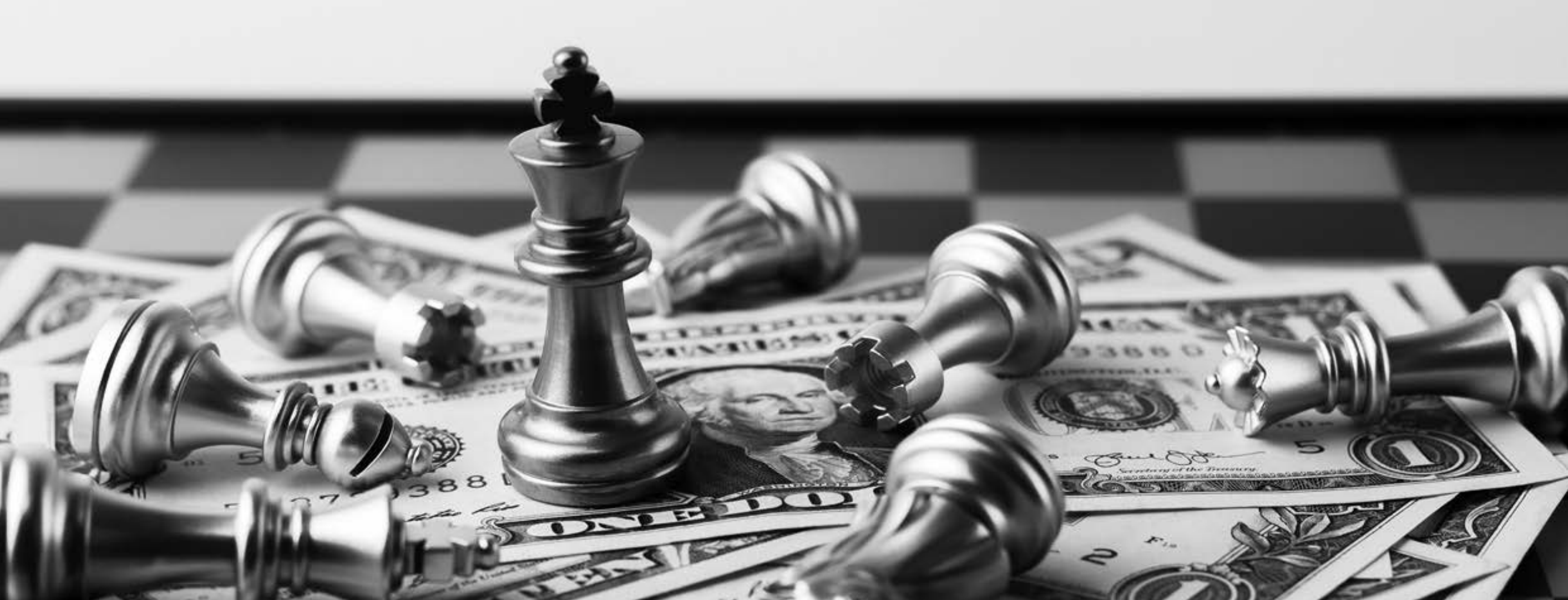

ICLG

The International Comparative Legal Guide to:

Mergers & Acquisitions 2019

13th Edition

A practical cross-border insight into mergers and acquisitions

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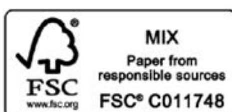

General Chapters:

1	**Global M&A Trends in 2019** – Scott Hopkins & Adam Howard, Skadden, Arps, Slate, Meagher & Flom (UK) LLP	1
2	**The MAC is Back: Material Adverse Change Provisions After *Akorn*** – Adam O. Emmerich & Trevor S. Norwitz, Wachtell, Lipton, Rosen & Katz	4
3	**The Dutch 'Stichting' – A Useful Tool in International Takeover Defences** – Alexander J. Kaarls & Willem J.T. Liedenbaum, Houthoff	10

Country Question and Answer Chapters:

4	**Albania**	Gjika & Associates: Gjergji Gjika & Evis Jani	14
5	**Angola**	Vieira de Almeida: Vanusa Gomes & Paulo Trindade Costa	21
6	**Australia**	Atanaskovic Hartnell: Jon Skene & Lawson Jepps	27
7	**Austria**	Schoenherr: Christian Herbst & Sascha Hödl	34
8	**Belgium**	Loyens & Loeff: Wim Vande Velde & Mathias Hendrickx	45
9	**Bermuda**	MJM Limited: Jeremy Leese & Brian Holdipp	55
10	**Botswana**	Kelobang Godisang Attorneys: Seilaneng Godisang & Laone Queen Moreki	62
11	**Brazil**	Motta Fernandes Advogados: Cecilia Vidigal Monteiro de Barros	67
12	**British Virgin Islands**	Maples Group: Richard May & Matthew Gilbert	75
13	**Bulgaria**	Schoenherr: Ilko Stoyanov & Katerina Kaloyanova	82
14	**Cameroon**	D. MOUKOURI AND PARTNERS: Danielle Moukouri Djengue & Franklin Ngabe	91
15	**Cayman Islands**	Maples Group: Nick Evans & Suzanne Correy	96
16	**China**	Zhong Lun Law Firm: Lefan Gong	103
17	**Croatia**	Law firm Vukić and Partners: Zoran Vukić & Ana Bukša	110
18	**Cyprus**	E&G Economides LLC: Marinella Kilikitas & George Economides	117
19	**Czech Republic**	HAVEL & PARTNERS s.r.o.: Jaroslav Havel & Jan Koval	124
20	**Denmark**	Bech-Bruun: Steen Jensen & David Moalem	131
21	**Finland**	Dittmar & Indrenius: Anders Carlberg & Jan Ollila	138
22	**France**	Villey Girard Grolleaud: Frédéric Grillier & Daniel Villey	146
23	**Germany**	SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH: Dr. Marc Löbbe & Dr. Michaela Balke	153
24	**Hong Kong**	Ashurst Hong Kong: Joshua Cole & Chin Yeoh	161
25	**Hungary**	Oppenheim Law Firm: József Bulcsú Fenyvesi & Mihály Barcza	168
26	**Iceland**	BBA: Baldvin Björn Haraldsson & Stefán Reykjalín	174
27	**India**	Shardul Amarchand Mangaldas & Co.: Iqbal Khan & Faraz Khan	181
28	**Indonesia**	Walalangi & Partners (in association with Nishimura & Asahi): Luky I. Walalangi & Siti Kemala Nuraida	188
29	**Ireland**	Matheson: Fergus A. Bolster & Brian McCloskey	193
30	**Italy**	NUNZIANTE MAGRONE: Fiorella Alvino & Fabio Liguori	202
31	**Japan**	Nishimura & Asahi: Tomohiro Takagi & Kei Takeda	208
32	**Korea**	SEUM Law: Steve Kim & Hyemi Kang	217
33	**Luxembourg**	GSK Stockmann: Marcus Peter & Kate Yu Rao	225
34	**Macedonia**	Debarliev Dameski & Kelesoska Attorneys at Law: Emilija Kelesoska Sholjakovska & Ljupco Cvetkovski	231
35	**Malta**	WH Partners: James Scicluna & Rachel Vella Baldacchino	238
36	**Mexico**	Nader, Hayaux & Goebel: Yves Hayaux-du-Tilly Laborde & Eduardo Villanueva Ortíz	245
37	**Montenegro**	Moravčević Vojnović and Partners in cooperation with Schoenherr: Slaven Moravčević & Miloš Laković	252

Continued Overleaf

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Country Question and Answer Chapters:

38	**Mozambique**	Vieira de Almeida: Guilherme Daniel & Paulo Trindade Costa	259
39	**Netherlands**	Houthoff: Alexander J. Kaarls & Willem J.T. Liedenbaum	266
40	**Norway**	Aabø-Evensen & Co Advokatfirma: Ole Kristian Aabø-Evensen & Gard A. Skogstrøm	275
41	**Poland**	WBW Weremczuk Bobeł & Partners Attorneys at Law: Łukasz Bobeł	289
42	**Portugal**	Vieira de Almeida: Jorge Bleck & António Vieira de Almeida	296
43	**Puerto Rico**	Ferraiuoli LLC: Fernando J. Rovira-Rullán & María del Rosario Fernández-Ginorio	302
44	**Romania**	Popovici Nițu Stoica & Asociații: Teodora Cazan	309
45	**Saudi Arabia**	Alexander & Partner Rechtsanwaelte mbB: Dr. Nicolas Bremer	315
46	**Serbia**	Moravčević Vojnović and Partners in cooperation with Schoenherr: Matija Vojnović & Vojimir Kurtić	322
47	**Slovakia**	Škubla & Partneri s. r. o.: Martin Fábry & Marián Šulík	331
48	**Slovenia**	Schoenherr: Vid Kobe & Bojan Brežan	337
49	**South Africa**	ENSafrica: Professor Michael Katz & Matthew Morrison	348
50	**Spain**	Ramón y Cajal Abogados: Andrés Mas Abad & Lucía García Clavería	357
51	**Sweden**	Advokatfirman Törngren Magnell: Johan Wigh & Sebastian Hellesnes	364
52	**Switzerland**	Bär & Karrer Ltd.: Dr. Mariel Hoch	370
53	**Turkey**	Kılınç Law & Consulting: Levent Lezgin Kılınç & Seray Özsoy	378
54	**Ukraine**	Nobles: Volodymyr Yakubovskyy & Tatiana Iurkovska	384
55	**United Arab Emirates**	Alexander & Partner Rechtsanwaelte mbB: Dr. Nicolas Bremer	392
56	**United Kingdom**	White & Case LLP: Philip Broke & Patrick Sarch	400
57	**USA**	Skadden, Arps, Slate, Meagher & Flom LLP: Ann Beth Stebbins & Thomas H. Kennedy	408

