2016, 13 percent in 2015, nine percent in 2014, and 12 percent in 2013.

Four of the five buyers that agreed to this form of reverse break-up fee were strategic buyers. The one financial-buyer agreement, which used an “RBF Uncapped v2” formulation, was for the *NRD Capital/Ruby Tuesday, Inc.* deal.

REVERSE BREAK-UP FEE, CAP ON DAMAGES

In the second general category, the buyer agrees to pay a reverse break-up fee that caps its damages in all instances, including if the buyer willfully breached the agreement.

This approach to the payment of a reverse break-up fee is observed in three variations. In the rarest form, the fee is payable only in the specific event of a financing failure. Once paid, however, the fee caps the buyer’s damages in all instances, even if it has committed a willful breach. These agreements are categorized in *Table A* in the Appendix to the study as “RBF Cap v1.” In 2017, this remedy formulation saw increased usage, appearing in six agreements. In both the 2016 and 2015 study samples, this remedy formulation was observed only once each year. Of the six agreements, two also required payment of a reverse break-up fee for regulatory failure.

More commonly, parties agreeing to a reverse break-up fee that caps damages for willful breach provide for the fee to be triggered by any failure by the buyer to close the merger when the closing conditions have otherwise been satisfied, even if the buyer’s failure to close is not specifically tied to a financing failure. Most important for the buyer, the agreement explicitly characterizes the fee as the target company’s sole

and exclusive remedy, including in the event of a willful breach. For the first time, this year’s study distinguishes two variations among these agreements, including:

- Agreements that trigger payment of a reverse break-up fee off of the buyer’s failure to close when the conditions to closing have otherwise been satisfied. These deals are categorized in *Table A* as “RBF Cap v2.”
- Agreements that trigger payment of a reverse break-up fee off of either the buyer’s failure to close when required or a breach by the buyer that is material enough to cause a failure of a closing condition. These deals are categorized in *Table A* as “RBF Cap v3.”

A total of 23 agreements in this year’s study sample, seven in the form of “RBF Cap v2” and 16 in the form of “RBF Cap v3,” took this approach. Five of the 16 agreements with the “RBF Cap v3” formulation also provided for a reverse break-up fee payable for regulatory failure.

Two-Tier Reverse Break-Up Fee

In this category, a hybrid of the two general types of reverse break-up fees, the buyer pays a lower reverse break-up fee for non-willful breaches or financing failure and a higher fee that caps the buyer’s damages for willful breach or when it does not close even though the financing is available. This approach occupies a shrinking portion of the overall remedy landscape. In 2017, two agreements for leveraged public deals provided for this remedy structure. This is similar to the two leveraged deals in 2016 and one leveraged deal in 2015. By comparison, the two-tier reverse break-up fee was once common enough to have appeared in 11 agreements in 2010.

One of the agreements with a Two-Tier Reverse Break-Up Fee structure was for the club deal among Energy Capital Partners, Access Industries, and Canada Pension Plan Investment Board to acquire Calpine Corporation. Under that agreement, the larger fee is payable in the event of the buyer’s breach or failure to close. The lower fee is triggered if the buyer group terminates the merger agreement due to a downgrade of the credit rating of certain debt instruments of the target company that may accelerate the target’s debt instruments’ repayment, as described in detail in *Table A* and *Table B* of the Appendix to the

study. The agreement thus represents not only the rare two-tier fee deal, but also the rare deal that keys payment of a reverse break-up fee off an objective criterion such as a credit-rating downgrade, rather than an undefined and potentially subjective failure to fund. Agreements with specified criteria for a finding of a financing failure are described in the Appendix to the study in *Table B: Financing Covenants in Leveraged Public Deals*.

The other agreement in this category was for the leveraged buyout of West Marine, Inc. by Monomoy Capital Partners. That agreement contemplates a multi-tier fee structure in which the lowest fee is payable for the intentional breach of a covenant, a larger fee is payable for a failure to close, and damages capped at a still higher amount are payable in the event that the target company pursues yet the court declines to award it specific performance.

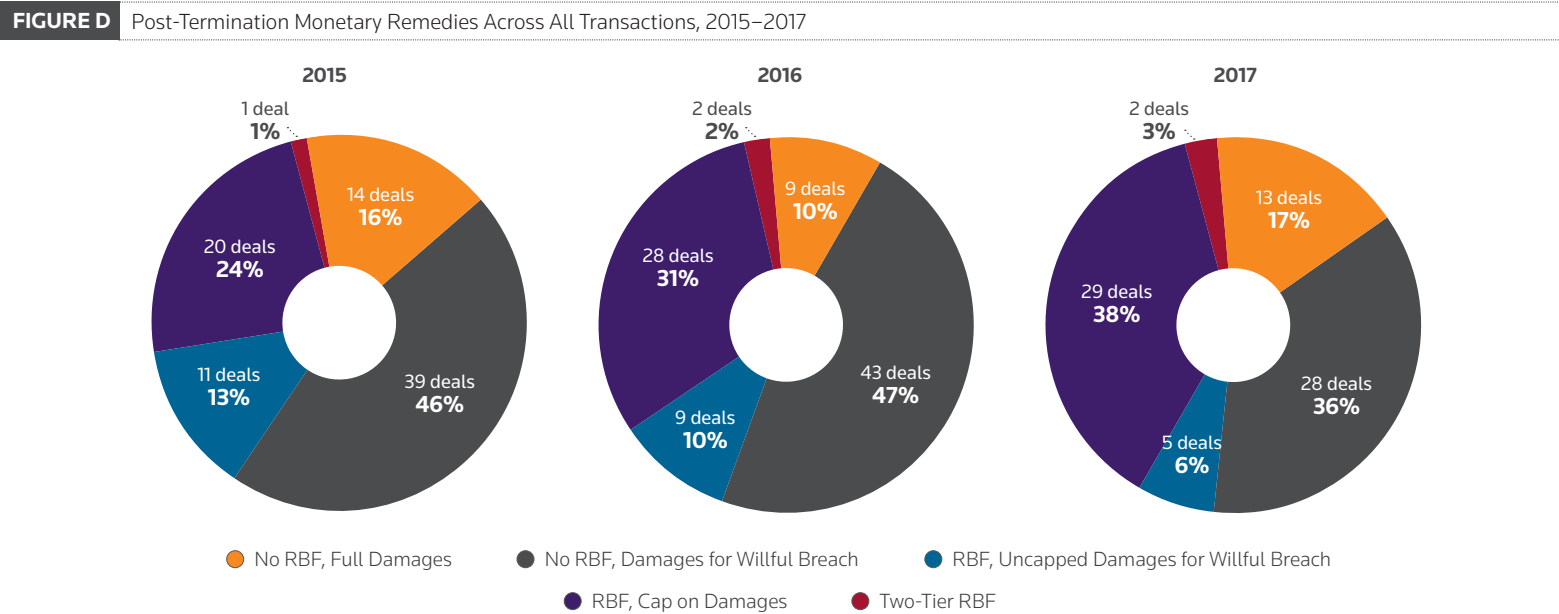
In the *Harland Clarke Holdings Corp./RetailMeNot, Inc.* merger agreement, the amount of the fee can increase based on the timing

of the financing failure and the agreement’s termination. Although different fee amounts are potentially payable at different times, this agreement is categorized as a single-tier “RBF Cap v1” because the trigger for the fee is fundamentally the same. The details of the fee structure are described in *Table A* in the Appendix to the study.

As always, the category of Two-Tier Reverse Break-up Fee does not refer to agreements with two fees where one of the two fees is a fiduciary reverse break-up fee payable by the buyer or a fee payable for antitrust or other regulator failure. All deals with a fiduciary, antitrust, or other regulatory reverse break-up fee are noted in *Table A* in the Appendix to the study.

ANALYSIS OF MONETARY REMEDIES

As illustrated in *Figure D: Post-Termination Monetary Remedies Across All Transactions, 2015–2017*, post-termination damages remedies in 2017 were generally in line with recent norms, though with some movement



away from historical practice. The most significant development of the year was that the “RBF, Cap on Damages” remedy replaced the “No RBF, Damages for Willful Breach” remedy as the most common post-termination monetary remedy among leveraged public deals in 2017. The “No RBF, Damages for Willful Breach” remedy, which is the most common monetary remedy for buyer breach in non-leveraged deals, was agreed to in 10 percentage points fewer leveraged deals in 2017 than it was in 2016 and 2015. This continues a downward trend observed since 2014, when 54 percent of surveyed leveraged deals agreed to this remedy. As with pre-termination enforcement remedies, a willingness to pay damages for willful breach can be expected to be the most common approach when strategic buyers comprise a significant majority of the study sample.

Part of the reason for the dip in agreements providing for “No RBF, Damages for Willful Breach” in 2017 may be due to the increasing willingness of buyers to agree to damages for any failure to close the merger, whether willful or not. In 2017, 17 percent of buyers agreed to the “No RBF, Full Damages” remedy, the highest proportion ever observed in the study. The previous year saw only 10 percent of the study sample take this approach, which followed 16 percent of surveyed deals in 2015, nine percent in 2014, 12 percent in 2013, seven percent in 2012, and 12 percent in 2011. The study posited in 2015 that the upturn in agreements taking the full-damages approach may have been due to a busy deal environment creating a seller’s market. But in 2017, a slower year for leveraged public deals, the pro-seller approach remained prominent. The explanation may be that more practitioners, especially counsel for target companies, are demanding the full-damages approach for the sake of avoiding a debate over whether the buyer’s failure to close was willful.

As mentioned, a significant development in 2017 was the increase in proportion of buyers negotiating the “RBF, Cap on Damages” remedy.

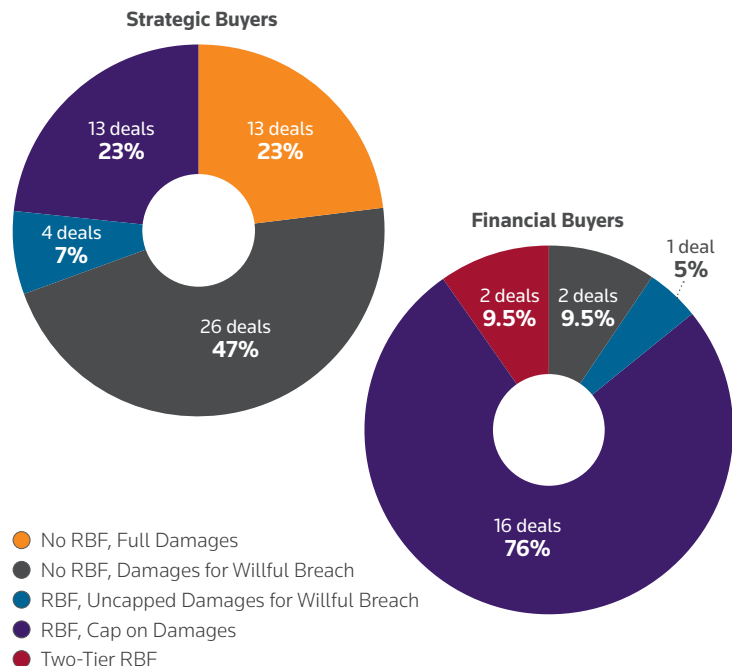
The uptick from 24 percent in 2015 to 31 percent in 2016 represented the first time that the number had risen from one year to the next since 2013. In 2017, that percentage rose again to 38 percent of all buyers. Though still off from the high of 2013, when 51 percent of the surveyed agreements included a reverse break-up fee that capped all damages when paid, the 38% figure represents the largest share of deals with the “RBF, Cap on Damages” remedy in the last four years.

While the number of agreements with the “RBF, Cap on Damages” remedy rose, the “RBF, Uncapped Damages for Willful Breach” remedy was agreed to in only 6.5% of leveraged public deals in 2017. This is the lowest figure for this remedy observed in the study, down from 10 percent in 2016, 13 percent in 2015, nine percent in 2014, 12 percent in 2013, seven percent in 2012, and 14 percent in 2011.

In the same vein, agreements with the “RBF, Uncapped Damages for Willful Breach” remedy represented a dwindling portion of the total number of agreements with all forms of reverse break-up fee (including those that cap damages for willful breach). In 2017 just under 14 percent of agreements with any form of reverse break-up fee contemplated the uncapped-damages model, compared to 23 percent of the agreements that contained any form of reverse break-up fee in 2016, 34 percent in 2015, and 25 percent in 2014. These figures may indicate that dealmakers and their counsel are determining that payment of a reverse break-up fee that does not cap damages for willful breach may create confusion in leveraged deals and is better suited for deals that do not involve debt-financing.

The “Two-Tier Reverse Break-Up Fee” remedy, though intuitively appealing, remains a relative outlier. In 2017, two leveraged public deals contemplated a two-tier fee, not unlike 2016 (two deals), 2015 (one deal), 2014 (no deals), and 2013 (three deals).

FIGURE E Post-Termination Monetary Remedies by Buyer Type, 2017



Financial buyers relying on debt financing usually negotiate for a cap on damages, as shown in *Figure E: Post-Termination Monetary Remedies by Buyer Type, 2017*. In 2017, financial buyers consolidated around their traditional approach to damages in leveraged public deals, with 18 out of 21 buyers negotiating a cap on damages through either a single-tier or multi-tier reverse break-up fee structure. At the other end of the spectrum for post-termination liability, no financial buyer agreed to a “No RBF, Full Damages” remedy.

Three agreements with financial buyers contemplated uncapped damages for willful breach. Unsurprisingly, all three have already been mentioned in the study for their pre-termination Full Specific Performance remedies. The one agreement with a financial buyer that agreed to the “RBF, Uncapped Damages for Willful Breach” remedy was for the *NRD Capital/Ruby Tuesday, Inc.* deal. The two agreements with no reverse break-up fee at all and uncapped damages for willful breach were for the *JAB Holding Company/Panera Bread Company* and *Calamos Partners LLC/Calamos Asset Management, Inc.* deals.

Even in leveraged deals, strategic buyers usually do not negotiate a reverse break-up fee, particularly a reverse break-up fee that would cap its damages. Forty-three out of 56 strategic buyers in this year’s study sample (77 percent) did not negotiate a cap on damages, instead agreeing either to damages for any failure to close (23 percent), damages only for willful breach (47 percent), or a reverse break-up fee that does not cap damages for willful breach (seven percent).

However, a relatively high number of strategic buyers negotiated a reverse break-up fee that caps their damages in 2017 compared to prior years, with 13 doing so compared to eight in 2016 and seven in 2015. As discussed in the context of pre-termination enforcement, the group of 13 buyers is a somewhat motley crew, including four buyers who obtained new equity financing from private equity sponsors to help finance their acquisitions and three consortia of strategic and financial buyers.

FIGURE F Post-Termination Monetary Remedies by Buyer Type, 2015–2017

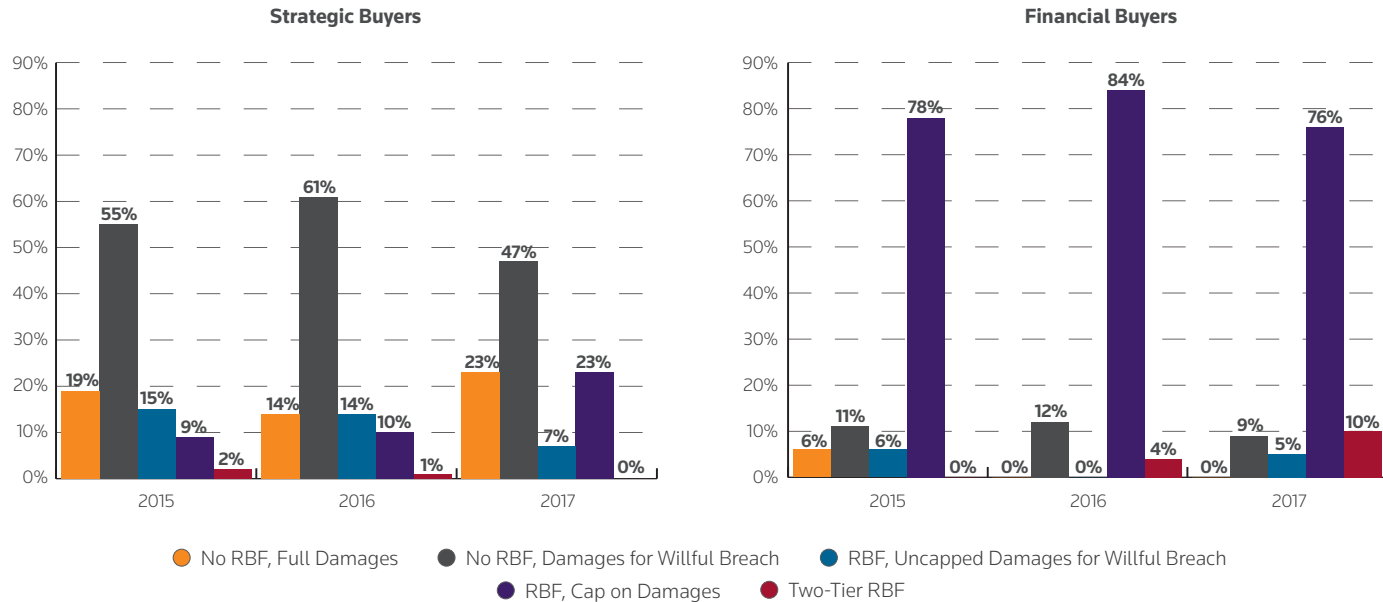
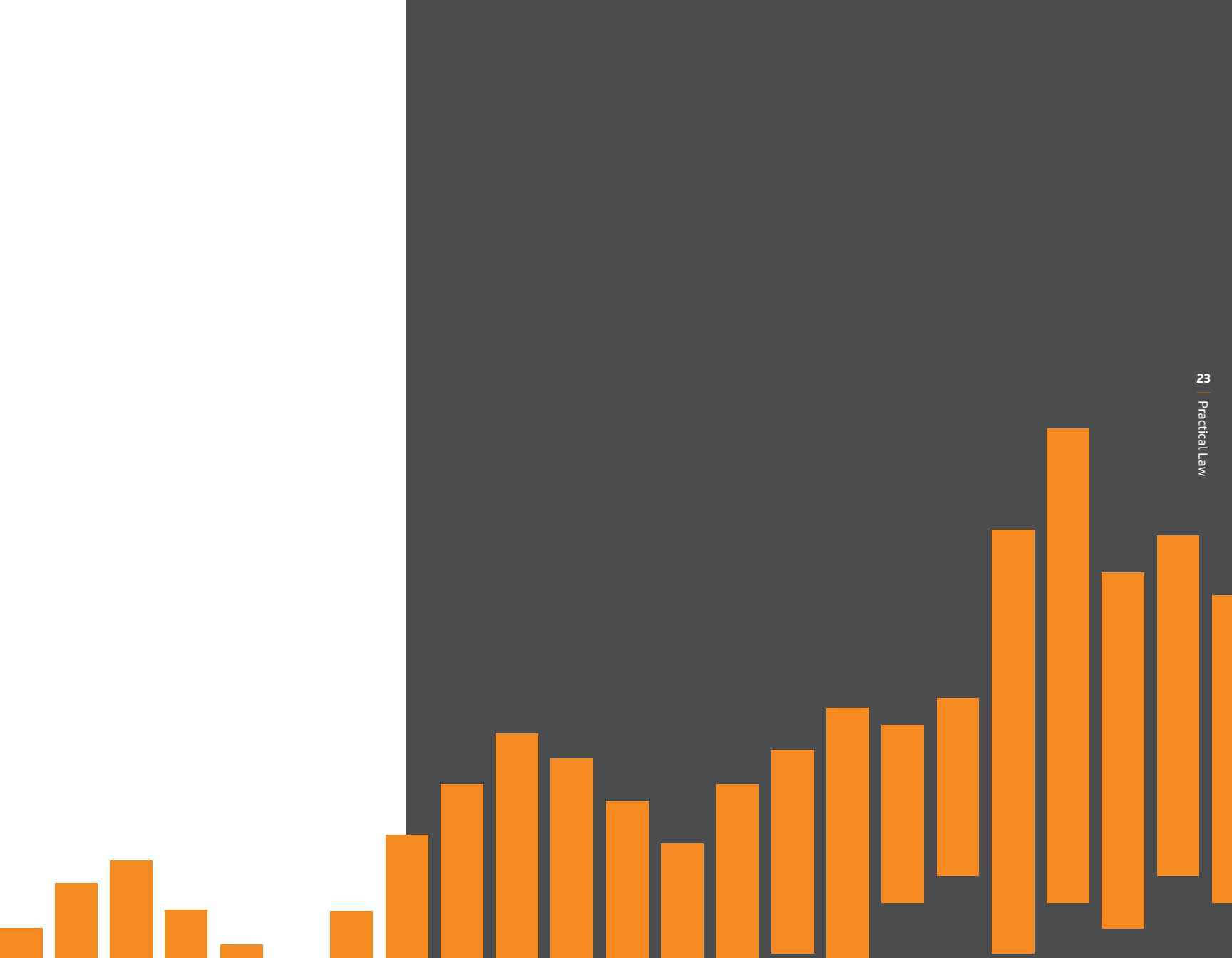


Figure F: Post-Termination Monetary Remedies by Buyer Type, 2015–2017 demonstrates market practice for strategic and financial buyers over the last three years. A total of 77 percent of strategic buyers in the 2017 survey sample did not negotiate any cap on damages in the form of a reverse break-up fee. This represents a new low for strategic buyers, dropping from 89 percent in 2016, 90 percent in 2015, 88 percent in 2014, and 83 percent in 2013. Overall, the spread of post-termination monetary remedies among strategic buyers was more even in the 2017 survey sample than is typical, with 23 percent of strategic buyers negotiating caps on damages and 23 percent agreeing to uncapped damages for any failure to close—both larger shares than has been customary.

