



**WINSTEAD**

# **MIDSTREAM OIL & GAS M&A DEAL POINT STUDY**

**(Including Transactions from 2013-2017)**



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# Midstream M&A Study Overview

This Midstream Oil and Gas M&A Study (this “Midstream M&A Study”) provides statistical information concerning certain key deal terms in 56 publicly-available M&A agreements involving the acquisition of midstream oil and gas assets or companies. In preparing this Midstream M&A Study, the author reviewed how these key deal terms were summarized by Practical Law Company (a division of West Publishing Corporation) for each of these 56 deals.

This Midstream M&A Study also contains a comparison of its findings against the findings of the *Private Target Mergers & Acquisitions Deal Points Study (Including Transactions from 2016 and H1 2017)* (the “ABA Study”), a project of the M&A Market Trends Subcommittee of the Mergers & Acquisition Committee of the American Bar Association’s Business Law Section. The ABA Study analyzes 139 M&A transactions from a variety of industries. Further information about the ABA Study, including its methodology and other matters, is set forth in the ABA Study. Due to time constraints, this Midstream M&A Study does not cover all of the key deal terms that are analyzed in the ABA Study. In addition, in some instances, this Midstream M&A Study does not analyze key deal terms in as much detail as does the ABA Study.

While efforts were made to ensure that key deal terms were defined, used and tabulated similarly by the author, the ABA and Practical Law Company (so as to make “apples to apples” comparisons in this Midstream M&A Study; and hence similar language (e.g., defining subsets of populations which were studied) from the ABA Study is used in this Midstream M&A Study), inevitably human judgment has been exercised and there may be instances where key deal terms were defined, used and tabulated somewhat differently by the author, the ABA and Practical Law Company. The author has noted in this Midstream M&A Study the instances of which he is aware where there are or may be differences in methodology as between this Midstream M&A Study, the ABA Study, and Practical Law Company’s transaction summaries.

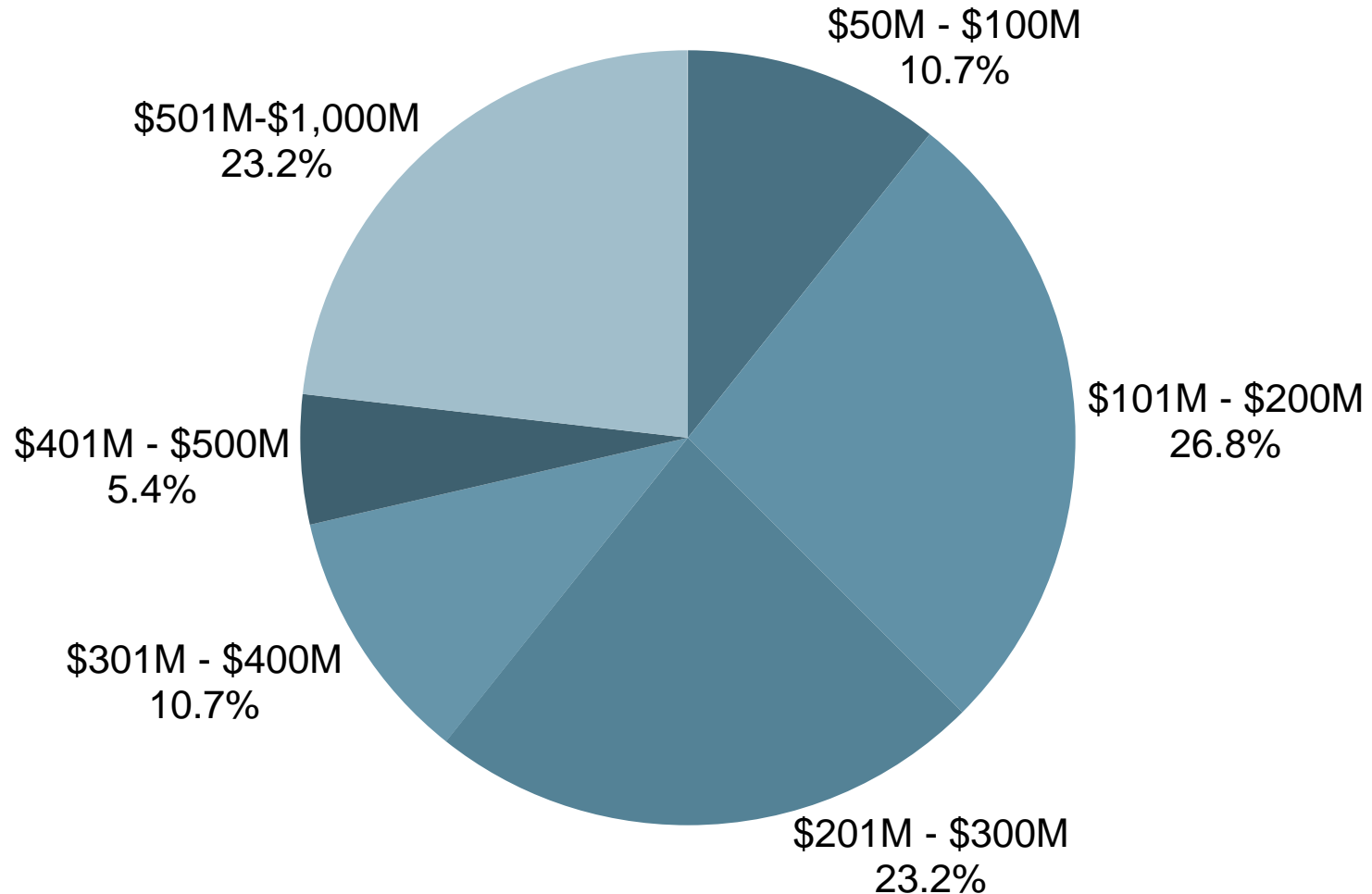
Neither the American Bar Association nor West Publishing Corporation had any involvement in this Midstream M&A Study. The author’s analysis and conclusions as contained in this Midstream M&A Study are solely those of the author, and do not reflect the views of the American Bar Association, West Publishing Corporation or Winstead PC.

This Midstream M&A Study is intended for informational and educational purposes only, and nothing in this Midstream M&A Study is to be considered as the rendering of legal advice for specific cases.

## Comparison of Midstream M&A Study and ABA Study

	Midstream M&A Study	ABA Study
<b>Number of Acquisition Agreements</b>	56	139
<b>Transaction Value Range</b>	\$50M - \$1,000M	\$30M - \$500M
<b>Average Transaction Size</b>	\$318.6M	\$176.6M
<b>Time Period Covered</b>	2013 – 2017	2016 – first half of 2017
<b>Percentage Which Were Asset Deals</b>	26.8%	13.7%

# Transaction Size of the 56 Deals Included in the Midstream M&A Study



## “Populations” Which Were Analyzed in the Midstream M&A Study

This Midstream M&A Study provides data on key deal terms for each of the following:

- **ABA Study** – Data points with this label are taken directly from the ABA Study.
- **Midstream (combined)** – Data points with this label cover all 56 midstream M&A agreements which are the subject of this Midstream M&A Study.
- **Unrelated** – Data points with this label cover the 31<sup>1</sup> of the 56 midstream M&A agreements which involved buyers and sellers which appeared to be unrelated third parties.
- **Related** – Data points with this label cover the 25<sup>2</sup> of the 56 midstream M&A agreements which involved buyers and sellers which were related in a meaningful way (e.g., a drop-down acquisition from an upstream company to its MLP, or buyers and sellers which controlled by a common private equity sponsor).
- **Gathering & Processing** – Data points with this label cover the 25<sup>3</sup> of the 56 midstream M&A agreements where most of the value of the acquired assets (or target company) were Gathering & Processing assets (as described on the following slide).
- **Logistics & Marketing** – Data points with this label cover the 31<sup>4</sup> of the 56 midstream M&A agreements where most of the value of the acquired assets (or target company) were Logistics & Marketing assets (as described on the following slide).

1. Of this 31, 17 (or 54.8%) concerned the acquisition of G&P assets and 14 (or 45.2%) concerned the acquisition of L&M assets.
2. Of this 25, 8 (or 32.0%) concerned the acquisition of G&P assets and 17 (or 68.0%) concerned the acquisition of L&M assets.
3. Of this 25, 17 (or 68.0%) involved Unrelated buyers and sellers and 8 (or 32.0%) involved Related buyers and sellers.
4. Of this 31, 14 (or 45.2%) involved Unrelated buyers and sellers and 17 (or 54.8%) involved Related buyers and sellers.

## Midstream Segments Referenced in This Study



- **Gathering & Processing (G&P):**  
Includes gathering lines, compressor stations, processing plants.



- **Logistics & Marketing (L&M):**  
Includes transportation pipelines, fractionation plants, storage tanks, salt caverns, petroleum product terminals.