EDITORIAL

Welcome to the thirteenth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 54 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Scott Hopkins and Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.com.

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The MAC is Back: Material Adverse Change Provisions After *Akorn*

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On December 7, 2018, the Delaware Supreme Court upheld the Delaware Court of Chancery's October 1, 2018 decision which held that Fresenius Kabi AG, a German pharmaceuticals company, had properly terminated its merger agreement with Akorn, Inc., a U.S. generic pharmaceuticals company.[1] *Akorn* is the first time that a Delaware court has permitted the termination of a merger agreement on the basis of a material adverse effect, commonly known as a "MAC" or "MAE". While the Delaware courts have previously opined on the scope and effect of MAC provisions[2] in public merger agreements, no buyer had previously been able to successfully terminate a merger agreement on such grounds. *Akorn* upends a longstanding view among practitioners that the Delaware courts will generally decline to recognise a MAC[3] and demonstrates, that given sufficiently egregious facts and relevant merger agreement provisions, the Delaware courts will allow a buyer to walk away from a merger agreement based on changed circumstances or contractual breaches. *Akorn* also provides new insights and guidance on how Delaware courts may interpret MAC provisions as well as practical considerations relevant to M&A negotiations, merger agreement drafting, and how to handle unexpected negative developments going forward. The Delaware Supreme Court's two-page affirmation was as terse as the 246-page Court of Chancery opinion was exhaustive, so the discussion below is largely drawn from the latter opinion by Vice Chancellor Laster.

Background

On April 24, 2017, Fresenius Kabi AG entered into a merger agreement to acquire Akorn, Inc. for approximately $4.75 billion. As is customary in merger agreements, Akorn made several representations to Fresenius, including representations regarding its compliance with applicable regulatory requirements and commitment to use commercially reasonable efforts to operate the business in the ordinary course of business between signing and closing.

The merger agreement also included termination provisions stipulating that Fresenius could terminate the merger agreement if Akorn's representations failed to be true and correct as of signing and closing and such failure "would, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect". Fresenius could also terminate the merger agreement if Akorn failed to comply with its covenant to operate its business in the ordinary course "in all material respects". In addition, Fresenius's obligation to close the merger was conditioned on Akorn not having suffered "any effect, change, event or occurrence that, individually or in the aggregate, has had or would reasonably be expected to have a Material Adverse Effect". Fresenius would later seek to terminate the merger agreement on all three grounds.

After the merger agreement was signed, Akorn's financial performance experienced a significant downturn, with the Court of Chancery noting that Akorn's business performance "fell off a cliff".[4] Akorn downgraded its earnings guidance for the second quarter 2017 and for the year shortly after the signing of the merger agreement. When second quarter earnings were released in July 2017, Akorn had experienced a 29% year-over-year decline in revenue, a 84% year-over-year decline in operating income and a 96% decline in year-over-year earnings per share.

Akorn's business performance went from bad to worse as 2017 progressed. The company downgraded its third quarter forecast and when earnings were released in November 2017, Akorn's revenue had fallen 29% year-over-year and its operating income and earnings per share had declined 89% and 105%, respectively, over the same period. By the fourth quarter, Akorn's revenue had fallen by 34%, its operating income by 105%, and its earnings per share by 300% over the year. The downward trend continued into the first quarter of 2018, albeit at a slower pace.

As Akorn's business faltered, Fresenius received two anonymous whistleblower letters alleging that Akorn's product development process failed to comply with regulatory requirements. The letters also raised doubts as to whether Akorn was operating its business in the ordinary course after the signing of the merger agreement. Fresenius brought the letters to Akorn's attention. Relying on its right under the merger agreement to reasonable access to information held by Akorn and to Akorn's officers and employees, Fresenius (which was by this time was beginning to regret its decision to enter into the merger agreement) began conducting an independent investigation to determine whether Akorn had potentially breached its obligations under the merger agreement. Fresenius's investigation uncovered serious and pervasive data integrity problems at various Akorn facilities. In particular, Fresenius uncovered a number of submissions made to the U.S. Food and Drug Administration ("FDA") that included false or inadequate underlying data. These concerns came to a head in March 2018, when Akorn met with representatives of the FDA to disclose the data integrity issues that Fresenius had uncovered. Following the meeting, Fresenius received a copy of the presentation that Akorn had submitted to the FDA, which upon review, Fresenius determined contained false, incomplete and misleading information.