Eighty-six percent of financial buyers in 2017 negotiated either a single-tier or two-tier fee structure that caps damages for willful breach. This share is comparable to the combined 88 percent in 2016 and greater than the 78 percent in 2015. As a general matter, financial buyers in 2017 hewed closer to their traditional approach to remedies for buyer breach in leveraged deals than did strategic buyers.



An abstract graphic featuring a series of vertical orange bars of varying heights. The bars are arranged in a sequence that starts on the left, dips, rises, dips again, and then rises towards the right. The left side of the image has a dark gray background, while the right side is white. The text 'REMEDY MODELS' is positioned in the upper right area.

REMEDY MODELS

REMEDY MODELS OVERVIEW

The remedy categories reviewed above separately analyze the target company's right to enforce the buyer's obligations and its entitlement to monetary damages. But parties and their counsel often approach deal negotiations with a remedies package in mind that contemplates pre-termination enforcement and post-termination damages as an overall model for how to handle buyer breach or financing failure. These remedy models can be categorized as follows:

- **Strategic model.** The target company has a right to specific performance and a right to monetary damages that at a minimum are uncapped for willful breach, if not for all breaches. This combination of remedies is typical for non-leveraged deals and is expected for deals with strategic buyers, even those relying on debt financing. The Strategic model includes all agreements using "No RBF, Full Damages" and "No RBF, Damages for Willful Breach" post-termination remedies. As a review of *Table A* in the Appendix to the study demonstrates, all of these agreements also provide for pre-termination Full Specific Performance. There has never been an agreement in the study's history with a Conditional Specific Performance pre-termination remedy but no reverse break-up fee.
 - The Strategic model also includes four agreements in this year's study that have a Full Specific Performance pre-termination remedy combined with the "RBF, Uncapped Damages for Willful Breach" post-termination monetary remedy. Although the buyer's damages are capped for non-willful breach, the fact that the target company has an unconditional right to specific performance should be enough to force the buyer to be certain that it can afford the merger consideration on its own if the financing fails. Agreements with unusual combinations of pre-termination and post-termination remedies are noted in red-colored font in *Table A*. The studies of 2016 and 2015 found five leveraged deals with this remedy combination.
- **Private Equity model.** The buyer's payment of a reverse break-up fee for breach or failure to close caps its damages, even if the breach was committed willfully. But before terminating the agreement, the target company has a conditional right of specific performance. Its right to enforce the buyer's obligations is essentially conditioned on the availability of the debt financing. This model includes all

agreements that have an "RBF, Cap on Damages" or "Two-Tier RBF" post-termination remedy when combined with a Conditional Specific Performance right.

- **Financing Failure model.** The buyer pays a reverse break-up fee for breach, failure to close, or a financing failure, but damages remain uncapped for willful breach. This model includes all agreements with a post-termination "RBF, Uncapped Damages for Willful Breach" remedy when combined with Conditional Specific Performance.
 - The Financing Failure model also includes two agreements in this year's study in which the buyer is subject to Full Specific Performance, but the buyer's damages are capped at the amount of the reverse break-up fee. This combination was observed for the first time in three agreements in 2014, followed by two agreements in 2015, and two in 2016. Agreements with unusual combinations of pre-termination and post-termination remedies are noted in red-colored font in *Table A*.

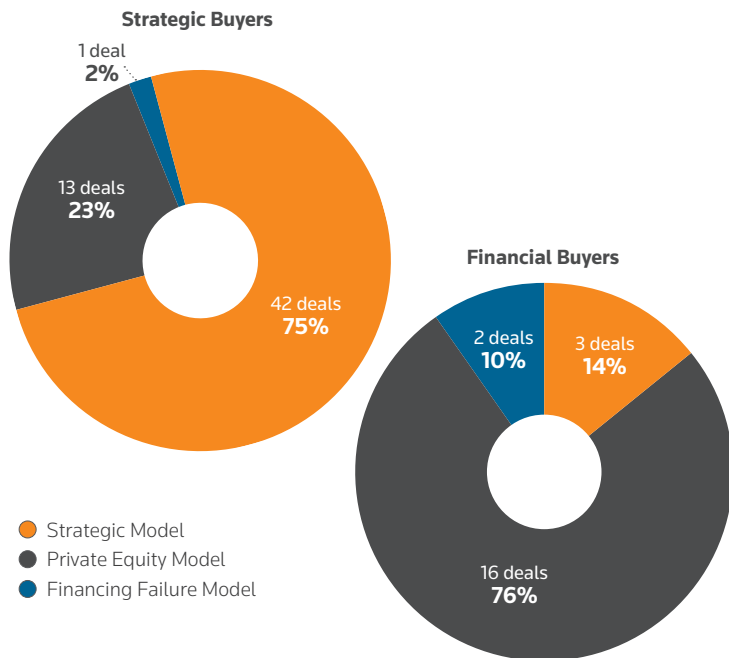
Past years also discussed a "Pure Option" model, in which the reverse break-up fee is the target company's sole and exclusive remedy in all circumstances, while pre-termination, the target company has no right to specific performance. In this model, the buyer has complete certainty of its exposure to both damages (the amount of the fee) and equitable remedies (none), effectively giving it the option to choose whether to close. This model has fallen out of use altogether in recent years.

ANALYSIS OF REMEDY MODELS

Figure G: Remedy Models by Buyer Type, 2017 reflects the results of the trends observed in the discussion of pre-termination and post-termination remedies. Strategic buyers in 2017 agreed to a traditional Strategic model in 75 percent of their leveraged deals, down somewhat from recent years. Previously, strategic buyers had negotiated the Strategic model in 85 percent of leveraged deals in 2016, 82 percent in 2015, and 80 percent in 2014. The 75% share is not a historical low, however, as only 62 percent of strategic buyers in 2013 and 71 percent in 2012 agreed to the Strategic model of remedies.

Although strategic buyers mostly consolidated around the traditional remedy model in 2017, 13 deals with strategic buyers contemplated

FIGURE G Remedy Models by Buyer Type, 2017



a Private Equity model agreement. As discussed in reference to enforcement and monetary remedies, these 13 deals included:

- Three acquisitions by consortiums of strategic and financial buyers working in tandem:
 - *Humana Inc.; TPG Capital; and Welsh, Carson, Anderson & Stowe/Kindred Healthcare, Inc.*
 - *Kohlberg Kravis Roberts & Co. L.P. and Walgreens Boots Alliance, Inc./PharMerica Corporation.*
 - *Aspen Skiing Company, L.L.C. and KSL Capital Partners/Intrawest Resorts Holdings, Inc.*

- Four deals with strategic buyers who obtained new equity financing from their private equity sponsors to help finance their acquisitions:
 - *Arby's Restaurant Group, Inc. (Roark Capital)/Buffalo Wild Wings, Inc.*
 - *Zenith Energy U.S., L.P. (Warburg Pincus)/Arc Logistics Partners LP.*
 - *Internet Brands, Inc. (Kohlberg Kravis Roberts & Co. L.P.)/WebMD Health Corp.*
 - *Avantor, Inc. (Broad Street Capital Partners)/VWR Corporation.*

The other six strategic buyers that negotiated a Private Equity model remedy structure are identified in *Table A* in the Appendix to the study. As mentioned in the discussion of pre-termination enforcement remedies, Keysight Technologies, Inc. in its agreement to acquire IXIA agreed to a reverse break-up fee of 29.20% of the deal's equity value. The incentive to close the merger rather than pay a fee that high might be powerful enough to essentially function as a Full Specific Performance remedy. By that understanding, the deal can also be thought of as following the Strategic model.

Most financial and private equity buyers in 2017 negotiated Private Equity model agreements in their leveraged deals. Three deals with financial buyers contemplated Strategic model remedies: the aforementioned *NRD Capital/Ruby Tuesday, Inc.*, *JAB Holding Company/Panera Bread Company*, and *Calamos Partners LLC/Calamos Asset Management, Inc.* deals. Each of NRD Capital and JAB Holding Company have previously agreed to the Strategic model in recent years.

A total of three agreements in 2017 used the Financing Failure model, continuing a downward trend from four agreements in 2016, eight in 2015, and nine in 2014. In one of the three agreements (for the *Unimin Corporation/Fairmount Santrol Holdings Inc.* strategic transaction), the buyer agreed to Conditional Specific Performance and a reverse break-up fee payable for financing failure that does not cap damages for willful breach. This approach reflects the parties' agreement to obligate the buyer to close if the financing is available, hold it liable for damages if it does not, but give the buyer a measure of certainty in case it cannot close because of a financing failure through no fault of its own.

The other two agreements categorized in the Financing Failure model, however, arrived at a combination of pre-termination and post-termination

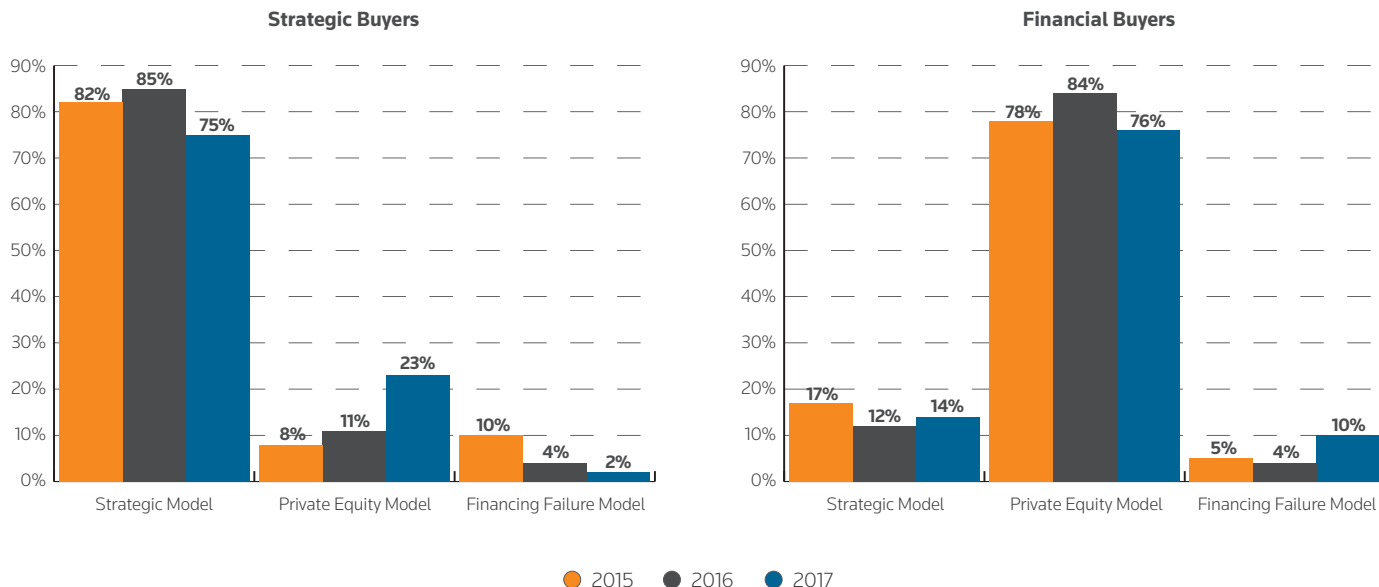
monetary remedies that the study first observed in 2014 and never before that. These agreements combined a Full Specific Performance remedy with a reverse break-up fee triggered by a failure to close that caps the buyer's damages for willful breach. One of these agreements, for the *Sino IC Capital Co. Ltd./Xcerra Corporation* transaction, also contemplated a reverse break-up fee payable for failure to obtain Chinese regulatory approval by the outside date. The parties ultimately terminated their merger agreement (without requiring payment of a fee) for failure to obtain CFIUS approval. The other agreement, for the *New Mountain Capital, L.L.C./TRC Companies, Inc.* buyout, expressed the payment as a maximum cap on damages for any breach, rather than as a fee triggered by a particular event of termination.

Figure H: *Remedy Models by Buyer Type, 2015–2017* confirms the study's observations about enforcement and monetary remedies in strategic deals in recent years. From 2011 through 2013, strategic buyers had increasingly negotiated Private Equity model remedies. In 2011, strategic buyers negotiated Strategic model remedies in 78 percent of their

leveraged deals, a share that dropped to 71 percent in 2012 and 62 percent in 2013. That trend reversed itself in 2014, with strategic buyers negotiating Strategic model remedies in 80 percent of their leveraged deals, a share that increased slightly in 2015 to 82 percent and then to 85 percent in 2016. But in 2017, the trend halted, with strategic buyers agreeing to Strategic model remedies in 75 percent of their leveraged public deals while negotiating Private Equity model remedies nearly a quarter of the time. As suggested previously, the reversal of the trend observed in 2014–2016 may reflect the end of a seller's market or may simply be a function of a smaller sample of leveraged deals reached in 2017 with strategic buyers without the help of private equity sponsors.

The share of financial buyers who negotiated a Strategic model agreement in 2017 was between the levels observed in the two previous years. As discussed, the 14 percent is attributable to three deals, two of which were with financial buyers (NRD Capital and JAB Holding Company) who have a history of agreeing to the Strategic model.

FIGURE H Remedy Models by Buyer Type, 2015–2017

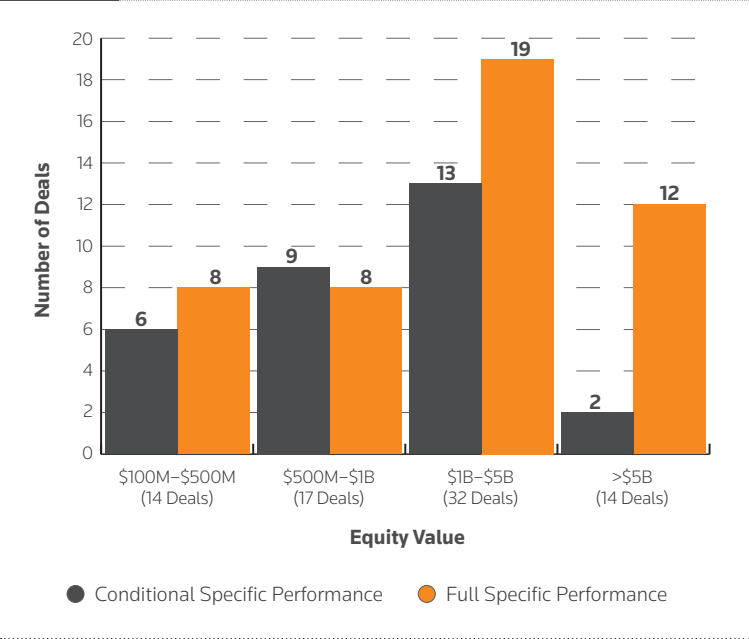


REMEDY TRENDS



DEAL VALUE AND REMEDIES

FIGURE I Pre-Termination Enforcement Remedies by Deal Value, 2017



The 2017 study sample was relatively evenly distributed among small and large deals, with a plurality of leveraged deals valued between \$1 billion and \$5 billion. As has been observed in years past and was equally true in 2017 (see *Figure I: Pre-Termination Enforcement Remedies by Deal Value, 2017*), the distribution of equitable remedies by deal value tends to reflect where strategic and private equity buyers do much of their dealmaking.

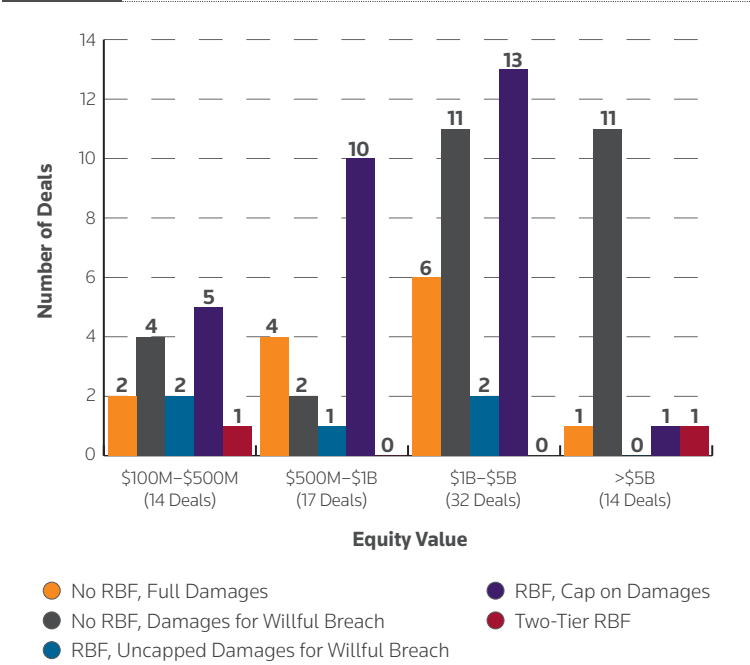
Regardless of the deal-size category, strategic buyers frequently agree to Full Specific Performance. The fact that a deal is particularly large does not lead to an expectation that the target company will bear the risk of financing failure and allow the strategic buyer to condition enforcement on the availability of the debt financing. Of the 14 largest leveraged deals of the year, only two (the club-deal buyout of Calpine

Corporation and the *Sycamore Partners/Staples, Inc.* buyout) provided for Conditional Specific Performance; the remaining 12 (11 strategic buyers and JAB Holding Company in its acquisition of Panera Bread Company) provided for Full Specific Performance.

Conditional Specific Performance was more common among smaller deals in 2017, where private equity buyers conducted most of their public M&A activity.

Historically, the “No RBF, Damages for Willful Breach” remedy has been consistently observed at every deal-size category, but especially among the largest deals, which are typically the purview of strategic buyers. As *Figure J: Post-Termination Monetary Remedies by Deal Value, 2017* illustrates, that remedy was common among the largest deals in 2017, but was outnumbered among smaller deals.

FIGURE J Post-Termination Monetary Remedies by Deal Value, 2017



A reverse break-up fee that caps the buyer's damages was the most common post-termination remedy in all but the largest deal-size category—a reflection of where private equity buyers are most active compared to strategic buyers. The largest deal with a reverse break-up fee that caps the buyer's damages was the *Sycamore Partners/Staples, Inc.* buyout, valued at \$6.84 billion, followed by the club-deal buyout of Calpine Corporation, with an equity value of \$5.55 billion, which provided for a two-tier reverse break-up fee structure.

In the past, the “No RBF, Full Damages” remedy had been observed most frequently among the largest deals. This trend shifted in 2017, with six of the 13 deals with that remedy valued below \$1 billion and another six in the \$1 billion–\$5 billion range. Only one deal valued above \$5 billion submitted to full damages in the event of a failure to close when required to do so under the merger agreement—the *CVS Health Corporation/Aetna Inc.* merger, the largest deal of the year with an equity

value of \$69 billion. The merger agreement for that deal separately provided for fiduciary and antitrust-related reverse break-up fees.

In general, the distribution of remedy models does not change meaningfully as deal sizes change, as illustrated in *Figure K: Remedy Models by Deal Value, 2017*. In deal-size categories where strategic and financial buyers are equally active, the Strategic and Private Equity models predominate proportionately. At deal sizes where strategic buyers are more active, the Strategic model becomes more common.

This held true in 2017. Strategic buyers dominated the largest deals of the year, and as a result, the Strategic model prevailed in deals above \$5 billion. The fact that failure to close a large deal could conceivably lead to large damages for the buyer has never made for a compelling argument for strategic buyers to cap their damages with a reverse break-up fee.