# Financial Provisions



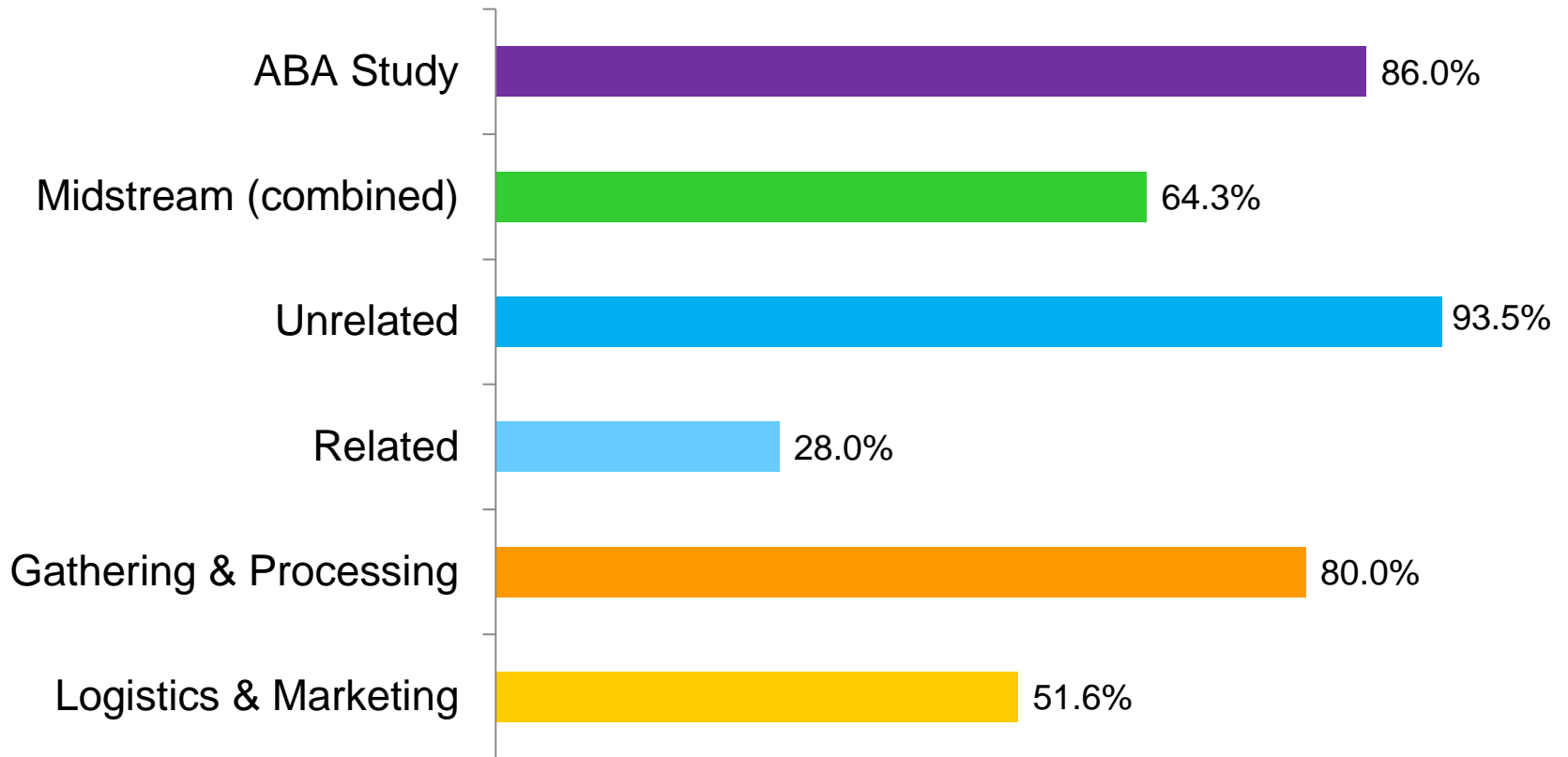
# Post-Closing Purchase Price Adjustments

*(Example provision)*

No later than 120 days after the Closing Date (or such later date as mutually agreed by Buyer and Seller), Buyer shall prepare and deliver to Seller (i) a balance sheet of the Company as of the Measurement Time, and (ii) worksheets showing Buyer's calculation of the: (A) Indebtedness of the Company as of the Measurement Time, plus the amount of any premiums, penalties, fees, make-whole payments or other charges incurred as a result of the payment thereof on the Closing Date as reflected in the applicable Payoff Letter, (B) the amount of all Transaction Expenses unpaid as of the Measurement Time, (C) Net Working Capital derived from the Final Balance Sheet, and (D) the amount of all Gap Period Extraordinary Expenditures, if any, in each case, together with a worksheet showing the difference, if any, between any Estimated Closing Item and the corresponding Final Closing Item...

Seller shall have the right for 30 days following receipt of the Final Closing Items to object to any of the Final Closing Items or the calculation thereof. Seller shall be deemed to have waived any rights to object under this Section [\_\_\_] unless Seller furnishes its written objections to Buyer within such 30-day period. If Seller delivers an objection within such 30-day period, then Buyer and Seller shall endeavor in good faith to resolve the objections. If, at the end of a 15-day period from the date of delivery of any objection by Seller or such longer period as may be mutually agreed by Buyer and Seller, there are any objections that remain in dispute, then the remaining objections in dispute shall be submitted to the Closing Item Arbitrator.

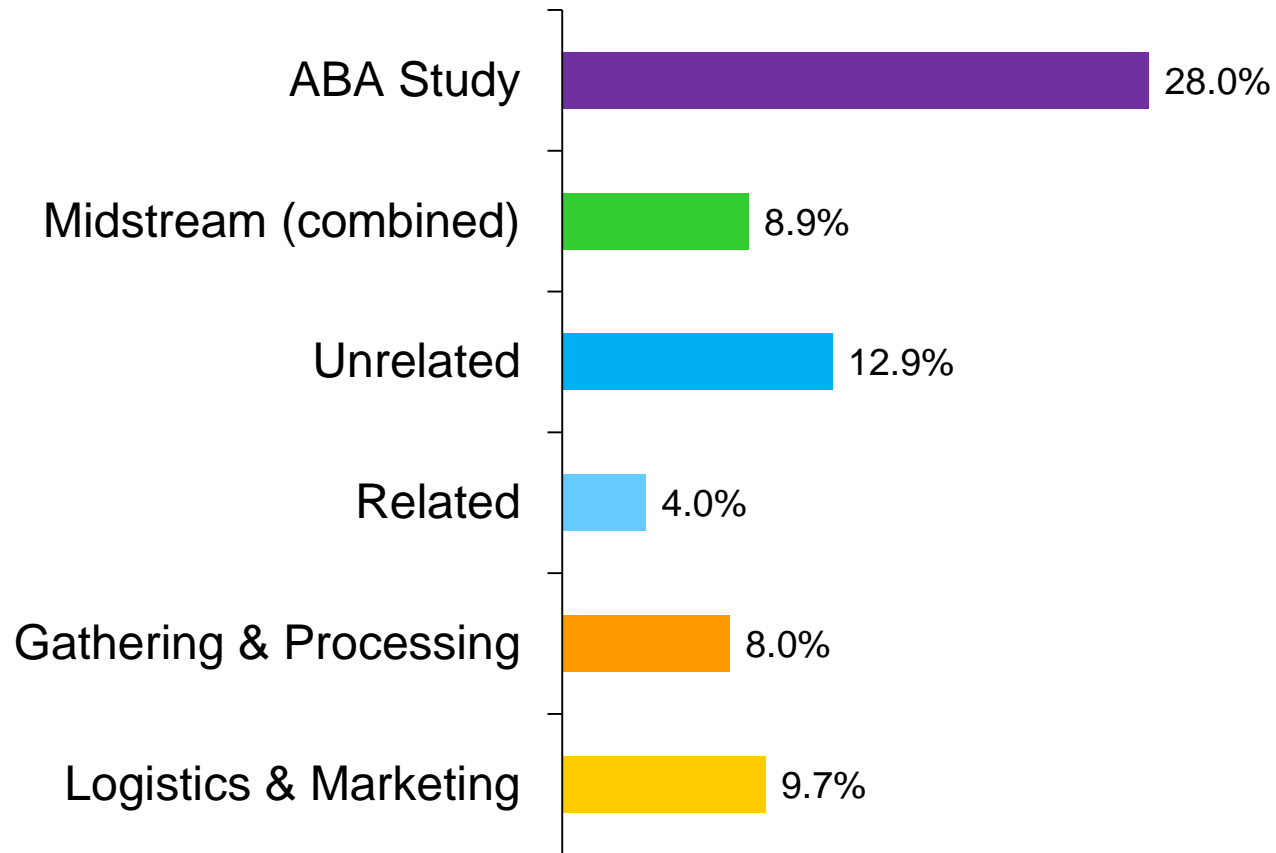
## Percentage of Deals with Post-Closing Purchase Price Adjustments



## Earn-out Provisions

A provision in an M&A agreement providing that the seller will be entitled to additional compensation from the buyer in the event that certain financial, operational or other performance targets are met over a given period of time following the closing of the transaction.