In March 2018, senior executives at Fresenius began exploring whether Akorn's data integrity issues and business performance would provide grounds for terminating the merger agreement. The

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next month, the executives recommended to their superiors at Fresenius's parent company and the Fresenius supervisory board that Fresenius terminate the merger agreement on the basis of the scale of Akorn's data integrity problems, the costs of remediation and the decline in Akorn's business performance. On April 22, 2018, Fresenius notified Akorn that it was terminating the merger agreement, stating that Akorn had breached its representations relating to regulatory compliance as well as its covenant to operate the business in the ordinary course of business. Fresenius also cited its right not to close the merger on the basis that Akorn had suffered a general material adverse effect. In its termination notice, Fresenius offered Akorn the opportunity to extend the outside date of the merger agreement to permit further investigation into Akorn's data integrity issues. Akorn believed that the negative developments did not amount to a MAC and regarded Fresenius as simply trying to get out of the deal it had struck due to buyer's remorse. Akorn declined to extend the outside date of the merger agreement, and commenced legal action against Fresenius the following day, seeking to compel Fresenius to close the merger.

New Insights into MAC Clauses

The Delaware Court of Chancery held that the facts of the case supported the finding that (1) Akorn had breached its representations regarding regulatory compliance to the extent that could reasonably be expected to have a material adverse effect on the company, (2) Akorn had suffered a general material adverse effect, and (3) Akorn had failed to perform in all material respects its covenant to operate the company in the ordinary course of business. The Delaware Supreme Court upheld the opinion of the Court of Chancery based on the first two grounds, noting that it did not need to consider the third. While the Court of Chancery's 246-page opinion is extremely fact-intensive and draws heavily from precedent Delaware cases, notably *Hexion* and *IBP*, the latest opinion sheds new light on how Delaware courts may evaluate MAC clauses going forward.

1. A 20% decrease in the value of the seller may constitute a MAC

Akorn provides new data points on the degree of value degradation that the Delaware courts may regard as a MAC. In evaluating whether Akorn's breach of its regulatory compliance representation amounted to a "Material Adverse Effect", the Court of Chancery concluded that a 21% decline in Akorn's equity value could reasonably be expected to result in a Material Adverse Effect.[5] The Delaware courts have been hesitant in establishing quantitative thresholds with respect to MACs, a view that is echoed in *Akorn*.[6] In *IBP*, for example, the Court of Chancery held that Tyson was not justified in terminating the merger agreement notwithstanding a 64% drop in IBP's quarterly earnings, noting a MAC must "substantially threaten the overall earnings potential of the target in a durationally-significant manner".[7] Notwithstanding the Court of Chancery's continued reluctance to establish quantitative thresholds for determining the presence of a MAC, *Akorn* presents a fact pattern that may help guide the resolution of future disputes on this issue.

To determine the size of the Akorn's decline in equity value, the Court of Chancery relied on internal management estimates and expert testimony.[8] Akorn estimated the economic cost of remedying the data discrepancies to be approximately $44 million while Fresenius estimated the cost to be as high as $1.9 billion.[9] An independent expert estimated the losses to be between $604 million and $808 million.[10] After assessing the underlying assumptions behind Akorn's and Fresenius's estimates and the independent expert report, the Court of Chancery concluded that the "most credible outcome lies in the vicinity of the midpoint of the parties' competing submissions, at approximately $900 million", which represented a decline of 21% in Akorn's implied equity value of $4.3 billion under the merger agreement.[11] To further justify its conclusion, the Court of Chancery added that the midpoint of the parties' estimates also approximated the estimates provided in the independent expert report.[12]

In evaluating whether the 21% decline in equity value constituted a "Material Adverse Effect" with respect to Akorn's regulatory compliance representation, the Court of Chancery first stressed that neither party had provided the court with any information on what they deemed material when viewed from the longer-term perspective of a reasonable acquirer.[13] Absent such estimates, the Court of Chancery turned to the fact that Fresenius's internal models had already priced in over $200 million in potential losses. The Court of Chancery noted that "[w]hen a deal is priced to perfection, a reasonable acquiror has less ability to accommodate an expense that equates to a substantial portion of the seller's value".[14] The estimated size of the losses from Akorn's data integrity problems was over four times the size of exposures that Fresenius had initially been prepared to close on – a figure that the Court of Chancery determined was a MAC.