Twenty-seven of the 29 deals that used the Private Equity model came in deals valued below \$5 billion. This is similar to the 27 of 28 deals in 2016 and 17 of 19 deals in 2015, a reflection of the fact that private equity buyers continue to focus on small- and mid-size targets rather than mega-sized buyouts. The two agreements with a Private Equity model in deals valued over \$5 billion in 2017 were the agreements for the *Staples, Inc.* and *Calpine Corporation* buyouts.

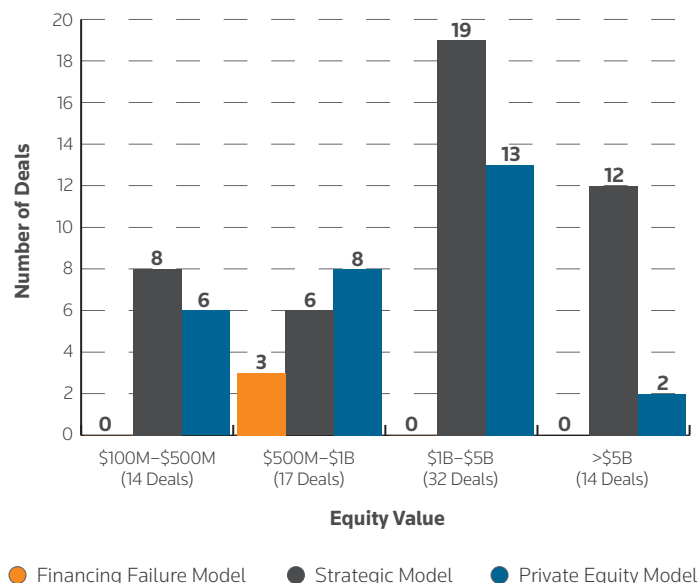
SIZE OF REVERSE BREAK-UP FEES

Figure L and *Figure M* analyze the sizes of the reverse break-up fees in the study along two lines:

- As a percentage of equity value for each deal.
- As a multiple of the corresponding target company's break-up fee in the same deal.

Figure L focuses on the reverse break-up fees in the “RBF, Cap on Damages” category. *Figure M* focuses on the reverse break-up fees in the “RBF, Uncapped Damages for Willful Breach” category. For purposes of this analysis, each of the two fees in the Calpine Corporation buyout, which had a two-tier reverse break-up fee structure, is counted separately. The lower fee is counted among “RBF, Uncapped Damages for Willful Breach,” as that fee functions as a cap on damages for

FIGURE K Remedy Models by Deal Value, 2017



financing failure, while leaving the liability for willful breach to the higher fee. The higher fee is included in *Figure L*. For the other two-tier reverse break-up fee deal observed in 2017 (the *Monomoy Capital Partners/ West Marine, Inc.* deal), the fee payable for a failure to close is counted in *Figure L*, while the fee payable for intentional breach of a covenant is set aside, as it cannot be considered a fee for non-willful breach.

CAP ON DAMAGES

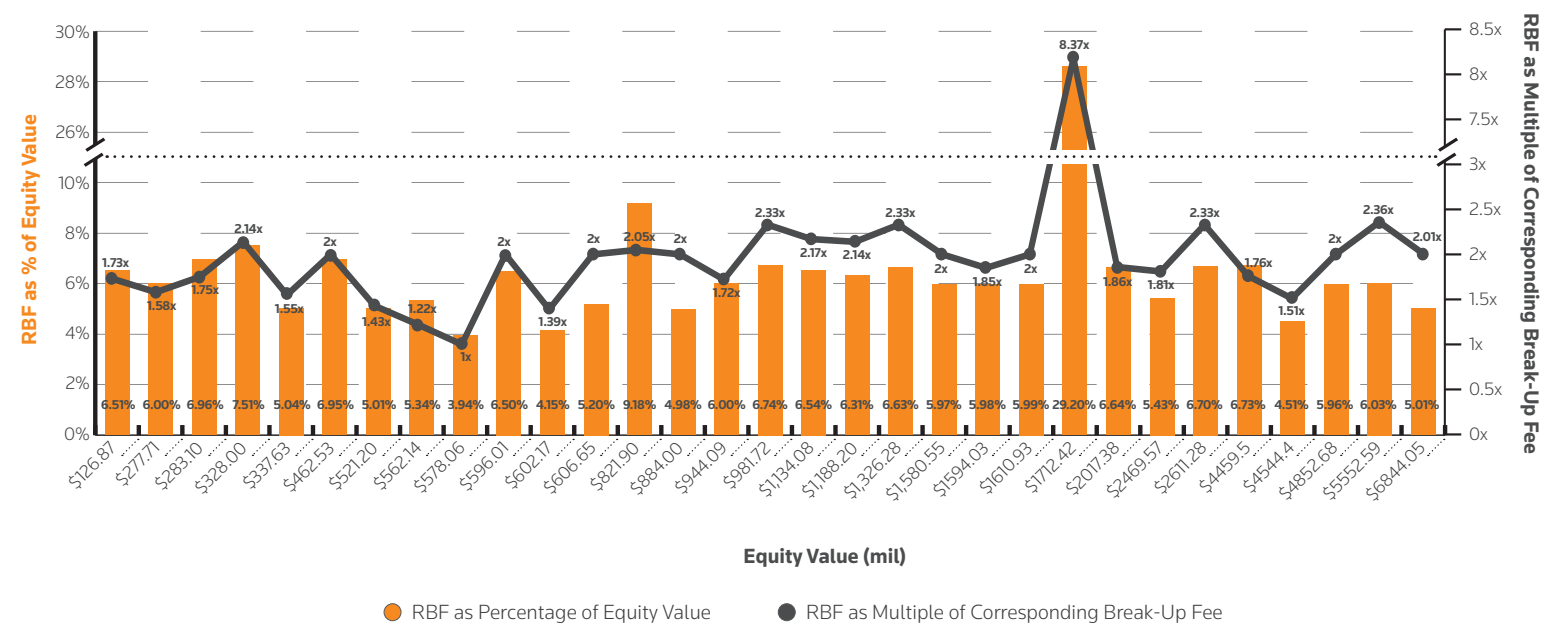
Figure L includes information for 31 deals, reflecting:

- The six fees in the “RBF Cap v1” category, in which the fee is triggered by a financing failure but caps all damages once paid.
- The seven fees in the “RBF Cap v2” category, in which the fee is triggered by any failure to close when required and which caps damages for all breaches.

- The 16 fees in the “RBF Cap v3” category, which are triggered by all breaches causing a failure of a closing condition or any failure to close when required.
- The applicable fees for failure to close from the two deals with a “Two-Tier RBF” remedy structure, as explained above.

The largest reverse break-up fee in 2017 on a percentage basis was 29.20%, from the *Keysight Technologies, Inc./IXIA* deal. (As always, this discussion does not include fees payable for fiduciary matters or antitrust or other regulatory failure.) A fee of that size is an outlier; the next largest fee in the 2017 study sample came from the deal among TPG Capital, Welsh, Carson, Anderson & Stowe, and Humana Inc. to acquire Kindred Healthcare, Inc., which the study calculated at 9.18% of equity value. That fee is expressed in the merger agreement as a fee of \$62 million (or 7.54% of equity value) plus reimbursement of expenses up to \$13.5

FIGURE L Size of Reverse Break-Up Fees: Cap on Damages (31 Deals)



million (or 1.64%). This approach is also an outlier; unlike target company break-up fees, reverse break-up fees are rarely expressed as a fee plus a reimbursement of expenses. *Figure L* reflects the full amount potentially payable for both the fee and expenses in this deal.

The average size of the 31 reverse break-up fees was 6.76% of the deal's equity value, up from 6.39% in 2016, 6.07% in 2015, 5.91% in 2014, and 6.51% in 2013. Excluding the *Keysight Technologies, Inc./IXIA* deal, however, the average size of the 30 remaining reverse break-up fees comes to 6.01%. The median reverse break-up fee in 2017 was the same as it was in 2016 and 2015: exactly 6.00% of equity value.

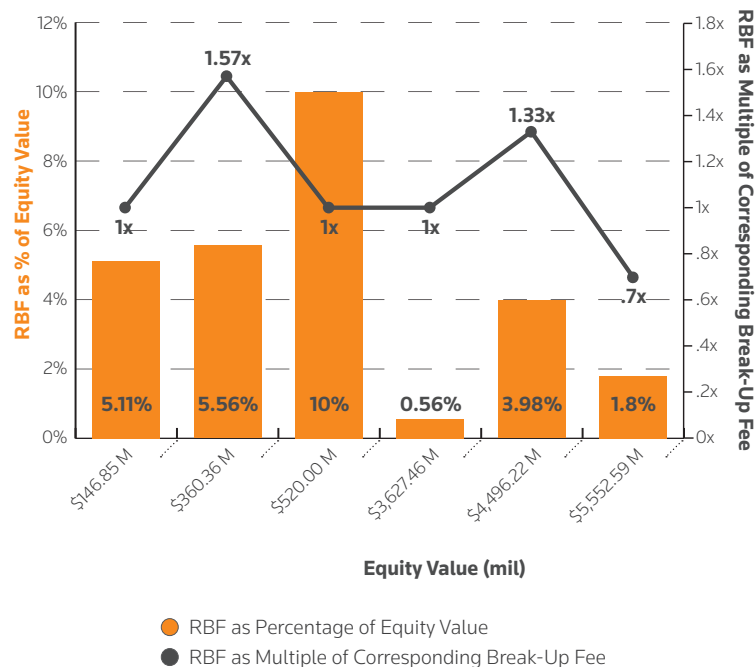
Seventeen of the 31 fees were at least double the size of the target company's break-up fee, a somewhat smaller proportion than the 19 of 30 fees in 2016 and 13 of 21 fees in 2015. Only the fee from the *Keysight Technologies, Inc./IXIA* deal was more than triple the target company's corresponding break-up fee. Seven of the reverse break-up fees were exactly double the target company's break-up fee. The lowest reverse break-up fee that functions as a cap on damages was 3.94%, from the (terminated) *Sino IC Capital Co. Ltd./Xcerra Corporation* deal. That fee was set at the same amount as the target company's break-up fee. The buyer in that deal did agree to Full Specific Performance, however.

One observation that has remained constant is that the size of the deal does not impact the size of the reverse break-up fee. Fees set at over 6.00% of the deal's equity value were observed in deals valued at over \$5 billion and under \$200 million.

UNCAPPED FOR WILLFUL BREACH

Figure M includes information for six deals, reflecting three fees categorized as "RBF Uncapped v1" (the buyer pays a fee or reimburses the target company's expenses up to a negotiated amount if the buyer commits a breach or otherwise fails to close, but the payment does not cap the buyer's damages if it willfully breached the agreement), two fees categorized as "RBF Uncapped v2" (the fee is payable in the specific instance of a financing failure; damages remain uncapped for willful breach), and the lower fee from the *Calpine Corporation* buyout, which had a two-tier fee structure.

FIGURE M Size of Reverse Break-Up Fees: Non-Willful Breach (6 Deals)



The largest of these reverse break-up fees was 10% of the deal's equity value, observed in the *Unimin Corporation/Fairmount Santrol Holdings Inc.* deal. The buyer's reverse break-up fee in that deal is the same size as the target company's break-up fee. (The board of the target company could agree to a fee that large without running afoul of its fiduciary duties under *Revlon* because the deal is for two-thirds stock consideration, meaning that *Revlon* is not invoked.)

Another two of the six fees were priced above 5.00% of equity value. None of the fees were set at double or more the target company's break-up fee, a departure from previous years.

Figure M indicates that there is still a lingering practice among some dealmakers to treat the reverse break-up fee that does not cap damages for willful breach as little more than an expense reimbursement, pricing it at the same level as the target company's own expense reimbursement for breach, but substantially below the break-up fee payable for fiduciary triggers. In those deals, the parties do not differentiate between a breach by the buyer and a breach by the target company, even though the buyer was relying on debt financing for the deal. Essentially, these deals use a template common to non-leveraged deals, in which the parties remain liable for willful breach but negotiate an expense reimbursement for non-willful breach. However, this arrangement leaves unanswered the question of how the agreement would treat a failure to close due to a financing failure if the buyer's subjective intent was to close as long as the financing proceeds were available.

In that respect, Table D in the Appendix to the study is instructive. Table D captures the various formulations for post-termination liability in agreements where damages are not capped by a reverse break-up fee. To take an example, the lowest fee in this year's study comes from the *Cineworld Group plc/Regal Entertainment Group* agreement, in which the fee is priced at 0.56% of the deal's equity value. This fee is payable for a breach or other failure to close, but does not cap damages for willful breach. As Table D indicates, the agreement is explicit that a party's failure to close the merger when otherwise required to do so is deemed a willful breach of the agreement. In this manner, the parties avoided a future disagreement over the buyer's intent.

An abstract graphic featuring a series of vertical orange bars of varying heights. The bars are arranged in two main groups: a cluster on the left side of the image and a larger, more dispersed cluster on the right. The left cluster is set against a dark gray background, while the right cluster is on a white background. The bars vary in height, with some reaching near the top of the frame and others being much shorter. The overall composition is modern and minimalist.

ALLOCATING FINANCING RISK

THE BUYER'S FINANCING COVENANTS

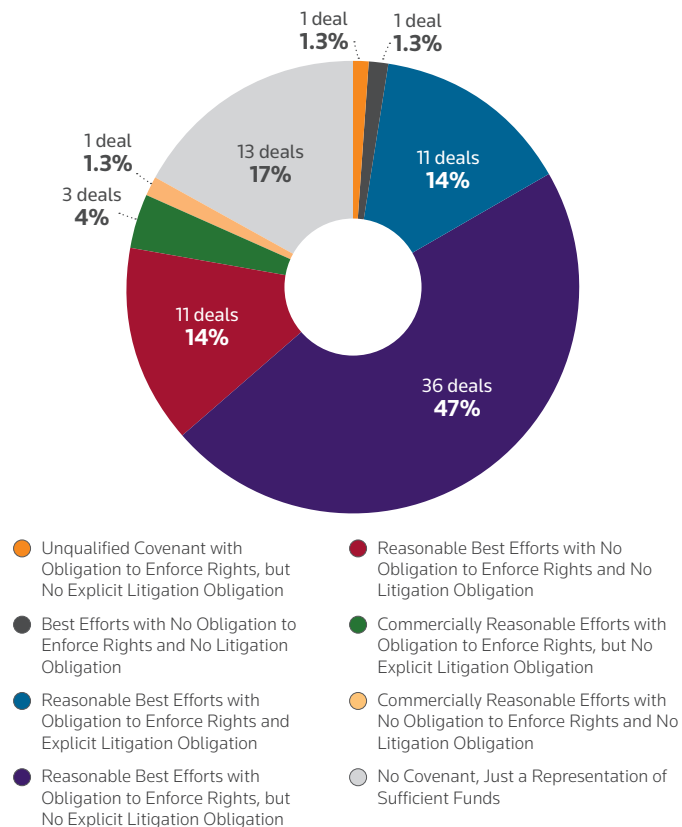
In agreements for debt-financed acquisitions, target companies can increase certainty of closing by negotiating detailed financing covenants with strong efforts standards and precise obligations that the buyer must undertake to consummate the financing. However, depending on the remedies available to the target company for breach, the significance of the financing covenants can vary. For example, if the target company has a Full Specific Performance remedy, the obligations described in the financing covenants are less important, because the target company can enforce the closing unconditionally. By contrast, if the target company's enforcement of the closing is conditioned on the availability of the debt financing, then the target company should negotiate covenants that require the buyer to take as much action as possible to cause the debt financing to be funded.

Most financing covenants include many similar provisions, such as obligations to negotiate definitive agreements based on the pre-signing debt-commitment letter, maintain the debt-commitment letter in effect, pursue alternative financing (if necessary), and satisfy the conditions to the financing. Some provisions that tend to vary across agreements are:

- The buyer's efforts standard.
- The inclusion or lack of an obligation on the buyer to "cause the lenders to fund" and/or "enforce its rights" under the debt commitment letter against the lenders.
- An explicit litigation obligation, beyond a commitment by the buyer to enforce its rights, in which the buyer commits to pursue litigation against the lenders if they refuse to lend.

The next two figures examine the frequency of these provisions in all debt-financed deals and in subsets of debt-financed deals in which the target company's enforcement remedy renders the covenants either more or less critical. For the purposes of the study, a commitment by the buyer to not agree to any changes to the debt commitment letter that would adversely affect its ability to enforce its rights under the letter, without an affirmative obligation to so enforce its rights, is not counted as an obligation to enforce its rights.

FIGURE N Financing Covenants in Leveraged Public Deals, 2017



Although there is significant variation within the study sample, the most common approach in financing covenants is for a “reasonable best efforts” standard with an obligation to cause the lenders to fund or enforce the buyer’s rights, but without specifying an explicit obligation to pursue litigation against the lenders. This approach has been gaining in popularity over recent years, with 47 percent of leveraged public deals taking using this variation in 2017 following 44 percent in 2016 and 35 percent in 2015.

A significant portion of agreements—13 deals in 2017, representing 17 percent of the survey sample—do not contain any financing covenant at all; rather, the buyer simply represents that it will have sufficient funds to close, much as it would in a deal that did not involve debt-financing at all.

Eleven deals provided for an explicit obligation that the buyer must pursue litigation against the lenders if they do not fund when required. By contrast, of the remaining 66 agreements with no litigation obligation, five made explicit that the buyer is not obligated to bring any enforcement action against the lenders.

EXAMPLE: Merger agreement for the buyout of Tangoe, Inc. by affiliates of Marlin Equity Partners, dated April 27, 2017

Section 6.12 Financing Cooperation. (a) Each of the Parent and the Purchaser shall use, and shall cause its Affiliates to use, reasonable best efforts to take, or cause to be taken, all actions and use reasonable best efforts to do, or cause to be done, all things necessary, to consummate and obtain the Financing at or prior to the Acceptance Time, or if a Conversion Event shall have occurred, the Closing, on the terms and subject only to the conditions (including the market flex provisions) set forth in the Financing Letters, including using reasonable best efforts to... (iv) enforce its rights under the Financing Letters (**provided that, notwithstanding anything to the contrary contained in this Agreement, neither the Parent nor the Purchaser shall be required to commence any legal Proceeding against any Debt Financing Source under the Debt Commitment Letter**)...

Previous editions of the study had found agreements with a “commercially reasonable efforts” standard that also included an explicit obligation to litigate against the lenders. That combination has not been observed in the last three years of the study.

Of the 64 agreements with a financing covenant, 58 used a “reasonable best efforts” standard four used a “commercially reasonable efforts” standard, one used a “best efforts” standard and one contained no qualification on the buyer’s obligation to do all things necessary to consummate the financing. The consolidation around the “reasonable best efforts” standard seems to reflect a belief in the market that that phrasing conveys the appropriate amount of effort that buyers should exert, while “commercially reasonable efforts” signifies a lesser commitment and “best efforts” requires something more than many buyers are comfortable with.

The Delaware Supreme Court recently cast some doubt on this assumed taxonomy, holding in *The Williams Companies, Inc. v. Energy Transfer Equity, L.P.* that “reasonable best efforts” and “commercially reasonable efforts” both conveyed an obligation to take “all reasonable steps” to complete the action in question (159 A.3d 264, 273 (Del. 2017)). In a dissent, Chief Justice Strine characterized the “commercially reasonable efforts” standard as a “comparatively strong one” and cited approvingly to a treatise that describes the “best efforts” standard as potentially requiring “extreme measures” while the “commercially reasonable efforts” standard is a “strong, but slightly more limited, alternative” (159 A.3d at 276 n.45). More recently, the Delaware Court of Chancery relied on the Supreme Court’s definition of the “commercially reasonable efforts” standard to interpret a standard of “reasonable efforts” in an LLC agreement (*In re Oxbow Carbon LLC Unitholder Litig.*, 2018 WL 818760, at *68 n.602 (Del. Ch. Feb. 12, 2018)). Thus, while the popular belief that the “best efforts” standard requires more effort than the other standards may be justified, there is little basis for the assumption that “reasonable best efforts” and “commercially reasonable efforts” are meaningfully different standards under Delaware law.

