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First COVID-19 M&A Decision: Target's Pandemic Responses Breached the Ordinary Course Covenant–AB Stable

A number of cases are currently pending in various courts relating to whether, under an acquisition agreement signed prior to the COVID-19 pandemic, the effects of the pandemic and the target company's responses to it constituted a "material adverse effect" and/or a breach of the covenant requiring the company to operate in the ordinary course of business between signing and closing. In *AB Stable VIII LLC v. Maps Hotels and Resorts One LLC* (Nov. 30, 2020), the Delaware Court of Chancery has reached the first decision, on the merits, that we know of on these issues. Vice Chancellor Laster ruled that the pandemic was not an MAE (because the MAE definition in the agreement excluded "calamities"), but that the target company's responses to the pandemic constituted a breach of the ordinary course covenant. Therefore, the buyer was not obligated to close.

As a result of the decision, the focus on ordinary course covenants as a possible basis for not consummating deals is likely to intensify, both in the context of the COVID-19 pandemic and with respect to the potential for the occurrence of other kinds of extraordinary events (including those that are less extreme and occur more commonly). We note that ordinary course covenants appear in many types of agreements outside the M&A context (such as financing and operating agreements) and, thus, there is the potential that the decision could have broad impact.

Background. The Buyer, a subsidiary of Mirae Asset Financial Group (a Korea-based financial services conglomerate), agreed in September 2019 to acquire Strategic Hotels & Resorts ("Strategic"), a Delaware company that owns fifteen luxury hotels. The Seller is a subsidiary of Dajia Insurance Group, a Chinese company that is the successor to Angbang Insurance Group. The closing of the $5.8 billion deal was scheduled to occur in mid-April 2020. The Buyer refused to close. The court held that the Buyer was not obligated to close because Strategic's responses to the pandemic breached the ordinary course covenant. The court ruled that, under the specific terms of the Sale Agreement relating to termination, the Buyer is entitled to a return of the deposit it paid (with interest) and reimbursement for $3.7 million in transaction-related expenses plus its attorneys' fees and expenses.

Key Points

- **Based on the decision, it appears that the court may, more readily than had been expected, find that a target company's responses to the pandemic constituted a breach of an ordinary course covenant.** The decision highlights that sellers and target companies should seek to ensure that an ordinary course covenant is specifically drafted to provide sufficient flexibility for the target

company to respond to extraordinary events so that such responses do *not* breach the covenant and trigger a right by the buyer to terminate the deal. Based on the language of the ordinary course covenant in this case–which required that the business be operated "only in the ordinary course consistent with past practices in all material respects"–the court held that the only relevant issue was whether Strategic, after entering into the agreement, "substantially deviated" from its "customary and normal routine of managing [its] business." It was irrelevant, the court stated, whether Strategic's responses to the pandemic were reasonable or were similar to other companies' responses. The court specifically rejected the Seller's arguments that an ordinary course covenant permits a target company to engage in "ordinary responses to extraordinary events" and that Strategic had "operated in the ordinary course of business based on what is ordinary during a pandemic."

- **The decision confirms that the court continues to interpret MAE clauses narrowly as a general matter.** Although the MAE definition did not specify an exception for effects arising from "pandemics" (or "epidemics"), the court concluded that the specified exception for "calamities" encompassed the COVID-19 pandemic. The decision is thus in line with the court's long tradition of not finding the occurrence of an MAE (with *Akorn*, decided in 2018, being the only case we know of in which the court has ever found that an MAE occurred). The decision appears to confirm the view that developed among many practitioners over the course of the pandemic that the court is more likely to find that the pandemic and a company's responses to it resulted in a breach of an ordinary course covenant than that they resulted in an MAE.

- **The decision illustrates the anomalous result that can occur through the interplay of an MAE condition and an ordinary course covenant.** Traditionally, it is the MAE clause that parties utilize to allocate the risk between them relating to the potential for an extraordinary event to occur between signing and closing. By contrast, an ordinary course covenant imposes restrictions on the target's flexibility in making decisions about how to operate its business pending closing so that the seller does not choose to make major changes (at least without the buyer's consent). The court confirmed that an ordinary course covenant typically is drafted to require compliance with it "in all material respects," while it is well-established by the case law that the finding of an MAE is subject to a much higher materiality standard. The court also confirmed that, unless the parties specifically provide otherwise in their agreement, the two provisions are not linked in any way and are to be analyzed separately. Thus, we would note, the anomalous result that can obtain (as it did in this case) that a buyer that has agreed (in the MAE clause) that certain specified extraordinary events will *not* provide a basis for an MAE nonetheless may be excused from closing based on the target company's *responses* to the event constituting a breach of the ordinary course covenant (even though those responses may be dictated by the circumstances and thus largely non-volitional). While the court did not specifically address this anomaly, as we read the opinion, the court was essentially indicating that it interprets agreements based on the plain language presented–and, if parties intend a result different from the one just described, they must accomplish this through changes to the typical drafting. (See "Practice Points" below.)