In reaching its conclusion, the Court of Chancery drew on a wide set of metrics, including (1) that a bear market occurs when stock prices fall at least 20% from their peak, (2) that studies suggest that when a target experiences a firm-specific MAC, subsequent renegotiations reduce the purchase price by 15% on average, (3) that, on average, the upper and lower bounds for collars in deals involving stock consideration generally fall within 10% to 20%, and (4) that studies have indicated that the median reverse termination fee is equal to 6.36% of the transaction value.[15] While Vice Chancellor Laster admitted that some of the metrics referenced in the opinion provide a "noisy indication of materiality", he nonetheless concluded that all the evidence collectively indicated that an expense amount totalling 20% of Akorn's value would be material to a reasonable buyer.[16]

It is noteworthy that the opinion ultimately cautions against drawing too much inference from its evaluation of Akorn's metrics. The opinion reiterates the holding in *Hexion* in which the Court of Chancery stated that "materiality for purposes of an MAE should be viewed as 'a term of art'".[17] Vice Chancellor Laster added that he had "primarily weighed the evidence in the record against [his] own intuition and experience (admittedly as a lawyer and judge rather than as a buyer or seller of businesses)".[18] Perhaps as a signal to future litigants, Vice Chancellor Laster noted that neither party had provided the court with much information in helping it determine whether the costs of remediation would be material when viewed from the longer-term perspective of a reasonable buyer. Vice Chancellor Laster added that "[i]t would have been helpful to have access to expert testimony or studies about the thresholds companies generally use when reporting material events, such as material acquisitions" as well as thresholds that Akorn and Fresenius had used in the past.[19]

2. A MAC is measured on the stand-alone value of the seller

Akorn also addressed the question of whether the MAE determination should be based on the seller as a stand-alone entity or should also include synergies arising from the merger. In an attempt to refute the existence of a MAC, Akorn contended that any assessment of Akorn's decline in value should include its value to Fresenius as a synergistic buyer, so that even if Akorn's value had decreased, it was still valuable to Fresenius because of what Fresenius could do with its assets. The court rejected this argument, noting that the plain language of the MAE clause in the merger

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agreement broadly referred to any "material adverse effect on the business, results of operations or financial condition of the Company and its Subsidiaries".[20] The opinion noted that had the parties intended to adopt a synergistic approach, the definition of MAE would have encompassed the surviving company or the combined company.[21] Moreover, the opinion added that the MAE definition included a carve-out of any effects resulting from "the negotiation, execution, announcement or performance" of the merger agreement, which the Court of Chancery interpreted to include the generation of any synergies as a result of the merger.[22]

The takeaway from *Akorn* is that a MAC can occur even if the buyer is still able to profit from the merger. The Court of Chancery justified this conclusion because requiring the buyer to prove a loss would require a showing of "a goodwill impairment" – a standard that the Court of Chancery deemed too burdensome.[23] Adopting such standard would also overlook the opportunity costs buyers typically factor in when deciding between competing projects. The Court of Chancery did note, however, that Akorn and Fresenius "could have bargained for such standard, but they did not".[24]

3. *The MAC is not premised on the doctrine of frustration*

In rejecting Akorn's argument that a MAC be conditioned on Fresenius having suffered a loss as a result of the merger, the Court of Chancery noted that the black-letter doctrine of frustration already serves such a purpose. Therefore, the parties, having drafted the MAE clause, must have intended to implement a different and lower burden of proof on the seller.[25] Under black-letter law, the doctrine of frustration discharges a contracting party's obligations when his or her "principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption to which the contract was made".[26] The Court of Chancery noted that if the parties had intended for the buyer to have to prove a loss in order to terminate the merger agreement, they would not have expended the additional effort to draft the MAE clause. The MAE standard, while onerous and hard to satisfy, imposes a lower burden of proof on the seller seeking to terminate a merger agreement than the doctrine of frustration. The Vice Chancellor's discussion of the doctrine of frustration as a possible separate common law basis for termination raises the intriguing possibility that the Delaware courts could separately allow a buyer to terminate a merger agreement on the grounds of frustration without having found a MAC. That would, however, seem to require an extreme and highly unusual set of facts given the effort specifically expended by the parties in spelling out their termination rights.

4. *The duration of a MAC might possibly be shorter for private equity buyers*

In keeping with earlier Delaware holdings in *Hexion* and *IBP*, *Akorn* underscores that any finding of MAE must be evaluated from the "longer-term perspective of a reasonable acquiror" and that the "important consideration therefore is whether there has been an adverse change in the target's business that is consequential to the company's long-term earnings power over a commercially reasonable period, which one would expect to be measured in years rather than months".[27] In *Akorn*, the Court of Chancery reviewed Akorn's performance over three quarters and against its year-on-year performance as well as industry-wide performance before concluding that the company had experienced a sustained decline in business performance that was durationally significant and which would be material to a reasonable buyer.