One agreement in the 2017 study sample provided for a “best efforts” standard (*NRD Capital/Ruby Tuesday, Inc.*) and one agreement contained a covenant with no qualification as to efforts, simply requiring the buyer

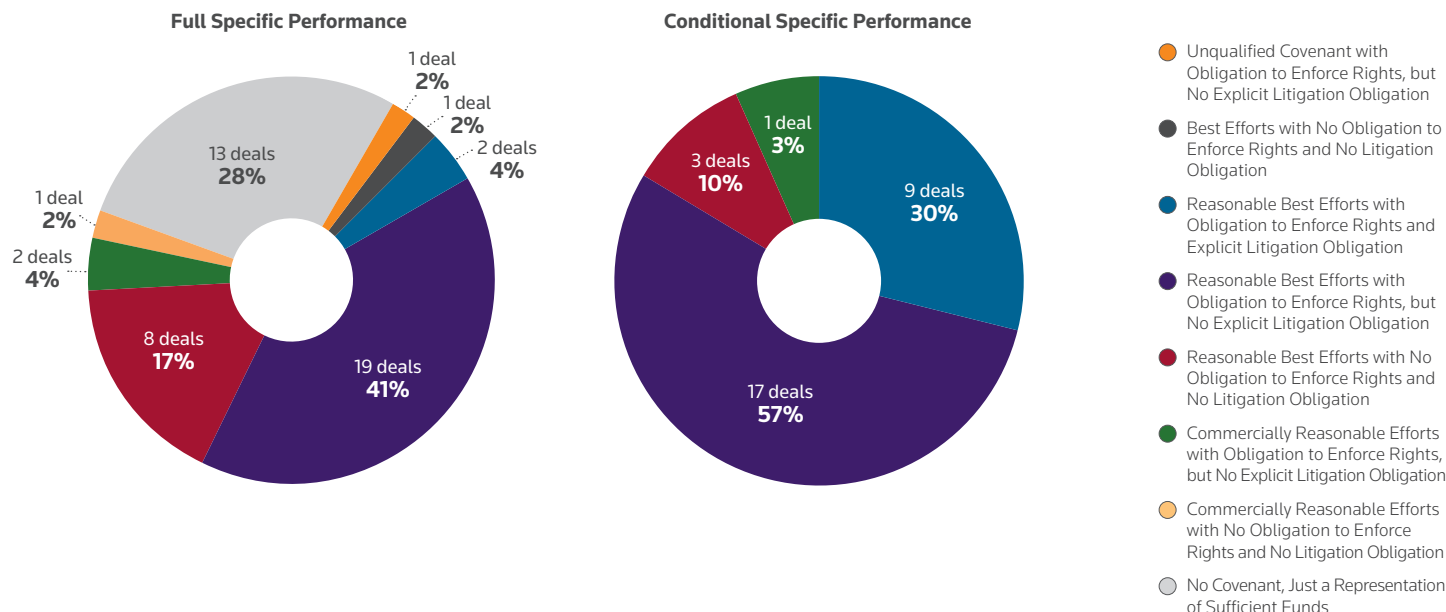
to take all actions necessary in satisfaction of its obligations (*Cineworld Group plc/Regal Entertainment Group*). As noted in the discussion of sizes of reverse break-up fees, Cineworld's agreement with Regal Entertainment contemplates the lowest reverse break-up fee of the year in any leveraged public deal. In light of the fact that Cineworld agreed to a relatively onerous standard in its financing covenant, the tradeoff for a low fee is understandable.

Figure O: *Financing Covenants by Enforcement Remedy* distinguishes between agreements with a Full Specific Performance remedy and agreements with a Conditional Specific Performance remedy. The financing covenants in the Full Specific Performance bucket are more varied, with all eight variations represented. All 13 agreements with no financing covenant and just a representation of sufficient funds contemplated Full Specific Performance. In these agreements, because

the target company can enforce the buyer's obligation to close without condition, it is not as important for the target company to negotiate financing covenants with the buyer. Nevertheless, two agreements with Full Specific Performance also included an explicit obligation on the buyer to litigate against the lenders if necessary. These were the agreements for the *CVS Health Corporation/Aetna Inc.* and *Cooke Inc./Omega Protein Corporation* deals. In a similar vein, the one agreement with the "best efforts" standard (*NRD Capital/Ruby Tuesday, Inc.*) also contemplated Full Specific Performance.

Among the deals with Conditional Specific Performance, only one agreement used a "commercially reasonable efforts" standard (*Mitel Networks Corporation/ShoreTel, Inc.*). Every other agreement with Conditional Specific Performance contained a financing covenant with a "reasonable best efforts" standard.

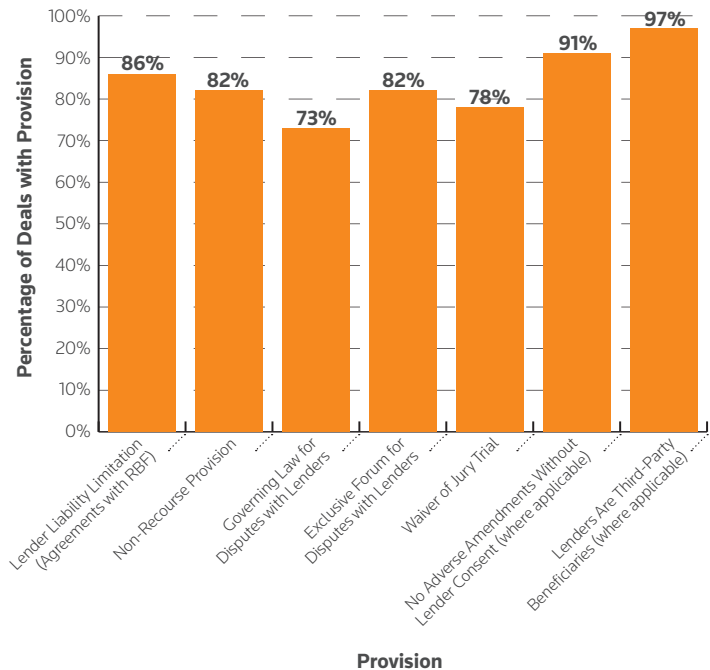
FIGURE O Financing Covenants by Enforcement Remedy



LENDER-RELATED PROVISIONS

In addition to the target company’s remedies for breach and the language of the financing covenant (if any), other provisions in the merger agreement impact the allocation of financing risk. “Xerox” provisions, so named for their introduction in the 2009 acquisition of Affiliated Computer Services, Inc. by Xerox Corporation, limit the lenders’ liability in the event of a financing failure and address the lenders’ litigation concerns. *Table C: Lender-Related Provisions in Leveraged Public Deals* in the Appendix to the study lists for every agreement in the 2017 study sample whether or not the agreement included provisions for lender-liability limitations, non-recourse to the lenders, governing law, litigation forum, and contractual enforcement of those provisions.

FIGURE P Lender-Related Provisions, 2017



LIMITATION OF LENDERS’ LIABILITY

In agreements with a reverse break-up fee, a lender liability limitation constitutes an explicit acknowledgement from the target company that the reverse break-up fee, when paid, is the target company’s sole and exclusive remedy against not only the buyer and its affiliates, but the lenders as well.

EXAMPLE: Merger agreement for the buyout of Air Methods Corporation via front-end tender offer by affiliates of American Securities LLC, dated March 14, 2017

Section 7.6. Fees and Expenses Following Termination ... (d) ... (i) in the event the Parent Termination Fee is paid to the Company in circumstances for which such fee is payable pursuant to Section 7.6(b), **payment of the Parent Termination Fee shall be the sole and exclusive remedy of the Company and its Subsidiaries against Parent, Merger Sub, the Sponsor or any of their respective former, current or future general or limited partners, stockholders, financing sources (including the Lender Related Parties), managers, members, directors, officers or Affiliates (collectively, the “Parent Related Parties”) for any Damages suffered as a result of the failure of the Transactions to be consummated or for a breach or failure to perform hereunder or otherwise relating to or arising out of this Agreement or the Transactions, and (ii) upon payment of such amount none of the Parent Related Parties shall have any further Liability relating to or arising out of this Agreement or the Transactions.**

Of the 36 agreements in this year’s study sample with a reverse break-up fee of any form (see *Figure D: Post-Termination Monetary Remedies Across All Transactions, 2015–2017*), 86 percent (31 agreements) included a provision limiting the lenders’ liability to the payment of the reverse break-up fee, up from 82 percent in 2016 and 72 percent in 2015. Of the remaining five agreements, two included a non-recourse provision of the type described below, which the parties likely intended to capture the liability-limitation concept.

As noted in *Table C* in the Appendix to the study, two agreements in 2017 provided that the reverse break-up fee payable by the buyer for fiduciary or regulatory reasons would, when paid, cap the lenders' liability as well. These agreements were for the *CVS Health Corporation/Aetna Inc.* and *MacDonald, Dettwiler and Associates Ltd./DigitalGlobe, Inc.* deals.

NON-RECOURSE PROVISION

Under this provision, the target company acknowledges that it has no direct recourse against the lenders under the merger agreement. The lenders' only contractual privity is with the buyer under the debt-commitment letter or definitive credit agreement.

EXAMPLE: Merger agreement between Northrop Grumman Corporation and Orbital ATK, Inc., dated September 17, 2017

Section 7.02. Effect of Termination ... Notwithstanding anything herein to the contrary, **the Company hereby waives any and all rights and claims against any Financing Sources** and their respective affiliates and the Representatives of the Financing Sources and such affiliates (such entities, which, for the avoidance of doubt, do not include Parent or any of its affiliates, the "Financing Sources Related Parties") in connection with this Agreement or the Financing, whether at law or in equity, in contract, in tort or otherwise, and agrees that it will not commence any actions or proceedings asserting any such rights or claims; provided, that the foregoing waiver and release shall not apply to any rights, claims or causes of action that the Company or any of its affiliates may have against the Financing Sources or the Financing Sources Related Parties for breach of any nondisclosure agreement that any Financing Sources Related Party may have entered into with the Company or its affiliates.

Sixty-three out of 77 agreements (82 percent) in the 2017 study sample included a non-recourse provision, the same percentage as in 2016 and up from 73 percent in 2015.

EXCLUSIVE FORUM AND WAIVER OF JURY TRIAL

To avoid a jury trial in an unfamiliar jurisdiction and with unintended law, lenders also increasingly demand the following provisions:

- **Governing law.** Any disputes with the lenders over the debt financing must be governed by the governing law of the financing papers — usually New York law — notwithstanding that a different governing law may apply to disputes between the transaction parties under the merger agreement (most frequently Delaware law in public merger transactions). Noticing that these provisions had become increasingly common in leveraged public deals, the study tracked these provisions for the first time this year. Fifty-six out of 77 agreements (73 percent) in the 2017 study sample required that disputes with the lenders be governed by New York law.
- **Exclusive forum.** Any litigation relating to the debt financing must be brought in a pre-agreed forum, usually New York. Out of the study's 77 agreements, 63 provided for an exclusive forum for litigation against the lenders (82 percent, compared to 81 percent in 2016 and 71 percent in 2015). All but one selected New York, with the other agreement providing for England as the exclusive forum.
- **Waiver of jury trial.** The waiver of trial by jury, already common in most public merger agreements, applies equally to litigation against the lenders. Sixty out of 77 agreements (78 percent, compared to 87 percent in 2016 and 75 percent in 2015) included a waiver of jury trial for the benefit of the lenders.

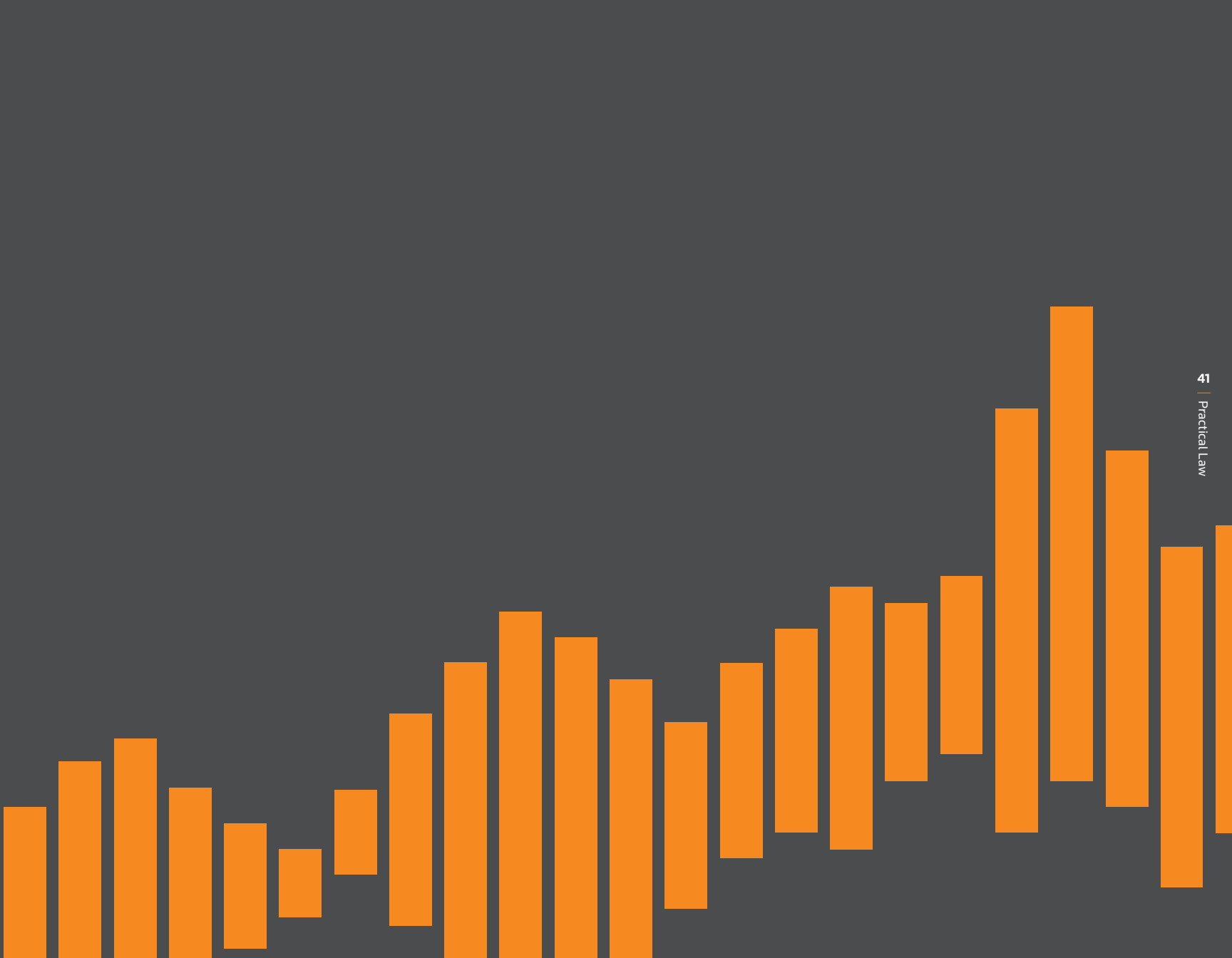
The provisions for governing law and exclusive forum are frequently drafted together. However, nine agreements provided for exclusive forum (eight selecting New York, one selecting England) without also specifying the governing law for disputes with lenders. Two agreements mandated New York governing law without specifying that suits against the lenders be brought in New York.

CONTRACTUAL PROTECTIONS

Because the lenders are not party to the merger agreement, they also require the following contractual protections to enforce their third-party rights:

- **No adverse amendments.** The provisions included for the lenders' benefit cannot be amended to their detriment without their consent. Sixty-two out of the 68 agreements that included any of the above provisions included this restriction on amendments.
- **Third-party beneficiaries.** The lenders must be made explicit third-party beneficiaries of the provisions that are included for their benefit. In this year's study sample, all but two agreements with any "Xerox" provision made the lenders third-party beneficiaries of the relevant provisions. In some cases, the agreement made the lenders third-party beneficiaries of certain provisions but not others. These agreements are noted in *Table C* in the Appendix to the study.





APPENDIX



Table A: Remedies for Buyer Breach in Leveraged Public Deals (Reverse Chronological Order)

DEAL (BUYER/TARGET)	BUYER TYPE	EQUITY VALUE	CONSIDERATION; STRUCTURE	PRE-TERMINATION ENFORCEMENT	POST-TERMINATION REMEDY (RBF PERCENTAGE OF EQUITY VALUE)	RBF AS MULTIPLE OF TARGET COMPANY BREAK-UP FEE	BUYER-BREACH REMEDY MODEL
Mallinckrodt plc/ Sucampo Pharmaceuticals, Inc.	Strategic	\$1,219.04 million	All cash; front-end tender offer	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
TPG Capital; Welsh, Carson, Anderson & Stowe; Humana Inc./Kindred Healthcare, Inc.	Strategic & Financial consortium	\$821.90 million	All cash; single-step RTM	Conditional specific performance	\$62 million (7.54%) and expenses up to \$13.5 million (1.64%) RBF Cap v3 ¹	2.05x	Private equity model
Campbell Soup Company/Snyder's-Lance, Inc.	Strategic	\$4,996.22 million	All cash; single-step RTM	Full specific performance	\$198.6 million (3.98%) RBF Uncapped v1 ²	1.33x	Strategic model
Penn National Gaming, Inc./ Pinnacle Entertainment, Inc.	Strategic	\$2,800 million	Cash and stock (62/38 split); single-step RTM	Full specific performance	No RBF, full damages v2 ^{2,3}	N/A	Strategic model
The Hershey Company/Amplify Snack Brands, Inc.	Strategic	\$945.15 million	All cash; front-end tender offer	Full specific performance	No RBF, full damages v2	N/A	Strategic model
Unimin Corporation/ Fairmount Santrol Holdings Inc.	Strategic	\$520 million	Cash and stock (33/67 split); single-step RTM followed by upstream merger	Conditional specific performance	\$52 million (10%) RBF Uncapped v2	1x	Financing failure model
Cineworld Group plc/Regal Entertainment Group	Strategic	\$3,627.46 million	All cash; single-step RTM	Full specific performance	\$20,150,963 (0.56%) RBF Uncapped v1 ³	1x	Strategic model
CVS Health Corporation/ Aetna Inc.	Strategic	\$69,000 million	Cash and stock (70/30 split); single-step RTM	Full specific performance	No RBF, full damages v2 ^{2,3}	N/A	Strategic model

DEAL (BUYER/ TARGET)	BUYER TYPE	EQUITY VALUE	CONSIDERATION; STRUCTURE	PRE- TERMINATION ENFORCEMENT	POST- TERMINATION REMEDY (RBF PERCENTAGE OF EQUITY VALUE)	RBF AS MULTIPLE OF TARGET COMPANY BREAK-UP FEE	BUYER-BREACH REMEDY MODEL
Prysmian Group/ General Cable Corporation	Strategic	\$1,555.34 million	All cash; single- step RTM	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
Arby's Restaurant Group, Inc./Buffalo Wild Wings, Inc.	Strategic ⁴	\$2,469.57 million	All cash; single- step RTM	Conditional specific performance	\$134 million (5.43%) RBF Cap v2	1.81x	Private equity model
Marlin Equity Partners/ Bazaarvoice, Inc.	Financial	\$521.20 million	All cash; single- step RTM	Conditional specific performance	\$26.1 million (5.01%) RBF Cap v1	1.43x	Private equity model
Meredith Corporation/Time Inc.	Strategic	\$1,913.39 million	All cash; front-end tender offer	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
Thoma Bravo, LLC/Barracuda Networks, Inc.	Financial	\$1,610.93 million	All cash; single- step RTM	Conditional specific performance	\$96.53 million (5.99%) RBF Cap v3	2x	Private equity model
Talos Energy LLC/ Stone Energy Corporation	Strategic	\$1,212.34 million	All stock; series of mergers and contributions under a newco	Full specific performance	No RBF, damages for willful breach ²	N/A	Strategic model
Marvell Technology Group Ltd./Cavium, Inc.	Strategic	\$6,000 million	Cash and stock (50/50 split); single-step RTM	Full specific performance	No RBF, damages for willful breach ^{2,3}	N/A	Strategic model
Elliott Management Corporation/ Gigamon Inc.	Financial	\$1,580.55 million	All cash; single- step RTM	Conditional specific performance	\$94.41 million (5.97%) RBF Cap v3	2x	Private equity model
Fintrax Group/ Planet Payment, Inc.	Strategic	\$257.74 million	All cash; front-end tender offer	Full specific performance	No RBF, full damages v2	N/A	Strategic model
Amneal Pharmaceuticals LLC/Impax Laboratories, Inc.	Strategic	\$1,600 million	All stock; "Up-C" transaction	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model