# Percentage of Deals with Earn-out Provision



## Five Deals in this Midstream M&A Study Having Earn-out Provisions

Midstream Segment	Base Purchase Price (in millions of dollars)	Maximum Potential Earn-out Payment (in millions of dollars)	Earn-out Payment as a Percentage of Base Purchase Price
Gathering & Processing	\$59.2	\$15.0	25.3%
	\$565.0	\$935.0	165.5%
Logistics & Marketing	\$166.0	\$23.0	13.9%
	\$60.0	\$5.0	12.0%
	\$216.0	\$27.0	12.5%



# **Representations and Warranties**

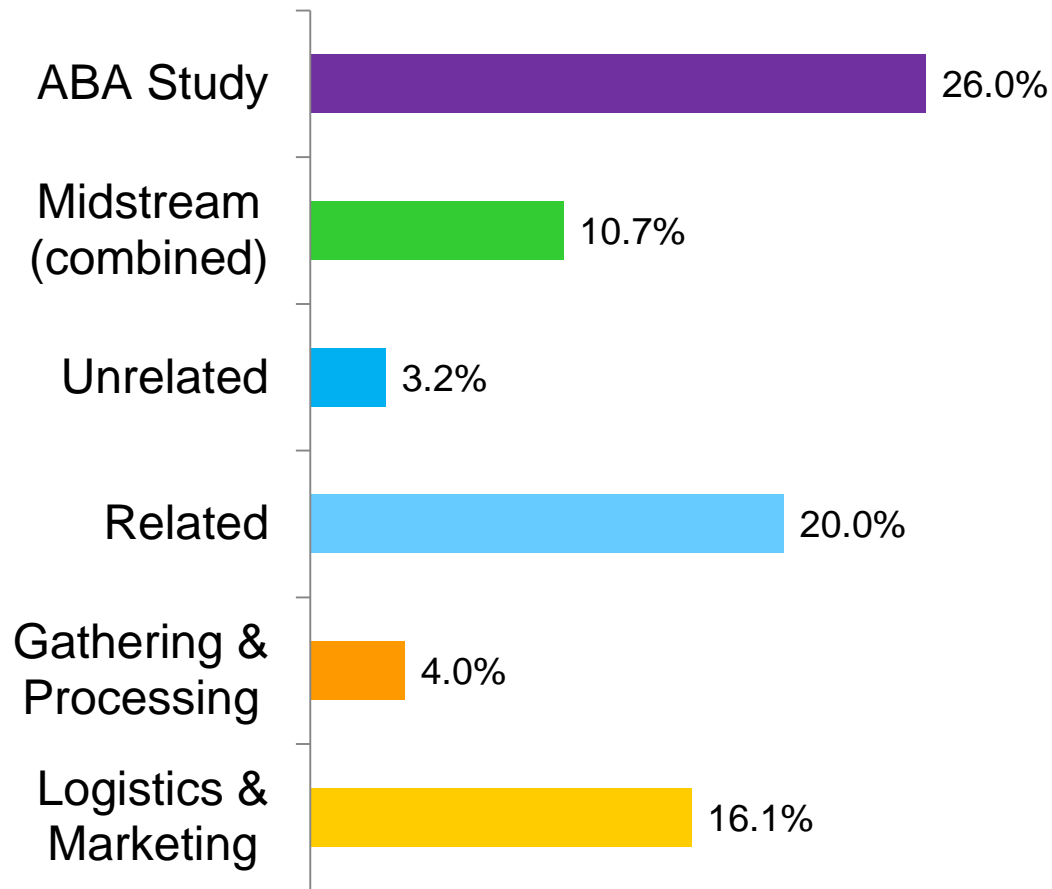
# 10b-5/Full Disclosure Representation and Warranty

*(Example provisions)*

- **10b-5 Formulation:** No representation or warranty or other statement made by [Seller] in this Agreement, the Ancillary Documents, the certificates delivered pursuant to this Agreement or otherwise in connection with the transactions contemplated by this Agreement contains any untrue statement of material fact or omits to state a material fact necessary to make the statements in this Agreement or therein, in light of the circumstances in which they were made, not misleading.
- **Full Disclosure Formulation:** Seller does not have Knowledge of any fact that has specific application to Seller (other than general economic or industry conditions) and that may materially adversely affect the assets, business, prospects, financial condition or results of operations of Seller that has not been set forth in this Agreement or the Disclosure Letter

*(ABA Model Asset Purchase Agreement)*

## 10b-5/Full Disclosure Representation and Warranty (Percentage of Deals Including either (or both) of the 10b-5 or Full Disclosure Formulations)