Interestingly, in a footnote, the opinion noted that commentators have suggested that the durational requirement for finding a MAC may not apply when the buyer is a financial investor "with an eye to short-term gain". While the opinion did not elaborate on how the burden of proof would change for such buyers, it did cite *Genesco, Inc. v. The Finish Lines, Inc.*, which found that two quarters of bad performance would be material to a buyer in a highly leveraged acquisition.[28] Going forward, it remains to be seen how the Delaware courts will evaluate the durational requirement for finding a MAC in transactions involving financial buyers.

A Framework for Risk Allocation between Buyer and Seller

The *Akorn* opinion supplemented its analysis of MAE clauses with a framework for understanding the types of risks that arise in a merger and how such risks ought to be allocated between the buyer and seller. Although not novel, this framework may provide a helpful guide to persons negotiating or seeking to interpret or explain (for example, to a board of directors) the allocation of risks between the buyer and the seller. The opinion stated that, as a general matter, the typical MAE clause allocates general market or industry risk to the buyer.[29] Company-specific risks are re-allocated to the seller through exceptions to the carve-outs in the MAE clause.[30] The opinion distilled general market and company-specific risks into four distinct categories:

- Systematic risks, *i.e.*, risks that are beyond the control of all parties and whose impact will generally extend beyond the parties to the transaction.
- Indicator risks, *i.e.*, risks that signal a MAC may have occurred, such as a drop in the seller's stock price or a credit rating downgrade, and which is evidence of, but not in and of itself an adverse change.
- Agreement risks, *i.e.*, risks that arise from the public announcement of the merger agreement and the taking of actions contemplated thereunder, including endogenous risks associated with getting from signing to closing.
- Business risks, *i.e.*, risks arising from the ordinary operations of a party and over which the party usually has significant control.

The opinion proceeded to evaluate the MAE clause in the *Akorn* merger agreement under its risk classification framework. It identified general industry changes, changes to the economy, credit or financial or capital markets, acts of war, violence, pandemics, disasters and other *force majeure* events such as earthquakes, floods and hurricanes, and changes in applicable law or regulation as examples of systematic risks that are borne by the buyer.[31] The opinion identified risks associated with the negotiation, execution, announcement or performance of the merger agreement and any action taken by Akorn or its subsidiaries as required under the merger agreement or at Fresenius's request as examples of agreement risks that are also borne by the buyer.[32] In addition, the opinion identified changes in Akorn's credit ratings, declines in market price or changes in trading volume of the shares of Akorn or any failure by Akorn to meet projections and guidance as examples of indicator risks also assumed by the buyer.[33] Business-specific risks were then re-allocated to the sellers through exceptions to the carve-outs in the MAE clause, which stated that the seller is not protected against systematic risks which have a "disproportionate impact" on the seller, and that the indicator-risk carve-out did not extend to the underlying causes behind the decline in the stock price, credit rating or other indicator.[34]

The Court of Chancery concluded that the MAE definition in the merger agreement ultimately leaves Akorn only bearing company-specific business risks and opined that this outcome is economically efficient as the seller "is better placed to prevent such risks . . . and has superior knowledge about the likelihood of the materialization

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of such risks that cannot be prevented".[35] It takes seriously deteriorated circumstances for those company-specific business risks to be triggered to the point where the buyer can walk away from the deal, but in Akorn's case, the Court found that they were.

No Reliance or Sand-bagging Defence in Delaware

In *Akorn*, the Court of Chancery also confirmed the contractarian nature of Delaware law and the absence of a reliance defence to a claim for breach of representations and warranties. Previously, in *IBP*, then Vice Chancellor Strine rejected the argument that a buyer could not have relied on a representation made by the seller when the buyer had reason to be concerned about the accuracy of the representation and had the ability to conduct due diligence to confirm the accuracy of the representation. Writing in a separate opinion, then Vice Chancellor Strine also noted that "due diligence is expensive and parties to contracts in the mergers and acquisitions arena often negotiate for contractual representations that minimize a buyer's need to verify every minute aspect of a seller's business".[36] The earlier opinions noted that representations served an important risk allocation function because they allowed the seller to lessen its burden to independently verify the matters covered under the representation.