DEAL (BUYER/ TARGET)	BUYER TYPE	EQUITY VALUE	CONSIDERATION; STRUCTURE	PRE- TERMINATION ENFORCEMENT	POST- TERMINATION REMEDY (RBF PERCENTAGE OF EQUITY VALUE)	RBF AS MULTIPLE OF TARGET COMPANY BREAK-UP FEE	BUYER-BREACH REMEDY MODEL
NRD Capital/Ruby Tuesday, Inc.	Financial	\$146.85 million	All cash; single- step RTM	Full specific performance	\$7.5 million (5.11%) RBF Uncapped v2 ²	1x	Strategic model
Cooke Inc./ Omega Protein Corporation	Strategic	\$500.7 million	All cash; single- step RTM	Full specific performance	No RBF, full damages v2 ²	N/A	Strategic model
Itron, Inc./Silver Spring Networks, Inc.	Strategic	\$956.61 million	All cash; single- step RTM	Full specific performance ⁵	No RBF, damages for willful breach	N/A	Strategic model
Northrop Grumman Corporation/Orbital ATK, Inc.	Strategic	\$7,821.76 million	All cash; single- step RTM	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
United Technologies Corp./Rockwell Collins, Inc.	Strategic	\$23,000 million	Cash and stock (67/33 split); single-step RTM	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
Zenith Energy U.S., L.P./Arc Logistics Partners LP	Strategic ⁶	\$328.00 million	All cash; single- step RTM and transfer of GP units	Conditional specific performance	\$24,616,491 (7.51%) RBF Cap v2 ⁷	2.14x	Private equity model
Energy Capital Partners; Access Industries; Canada Pension Plan Investment Board/Calpine Corporation	Financial	\$5,552.59 million	All cash; single- step RTM	Conditional specific performance	Two-Tier RBF: \$100 million (1.80%) or \$335 million (6.03%) ⁸	0.70x or 2.36x ⁸	Private equity model
United Rentals, Inc./Neff Corporation (topping bid)	Strategic	\$632.46 million	All cash; single- step RTM	Full specific performance	No RBF, full damages v2	N/A	Strategic model
Wabash National Corporation/ Supreme Industries, Inc.	Strategic	\$360.36 million	All cash; front-end tender offer	Full specific performance	\$20.037 million (5.56%) RBF Uncapped v1	1.57x	Strategic model

DEAL (BUYER/ TARGET)	BUYER TYPE	EQUITY VALUE	CONSIDERATION; STRUCTURE	PRE- TERMINATION ENFORCEMENT	POST- TERMINATION REMEDY (RBF PERCENTAGE OF EQUITY VALUE)	RBF AS MULTIPLE OF TARGET COMPANY BREAK-UP FEE	BUYER-BREACH REMEDY MODEL
Jacobs Engineering Group Inc./CH2M HILL Companies, Ltd.	Strategic	\$2,850 million	Cash/stock/mix election (60/40 split); single-step RTM	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
Kohlberg Kravis Roberts & Co. L.P.; Walgreens Boots Alliance, Inc./PharMerica Corporation	Strategic & Financial consortium	\$944.09 million	All cash; single-step RTM	Conditional specific performance	\$56.6 million (6.00%) RBF Cap v3 ²	1.72x	Private equity model
Discovery Communications, Inc./Scripps Networks Interactive, Inc.	Strategic	\$11,900 million	Cash/stock/mix election (70/30 split); single-step RTM	Full specific performance	No RBF, damages for willful breach ³	N/A	Strategic model
Mitel Networks Corporation/ShoreTel, Inc.	Strategic	\$562.14 million	All cash; front-end tender offer	Conditional specific performance	\$30 million (5.34%) RBF Cap v1	1.22x	Private equity model
Internet Brands, Inc./WebMD Health Corp.	Strategic ⁹	\$2,611.28 million	All cash; front-end tender offer	Conditional specific performance ¹⁰	\$175 million (6.70%) RBF Cap v3	2.33x	Private equity model
H&E Equipment Services, Inc./Neff Corporation (terminated in favor of topping bid; break-up fee paid)	Strategic	\$531.67 million	All cash; single-step RTM	Full specific performance	No RBF, full damages v2	N/A	Strategic model
Apollo Global Management, LLC/ClubCorp Holdings, Inc.	Financial	\$1,134.08 million	All cash; single-step RTM	Conditional specific performance	\$74.2 million (6.54%) RBF Cap v3	2.17x	Private equity model
Cincinnati Bell Inc./Hawaiian Telcom Holdco, Inc.	Strategic	\$367.38 million	Cash/stock/mix election (60/40 split); single-step RTM	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model

DEAL (BUYER/ TARGET)	BUYER TYPE	EQUITY VALUE	CONSIDERATION; STRUCTURE	PRE- TERMINATION ENFORCEMENT	POST- TERMINATION REMEDY (RBF PERCENTAGE OF EQUITY VALUE)	RBF AS MULTIPLE OF TARGET COMPANY BREAK-UP FEE	BUYER-BREACH REMEDY MODEL
H.I.G. Capital, LLC/NCI, Inc.	Financial	\$283.10 million	All cash; front-end tender offer	Conditional specific performance	\$19.698 million (6.96%) RBF Cap v1 ¹¹	1.75x	Private equity model
Red Ventures Holdco, LP/ Bankrate, Inc.	Strategic	\$1,326.28 million	All cash; single- step RTM	Conditional specific performance	\$87.909 million (6.63%) RBF Cap v2	2.33x	Private equity model
Monomoy Capital Partners/West Marine, Inc.	Financial	\$337.63 million	All cash; single- step RTM	Conditional specific performance	Multi-Tier RBF: \$15 million (4.44%) for intentional breach of a covenant; \$17 million (5.04%) for failure to close; damages up to \$25 million (7.40%) if the company pursues but the court declines to award specific performance	1.36x/1.55x/2.27x	Private equity model
Sycamore Partners/Staples, Inc.	Financial	\$6,844.05 million	All cash; single- step RTM	Conditional specific performance	\$343 million (5.01%) RBF Cap v3	2.01x	Private equity model
True Wind Capital Management, LLC/ARI Network Services, Inc.	Financial	\$126.87 million	All cash; single- step RTM	Conditional specific performance	\$8,264,000 (6.51%) RBF Cap v3	1.73x	Private equity model
EQT Corporation/ Rice Energy Inc.	Strategic	\$6,700 million	Cash and stock (20/80 split); single-step RTM followed by upstream merger	Full specific performance	No RBF, damages for willful breach ³	N/A	Strategic model
Pamplona Capital Management, LLP/PAREXEL International Corporation	Financial	\$4,852.68 million	All cash; single- step RTM	Conditional specific performance	\$276 million (5.96%) RBF Cap v3	2x	Private equity model

DEAL (BUYER/ TARGET)	BUYER TYPE	EQUITY VALUE	CONSIDERATION; STRUCTURE	PRE- TERMINATION ENFORCEMENT	POST- TERMINATION REMEDY (RBF PERCENTAGE OF EQUITY VALUE)	RBF AS MULTIPLE OF TARGET COMPANY BREAK-UP FEE	BUYER-BREACH REMEDY MODEL
Amazon.com, Inc./Whole Foods Market, Inc.	Strategic	\$13,571.75 million	All cash; single-step RTM	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
Donuts Inc./Rightside Group, Ltd.	Strategic	\$219.22 million	All cash; front-end tender offer	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
GL Capital Management GP Limited; Bank of China Group Investment Limited; CDH Investments; Ascendent Capital Partners; Boying Investments Limited/SciClone Pharmaceuticals, Inc.	Financial	\$606.65 million	All cash and a rollover; single-step RTM	Conditional specific performance	\$31,554,583 (5.20%) RBF Cap v1 ^{2,12}	2x	Private equity model
The Carlyle Group; GTCR LLC/Albany Molecular Research, Inc.	Financial	\$1,188.20 million	All cash; single-step RTM	Conditional specific performance	\$75 million (6.31%) RBF Cap v3	2.14x13	Private equity model
CF Corporation/Fidelity & Guaranty Life	Strategic	\$1,835.19 million	All cash; single-step RTM under a holdco	Full specific performance	No RBF, full damages v2	N/A	Strategic model
Apollo Global Management, LLC/West Corporation	Financial	\$2,017.38 million	All cash; single-step RTM	Conditional specific performance	\$134 million (6.64%) RBF Cap v2	1.86x	Private equity model
Sinclair Broadcast Group, Inc./Tribune Media Company	Strategic	\$3,900 million	Cash and stock (80/20 split); single-step RTM	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
Coach, Inc./Kate Spade & Company	Strategic	\$2,400 million	All cash; front-end tender offer	Full specific performance	No RBF, full damages v2	N/A	Strategic model

DEAL (BUYER/TARGET)	BUYER TYPE	EQUITY VALUE	CONSIDERATION; STRUCTURE	PRE-TERMINATION ENFORCEMENT	POST-TERMINATION REMEDY (RBF PERCENTAGE OF EQUITY VALUE)	RBF AS MULTIPLE OF TARGET COMPANY BREAK-UP FEE	BUYER-BREACH REMEDY MODEL
Avantor, Inc./VWR Corporation	Strategic ¹⁴	\$4,459.50 million	All cash; single-step RTM	Conditional specific performance	\$300 million (6.73%) RBF Cap v3 ²	1.76x	Private equity model
Marlin Equity Partners/Tangoe, Inc.	Financial	\$277.71 million	All cash; front-end tender offer	Conditional specific performance	\$16,668,531 (6.00%) RBF Cap v2 ¹⁵	1.58x	Private equity model
Tyson Foods, Inc./AdvancePierre Foods Holdings, Inc.	Strategic	\$3,208.61 million	All cash; front-end tender offer	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
Becton, Dickinson and Company/ C. R. Bard, Inc.	Strategic	\$24,000 million	Cash and stock (70/30 split): single-step RTM	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
Virtu Financial, Inc./KCG Holdings, Inc.	Strategic ¹⁶	\$1,400 million	All cash; single-step RTM	Full specific performance	No RBF, full damages v2	N/A	Strategic model
Harland Clarke Holdings Corp./RetailMeNot, Inc.	Strategic ¹⁷	\$602.17 million	All cash; front-end tender offer	Conditional specific performance	\$25 million (4.15%) up to \$35 million (5.81%) ¹⁸ RBF Cap v1	1.39x–1.94x	Private equity model
Aspen Skiing Company, L.L.C.; KSL Capital Partners/Intrawest Resorts Holdings, Inc.	Strategic ¹⁹ & Financial consortium	\$981.72 million	All cash; single-step RTM	Conditional specific performance	\$66,205,091 (6.74%) RBF Cap v3 ²	2.33x	Private equity model
Sino IC Capital Co. Ltd./Xcerra Corporation (terminated due to CFIUS failure)	Financial	\$578.06 million	All cash; single-step RTM	Full specific performance	\$22.8 million (3.94%) RBF Cap v3 ²	1x	Financing failure model
JAB Holding Company/Panera Bread Company	Financial	\$7,175.60 million	All cash; single-step RTM	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model

DEAL (BUYER/ TARGET)	BUYER TYPE	EQUITY VALUE	CONSIDERATION; STRUCTURE	PRE- TERMINATION ENFORCEMENT	POST- TERMINATION REMEDY (RBF PERCENTAGE OF EQUITY VALUE)	RBF AS MULTIPLE OF TARGET COMPANY BREAK-UP FEE	BUYER-BREACH REMEDY MODEL
New Mountain Capital, L.L.C./ TRC Companies, Inc.	Financial	\$596.01 million	All cash; single-step RTM	Full specific performance	\$38.76 million (6.50%) RBF Cap v2 ²⁰	2x	Financing failure model
MaxLinear, Inc./ Exar Corporation	Strategic	\$681.44 million	All cash; front-end tender offer	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
American Securities LLC/ Air Methods Corporation	Financial	\$1,594.03 million	All cash; front-end tender offer	Conditional specific performance	\$95,286,240 (5.98%) RBF Cap v3	1.85x	Private equity model
MacDonald, Dettwiler and Associates Ltd./ DigitalGlobe, Inc.	Strategic	\$2,400 million	Cash and stock (50/50 split); single-step RTM	Full specific performance	No RBF, damages for willful breach ^{2,3}	N/A	Strategic model
Restaurant Brands International Inc./ Popeyes Louisiana Kitchen, Inc.	Strategic	\$1,672.05 million	All cash; front-end tender offer	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
EQT Partners Inc./ Lumos Networks Corp.	Financial	\$462.53 million	All cash; single-step RTM	Conditional specific performance	\$32.138 million (6.95%) RBF Cap v3	2x	Private equity model
Sonaca Group/LMI Aerospace Inc.	Strategic	\$192.26 million	All cash; single-step RTM	Full specific performance	No RBF, full damages v1	N/A	Strategic model
Integrated Device Technology, Inc./ GigPeak, Inc.	Strategic	\$230.87 million	All cash; front-end tender offer	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
Reckitt Benckiser Group plc/Mead Johnson Nutrition Company	Strategic	\$16,640.39 million	All cash; single-step RTM	Full specific performance	No RBF, damages for willful breach ³	N/A	Strategic model

DEAL (BUYER/ TARGET)	BUYER TYPE	EQUITY VALUE	CONSIDERATION; STRUCTURE	PRE- TERMINATION ENFORCEMENT	POST- TERMINATION REMEDY (RBF PERCENTAGE OF EQUITY VALUE)	RBF AS MULTIPLE OF TARGET COMPANY BREAK-UP FEE	BUYER-BREACH REMEDY MODEL
CBS Corporation and CBS Radio Inc./Entercom Communications Corp.	Strategic	\$1,369.00 million	All stock; Reverse Morris Trust transaction ²⁰	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
Keysight Technologies, Inc./ IXIA	Strategic	\$1,712.42 million	All cash; single- step RTM	Conditional specific performance	\$500 million (29.20%) RBF Cap v2	8.37x	Private equity model
Ant Financial Services Group/ MoneyGram International, Inc. (terminated due to CFIUS failure)	Strategic	\$884.0 million initially, \$1,204.0 million as amended	All cash; single- step RTM	Conditional specific performance	\$60 million (4.98%) initially, \$82 million (6.81%) as amended RBF Cap v3 ²	2x	Private equity model
AltaGas Ltd./WGL Holdings, Inc.	Strategic	\$4,544.40 million	All cash; single- step RTM	Conditional specific performance	\$205 million (4.51%) RBF Cap v1 ²	1.51x	Private equity model
British American Tobacco p.l.c./ Reynolds American Inc.	Strategic	\$49,400 million	Cash and stock (49/51 split); single-step RTM	Full specific performance	No RBF, damages for willful breach ^{2,3}	N/A	Strategic model
Calamos Partners LLC/ Calamos Asset Management, Inc.	Financial	\$169.38 million	All cash; front-end tender offer	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
Takeda Pharmaceutical Company Limited/ ARIAD Pharmaceuticals, Inc.	Strategic	\$4,898.59 million	All cash; front-end tender offer	Full specific performance	No RBF, full damages v2	N/A	Strategic model

DEAL (BUYER/ TARGET)	BUYER TYPE	EQUITY VALUE	CONSIDERATION; STRUCTURE	PRE- TERMINATION ENFORCEMENT	POST- TERMINATION REMEDY (RBF PERCENTAGE OF EQUITY VALUE)	RBF AS MULTIPLE OF TARGET COMPANY BREAK-UP FEE	BUYER-BREACH REMEDY MODEL
Mars, Incorporated/ VCA Inc.	Strategic	\$7,682.42 million	All cash; single- step RTM	Full specific performance	No RBF, damages for willful breach	N/A	Strategic model
Gartner, Inc./CEB Inc.	Strategic	\$2,600 million	Cash and stock (70/30 split); single-step RTM	Full specific performance	No RBF, full damages v2 ²	N/A	Strategic model

Notes:

Equity value is calculated by multiplying the actual number of target shares outstanding by the price per share, plus the cost to acquire convertible securities. This study uses the equity value for a transaction as disclosed by the parties, when available. When the parties have not disclosed an equity value (such as if they have disclosed a general transaction value or enterprise value), the study relies on the equity value provided by Thomson Reuters.

The deal-structure acronym “RTM” means a reverse triangular merger. All front-end tender offers are followed by a second-step squeeze-out merger.

Deals are categorized as leveraged if the buyer has entered into new financing arrangements to finance the acquisition, or has represented (whether in the merger agreement or in other public filings related to the transaction) that it intends to raise new debt to finance the acquisition. Transactions are not categorized as leveraged if: (i) the buyer has represented (whether in the merger agreement or in other public filings related to the transaction) that it will rely on existing borrowing resources (such as “available” or “existing” lines of credit) to finance the transaction (even if the buyer is raising the previous limit on the facility); (ii) the buyer has represented that it will finance the acquisition by selling debt securities on the capital markets, without negotiating a credit agreement with specific lenders; or (iii) the deal is financed with a loan from the buyer’s parent company or other affiliate.

The “RBF as Multiple of Target Company Break-Up Fee” column compares the size of the buyer’s reverse break-up fee against the size of the target company’s break-up fee. If the target company is subject to a two-tier break-up fee (such as when a lower fee is payable for entering into an agreement with a bidder who submitted a bid during a go-shop period and a higher fee otherwise), the column uses the larger break-up fee as a point of comparison. If expenses are reimbursable over and above the amount of the primary fee, the study includes the expenses and assumes they would be payable up to the negotiated limit.

A red font for a given remedy model indicates an unusual combination of pre-termination and post-termination remedies, as further described in the study.

¹ The reverse break-up fee is categorized in two parts: 1.5% of the total enterprise value of \$4.1 billion (or \$61.5 million) and a separate \$5 million “additional expense reimbursement.” The \$5 million amount is payable under any circumstance of the agreement’s termination other than rejection of the merger by Kindred Healthcare’s stockholders. Nothing in the merger agreement indicates that Kindred Healthcare is only entitled to reimbursement for expenses up to that \$5 million amount. There is also a separate reimbursement for expenses up to \$13.5 million.

² The merger agreement also contemplates a reverse break-up fee payable for failure to obtain antitrust or other regulatory approval.

³ The buyer must pay a fiduciary break-up fee similar to the break-up fee payable by the target company under reciprocal circumstances.

⁴ Arby’s obtained new equity financing from its sponsor fund affiliated with Roark Capital.

⁵ Enforcement of the closing is conditioned, but only on satisfaction of the buyer’s closing conditions and the target company’s readiness to close; it is not conditioned, however, on the availability of the debt financing. The remedy is therefore categorized as “Full specific performance,” not “Conditional specific performance.”

⁶ Zenith Energy obtained new equity financing from its sponsor funds affiliated with Warburg Pincus.

⁷ In the event of breach, the agreement requires payment of an expense reimbursement up to \$1.5 million. This reimbursement is explicitly not the target company’s sole and exclusive remedy and is credited against any eventual payment of the full fee.

⁸ The larger fee is payable in the event of breach or failure to close. The lower fee is payable if the rating on any of certain debt instruments of Calpine Corporation is lowered by both Moody’s and S&P within 60 days of the initial public announcement of the merger agreement (which 60-day period can be extended if the debt instruments are under publicly announced consideration for a possible downgrade by one or both of the rating agencies during that 60-day period), to the extent that Calpine would,

if the closing were to occur, be required to make an offer to prepay or repurchase, as applicable, under any of the debt instruments in connection with the lowered ratings. The lower fee is not payable if the ratings downgrade arises primarily from an action taken with the intent of causing the downgrade.

⁹ Internet Brands obtained new equity financing from its sponsor fund affiliated with Kohlberg Kravis Roberts & Co. L.P.

¹⁰ The merger agreement also conditions enforcement of the buyer's obligation to cause the debt financing to be funded on conditions reciprocal to those conditioning enforcement of the equity financing and closing.

¹¹ In the event of breach, the agreement requires payment of an expense reimbursement of \$3 million. This reimbursement does not cap damages for willful breach and is credited against any eventual payment of the full fee.

¹² A fee of 1.19% would also have been payable by the buyer consortium for failure to deposit the amount of the full reverse break-up fee into escrow by the stipulated deadline.

¹³ The target company's liability for willful breach is capped at \$70 million, as compared to the buyer's \$75 million cap. The company's standard break-up fee is \$35 million.

¹⁴ Avantor is a portfolio company of New Mountain Capital and obtained new preferred equity financing from Broad Street Capital Partners, an affiliate of Goldman Sachs & Co. LLC.

¹⁵ The reverse break-up fee is payable if the debt-financing proceeds are unavailable to consummate the tender offer. This trigger, on its own, would qualify the fee as an "RBF Cap v1." However, both the buyer and the target company can, under certain circumstances, convert the tender offer into a single-step merger process. The fee is payable if the buyer does not close the merger when otherwise required, with no reference to the failure of the debt financing. The remedy is therefore categorized as "RBF Cap v2."

¹⁶ Virtu Financial obtained new equity financing from Aranda Investments Pte. Ltd (an investment vehicle funded by Temasek, an investment company based in Singapore) and from North Island Holdings I, LP (an investment vehicle funded by GIC, Singapore's sovereign wealth fund, and Public Sector Pension Investment Board, a Canadian pension investment manager).

¹⁷ Harland Clarke Holdings is a subsidiary of M&F Worldwide Corp.