## “No Undisclosed Liabilities” Representation

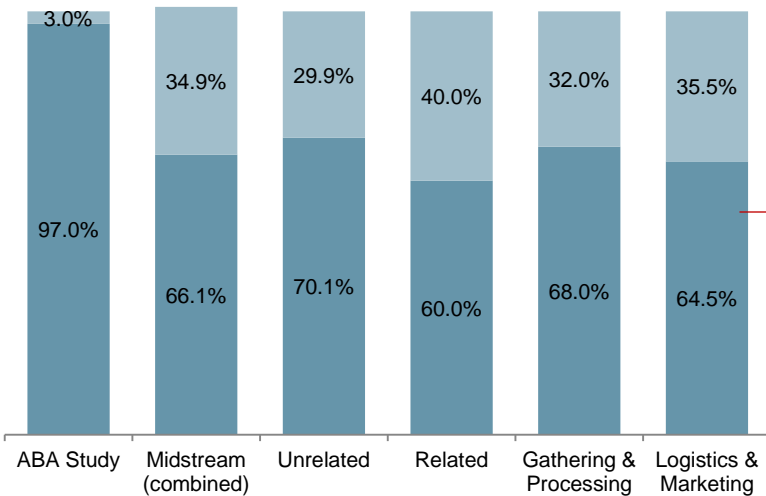
*(Example provisions)*

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

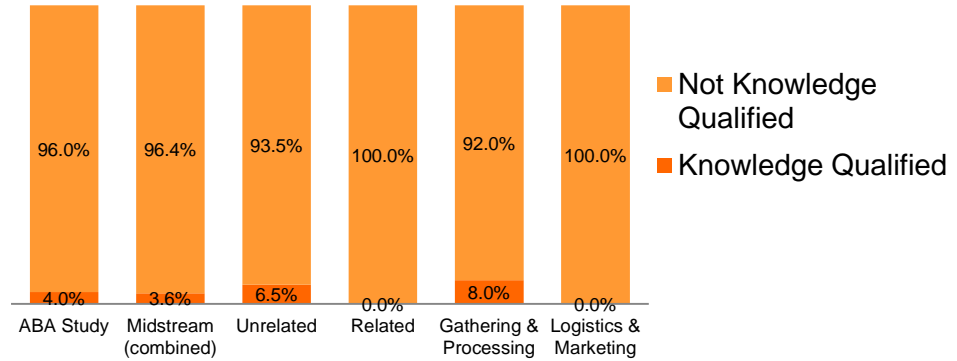
# Representations and Warranties

## “No Undisclosed Liabilities” Representation

- Representation Not Included
- Representation Included



## (Subset: Includes “No Undisclosed Liabilities” Representation)



## (Subset: Includes “No Undisclosed Liabilities” Representation)

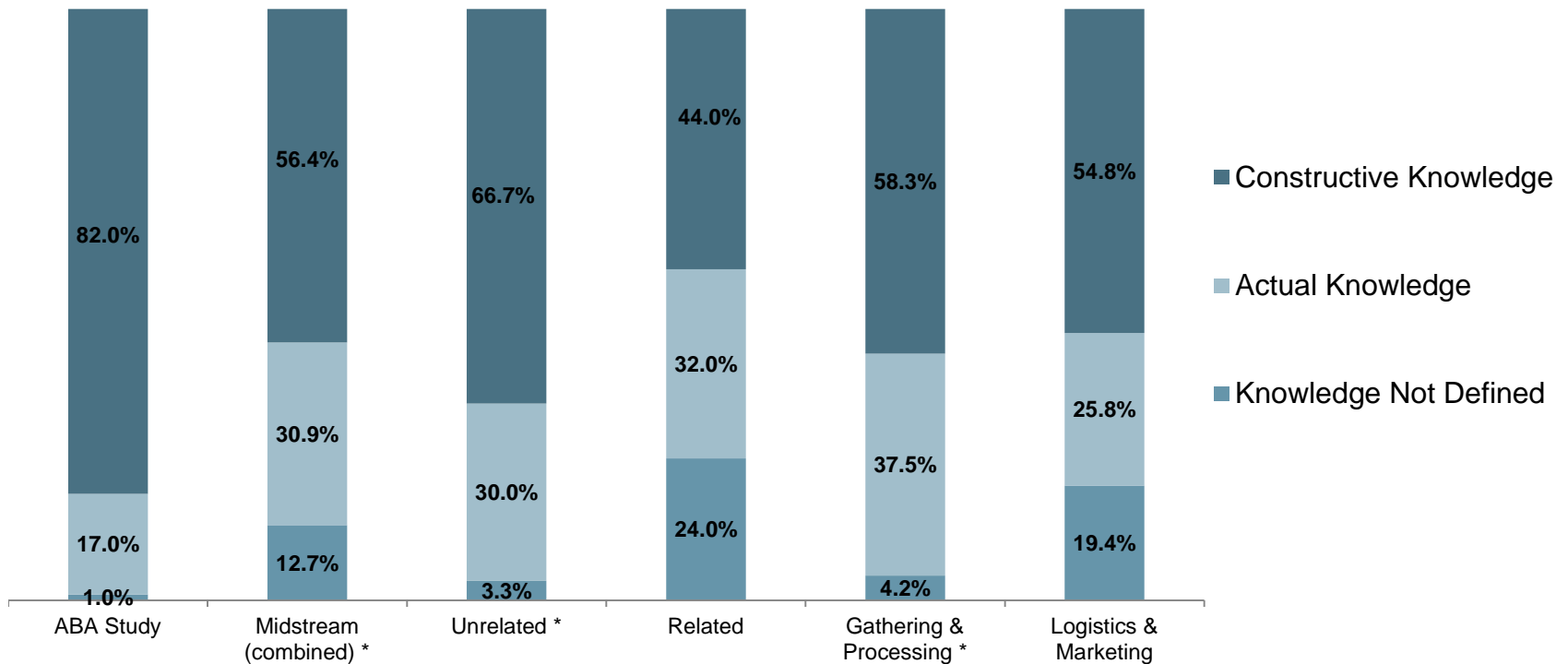


## Definition of Seller's Knowledge

*(Example provisions)*

- **Constructive Knowledge:** "Knowledge" means, in the case of "to the Company's Knowledge", the actual knowledge, after due inquiry, of the individuals listed in Section [\_\_\_\_] of the Company Disclosure Schedule; provided, however, that for purposes of the definition of "to the Company's Knowledge," "due inquiry" includes (i) review of the relevant Sections of this Agreement and corresponding Sections of the Company Disclosure Schedule, (ii) review of the files and other documents and information in the possession or control of the Company or its Subsidiary, (iii) making reasonable inquiry of the managers, officers and employees of the Company or its Subsidiary who would reasonably be expected to have knowledge of the particular subject matter, (iv) making due and appropriate inquiry of counsel to the Company with respect to matters involving questions of law, and (v) otherwise conducting a reasonable investigation regarding the matter in question.
- **Actual Knowledge:** "Knowledge" means, with respect to [Seller], the actual knowledge, without investigation or further inquiry, of the natural Persons identified in Schedule [\_\_\_\_\_].

## Definition of Seller's Knowledge



\* Excludes one deal in which the Knowledge definition was redacted.



# Indemnification

# Survival Period

*(Example provisions)*

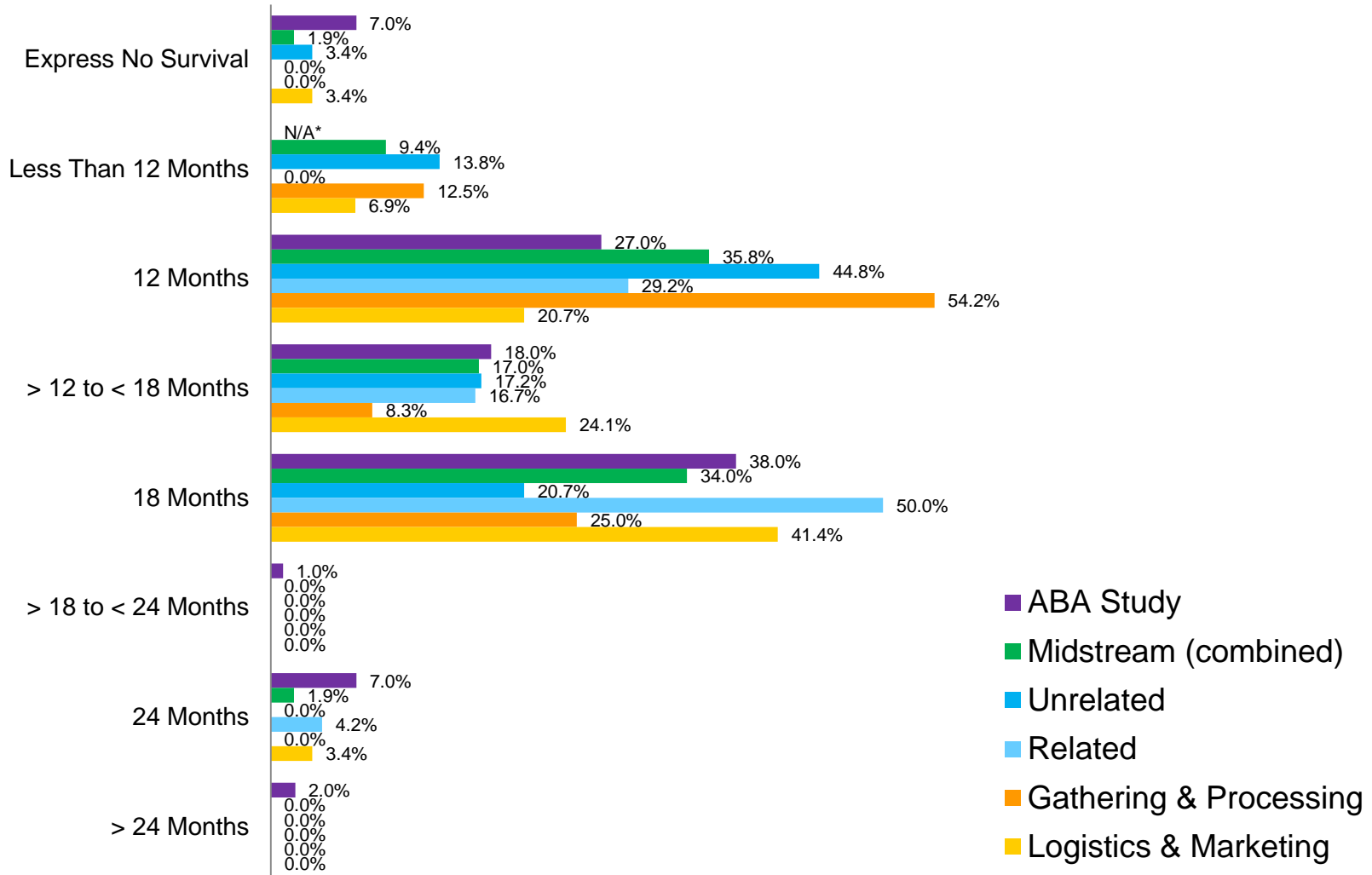
- **Survival provision:** All representations, warranties, covenants and indemnities made by the Parties in this Agreement or pursuant hereto, shall survive the Closing as hereinafter provided, and shall not be merged into any instruments or agreements delivered at Closing.
- **Claim Date\*:** No Buyer Indemnitee or Seller Indemnitee, as applicable, shall be entitled to assert any right to indemnification after (A) with respect to (1) the Fundamental Representations or (2) Sections [\_\_\_\_], the expiration of the applicable statute of limitations, (B) with respect to the breach of any of the representations or warranties contained in Section [\_\_\_\_], the date that is ninety (90) days after the Execution Date, (C) with respect to the breach of any of the representations or warranties contained in this Agreement other than Fundamental Representations and Section [\_\_\_\_], the date that is Three Hundred Sixty Five (365) days after the Execution Date and (D) with respect to any covenant, after such covenant has been fully completed or expired in accordance with its terms;

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\* Note: The survival periods which are analyzed on the following slide are the “general” survival period set forth in the M&A agreement in question (i.e., similar to clause (C) above), and not the survival period for “fundamental representations and warranties” or selected representations and warranties that have a survival period longer than the general survival period.

# Survival Period

(Subset: deals with survival provisions)



\* This data point was not provided in the ABA Study.

# Indemnity Basket

*(Example provisions)*

- **Tipping Basket**<sup>\*</sup>: To the extent that the Partnership Indemnified Parties are entitled to indemnification for Damages pursuant to Section [\_\_\_] or Section [\_\_\_], the Contributing Parties shall not be liable for such Damages until the aggregate amount of all such Damages exceeds 1.0% of the dollar value of the Aggregate Consideration as of the Closing Date (the "Threshold Amount"), and then the Contributing Parties shall be liable for all such Damages, whether incurred before or after the Threshold Amount was exceeded.
- **Deductible**: Seller will not have liability pursuant to Section [\_\_\_] with respect to any breach of representation or warranty of the Seller (other than any Fundamental Representations) until the aggregate amount of all Losses incurred by the Buyer Indemnified Parties with respect to such matters exceeds one percent (1%) of the Unadjusted Purchase Price (the "Deductible"), in which case the Buyer Indemnified Parties shall have the right to seek indemnification for all Losses in excess of, but not including, the Deductible.