Akorn echoes the views of earlier Delaware cases and rejects Akorn's argument that the MAE qualifier to a representation changes the nature of the representation and its risk allocation function. Instead, the Court of Chancery held that a MAC or MAE qualifier to a representation serves a more subtle purpose: it "addresses the degree of deviation from the representation that is permissible before the representation would be deemed inaccurate".[37] Vice Chancellor Laster further held that "it should not matter whether or not the buyer had concerns about potential regulatory compliance issues (which the representation evidenced) or conducted some degree of due diligence".[38] What did matter was that the parties had allocated the risk of the issues addressed in the representation through the representation. If the parties wished to allocate risk any differently, the Court of Chancery suggested that they could have done so through qualifying certain items on a disclosure schedule. The Court of Chancery added that implying a knowledge-based carve-out to a representation would lead to an "expansive knowledge-based exception framed in terms of everything the buyer knew or should have known" and which "is not consistent with the plain language of the Merger Agreement".[39]

If the parties intend that a particular known potential risk should be borne by the buyer, it is possible to call that risk out specifically in the disclosure schedules to the merger agreement. Going forward, it is possible that sellers will seek to avoid free-standing MAC conditions even more strongly than they already do, and to build into the disclosure schedules known risks that they want the buyer to take on.

An Objective Standard for Operating in the Ordinary Course?

The third basis on which the Court of Chancery allowed Fresenius to terminate its agreement with Akorn was Akorn's failure to perform in all material respects its covenant to operate the company in the ordinary course of business, and this failure had been sufficiently material to satisfy the bring-down closing condition applicable to covenants (which is at the lower "materiality" standard and does not require an MAE). The Delaware Supreme Court did not affirm the decision on this basis but simply noted in a footnote that there was "no need for [them] to comment upon or to address this reasoning to decide this expedited appeal".

In addressing whether Akorn breached its covenant to operate in the "ordinary course" of business between signing and closing, the Court of Chancery appeared to adopt an objective standard, measuring Akorn's actions against what a "general pharmaceutical company operating in the ordinary course of business" would do.[40] In Akorn's case, the Court did find that Akorn had engaged in practices post-signing that were inconsistent with its own past business practices. Notably, Akorn cancelled regular audits at four sites in favour of less invasive "verification" audits and submitted fabricated data to the FDA. However, the Court of Chancery's reference to an objective standard when evaluating what constitutes ordinary course behaviour raises the interesting question of whether a company that had not been operating historically according to such objective standards would be required to "step up its game" between signing and closing. The Court's findings suggest that the continuation of egregious past missteps by the seller, especially if exacerbated by serious missteps post-signing, may amount to a breach of the ordinary course covenant.

The Court of Chancery also suggested that the customary language requiring Akorn to comply with its covenants "in all material respects" invoked a materiality standard comparable to that used for disclosures under U.S. federal securities law. Under federal securities law, materiality hinges on whether a breach would have been viewed by a reasonable investor as having significantly altered the "total mix" of information. The Court of Chancery rejected Akorn's argument that a breach of the covenant would require a showing of a material breach of contract under common law. The opinion stated that the purpose of the clause "in all material respects" was to "exclude small, *de minimis*, and nitpicky issues that should not derail an acquisition". This latest interpretation of "in all material respects" by the Court of Chancery suggests that future analyses of breaches of covenants may rely heavily on the context and facts at hand, and that the burden of proof may not be as onerous as previously believed.

Tactical Considerations in Dealing with Disputes Before Terminating

Akorn also offers practical guidance for parties – buyers in particular – in navigating a potential MAC situation. A buyer under a merger agreement whose target has suffered a precipitous decline in its fortunes or prospects since the signing is in a difficult position. Integrating acquired companies and making them accretive is hard enough. When what you will receive in the deal is substantially less than what you thought you had negotiated to buy and were paying for, that can be a bitter pill to swallow. In a public company acquisition, unless the value degradation is extreme, there is often little the buyer can do. However if the target's performance shortfall reaches the level of potential materiality, there may be a reasonable prospect of renegotiating the transaction at a level that makes sense for all parties, which is what often happens. Indeed, the vagueness and lack of precision in the MAC definition is deliberate, designed to give both parties an incentive to find a workable solution if things go wrong. Sometimes, however, this can be complicated by the uncertainty of the underlying facts, legal and cultural considerations and even personalities. A buyer might believe, for example, that as soon as they raised the possibility of a renegotiation, they would find themselves being sued in an unfavourable jurisdiction. In such a case, they may be nervous to engage their counterpart in

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renegotiation discussions and may even be tempted to act unilaterally, as Hexion did when its transaction with Huntsman Chemical was doomed by the collapse of the chemicals industry.