¹⁸ The amount of the reverse break-up fee begins at \$25 million for termination due to delivery by Harland Clarke Holdings of a financing-extension notice to RetailMeNot combined with Harland Clarke Holdings' failure to close the tender offer or merger when required due to failure of the debt financing to be funded and either a material breach causing failure of a closing condition or the expiration of the offer period or acceptance time. Starting with the date that is two business days following the first offer-expiration date on or prior to which Harland Clarke Holdings delivered a financing-extension notice (the Specified Date), the reverse break-up fee increases incrementally, up to a maximum of \$35 million, based on a formula of multiplying the Financing Extension Time Period (the number of business days following the Specified Date through and including the date on which the reverse break-up fee becomes payable) by the Incremental Parent Termination Fee Amount (an amount equal to the quotient obtained by dividing \$10 million by the total number of business days following the Specified Date through and including the drop-dead date).

¹⁹ The buyer entity is jointly owned by affiliates of Aspen Skiing Company, L.L.C. and KSL Capital Partners, LLC. The buyer also obtained equity financing from Henry Crown & Company, an affiliate of Aspen with common private ownership.

²⁰ The fee is expressed as a maximum cap on damages for any breach rather than as a fee triggered by a particular event of termination.

²¹ CBS splits off its CBS Radio business and distributes CBS Radio's stock to participating stockholders via an exchange offer. An Entercom merger subsidiary merges with and into CBS Radio; CBS Radio stockholders exchange their CBS Radio shares for Entercom shares.

Table B: Financing Covenants in Leveraged Public Deals (Reverse Chronological Order)

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	EFFORTS STANDARD IN COVENANT	OBLIGATION TO ENFORCE RIGHTS AND/OR CAUSE LENDERS TO FUND	EXPLICIT OBLIGATION TO LITIGATE AGAINST THE LENDERS	FINANCING OUT OR FINANCIAL- METRIC CLOSING CONDITION	CRITERIA FOR A FINDING OF FINANCING FAILURE
Mallinckrodt plc/Sucampo Pharmaceuticals, Inc.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	Yes	None	None	N/A
TPG Capital; Welsh, Carson, Anderson & Stowe; Humana Inc./Kindred Healthcare, Inc.	7.54% and expenses up to 1.64% RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	None	None	N/A
Campbell Soup Company/Snyder's- Lance, Inc.	3.98% RBF Uncapped v1; Full specific performance	Reasonable best efforts	Yes	None	None	None (fee payable for breach or failure to close)
Penn National Gaming, Inc./ Pinnacle Entertainment, Inc.	Full specific performance; No RBF, full damages v2	Reasonable best efforts	Yes	None	None	N/A
The Hershey Company/Amplify Snack Brands, Inc.	Full specific performance; No RBF, full damages v2	No covenant, just a representation of available funds	N/A	N/A	None	N/A
Unimin Corporation/ Fairmount Santrol Holdings Inc.	10% RBF Uncapped v2; Conditional specific performance	Reasonable best efforts	Yes	None	None	Failure to close "due to the financing not being funded," a decrease of \$53 million in net income, or an increase of \$25 million in net debt.
Cineworld Group plc/Regal Entertainment Group	0.56% RBF Uncapped v1; Full specific performance	All actions necessary (unqualified)	Yes	None	None	None (fee payable for breach, failure to close, or if the debt commitment letters are not in full force and effect as of a specified date and Cineworld has not arranged replacement financing)
CVS Health Corporation/ Aetna Inc.	Full specific performance; No RBF, full damages v2	Reasonable best efforts ¹	Yes	Yes	None	N/A

DEAL (BUYER/TARGET)	REMEDY FOR BUYER BREACH	EFFORTS STANDARD IN COVENANT	OBLIGATION TO ENFORCE RIGHTS AND/OR CAUSE LENDERS TO FUND	EXPLICIT OBLIGATION TO LITIGATE AGAINST THE LENDERS	FINANCING OUT OR FINANCIAL-METRIC CLOSING CONDITION	CRITERIA FOR A FINDING OF FINANCING FAILURE
Prysmian Group/ General Cable Corporation	Full specific performance; No RBF, damages for willful breach	No covenant, just a representation of sufficient funds	N/A	N/A	None	N/A
Arby's Restaurant Group, Inc./Buffalo Wild Wings, Inc.	5.43% RBF Cap v2; Conditional specific performance	Reasonable best efforts	None	None	None	N/A
Marlin Equity Partners/ Bazaarvoice, Inc.	5.01% RBF Cap v1; Conditional specific performance	Reasonable best efforts	Yes	None ²	None	The full proceeds of the debt financing are not available on the terms of the debt commitment letters.
Meredith Corporation/ Time Inc.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	Yes	None	None	N/A
Thoma Bravo, LLC/Barracuda Networks, Inc.	5.99% RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	None	None	N/A
Talos Energy LLC/ Stone Energy Corporation	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	None	None	Completion of debt exchange	N/A
Marvell Technology Group Ltd./Cavium, Inc.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	Yes	None	None	N/A
Elliott Management Corporation/ Gigamon Inc.	5.97% RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	Yes	Minimum \$230 million cash on hand	N/A
Fintrax Group/ Planet Payment, Inc.	Full specific performance; No RBF, full damages v2	No covenant, just a representation of necessary funds	N/A	N/A	None	N/A
Amneal Pharmaceuticals LLC/Impax Laboratories, Inc.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	Yes	None	None (Impax is not required to close if Amneal's aggregate indebtedness under its existing credit facilities exceeds \$1.6 billion)	N/A

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	EFFORTS STANDARD IN COVENANT	OBLIGATION TO ENFORCE RIGHTS AND/OR CAUSE LENDERS TO FUND	EXPLICIT OBLIGATION TO LITIGATE AGAINST THE LENDERS	FINANCING OUT OR FINANCIAL- METRIC CLOSING CONDITION	CRITERIA FOR A FINDING OF FINANCING FAILURE
NRD Capital/Ruby Tuesday, Inc.	5.11% RBF Uncapped v2; Full specific performance	Best efforts	None	None	None	Failure to obtain the financing proceeds and such failure is not due to willful and intentional breach.
Cooke Inc./Omega Protein Corporation	Full specific performance; No RBF, full damages v2	Reasonable best efforts	Yes (unqualified obligation)	Yes (unqualified obligation)	None	N/A
Itron, Inc./Silver Spring Networks, Inc.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	Yes	None	None	N/A
Northrop Grumman Corporation/Orbital ATK, Inc.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	None	None	None	N/A
United Technologies Corp./Rockwell Collins, Inc.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	Yes	None	None	N/A
Zenith Energy U.S., L.P./Arc Logistics Partners LP	7.51% RBF Cap v2; Conditional specific performance	Reasonable best efforts	Yes	Yes	None	N/A
Energy Capital Partners; Access Industries; Canada Pension Plan Investment Board/ Calpine Corporation	Two-Tier RBF: 1.80% or 6.03%; Conditional specific performance	Reasonable best efforts	Yes	None	None	The lower fee is payable if the rating on any delineated debt instruments of Calpine is lowered by both Moody's and S&P within 60 days of the initial public announcement of the merger agreement, to the extent that Calpine would, if the closing were to occur, be required to prepay or repur- chase any of the relevant debt instruments.
United Rentals, Inc./Neff Corporation	Full specific performance; No RBF, full damages v2	No covenant, just a representation of available funds	N/A	N/A	None	N/A
Wabash National Corporation/ Supreme Industries, Inc.	5.56% RBF Uncapped v1; Full specific performance	Reasonable best efforts	Yes	None	None	None (fee payable for breach or failure to close)

DEAL (BUYER/TARGET)	REMEDY FOR BUYER BREACH	EFFORTS STANDARD IN COVENANT	OBLIGATION TO ENFORCE RIGHTS AND/OR CAUSE LENDERS TO FUND	EXPLICIT OBLIGATION TO LITIGATE AGAINST THE LENDERS	FINANCING OUT OR FINANCIAL-METRIC CLOSING CONDITION	CRITERIA FOR A FINDING OF FINANCING FAILURE
Jacobs Engineering Group Inc./CH2M HILL Companies, Ltd.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	None	None	None	N/A
Kohlberg Kravis Roberts & Co. L.P.; Walgreens Boots Alliance, Inc./PharMerica Corporation	6.00% RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	Yes	None	N/A
Discovery Communications, Inc./Scripps Networks Interactive, Inc.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	Yes	None	None	N/A
Mitel Networks Corporation/ShoreTel, Inc.	5.34% RBF Cap v1; Conditional specific performance	Commercially reasonable efforts	Yes	None	None	The marketing period for the debt financing has ended, the tender offer conditions have been satisfied or waived, Mitel Networks has failed to close the offer, and ShoreTel is ready to close.
Internet Brands, Inc./WebMD Health Corp.	6.70% RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	Yes	None	N/A
H&E Equipment Services, Inc./Neff Corporation	Full specific performance; No RBF, full damages v2	Reasonable best efforts	Yes	None ²	None	N/A (purchase price subject to certain downward adjustments, not to exceed \$0.44 per share, if H&E incurs certain increased financing costs due to the merger not closing on or before the outside date)
Apollo Global Management, LLC/ClubCorp Holdings, Inc.	6.54% RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	Yes	No new dividend declarations or payments	N/A

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	EFFORTS STANDARD IN COVENANT	OBLIGATION TO ENFORCE RIGHTS AND/OR CAUSE LENDERS TO FUND	EXPLICIT OBLIGATION TO LITIGATE AGAINST THE LENDERS	FINANCING OUT OR FINANCIAL- METRIC CLOSING CONDITION	CRITERIA FOR A FINDING OF FINANCING FAILURE
Cincinnati Bell Inc./ Hawaiian Telcom Holdco, Inc.	Full specific performance; No RBF, damages for willful breach	Commercially reasonable efforts	Yes	None	None	N/A
H.I.G. Capital, LLC/ NCL, Inc.	6.96% RBF Cap v1; Conditional specific performance	Reasonable best efforts	None	None	None	If the full proceeds of the debt financing “are not available” or if H.I.G. Capital has delivered a financing-extension notice representing that the full amount of the debt financing has not been funded and would not be available to be funded.
Red Ventures Holdco, LP/ Bankrate, Inc.	6.63% RBF Cap v2; Conditional specific performance	Reasonable best efforts	Yes	None	None	N/A
Monomoy Capital Partners/West Marine, Inc.	Multi-Tier RBF: 4.44% or 5.04% or 7.40%; Conditional specific performance	Reasonable best efforts	Yes	None	None	N/A
Sycamore Partners/ Staples, Inc.	5.01% RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	None	None	N/A
True Wind Capital Management, LLC/ARI Network Services, Inc.	6.51% RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	None ²	None	N/A
EQT Corporation/ Rice Energy Inc.	Full specific performance; No RBF, damages for willful breach	No covenant, just a representation of sufficient funds	N/A	N/A	None	N/A
Pamplona Capital Management, LLP/PAREXEL International Corporation	5.96% RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	None	None	N/A

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	EFFORTS STANDARD IN COVENANT	OBLIGATION TO ENFORCE RIGHTS AND/OR CAUSE LENDERS TO FUND	EXPLICIT OBLIGATION TO LITIGATE AGAINST THE LENDERS	FINANCING OUT OR FINANCIAL- METRIC CLOSING CONDITION	CRITERIA FOR A FINDING OF FINANCING FAILURE
Amazon.com, Inc./Whole Foods Market, Inc.	Full specific performance; No RBF, damages for willful breach	No covenant, just a representation of sufficient funds	N/A	N/A	None	N/A
Donuts Inc./ Rightside Group, Ltd.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	Yes	None	None	N/A
GL Capital Management GP Limited; Bank of China Group Investment Limited; CDH Investments; Ascendent Capital Partners; Boying Investments Limited/SciClone Pharmaceuticals, Inc.	5.20% RBF Cap v1; Conditional specific performance	Reasonable best efforts	Yes	None	No obligation to close the merger unless, if requested by the buyer, SPI has transferred \$113 million in cash held outside the US by its subsidiaries to it, and those offshore funds are held unencumbered.	Failure of the debt financing “to be funded”
The Carlyle Group; GTCR LLC/ Albany Molecular Research, Inc.	6.31% RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	None	None	N/A
CF Corporation/ Fidelity & Guaranty Life	Full specific performance; No RBF, full damages v2	Commercially reasonable efforts	Yes	None	None	N/A
Apollo Global Management, LLC/ West Corporation	6.64% RBF Cap v2; Conditional specific performance	Reasonable best efforts	Yes	Yes	None	N/A
Sinclair Broadcast Group, Inc./Tribune Media Company	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	Yes	None	None	N/A
Coach, Inc./Kate Spade & Company	Full specific performance; No RBF, full damages v2	Reasonable best efforts	None	None	None	N/A
Avantor, Inc./VWR Corporation	6.73% RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	None	None	N/A

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	EFFORTS STANDARD IN COVENANT	OBLIGATION TO ENFORCE RIGHTS AND/OR CAUSE LENDERS TO FUND	EXPLICIT OBLIGATION TO LITIGATE AGAINST THE LENDERS	FINANCING OUT OR FINANCIAL- METRIC CLOSING CONDITION	CRITERIA FOR A FINDING OF FINANCING FAILURE
Marlin Equity Partners/Tangoe, Inc.	6.00% RBF Cap v2; Conditional specific performance	Reasonable best efforts	Yes	None ²	None	Fee payable if, under tender offer structure, the buyer does not receive written confirmation that the proceeds of the debt financing will be available or the proceeds are not in an amount sufficient to close.
Tyson Foods, Inc./ AdvancePierre Foods Holdings, Inc.	Full specific performance; No RBF, damages for willful breach	No covenant, just a representation of available funds	N/A	N/A	None	N/A
Becton, Dickinson and Company/ C. R. Bard, Inc.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	Yes	None	None	N/A
Virtu Financial, Inc./ KCG Holdings, Inc.	Full specific performance; No RBF, full damages v2	Reasonable best efforts	None	None	None	N/A
Harland Clarke Holdings Corp./ RetailMeNot, Inc.	4.15% up to 5.81% RBF Cap v1; Conditional specific performance	Reasonable best efforts	Yes	None	None	Delivery of a financing- extension notice combined with termination as a result of the full amount of the debt financing “failing to be funded or prospectively funded”
Aspen Skiing Company, L.L.C.; KSL Capital Partners/Intrawest Resorts Holdings, Inc.	6.74% RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	Yes	None	N/A
Sino IC Capital Co. Ltd./Xcerra Corporation	3.94% RBF Cap v3; Full specific performance	Reasonable best efforts	None	None	None	N/A
JAB Holding Company/Panera Bread Company	Full specific performance; No RBF, damages for willful breach	No covenant, just a representation of sufficient funds	N/A	N/A	None	N/A
New Mountain Capital, L.L.C./TRC Companies, Inc.	6.50% RBF Cap v2; Full specific performance	No covenant, just a representation as to the equity financing	N/A	N/A	None	N/A

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	EFFORTS STANDARD IN COVENANT	OBLIGATION TO ENFORCE RIGHTS AND/OR CAUSE LENDERS TO FUND	EXPLICIT OBLIGATION TO LITIGATE AGAINST THE LENDERS	FINANCING OUT OR FINANCIAL- METRIC CLOSING CONDITION	CRITERIA FOR A FINDING OF FINANCING FAILURE
MaxLinear, Inc./ Exar Corporation	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	Yes	None	None	N/A
American Securities LLC/Air Methods Corporation	5.98% RBF Cap v3; Conditional specific performance	Reasonable best efforts	None	None	None	N/A
MacDonald, Dettwiler and Associates Ltd./ DigitalGlobe, Inc.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	None	None	None	N/A
Restaurant Brands International Inc./ Popeyes Louisiana Kitchen, Inc.	Full specific performance; No RBF, damages for willful breach	No covenant, just a representation of available funds	N/A	N/A	None	N/A
EQT Partners Inc./ Lumos Networks Corp.	6.95% RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	None	None	N/A
Sonaca Group/LMI Aerospace Inc.	Full specific performance; No RBF, full damages v1	Reasonable best efforts	Yes	None ²	None	N/A
Integrated Device Technology, Inc./ GigPeak, Inc.	Full specific performance; No RBF, damages for willful breach	No covenant, just a representation of sufficient funds	N/A	N/A	None	N/A
Reckitt Benckiser Group plc/Mead Johnson Nutrition Company	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	None	None	None	N/A

DEAL (BUYER/TARGET)	REMEDY FOR BUYER BREACH	EFFORTS STANDARD IN COVENANT	OBLIGATION TO ENFORCE RIGHTS AND/OR CAUSE LENDERS TO FUND	EXPLICIT OBLIGATION TO LITIGATE AGAINST THE LENDERS	FINANCING OUT OR FINANCIAL-METRIC CLOSING CONDITION	CRITERIA FOR A FINDING OF FINANCING FAILURE
CBS Corporation and CBS Radio Inc./Entercom Communications Corp.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	Yes	None	Receipt of (1) no less than \$500 million in financing proceeds for repayment of Entercom's indebtedness and cash collateralization of letters of credit outstanding under Entercom's existing credit facility; and (2) FCC consent with no requirement to dispose of any assets, properties or businesses that would be expected to account for a loss of more than \$40 million EBITDA for the 12 months ended 12/31/2016.	CBS Radio "shall have received the proceeds" of the financing.
Keysight Technologies, Inc./IXIA	29.20% RBF Cap v2; Conditional specific performance	Reasonable best efforts	Yes	None	None	N/A
Ant Financial Services Group/MoneyGram International, Inc.	4.98% (initially)/ 6.81% (as amended) RBF Cap v3; Conditional specific performance	Reasonable best efforts	Yes	Yes	None	N/A
AltaGas Ltd./WGL Holdings, Inc.	4.51% RBF Cap v1; Conditional specific performance	Reasonable best efforts	Yes	Yes	None	Any failure of the debt financing to be available to AltaGas, unless AltaGas has received proceeds of any debt/equity financings and asset sales or dispositions (including as a result of casualty or condemnation) that are required by the debt commitment letter to reduce the debt financing in an amount sufficient to consummate the transactions.

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	EFFORTS STANDARD IN COVENANT	OBLIGATION TO ENFORCE RIGHTS AND/OR CAUSE LENDERS TO FUND	EXPLICIT OBLIGATION TO LITIGATE AGAINST THE LENDERS	FINANCING OUT OR FINANCIAL- METRIC CLOSING CONDITION	CRITERIA FOR A FINDING OF FINANCING FAILURE
British American Tobacco p.l.c./ Reynolds American Inc.	Full specific performance; No RBF, damages for willful breach	Reasonable best efforts	Yes	None	None	N/A
Calamos Partners LLC/Calamos Asset Management, Inc.	Full specific performance; No RBF, damages for willful breach	Commercially reasonable efforts (covenant only for alternative financing)	None	None	None	N/A
Takeda Pharmaceutical Company Limited/ARIAD Pharmaceuticals, Inc.	Full specific performance; No RBF, full damages v2	No covenant, just a representation of available funds	N/A	N/A	None	N/A
Mars, Incorporated/ VCA Inc.	Full specific performance; No RBF, damages for willful breach	No covenant, just a representation of sufficient funds	N/A	N/A	None	None
Gartner, Inc./CEB Inc.	Full specific performance; No RBF, full damages v2	Reasonable best efforts	Yes	None	None	N/A

Notes:

See the footnotes in Table A for descriptions of deal-specific remedies.

The “Explicit Obligation to Litigate Against the Lenders” column indicates whether the agreement makes explicit, over and above the formulation that the buyer must “enforce its rights” against the lenders or “cause the lenders to fund,” an obligation to pursue litigation against the lenders in order to enforce the debt financing. An example of this formulation: “Parent shall cause the Debt Providers to comply with their respective obligations, including to fund the Debt Financing required to consummate the Transactions on the Closing Date, including to pay the aggregate Offer Price at the Acceptance Time and the aggregate Merger Consideration on the Closing Date (including by promptly commencing a litigation proceeding against any breaching Debt Provider to compel such Debt Provider to provide its portion of the Debt Financing or otherwise comply with its obligations under the Debt Commitment Letter or Definitive Financing Agreements).”

The “Financing Out or Financial-Metric Closing Condition” column indicates whether the agreement explicitly makes receipt of the financing proceeds or the satisfaction of a

financial metric (such as minimum cash on hand) a condition of the buyer’s obligation to close. This column does not record whether the target company made a finance-related representation (such as solvency) or covenant (such as payoff of indebtedness), even though the representation or covenant must be brought down to closing in material respects, unless the underlying obligation or metric is expressed explicitly as a closing condition.