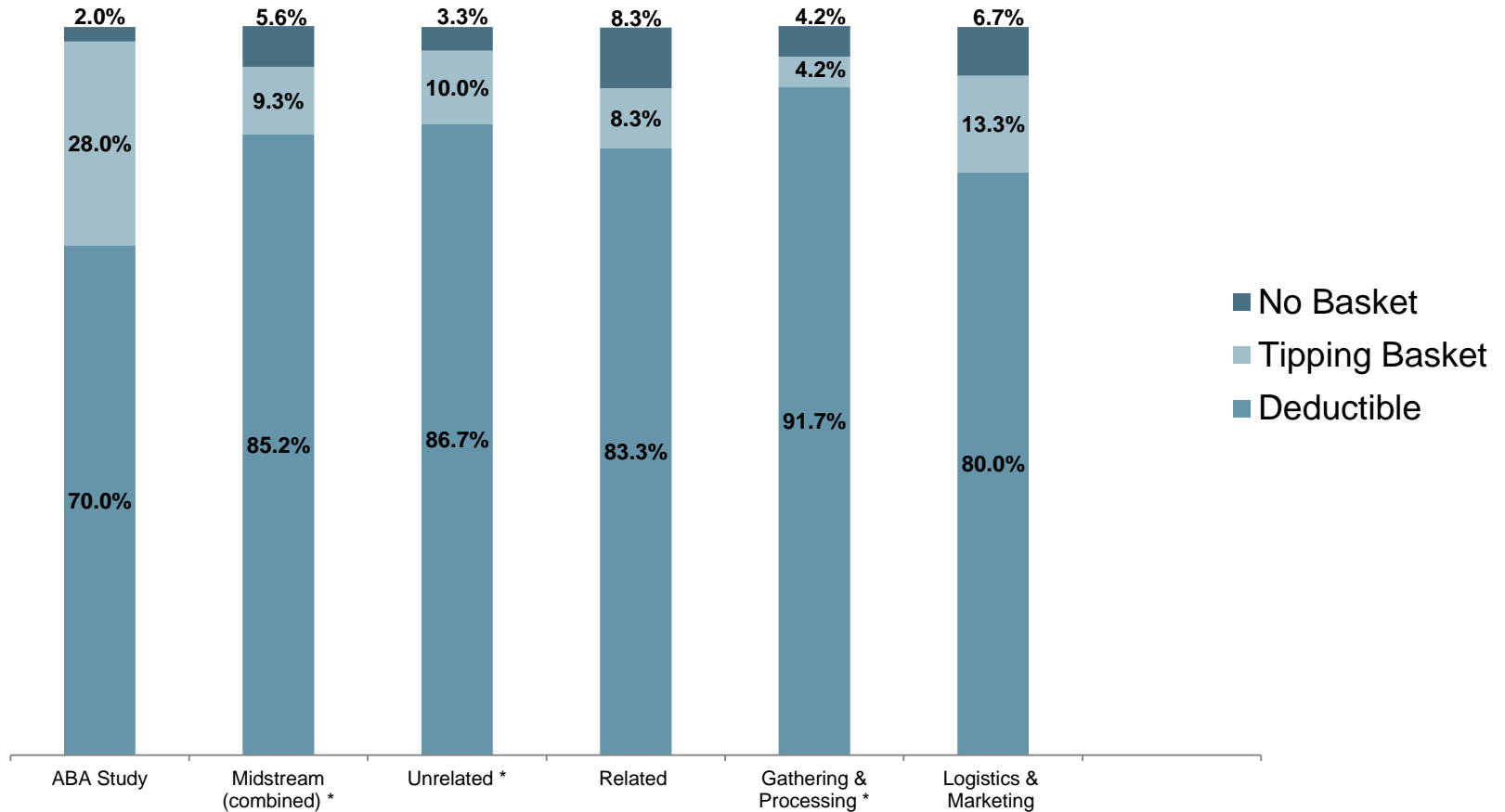
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\* With respect to indemnity baskets which are not structured as a deductible, the ABA Study differentiates between indemnity baskets which provide that the indemnified party can be indemnified from the first dollar of losses (after the basket threshold has been exceeded) and indemnity baskets where the indemnified party can be indemnified from a certain amount (above dollar one) but less than the threshold level. This Midstream M&A Study simply differentiates between baskets that are structured as a pure deductible and baskets which provide that at least some amount of losses incurred prior to the threshold being exceeded may be recovered by the indemnified party.



# Indemnity Basket

*(Subset: deals with survival provisions)*



\* Excludes one deal which had basket structure redacted.

# Indemnity Basket as % of Transaction Value

*(Subset: deals with baskets)*  
*(Average indemnity basket, as percentage of transaction value)*

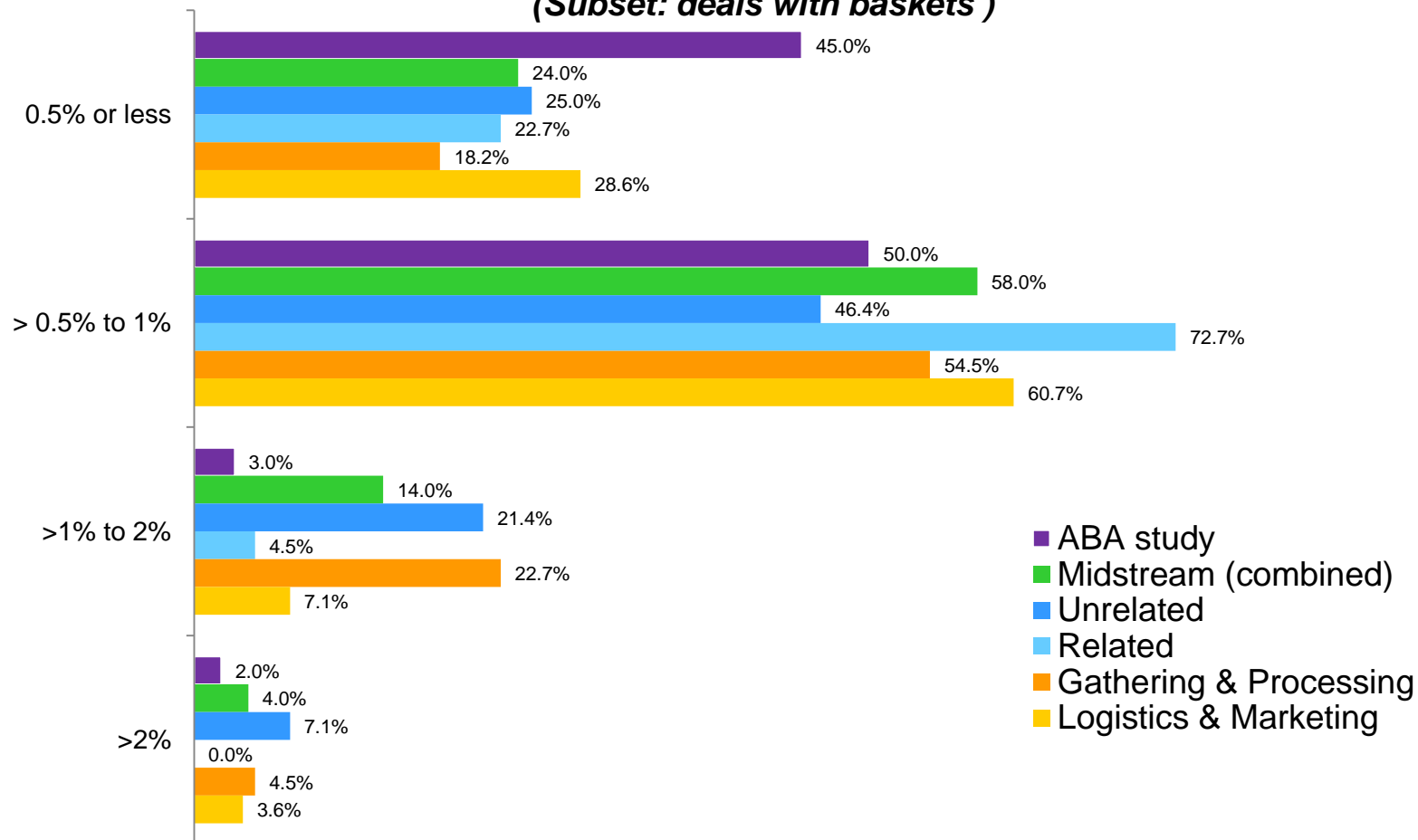
ABA Study*:	0.79%
Midstream (combined)**:	0.93%
Unrelated**:	1.06%
Related:	0.78%
Gathering & Processing**:	1.04%
Logistics & Marketing:	0.85%

\* The ABA Study also provides the average indemnity basket for deals having representation and warranty insurance (0.84%) and for deals not having representation and warranty insurance (0.77%). The 0.79% figure noted above for the ABA Study covers both categories of deals (i.e., both deals which do not have representation and warranty insurance and those that do have it), but excludes baskets where some amount of losses below the threshold (but not all the way to “dollar one”) may be recovered. The ABA Study data points on the following page also cover both deals which do not have representation and warranty insurance and those that do have it.

\*\* Excludes two deals which had basket amounts redacted

# Basket Amount As % of Transaction Value

*(Subset: deals with baskets\*)*



Note: Excludes two deals which had basket amounts redacted.