In *Akorn*, the Court of Chancery placed substantial weight on the fact that Fresenius had made overt efforts to reach out to Akorn to deal with the unfolding situation before terminating the merger agreement. The difficult judgments that will have to be made in these unfortunate situations will always be heavily dependent on the underlying facts. Ultimately in *Akorn*, the Court held that Fresenius struck an acceptable balance between using its best efforts to consummate the merger on the terms specified in the merger agreement and pursuing its rights to terminate under the agreement in light of the adverse developments.

Conclusion

On one level, *Akorn* is not a momentous case that breaks new legal ground, but is simply a recognition that given sufficiently egregious facts, a buyer will be able to walk away from a merger agreement. The "curse" has been broken, the "taboo" lifted, and new life breathed back into the MAC clause. Lawyers can take comfort that the contracts they write do mean something.

Beyond that headline, *Akorn* is a case that will be studied for many years as it offers significant guidance on various issues relating to the standards used to establish a MAC. Because the situation where a MAC-dispute comes into play is one of the most difficult and sensitive areas of M&A law, this guidance is most welcome.

Acknowledgment

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Endnotes

1. *Akorn, Inc. v. Fresenius Kabi AG, Inc.*, No. 535, 2018 (Del. Dec. 7, 2018); *Akorn, Inc. v. Fresenius Kabi AG Inc.*, C.A. No. 2018-0300-JTL (Del. Ch. Oct. 1, 2018).
2. *See, e.g., In re IBP, Inc. S'holders Litig.*, 789 A.2d 14 (Del. Ch. 2001) and *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008).
3. "Many commentators have noted that Delaware courts have never found a material adverse effect to have occurred in the context of a merger agreement. This is not a coincidence." Vice Chancellor Lamb in *Hexion* (*supra*) at 40.
4. C.A. No. 2018-0300-JTL, at 2 (Del. Ch. Oct. 1, 2018).
5. C.A. No. 2018-0300-JTL, at 185 (Del. Ch. Oct. 1, 2018).
6. The Court of Chancery noted that notwithstanding the fact that most courts have considered decreases in profits of 40% or higher to constitute a material adverse effect, the "precedents do not foreclose the possibility that a buyer could show that percentage changes of a lesser magnitude constituted an MAE". *Id.* at 132.
7. 789 A.2d 14 at 738 (Del. Ch. 2001).
8. The court relied on dollar estimates provided by Akorn and Fresenius as well as evidence from depositions of Akorn and Fresenius executives regarding the accuracy of the estimates. The court also relied on an independent expert's report calculating out-of-pocket remediation costs. It is notable that the Court of Chancery did not devise a formulaic approach to determining losses with Vice Chancellor Laster, noting that he landed at a figure that made "intuitive sense to me given the seriousness of Akorn's regulatory problems and the ever-expanding efforts that Akorn has been forced to make to remediate them". C.A. No. 2018-0300-JTL, at 184 (Del. Ch. Oct. 1, 2018).
9. *Id.* at 179 (Del. Ch. Oct. 1, 2018).
10. *Id.* at 183.
11. *Id.* at 184.
12. *Id.* at 184.
13. The Court of Chancery suggests that had either party put forth an estimate on what it considered to be an MAE, the court would have taken such number into consideration. *Id.* at 185.
14. C.A. No. 2018-0300-JTL, at 186 (Del. Ch. Oct. 1, 2018).
15. *Id.* at 187–88.
16. *Id.* at 190.
17. 965 A.2d 715 at 742 (Del. Ch. 2008).
18. C.A. No. 2018-0300-JTL, at 186 (Del. Ch. Oct. 1, 2018).
19. *Id.* at 185.
20. *Id.* at 139.
21. *Id.* at 140.
22. *Id.*
23. *Id.* at 140–41.
24. *Id.* at 140.
25. *Id.* at 141.
26. *Id.*
27. C.A. No. 2018-0300-JTL, at 130 (Del. Ch. Oct. 1, 2018).
28. *Id.*
29. *Id.* at 121–24.
30. *Id.* at 122.
31. *Id.* at 126.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 128.
36. *Cobalt Operating, LLC v. James Crystal Enterprises, LLC*, 2007 WL 2142926 at 28 (Del. Ch. Jul. 20, 2007).
37. C.A. No. 2018-0300-JTL, at 195 (Del. Ch. Oct. 1, 2018).
38. *Id.* at 197.
39. *Id.* at 198.
40. *Id.* at 216.

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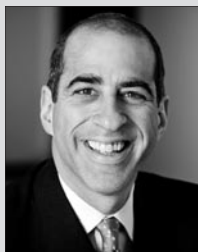

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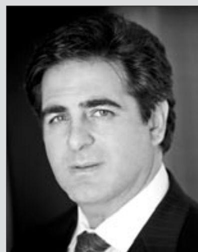

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