¹CVS Health agreed to do “all things necessary” to arrange the debt financing, including entering definitive agreements and satisfying the conditions within its control. The covenant contains a “reasonable best efforts” standard for causing the lenders to fund, enforcing the buyer’s rights, and arranging alternative debt financing if necessary.

²The agreement is explicit that the buyer is not required to commence a proceeding against any lender to enforce the terms of the debt-commitment letter.

Table C: Lender-Related Provisions in Leveraged Public Deals (Reverse Chronological Order)

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	PROVISION LIMITING LENDERS' LIABILITY TO RBF	PROVISION FOR NO RECOURSE TO THE LENDERS UNDER THE MERGER AGREEMENT	GOVERNING LAW AND EXCLUSIVE FORUM FOR DISPUTES WITH THE LENDERS	WAIVER OF JURY TRIAL IN DISPUTES WITH LENDERS	PROVISION FOR NO AMENDMENTS ADVERSE TO THE LENDERS WITHOUT THEIR CONSENT	LENDERS ARE THIRD-PARTY BENEFICIARIES OF THE RELEVANT PROVISIONS
Mallinckrodt plc/Sucampo Pharmaceuticals, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes
TPG Capital; Welsh, Carson, Anderson & Stowe; Humana Inc./Kindred Healthcare, Inc.	7.54% and expenses up to 1.64% RBF Cap v3; Conditional specific perfor- mance	Yes	Yes	New York	Yes	Yes	Yes
Campbell Soup Company/ Snyder's-Lance, Inc.	3.98% RBF Uncapped v1; Full specific performance	Yes	Yes	New York	Yes	Yes	Yes
Penn National Gaming, Inc./ Pinnacle Entertainment, Inc.	Full specific performance; No RBF, full damages v2	N/A	Yes	New York	Yes	Yes	Yes
The Hershey Company/Amplify Snack Brands, Inc.	Full specific performance; No RBF, full damages v2	N/A	None	None	None	N/A	N/A
Unimin Corporation/ Fairmount Santrol Holdings Inc.	10% RBF Uncapped v2; Conditional specific perfor- mance	None	Yes	New York	Yes	Yes	Yes
Cineworld Group plc/Regal Entertainment Group	0.56% RBF Uncapped v1; Full specific performance	None	None	New York (forum only) ¹	Yes	Yes	Yes

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	PROVISION LIMITING LENDERS' LIABILITY TO RBF	PROVISION FOR NO RECOURSE TO THE LENDERS UNDER THE MERGER AGREEMENT	GOVERNING LAW AND EXCLUSIVE FORUM FOR DISPUTES WITH THE LENDERS	WAIVER OF JURY TRIAL IN DISPUTES WITH LENDERS	PROVISION FOR NO AMENDMENTS ADVERSE TO THE LENDERS WITHOUT THEIR CONSENT	LENDERS ARE THIRD-PARTY BENEFICIARIES OF THE RELEVANT PROVISIONS
CVS Health Corporation/ Aetna Inc.	Full specific performance; No RBF, full damages v2	N/A ^{2,3}	Yes	New York	Yes	Yes, except for liability limitation	Yes, except for liability limitation
Prysmian Group/ General Cable Corporation	Full specific performance; No RBF, damages for willful breach	N/A	None	None	None	N/A	N/A
Arby's Restaurant Group, Inc./Buffalo Wild Wings, Inc.	5.43% RBF Cap v2; Conditional specific perfor- mance	Yes	Yes	New York	Yes	Yes	Yes
Marlin Equity Partners/ Bazaarvoice, Inc.	5.01% RBF Cap v1; Conditional specific perfor- mance	Yes	Yes	New York (forum only)	None	Yes, except for liability limitation	Yes, except for liability limitation
Meredith Corporation/ Time Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes
Thoma Bravo, LLC/Barracuda Networks, Inc.	5.99% RBF Cap v3; Conditional specific perfor- mance	Yes	Yes	New York	Yes	Yes	Yes
Talos Energy LLC/ Stone Energy Corporation	Full specific performance; No RBF, damages for willful breach	N/A	None	None ⁴	Yes ⁴	None	Yes
Marvell Technology Group Ltd./Cavium, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	PROVISION LIMITING LENDERS' LIABILITY TO RBF	PROVISION FOR NO RECOURSE TO THE LENDERS UNDER THE MERGER AGREEMENT	GOVERNING LAW AND EXCLUSIVE FORUM FOR DISPUTES WITH THE LENDERS	WAIVER OF JURY TRIAL IN DISPUTES WITH LENDERS	PROVISION FOR NO AMENDMENTS ADVERSE TO THE LENDERS WITHOUT THEIR CONSENT	LENDERS ARE THIRD-PARTY BENEFICIARIES OF THE RELEVANT PROVISIONS
Elliott Management Corporation/ Gigamon Inc.	5.97% RBF Cap v3; Conditional specific perfor- mance	None	Yes	New York	Yes	Yes	Yes
Fintrax Group/ Planet Payment, Inc.	Full specific performance; No RBF, full damages v2	N/A	Yes	New York (forum only)	Yes	Yes	Yes
Amneal Pharmaceuticals LLC/Impax Laboratories, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes
NRD Capital/Ruby Tuesday, Inc.	5.11% RBF Uncapped v2; Full specific performance	None	None	None	None	N/A	N/A
Cooke Inc./ Omega Protein Corporation	Full specific performance; No RBF, full damages v2	N/A	Yes	New York	Yes ⁵	Yes	Yes
Itron, Inc./Silver Spring Networks, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes
Northrop Grumman Corporation/Orbital ATK, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes
United Technologies Corp./Rockwell Collins, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	PROVISION LIMITING LENDERS' LIABILITY TO RBF	PROVISION FOR NO RECOURSE TO THE LENDERS UNDER THE MERGER AGREEMENT	GOVERNING LAW AND EXCLUSIVE FORUM FOR DISPUTES WITH THE LENDERS	WAIVER OF JURY TRIAL IN DISPUTES WITH LENDERS	PROVISION FOR NO AMENDMENTS ADVERSE TO THE LENDERS WITHOUT THEIR CONSENT	LENDERS ARE THIRD-PARTY BENEFICIARIES OF THE RELEVANT PROVISIONS
Zenith Energy U.S., L.P./Arc Logistics Partners LP	7.51% RBF Cap v2; Conditional specific perfor- mance	Yes	Yes	New York	None	Yes, except for liability limitation	Yes, except for liability limitation
Energy Capital Partners; Access Industries; Canada Pension Plan Investment Board/Calpine Corporation	Two-Tier RBF: 1.80% or 6.03%; Conditional specific perfor- mance	Yes	Yes	New York (governing law only)	None	Yes	Yes
United Rentals, Inc./Neff Corporation	Full specific performance; No RBF, full damages v2	N/A	None	None	None	N/A	N/A
Wabash National Corporation/ Supreme Industries, Inc.	5.56% RBF Uncapped v1; Full specific performance	Yes	Yes	New York	Yes ⁵	Yes	Yes
Jacobs Engineering Group Inc./CH2M HILL Companies, Ltd.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes
Kohlberg Kravis Roberts & Co. L.P.; Walgreens Boots Alliance, Inc./PharMerica Corporation	6.00% RBF Cap v3; Conditional specific perfor- mance	Yes	Yes	New York (forum only)	Yes	None	Yes
Discovery Communications, Inc./Scripps Networks Interactive, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	PROVISION LIMITING LENDERS' LIABILITY TO RBF	PROVISION FOR NO RECOURSE TO THE LENDERS UNDER THE MERGER AGREEMENT	GOVERNING LAW AND EXCLUSIVE FORUM FOR DISPUTES WITH THE LENDERS	WAIVER OF JURY TRIAL IN DISPUTES WITH LENDERS	PROVISION FOR NO AMENDMENTS ADVERSE TO THE LENDERS WITHOUT THEIR CONSENT	LENDERS ARE THIRD-PARTY BENEFICIARIES OF THE RELEVANT PROVISIONS
Mitel Networks Corporation/ ShoreTel, Inc.	5.34% RBF Cap v1; Conditional specific performance	Yes	Yes	New York	Yes	Yes	Yes ⁶
Internet Brands, Inc./WebMD Health Corp.	6.70% RBF Cap v3; Conditional specific performance	Yes	None	New York	Yes	Yes	Yes, except for liability limitation
H&E Equipment Services, Inc./Neff Corporation	Full specific performance; No RBF, full damages v2	N/A	Yes	New York (forum only)	None	Yes	Yes
Apollo Global Management, LLC/ClubCorp Holdings, Inc.	6.54% RBF Cap v3; Conditional specific performance	Yes	Yes	New York	Yes	Yes	Yes
Cincinnati Bell Inc./Hawaiian Telcom Holdco, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes ⁵	Yes	Yes
H.I.G. Capital, LLC/NCI, Inc.	6.96% RBF Cap v1; Conditional specific performance	Yes	Yes	New York	Yes	Yes	Yes
Red Ventures Holdco, LP/ Bankrate, Inc.	6.63% RBF Cap v2; Conditional specific performance	Yes	Yes	New York	Yes	Yes	Yes
Monomoy Capital Partners/West Marine, Inc.	Multi-Tier RBF: 4.44% or 5.04% or 7.40%; Conditional specific performance	Yes ⁷	Yes	New York	Yes	Yes	Yes

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	PROVISION LIMITING LENDERS' LIABILITY TO RBF	PROVISION FOR NO RECOURSE TO THE LENDERS UNDER THE MERGER AGREEMENT	GOVERNING LAW AND EXCLUSIVE FORUM FOR DISPUTES WITH THE LENDERS	WAIVER OF JURY TRIAL IN DISPUTES WITH LENDERS	PROVISION FOR NO AMENDMENTS ADVERSE TO THE LENDERS WITHOUT THEIR CONSENT	LENDERS ARE THIRD-PARTY BENEFICIARIES OF THE RELEVANT PROVISIONS
Sycamore Partners/ Staples, Inc.	5.01% RBF Cap v3; Conditional specific perfor- mance	Yes	Yes	New York	Yes	Yes	Yes
True Wind Capital Management, LLC/ARI Network Services, Inc.	6.51% RBF Cap v3; Conditional specific perfor- mance	Yes	Yes	New York	Yes	Yes	Yes, except for governing law, jury waiver, and adverse amendments
EQT Corporation/ Rice Energy Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes
Pamplona Capital Management, LLP/PAREXEL International Corporation	5.96% RBF Cap v3; Conditional specific perfor- mance	Yes	Yes	New York	Yes	Yes	Yes
Amazon.com, Inc./Whole Foods Market, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	None	Yes	Yes, except for governing law and venue
Donuts Inc./ Rightside Group, Ltd.	Full specific performance; No RBF, damages for willful breach	N/A	None	None	None	N/A	N/A

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	PROVISION LIMITING LENDERS' LIABILITY TO RBF	PROVISION FOR NO RECOURSE TO THE LENDERS UNDER THE MERGER AGREEMENT	GOVERNING LAW AND EXCLUSIVE FORUM FOR DISPUTES WITH THE LENDERS	WAIVER OF JURY TRIAL IN DISPUTES WITH LENDERS	PROVISION FOR NO AMENDMENTS ADVERSE TO THE LENDERS WITHOUT THEIR CONSENT	LENDERS ARE THIRD-PARTY BENEFICIARIES OF THE RELEVANT PROVISIONS
GL Capital Management GP Limited; Bank of China Group Investment Limited; CDH Investments; Ascendent Capital Partners; Boying Investments Limited/SciClone Pharmaceuticals, Inc.	5.20% RBF Cap v1; Conditional specific performance	Yes	None	None	None	None	None
The Carlyle Group; GTCR LLC/ Albany Molecular Research, Inc.	6.31% RBF Cap v3; Conditional specific performance	Yes	Yes	New York	Yes	Yes	Yes
CF Corporation/ Fidelity & Guaranty Life	Full specific performance; No RBF, full damages v2	N/A	Yes	New York	Yes ⁵	None	Yes
Apollo Global Management, LLC/West Corporation	6.64% RBF Cap v2; Conditional specific performance	Yes	Yes	New York	Yes	Yes	Yes
Sinclair Broadcast Group, Inc./ Tribune Media Company	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes
Coach, Inc./Kate Spade & Company	Full specific performance; No RBF, full damages v2	N/A	Yes	New York	Yes	Yes	Yes
Avantor, Inc./VWR Corporation	6.73% RBF Cap v3; Conditional specific performance	Yes	Yes	New York	Yes	Yes	Yes

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	PROVISION LIMITING LENDERS' LIABILITY TO RBF	PROVISION FOR NO RECOURSE TO THE LENDERS UNDER THE MERGER AGREEMENT	GOVERNING LAW AND EXCLUSIVE FORUM FOR DISPUTES WITH THE LENDERS	WAIVER OF JURY TRIAL IN DISPUTES WITH LENDERS	PROVISION FOR NO AMENDMENTS ADVERSE TO THE LENDERS WITHOUT THEIR CONSENT	LENDERS ARE THIRD-PARTY BENEFICIARIES OF THE RELEVANT PROVISIONS
Marlin Equity Partners/Tangoe, Inc.	6.00% RBF Cap v2; Conditional specific perfor- mance	Yes	Yes	New York	Yes	Yes	Yes
Tyson Foods, Inc./ AdvancePierre Foods Holdings, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes
Becton, Dickinson and Company/ C. R. Bard, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes
Virtu Financial, Inc./KCG Holdings, Inc.	Full specific performance; No RBF, full damages v2	N/A	Yes	New York	Yes	Yes	Yes
Harland Clarke Holdings Corp./ RetailMeNot, Inc.	4.15% up to 5.81% RBF Cap v1; Conditional specific perfor- mance	Yes	None	New York (forum only)	Yes	None	Yes
Aspen Skiing Company, L.L.C.; KSL Capital Partners/Intrawest Resorts Holdings, Inc.	6.74% RBF Cap v3; Conditional specific perfor- mance	Yes	Yes	New York	Yes	Yes	Yes
Sino IC Capital Co. Ltd./Xcerra Corporation	3.94% RBF Cap v3; Full specific performance	None	None	None	None	N/A	N/A
JAB Holding Company/Panera Bread Company	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York (forum only)	Yes	Yes	Yes

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	PROVISION LIMITING LENDERS' LIABILITY TO RBF	PROVISION FOR NO RECOURSE TO THE LENDERS UNDER THE MERGER AGREEMENT	GOVERNING LAW AND EXCLUSIVE FORUM FOR DISPUTES WITH THE LENDERS	WAIVER OF JURY TRIAL IN DISPUTES WITH LENDERS	PROVISION FOR NO AMENDMENTS ADVERSE TO THE LENDERS WITHOUT THEIR CONSENT	LENDERS ARE THIRD-PARTY BENEFICIARIES OF THE RELEVANT PROVISIONS
New Mountain Capital, L.L.C./ TRC Companies, Inc.	6.50% RBF Cap v2; Full specific performance	Yes	Yes	New York (forum only)	Yes	Yes	Yes
MaxLinear, Inc./ Exar Corporation	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes
American Securities LLC/ Air Methods Corporation	5.98% RBF Cap v3; Conditional specific perfor- mance	Yes	Yes	New York	Yes	Yes	Yes
MacDonald, Dettwiler and Associates Ltd./ DigitalGlobe, Inc.	Full specific performance; No RBF, damages for willful breach	N/A ^{2,3}	Yes	New York	None	Yes	Yes
Restaurant Brands International Inc./ Popeyes Louisiana Kitchen, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	None	Yes	None	None
EQT Partners Inc./ Lumos Networks Corp.	6.95% RBF Cap v3; Conditional specific perfor- mance	Yes	Yes	New York	Yes	Yes	Yes
Sonaca Group/LMI Aerospace Inc.	Full specific performance; No RBF, full damages v1	N/A	Yes	New York	Yes	Yes	Yes
Integrated Device Technology, Inc./ GigPeak, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	PROVISION LIMITING LENDERS' LIABILITY TO RBF	PROVISION FOR NO RECOURSE TO THE LENDERS UNDER THE MERGER AGREEMENT	GOVERNING LAW AND EXCLUSIVE FORUM FOR DISPUTES WITH THE LENDERS	WAIVER OF JURY TRIAL IN DISPUTES WITH LENDERS	PROVISION FOR NO AMENDMENTS ADVERSE TO THE LENDERS WITHOUT THEIR CONSENT	LENDERS ARE THIRD-PARTY BENEFICIARIES OF THE RELEVANT PROVISIONS
Reckitt Benckiser Group plc/Mead Johnson Nutrition Company	Full specific performance; No RBF, damages for willful breach	N/A	Yes	England (forum only) ¹	Yes	Yes	Yes
CBS Corporation and CBS Radio Inc./Entercom Communications Corp.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes
Keysight Technologies, Inc./ IXIA	29.20% RBF Cap v2; Conditional specific performance	Yes ⁷	Yes	New York	Yes	Yes	Yes
Ant Financial Services Group/ MoneyGram International, Inc.	4.98% (initial- ly)/ 6.81% (as amend-ed) RBF Cap v3; Conditional specific perfor- mance	Yes	Yes	New York	None	Yes, except for liability limitation	Yes, except for liability limitation
AltaGas Ltd./WGL Holdings, Inc.	4.51% RBF Cap v1; Conditional specific perfor- mance	Yes	Yes	New York	Yes	Yes	Yes
British American Tobacco p.l.c./ Reynolds American Inc.	Full specific performance; No RBF, damages for willful breach	N/A	None	None	None	N/A	N/A
Calamos Partners LLC/ Calamos Asset Management, Inc.	Full specific performance; No RBF, damages for willful breach	N/A	None	None	None	N/A	N/A

DEAL (BUYER/ TARGET)	REMEDY FOR BUYER BREACH	PROVISION LIMITING LENDERS' LIABILITY TO RBF	PROVISION FOR NO RECOURSE TO THE LENDERS UNDER THE MERGER AGREEMENT	GOVERNING LAW AND EXCLUSIVE FORUM FOR DISPUTES WITH THE LENDERS	WAIVER OF JURY TRIAL IN DISPUTES WITH LENDERS	PROVISION FOR NO AMENDMENTS ADVERSE TO THE LENDERS WITHOUT THEIR CONSENT	LENDERS ARE THIRD-PARTY BENEFICIARIES OF THE RELEVANT PROVISIONS
Takeda Pharmaceutical Company Limited/ARIAD Pharmaceuticals, Inc.	Full specific performance; No RBF, full damages v2	N/A	None	None	None	N/A	N/A
Mars, Incorporated/VCA Inc.	Full specific performance; No RBF, damages for willful breach	N/A	Yes	New York	Yes	Yes	Yes
Gartner, Inc./CEB Inc.	Full specific performance; No RBF, full damages v2	N/A	Yes	New York (governing law only)	Yes	Yes	Yes

NOTES:

See the footnotes in Table A for descriptions of deal-specific remedies.

¹The merger agreement provides that the lenders are third-party beneficiaries of the governing-law provision, but the provision makes no mention of the lenders and only addresses the governing law of the merger agreement (Delaware).

²The merger agreement provides that the buyer's reverse break-up fee for regulatory failure is the target company's sole and exclusive remedy, including for willful breach, and that this fee limits the lenders' liability as well. Although the fee functions as complete cap on damages, the agreement's remedy is categorized as "damages" and not a reverse break-up fee because the fee can only be triggered by regulatory failure, not unrelated breach or failure to close.

³The merger agreement provides that the buyer's fiduciary break-up fee is the target company's sole and exclusive remedy, including for willful breach, and that this fee limits the lenders' liability as well. Although the fee functions as a complete cap on damages, the agreement's remedy is categorized as "damages" and not a reverse break-up fee because the fee can only be triggered by fiduciary-related events, not unrelated breach or failure to close.

⁴The merger agreement provides that the lenders are third-party beneficiaries of the governing-law, forum and jury-waiver provisions. The provisions make no mention of the lenders and only address the governing law of the merger agreement and the forum for disputes over it (Delaware).

⁵The jury waiver is drafted only with respect to the parties to the merger agreement, yet the agreement explicitly makes the lenders third-party beneficiaries of the waiver. The presumed intention is that the lenders can enforce the waiver to their benefit.

⁶The agreement states explicitly that the lenders are third-party beneficiaries of the non-recourse, governing-law, and forum provisions. The agreement carves out the liability-limitation, jury-waiver, and adverse-amendment provisions from the no-third-party-beneficiaries provision, but does not affirmatively state that the lenders are in fact beneficiaries of those provisions.

⁷The limitation of liability to payment of the reverse break-up fee is drafted only with respect to the target company, yet the agreement explicitly makes the lenders third-party beneficiaries of the limitation. The presumed intention is that the lenders can enforce the limitation to their benefit.