# Indemnity Cap\*

*(Subset: deals with determinable caps)  
(Average indemnity cap, as percentage of transaction value)*

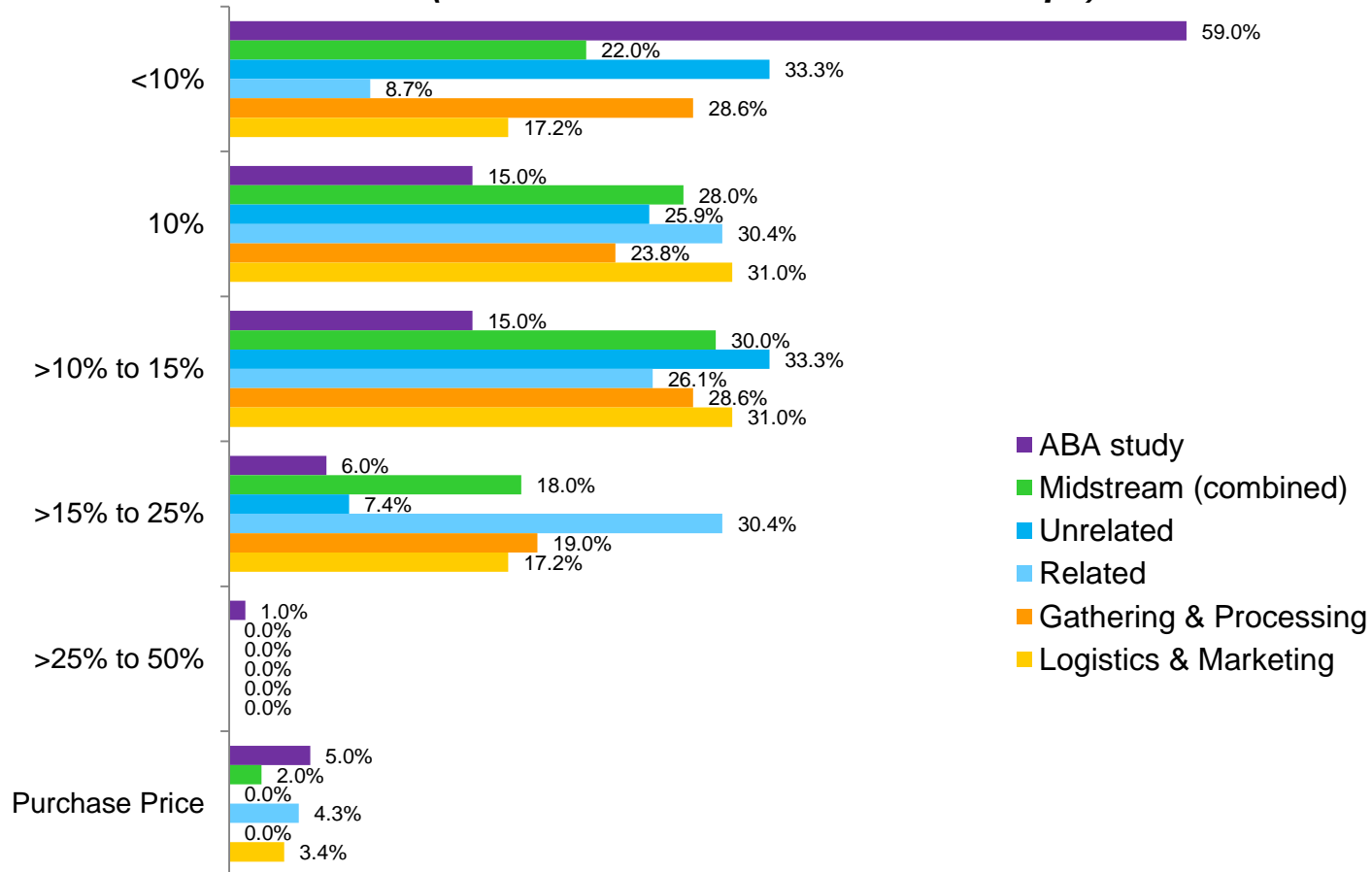
ABA Study**:	12.20%
Midstream (combined):	13.99%
Unrelated:	10.76%
Related:	17.79%
Gathering & Processing:	12.08%
Logistics & Marketing:	15.38%

\* Caps which generally cover indemnification obligations in the M&A agreement (i.e., does not take into consideration additional caps which cover indemnification obligations as to specific matters).

\*\* The ABA Study also provided the average indemnity cap for deals having representation and warranty insurance (5.77%) and deals not having representation and warranty insurance (14.70%). The 12.20% figure noted above for the ABA Study covers both categories of deals (i.e., both deals which do not have representation and warranty insurance and those that do have it). Similarly, the ABA Study data points on the following page cover both categories of deals.

# Indemnity Cap\* as Percentage of Transaction Value

(Subset: deals with determinable caps)



\* Caps which generally cover indemnification obligations in the M&A agreement (i.e., does not take into consideration additional caps which cover indemnification obligations as to specific matters).

## Escrow/Holdback

*(Subset: deals with determinable escrow/holdback amounts)*

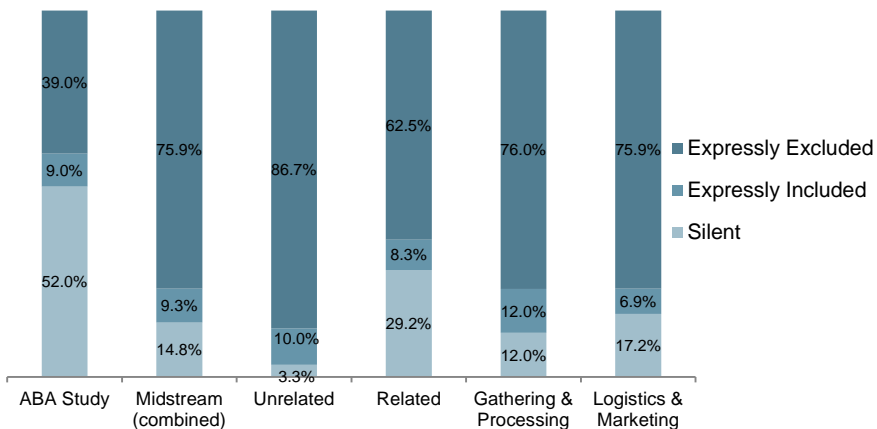
*(Summary of average size of escrow/holdback, as percentage of transaction value)*

ABA Study:	6.66%
Midstream (combined):	6.42%
Unrelated:	6.42%
Related:	N/A
Gathering & Processing:	6.79%
Logistics & Marketing:	5.46%