Table D: Post-Termination Liability in Leveraged Public Deals (Reverse Chronological Order)

DEAL (BUYER/TARGET)	REMEDY FOR BUYER BREACH	STANDARD FOR BUYER'S CONTINUING POST-TERMINATION LIABILITY, BEYOND PAYMENT OF REVERSE BREAK-UP FEE	DEFINITION OF WILLFULNESS FOR POST-TERMINATION LIABILITY
Mallinckrodt plc/Sucampo Pharmaceuticals, Inc.	Full specific performance; No RBF, damages for willful breach	Fraud or willful breach	A material breach of any covenant or agreement that is a consequence of an act, or failure to act, undertaken with the knowledge that the taking of such act, or failure to act, would result in such breach.
TPG Capital; Welsh, Carson, Anderson & Stowe; Humana Inc./Kindred Healthcare, Inc.	7.54% and expenses up to 1.64% RBF Cap v3; Conditional specific performance	Fraud	N/A
Campbell Soup Company/Snyder's-Lance, Inc.	3.98% RBF Uncapped v1; Full specific performance	Fraud or willful breach	A material breach that is a consequence of an act undertaken or a failure to take an act with the knowledge that the taking of such act or the failure to take such act would cause a breach.
Penn National Gaming, Inc./Pinnacle Entertainment, Inc.	Full specific performance; No RBF, full damages v2	Fraud or willful and material breach	A material breach that is a consequence of an act undertaken or failure to act with knowledge that the taking of or failure to take such act would cause a material breach. A party's failure to close when required shall be a Willful and Material Breach of this Agreement.
The Hershey Company/Amplify Snack Brands, Inc.	Full specific performance; No RBF, full damages v2	Fraud or knowing and intentional breach	Any failure of The Hershey Company to satisfy its obligation to accept for payment or pay for the tendered stock when required following satisfaction of all of the tender offer conditions, and any failure to cause the merger to be effected following satisfaction of the closing conditions, will be deemed to constitute an intentional and material breach.
Unimin Corporation/Fairmount Santrol Holdings Inc.	10% RBF Uncapped v2; Conditional specific performance	Fraud or willful breach	A material breach or failure to perform that is the consequence of an act or omission with the knowledge that the taking of, or failure to take, such act would, or would be reasonably expected to, cause a material breach.
Cineworld Group plc/Regal Entertainment Group	0.56% RBF Uncapped v1; Full specific performance	Willful breach	A material breach of any covenant or agreement that is a consequence of an act, or failure to act, undertaken with the actual knowledge that the taking of such act, or failure to act, would result, or would reasonably be expected to result, in such breach. The failure to close when required shall be a Willful Breach.

DEAL (BUYER/TARGET)	REMEDY FOR BUYER BREACH	STANDARD FOR BUYER'S CONTINUING POST-TERMINATION LIABILITY, BEYOND PAYMENT OF REVERSE BREAK-UP FEE	DEFINITION OF WILLFULNESS FOR POST-TERMINATION LIABILITY
CVS Health Corporation/ Aetna Inc.	Full specific performance; No RBF, full damages v2	Fraud or willful breach	A material breach that is the consequence of an act or omission with the actual knowledge that the taking of such act or failure to take such action would be a material breach. The failure, for any reason, other than as a result of any material breach by Aetna, of CVS Health to have sufficient cash available on the date that the closing is required to occur, and/or the failure to pay the aggregate cash consideration on the date that the closing is required to occur, shall constitute a Willful Breach.
Prysmian Group/General Cable Corporation	Full specific performance; No RBF, damages for willful breach	Fraud or willful and material breach	A material breach that is a consequence of an act undertaken or a failure to take an act with the knowledge that the taking of such act or the failure to take such act would cause a material breach.
Arby's Restaurant Group, Inc./Buffalo Wild Wings, Inc.	5.43% RBF Cap v2; Conditional Specific Performance v3	None	N/A
Marlin Equity Partners/ Bazaarvoice, Inc.	5.01% RBF Cap v1; Conditional specific performance	Fraud	N/A
Meredith Corporation/ Time Inc.	Full specific performance; No RBF, damages for willful breach	Willful breach	A deliberate act or a deliberate failure to act, taken or not taken with the actual knowledge that such act or failure to act would, or would reasonably be expected to, result in or constitute a material breach, regardless of whether breaching was the object of the act or failure to act.
Thoma Bravo, LLC/ Barracuda Networks, Inc.	5.99% RBF Cap v3; Conditional specific performance	Fraud	N/A
Talos Energy LLC/ Stone Energy Corporation	Full specific performance; No RBF, damages for willful breach	Intentional fraud or willful and material breach	A material breach of any covenant, agreement or obligation that is a consequence of an act undertaken (or the failure to take an act) with knowledge that the taking of (or failure to take) such act would, or would reasonably be expected to, cause a breach. "Knowledge" means the actual knowledge, after reasonable inquiry of their respective direct reports, of the individuals listed on the disclosure schedule.
Marvell Technology Group Ltd./Cavium, Inc.	Full specific performance; No RBF, damages for willful breach	Fraud or knowing and intentional breach	A material breach that is a consequence of an act undertaken with the knowledge that the taking of such act, or failure to act, would, or would reasonably be expected to, result in a breach. "Knowledge" means the knowledge of the individuals identified on the disclosure schedule, after reasonable inquiry.

DEAL (BUYER/TARGET)	REMEDY FOR BUYER BREACH	STANDARD FOR BUYER'S CONTINUING POST-TERMINATION LIABILITY, BEYOND PAYMENT OF REVERSE BREAK-UP FEE	DEFINITION OF WILLFULNESS FOR POST-TERMINATION LIABILITY
Elliott Management Corporation/Gigamon Inc.	5.97% RBF Cap v3; Conditional specific performance	None	N/A
Fintrax Group/Planet Payment, Inc.	Full specific performance; No RBF, full damages v2	Knowing or intentional breach or fraud	Any failure of Fintrax to satisfy its obligation to accept for payment or pay for the shares following satisfaction of the tender offer conditions, and any failure of Fintrax to cause the merger to be effected following satisfaction of the closing conditions, will be deemed to constitute an intentional and material breach.
Amneal Pharmaceuticals LLC/Impax Laboratories, Inc.	Full specific performance; No RBF, damages for willful breach	Fraud or willful and material breach	None
NRD Capital/Ruby Tuesday, Inc.	5.11% RBF Uncapped v2; Full specific performance	Willful and intentional breach	None
Cooke Inc./Omega Protein Corporation	Full specific performance; No RBF, full damages v2	Fraud or willful breach	A material breach that is a consequence of an action undertaken or failure to take an action with the actual or constructive (that which a reasonable person should know) knowledge that the taking of such action or such failure to act would constitute or be reasonably likely to result in a breach. Any failure by a party to close after the applicable conditions to closing have been satisfied or waived shall constitute a willful breach.
Itron, Inc./Silver Spring Networks, Inc.	Full specific performance; No RBF, damages for willful breach	Fraud or willful breach	A material breach that is a consequence of an act or failure to act undertaken with knowledge (after reasonable inquiry) that the act or failure to act would reasonably be expected to result in or constitute a breach. "Knowledge" means the actual knowledge of Itron's executive officers.
Northrop Grumman Corporation/Orbital ATK, Inc.	Full specific performance; No RBF, damages for willful breach	Intentional and material breach	None
United Technologies Corp./Rockwell Collins, Inc.	Full specific performance; No RBF, damages for willful breach	Fraud or intentional breach	An action or omission that the breaching party intentionally takes (or fails to take) and knows would, or knows would reasonably be expected to, cause a material breach.
Zenith Energy U.S., L.P./Arc Logistics Partners LP	7.51% RBF Cap v2; Conditional specific performance	None	N/A

DEAL (BUYER/TARGET)	REMEDY FOR BUYER BREACH	STANDARD FOR BUYER'S CONTINUING POST-TERMINATION LIABILITY, BEYOND PAYMENT OF REVERSE BREAK-UP FEE	DEFINITION OF WILLFULNESS FOR POST-TERMINATION LIABILITY
Energy Capital Partners; Access Industries; Canada Pension Plan Investment Board/Calpine Corporation	Two-Tier RBF: 1.80% or 6.03%; Conditional specific performance	None (larger fee is payable if ratings downgrade is caused by action taken with "intent" to cause the downgrade)	N/A
United Rentals, Inc./Neff Corporation	Full specific performance; No RBF, full damages v2	Fraud or willful breach	An act or a failure to act with the actual or constructive knowledge that the taking of such act or failure to take such act could cause or result in a material breach and does actually cause or result in a material breach. A failure of a party to close the merger as required (regardless of whether the financing has been obtained) shall be deemed a willful and material breach.
Wabash National Corporation/Supreme Industries, Inc.	5.56% RBF Uncapped v1; Full specific performance	Fraud or willful and material breach	An act or a failure to act, which act or failure to act constitutes in and of itself a material breach, with actual knowledge that the taking of the act or failure to act would, or would reasonably be expected to, cause or constitute a breach.
Jacobs Engineering Group Inc./CH2M HILL Companies, Ltd.	Full specific performance; No RBF, damages for willful breach	Fraud or willful and material breach	None
Kohlberg Kravis Roberts & Co. L.P.; Walgreens Boots Alliance, Inc./PharMerica Corporation	6.00% RBF Cap v3; Conditional specific performance	None	N/A
Discovery Communications, Inc./Scripps Networks Interactive, Inc.	Full specific performance; No RBF, damages for willful breach	Fraud or willful breach	A deliberate act or a deliberate failure to act, taken or not taken with the actual knowledge that such act or failure to act would, or would reasonably be expected to, result in or constitute a material breach, regardless of whether breaching was the object of the act or failure to act.
Mitel Networks Corporation/ShoreTel, Inc.	5.34% RBF Cap v1; Conditional specific performance	None	N/A
Internet Brands, Inc./WebMD Health Corp.	6.70% RBF Cap v3; Conditional specific performance	None	N/A
H&E Equipment Services, Inc./Neff Corporation	Full specific performance; No RBF, full damages v2	Fraud or willful breach	An act or a failure to act with the actual or constructive knowledge that the taking of such act or failure to take such act could cause or result in a material breach and does actually cause or result in a material breach. A failure of a party to close the merger as required (regardless of whether the financing has been obtained) shall be deemed a willful and material breach.

DEAL (BUYER/TARGET)	REMEDY FOR BUYER BREACH	STANDARD FOR BUYER'S CONTINUING POST-TERMINATION LIABILITY, BEYOND PAYMENT OF REVERSE BREAK-UP FEE	DEFINITION OF WILLFULNESS FOR POST-TERMINATION LIABILITY
Apollo Global Management, LLC/ClubCorp Holdings, Inc.	6.54% RBF Cap v3; Conditional specific performance	None	N/A
Cincinnati Bell Inc./Hawaiian Telcom Holdco, Inc.	Full specific performance; No RBF, damages for willful breach	Fraud or willful and material beach	None
H.I.G. Capital, LLC/NCI, Inc.	6.96% RBF Cap v1; Conditional specific performance	None	N/A
Red Ventures Holdco, LP/ Bankrate, Inc.	6.63% RBF Cap v2; Conditional specific performance	None	N/A
Monomoy Capital Partners/ West Marine, Inc.	Multi-Tier RBF: 4.44% or 5.04% or 7.40%; Conditional specific performance	None	N/A
Sycamore Partners/ Staples, Inc.	5.01% RBF Cap v3; Conditional specific performance	None	N/A
True Wind Capital Management, LLC/ ARI Network Services, Inc.	6.51% RBF Cap v3; Conditional specific performance	None	N/A
EQT Corporation/ Rice Energy Inc.	Full specific performance; No RBF, damages for willful breach	Intentional fraud or willful and material breach	None
Pamplona Capital Management, LLP/ PAREXEL International Corporation	5.96% RBF Cap v3; Conditional specific performance	Fraud	N/A
Amazon.com, Inc. / Whole Foods Market, Inc.	Full specific performance; No RBF, damages for willful breach	Willful and material beach	A material breach that is a consequence of an act undertaken or a failure to take an act with the knowledge that the taking of such act or the failure to take such act would cause a material breach.
Donuts Inc./Rightside Group, Ltd.	Full specific performance; No RBF, damages for willful breach	Willful and intentional breach	None

DEAL (BUYER/TARGET)	REMEDY FOR BUYER BREACH	STANDARD FOR BUYER'S CONTINUING POST-TERMINATION LIABILITY, BEYOND PAYMENT OF REVERSE BREAK-UP FEE	DEFINITION OF WILLFULNESS FOR POST-TERMINATION LIABILITY
GL Capital Management GP Limited; Bank of China Group Investment Limited; CDH Investments; Ascendent Capital Partners; Boying Investments Limited/SciClone Pharmaceuticals, Inc.	5.20% RBF Cap v1; Conditional specific performance	None	N/A
The Carlyle Group; GTCR LLC/Albany Molecular Research, Inc.	6.31% RBF Cap v3; Conditional specific performance	None	N/A
CF Corporation/Fidelity & Guaranty Life	Full specific performance; No RBF, full damages v2	Intentional and material breach or fraud	Failure to close when otherwise obligated to do so shall be deemed an intentional and material breach.
Apollo Global Management, LLC/West Corporation	6.64% RBF Cap v2; Conditional specific performance	None	N/A
Sinclair Broadcast Group, Inc./Tribune Media Company	Full specific performance; No RBF, damages for willful breach	Willful breach	A deliberate act or a deliberate failure to act, taken or not taken with the actual knowledge that such act or failure to act would, or would reasonably be expected to, result in or constitute a material breach, regardless of whether breaching was the object of the act or failure to act.
Coach, Inc./Kate Spade & Company	Full specific performance; No RBF, full damages v2	Willful and material breach	A willful and deliberate act or a willful and deliberate failure to act (including a failure to cure), in each case that is the consequence of an act or omission by a party that knows that the taking of such act or failure to take such act would or would reasonably be expected to cause a breach (regardless of whether breaching was the object of the act or failure to act), it being understood that such term shall include, in any event, the failure to consummate the tender offer or the merger when required to do so.
Avantor, Inc./VWR Corporation	6.73% RBF Cap v3; Conditional specific performance	None	N/A
Marlin Equity Partners/Tangoe, Inc.	6.00% RBF Cap v2; Conditional specific performance	None	N/A
Tyson Foods, Inc./AdvancePierre Foods Holdings, Inc.	Full specific performance; No RBF, damages for willful breach	Fraud or knowing and intentional breach	A material breach that is a consequence of an act undertaken with the knowledge that the taking of such act, or failure to act, would, or would be reasonably expected to, result in a breach.

DEAL (BUYER/TARGET)	REMEDY FOR BUYER BREACH	STANDARD FOR BUYER'S CONTINUING POST-TERMINATION LIABILITY, BEYOND PAYMENT OF REVERSE BREAK-UP FEE	DEFINITION OF WILLFULNESS FOR POST-TERMINATION LIABILITY
Becton, Dickinson and Company/C. R. Bard, Inc.	Full specific performance; No RBF, damages for willful breach	Fraud or willful breach	A material breach that is a consequence of an act undertaken or a failure to take an act with the knowledge that the taking of such act or the failure to take such act would, or would reasonably be expected to, cause a material breach. "Knowledge" means the actual knowledge, after reasonable inquiry, of the individuals listed on the disclosure schedule.
Virtu Financial, Inc./KCG Holdings, Inc.	Full specific performance; No RBF, full damages v2	Fraud or material and willful breach	An intentional action or omission that causes a breach of a representation, warranty, agreement or covenant and the breaching party knows at the time of such intentional action or omission is or would constitute a breach, or would reasonably be expected to result in a breach, of such representation, warranty, agreement or covenant. The failure to consummate the merger when the relevant conditions to the merger have been satisfied and Virtu Financial is obligated to effectuate the closing will, in and of itself, constitute a Willful Breach.
Harland Clarke Holdings Corp./RetailMeNot, Inc.	4.15% up to 5.81% RBF Cap v1; Conditional specific performance	None	N/A
Aspen Skiing Company, L.L.C.; KSL Capital Partners/Intrawest Resorts Holdings, Inc.	6.74% RBF Cap v3; Conditional specific performance	None	N/A
Sino IC Capital Co. Ltd./Xcerra Corporation	3.94% RBF Cap v3; Full specific performance	None	N/A
JAB Holding Company/Panera Bread Company	Full specific performance; No RBF, damages for willful breach	Fraud or willful breach	A material breach or failure to perform any covenant or other agreement that is a consequence of an act or failure to act with actual knowledge, or knowledge that a person acting reasonably under the circumstances should have, that such act or failure to act would, or would be reasonably expected to, result in or constitute a breach of or failure of performance.
New Mountain Capital, L.L.C./TRC Companies, Inc.	6.50% RBF Cap v2; Full specific performance	None	N/A
MaxLinear, Inc./Exar Corporation	Full specific performance; No RBF, damages for willful breach	Willful, knowing and material breach	None
American Securities LLC/Air Methods Corporation	5.98% RBF Cap v3; Conditional specific performance	None	N/A

DEAL (BUYER/TARGET)	REMEDY FOR BUYER BREACH	STANDARD FOR BUYER'S CONTINUING POST-TERMINATION LIABILITY, BEYOND PAYMENT OF REVERSE BREAK-UP FEE	DEFINITION OF WILLFULNESS FOR POST-TERMINATION LIABILITY
MacDonald, Dettwiler and Associates Ltd./ DigitalGlobe, Inc.	Full specific performance; No RBF, damages for willful breach	Willful and material breach	A material breach that is a consequence of an act taken, or the failure to take an act required to be taken, when knowing that the taking of, or the failure to take, such act would, or would be reasonably be expected to, result in a breach.
Restaurant Brands International Inc./Popeyes Louisiana Kitchen, Inc.	Full specific performance; No RBF, damages for willful breach	Intentional and material breach	None
EQT Partners Inc./ Lumos Networks Corp.	6.95% RBF Cap v3; Conditional specific performance	None	N/A
Sonaca Group/LMI Aerospace Inc.	Full specific performance; No RBF, full damages v1	Material breach	N/A
Integrated Device Technology, Inc./ GigPeak, Inc.	Full specific performance; No RBF, damages for willful breach	Willful and material breach	None
Reckitt Benckiser Group plc/Mead Johnson Nutrition Company	Full specific performance; No RBF, damages for willful breach	Fraud or any material breach	A breach that is the consequence of an act or omission with the actual knowledge that such act or omission would be a material breach.
CBS Corporation and CBS Radio Inc./Entercom Communications Corp.	Full specific performance; No RBF, damages for willful breach	Fraud or willful and material breach	None
Keysight Technologies, Inc./ IXIA	29.20% RBF Cap v2; Conditional specific performance	None	N/A
Ant Financial Services Group/MoneyGram International, Inc.	4.98% (initially)/6.81% (as amended) RBF Cap v3; Conditional specific performance	None	N/A
AltaGas Ltd./ WGL Holdings, Inc.	4.51% RBF Cap v1; Conditional specific performance	None	N/A
British American Tobacco p.l.c./Reynolds American Inc.	Full specific performance; No RBF, damages for willful breach	Willful and material breach	None

DEAL (BUYER/TARGET)	REMEDY FOR BUYER BREACH	STANDARD FOR BUYER'S CONTINUING POST-TERMINATION LIABILITY, BEYOND PAYMENT OF REVERSE BREAK-UP FEE	DEFINITION OF WILLFULNESS FOR POST-TERMINATION LIABILITY
Calamos Partners LLC/Calamos Asset Management, Inc.	Full specific performance; No RBF, damages for willful breach	Willful or intentional breach	None
Takeda Pharmaceutical Company Limited/ARIAD Pharmaceuticals, Inc.	Full specific performance; No RBF, full damages v2	Willful and intentional breach	A deliberate action or omission (including a failure to cure circumstances) when knowing knows such action or omission is or would reasonably be expected to result in a breach, it being understood that such term shall include, in any event, the failure to consummate the tender offer or the closing when required to do so.
Mars, Incorporated/ VCA Inc.	Full specific performance; No RBF, damages for willful breach	Fraud or willful breach	A breach that is the result of a willful or intentional act or failure to act that would, or reasonably would be expected, to result in a material breach.
Gartner, Inc./CEB Inc.	Full specific performance; No RBF, full damages v2	Material and intentional breach	Any statement, act or failure to act that is material and intended to be a misrepresentation or a breach of any covenant or agreement. No such termination shall relieve a party from any liability for its failure to consummate the merger when required after the conditions precedent to such party's obligations to effect the closing have been satisfied or waived.

NOTE:

Bold text indicates language that forms the basis for categorizing the post-termination monetary remedy as "full damages."