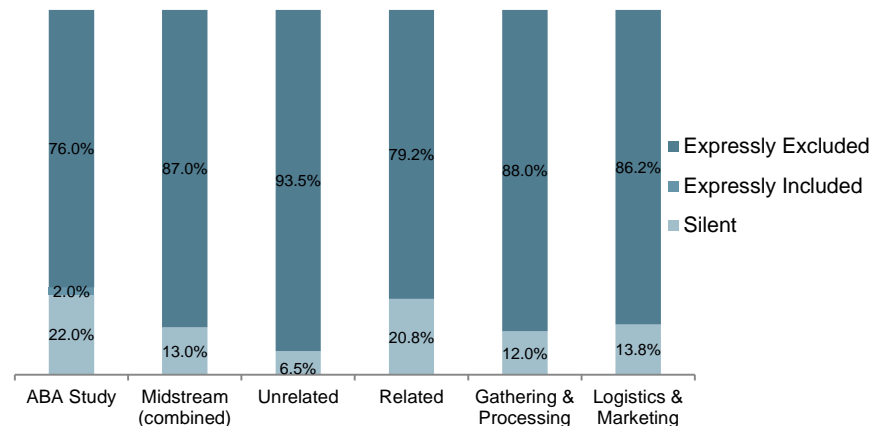
# Types of Damages/Losses Covered

*(Subset: deals with survival provisions)*

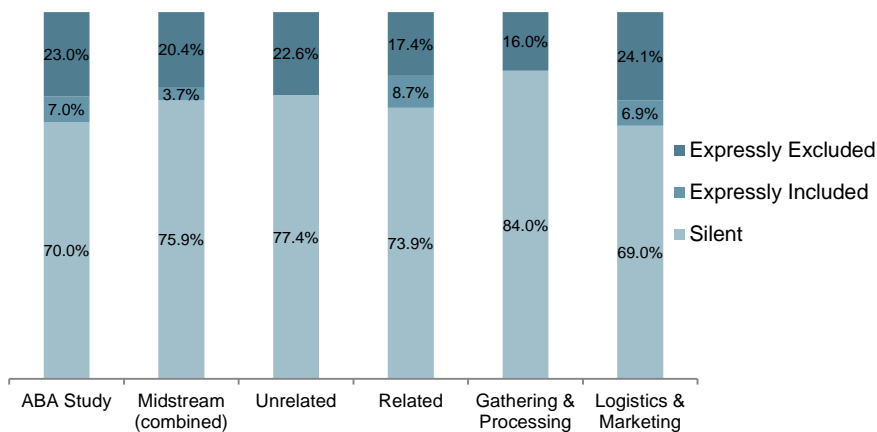
## Consequential Damages



## Punitive Damages

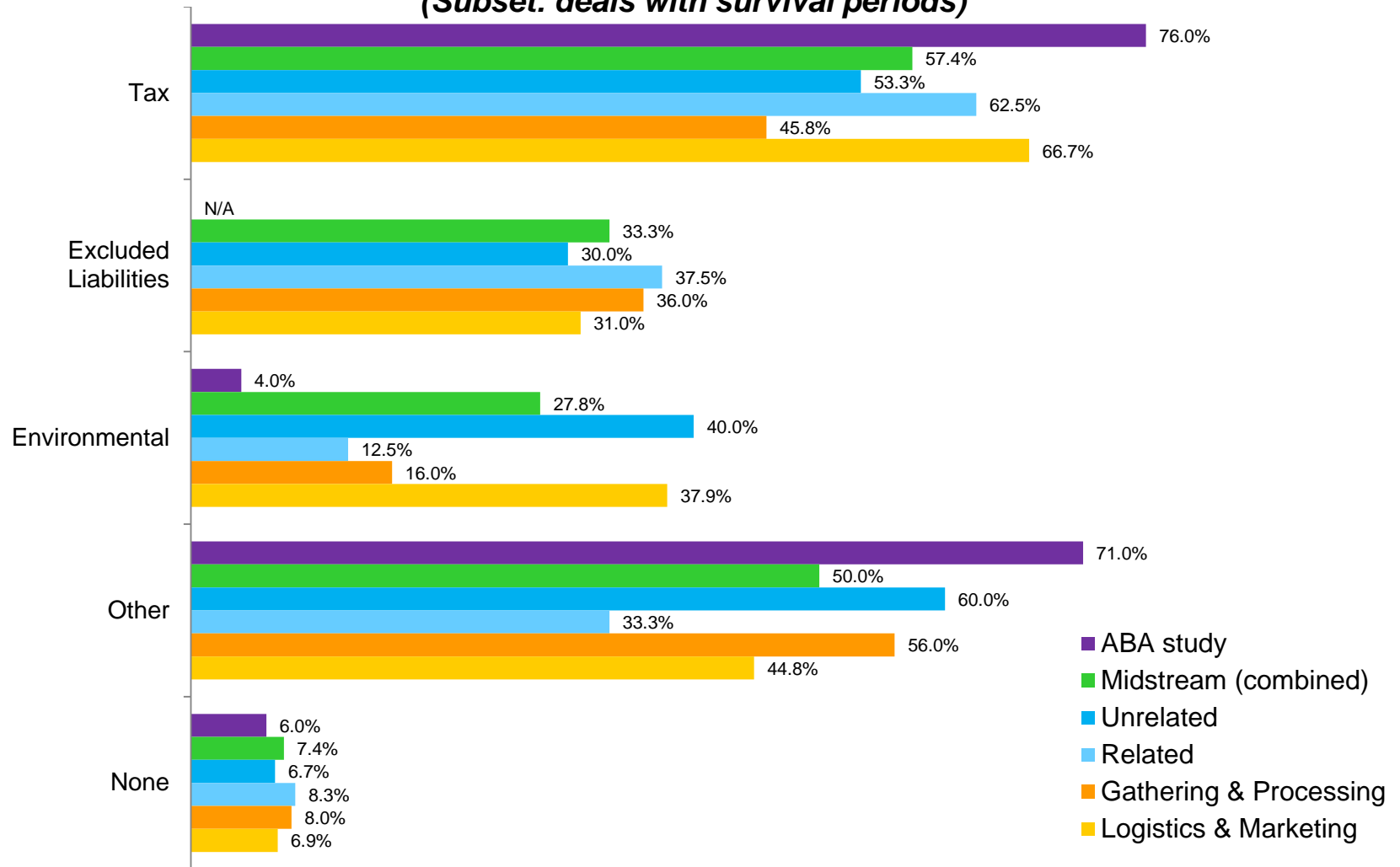


## Diminution in Value



# Stand-Alone Indemnities\*

(Subset: deals with survival periods)



\* Data points for stand-alone indemnities covering tax, excluded liabilities, and environmental matters are provided because these were the three most common stand-alone indemnities in the midstream M&A agreements which were the subject of this Midstream M&A Study.

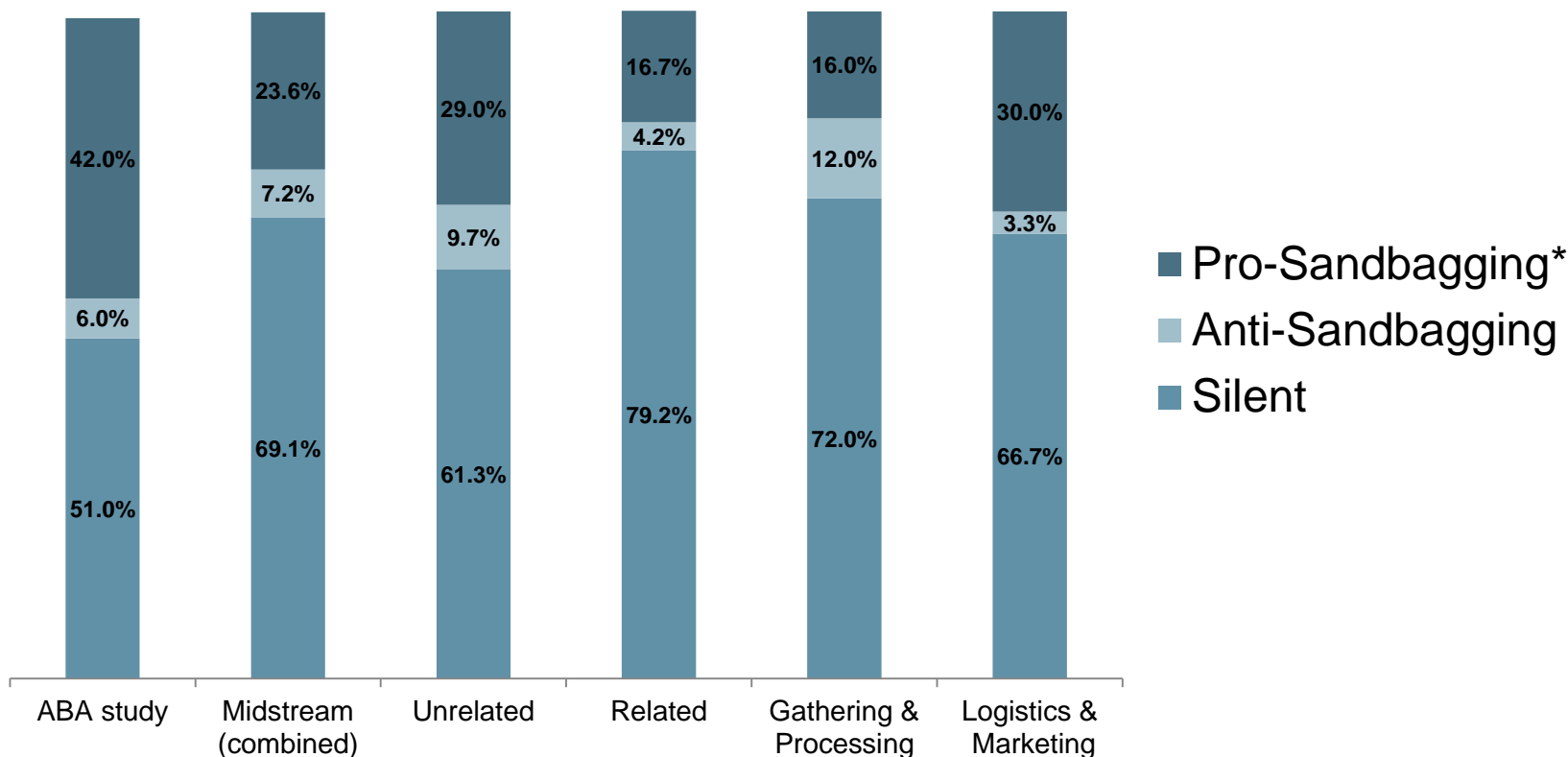


# Sandbagging Provisions

*(Example provisions)*

- **Pro-sandbagging / Benefit of the Bargain:** The representations, warranties and covenants of the Indemnifying Party, and the Indemnified Party's right to indemnification with respect thereto, shall not be affected or deemed waived by reason of any investigation made by or on behalf of the Indemnified Party or by reason of the fact that the Indemnified Party knew or should have known that any such representation or warranty is, was or might be inaccurate.
- **Anti-sandbagging:** Notwithstanding anything to the contrary contained herein, if either Party elects to proceed with the Closing with actual knowledge by such Party of the breach of any representation, warranty, agreement or covenant by the other Party, then the representation, warranty, agreement or covenant which is breached at the Closing Date will be deemed waived by such Party, and such Party shall be deemed to fully release and forever discharge the other Party on account of any and all claims, demands or charges, known or unknown, with respect to such representation, warranty, agreement or covenant.

# Sandbagging



\* As in the ABA Study, in this Midstream M&A Study, pro-sandbagging is defined by excluding provisions which only state that the seller's representations and warranties survive buyer's investigation (or similar such language) unless the provision also expressly addresses the effect of the buyer's knowledge on the buyer's indemnification rights.

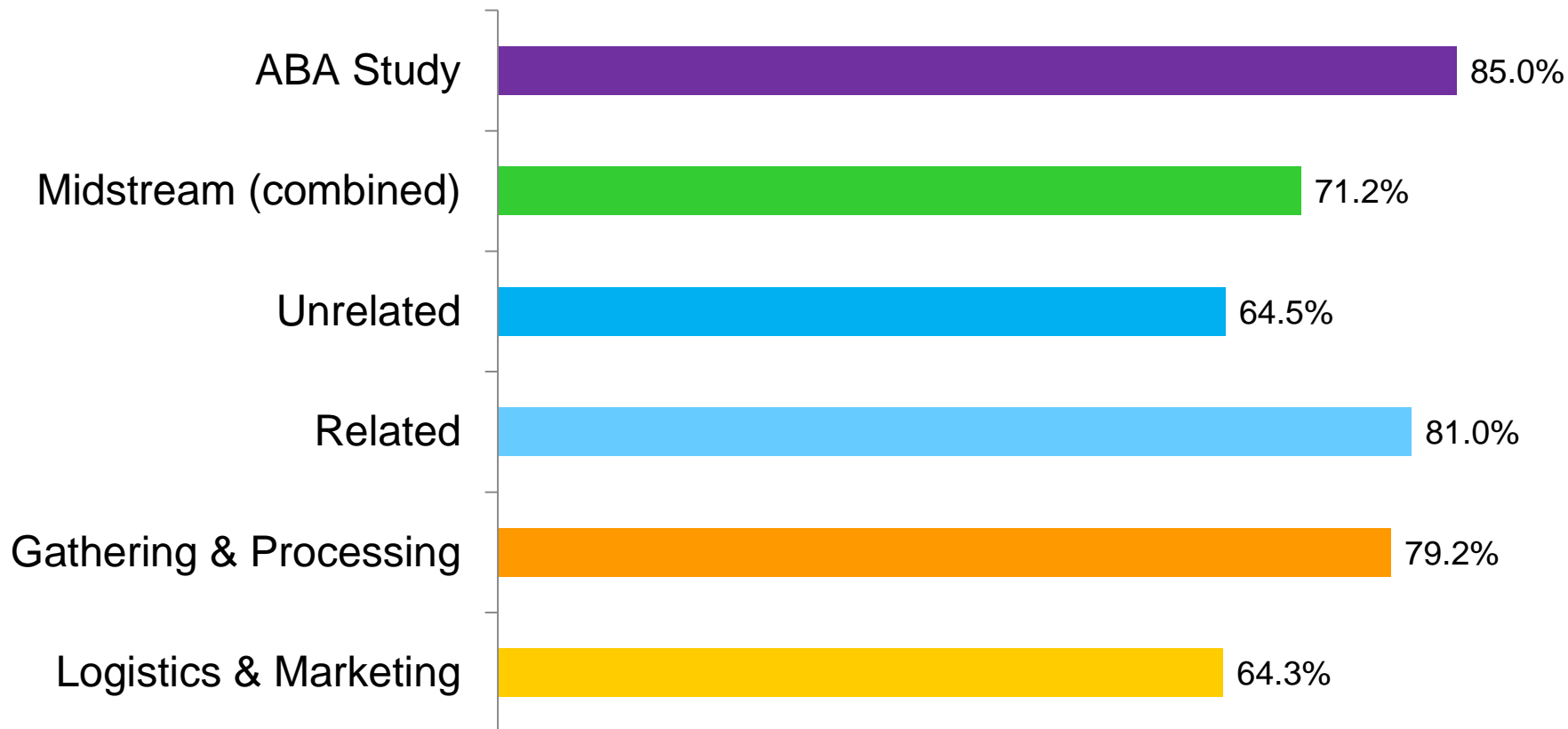
# Materiality Scrape

*(Example provision)*

For purposes of determining whether a representation or warranty has been breached for purposes of this Article [\_\_\_] and determining the amount of Losses suffered by any Indemnatee, each representation and warranty set forth in this Agreement, and any qualification with respect to any representation or warranty set forth in the Schedules, shall be read without regard or giving effect to any "material," "materiality" or "Material Adverse Effect" qualifications that may be contained in any such representation or warranty.

# Materiality Scrape

*(Subset: deals with baskets)*



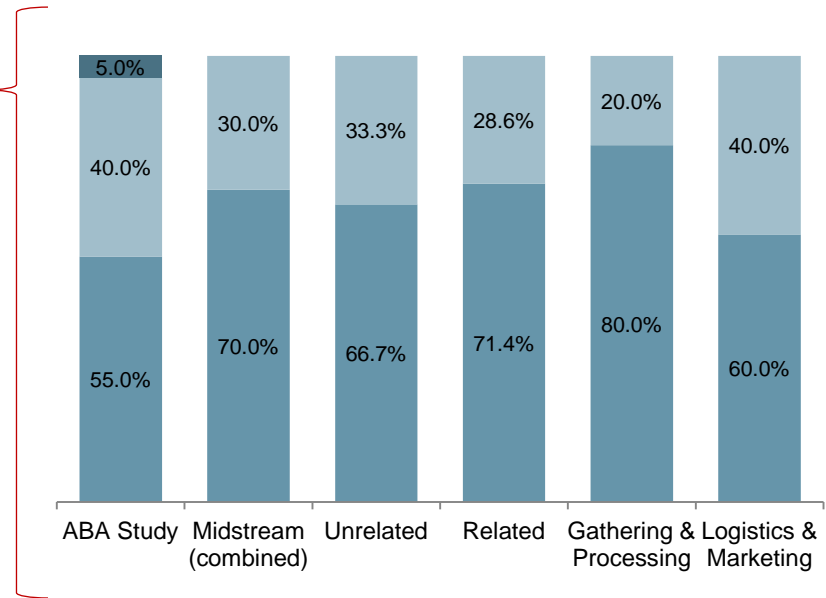
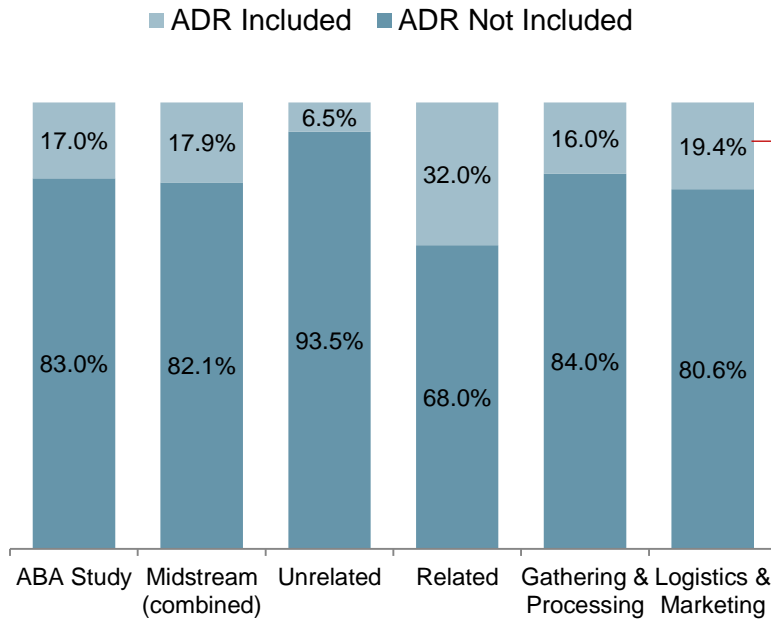


# Dispute Resolution


# Alternative Dispute Resolution (“ADR”)\*

*(Subset: deals with general ADR provisions)*

- International Chamber of Commerce (ICC)
- Judicial Arbitration & Mediation Services (JAMS)
- American Arbitration Association (AAA)



\* ADR provisions which generally address disputes arising under the M&A agreement (as opposed to ADR provisions which specifically address more narrow areas of dispute, e.g. post-closing purchase price adjustments).



# Take-Aways

# Take-Aways

Based on a review of the key deal terms covered in this Midstream M&A Study and comparable data points from the ABA Study, the M&A agreements which were the subject of this Midstream M&A Study generally:

- Allocated more of the unknown risks to the Buyer; for example, the midstream M&A agreements were:
  - less likely to include 10b-5/full disclosure and “No undisclosed liabilities” representations and warranties of the Seller; and
  - more likely to limit the definition of Seller’s knowledge to the actual knowledge (and not constructive knowledge) of specified individuals;
- Had more “seller-friendly” indemnification terms in certain respects, for example:
  - the indemnity basket was more likely to be structured as a deductible;
  - the indemnity basket as a percentage of transaction value was generally higher;
  - they were more likely to exclude consequential damages from indemnifiable losses;
  - they were less likely to include a pro-sandbagging provision; and
  - they were less likely to include a materiality scape; and
- Were less likely to include an earn-out provision.



# Questions?



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# Speaker Profile



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Greg Krafka is a member of the Corporate, Securities/Mergers & Acquisitions Practice Group and the Energy Industry Group at Winstead PC. Greg's practice focuses primarily on mergers and acquisitions, securities offerings, joint ventures, corporate governance, restructurings and commercial agreements. Greg represents a diverse group of domestic and foreign clients, including public and private companies, private equity funds, investors and entrepreneurs. His practice is focused on representing clients in the energy and technology industries. Within the energy space, Greg has particular experience and interest in the midstream oil and gas industry, and his articles covering legal issues in this area have been published in *Midstream Business*, *Law360* and *Oil & Gas Investor*.

Education: Harvard Law School (J.D., 2006), Gordon-Conwell Theological Seminary (M.A. in Theology, 2006), University of Nebraska-Lincoln (B.S. in Economics, 2001)