- **The court viewed the precise language of the ordinary course covenant as critical to the court's interpretation of the standard to be applied to determine compliance with the covenant (which was outcome-determinative).** The court viewed the parties' use in the covenant of the phrase "consistent with past practice," and the adverbial modifier "only" (which is the typical formulation), as "creat[ing] a standard that looks exclusively to how the business has operated in the

past," which requires that the court look only to whether the company's operations "before and after entering into the agreement" were "consistent."

We note also that the opinion, which is 242 pages long, provides an in-depth explication of the structure, drafting and operation of, and the court's approach in interpreting, ordinary course covenants and MAEs.

The Ordinary Course Covenant

The court readily found that Strategic's responses to the pandemic reflected "extraordinary" and "massive" changes to its business. The court cited the following:

- Two of the Hotels were closed entirely (which, in one case, extended the "normal seasonal closure" by two months; and in the other case was "unprecedented" as that Hotel did not close seasonally);
- The operations at the other thirteen Hotels were "severely" restricted–a status that Strategic described as "closed but open" (with all food and beverage service stopped other than room service; and amenities such as gyms, pools, spas, recreational activities, club lounge operations, valet parking, retail shops, and concierge and bellhop services all shut down or limited);
- Headcount was "slashed," hours for the remaining employees were shortened, and pay increases were deferred until further notice;
- Hotel operations were reduced to "skeleton staffing" and engineering services were limited to "safety and OSHA issues"; and
- Spending on marketing and capital expenditures were "minimized" (down 33% in March, 76% in April, and 69% in May 2020, compared to the previous year); all non-essential capital spending was put on hold; and all of the Hotels were directed to "hold" all spending on FF&E (furnishings, fixtures, and equipment) until further notice.

Moreover, Strategic's top executives testified that the company made "major material changes" to its business. Industry experts testified that the changes were "monumental" and "unprecedented" in their scope and impact and had a "dramatic" negative effect on the Hotels. Experts testified also that reducing staffing and amenities was "inconsistent with the very nature of the luxury hotel business" and could imperil the Hotels' status as luxury-rated hotels. Expert testimony also contradicted the Seller's contentions that the changes it made were not much more dramatic than those it had made in response to previous crises, such as the 2008 financial crisis.

The court rejected the Seller's argument that Strategic had operated in the ordinary course of business "based on what is ordinary during a pandemic." The Seller argued that an ordinary course covenant leaves room for a company to address changed circumstances and unforeseen events, "including by engaging in an ordinary response to extraordinary events." The court stated that, although "prior cases have not framed the interpretive question so starkly, the weight of Delaware precedent" supports the contrary view. The precedential decisions have treated the contractual term "ordinary course" to mean "the customary and normal routine of managing a business in the expected manner," the court wrote. This approach is consistent with the provision's purpose to "reassure a buyer that the target company has not materially changed its business or business practices during the pendency of the transaction" and that the buyer is "paying for the same business at closing that it thought it was buying," the court stated.

The court rejected the Seller's argument that Strategic's business was the "asset management firm" business rather than the hotel business. The Seller contended that its business was "deploying capital" and "overseeing" the Hotels' managers, which, it argued, it continued to do in the ordinary course post-pandemic. The court noted that the "plain language" of the ordinary course covenant referred not to *Strategic's* business but to the business of Strategic *and its subsidiaries* (*i.e.*, the Hotels). In addition, the covenant provided that, as part of operating in the ordinary course, Strategic had to maintain commercially reasonable levels of its subsidiaries' supplies and inventory. This language, the court wrote, did not "focus narrowly on Strategic," did not "treat Strategic as simply an asset management firm," and reflected that "the business of [Strategic] and its subsidiaries extends to the day-to-day operation of the Hotels themselves, including minutia such as 'matches and ashtrays, soap and other toiletries.'"

The court focused on the phrase "consistent with past practice" and the word "only" in the ordinary course covenant. The court stated that there are two principal sources of evidence to establish what constitutes the ordinary course of business. First, the court can look to "how the company has operated in the past, both generally and under similar circumstances." Second, the court can look to "how comparable companies are operating or have operated, both generally and under similar circumstances." In *Akorn*, the court noted, the ordinary course covenant did not include the phrase "consistent with past practices"–and, therefore, the court in that case considered both of these sources (and contrasted the company's practices with "a generic pharmaceutical company" as well as reviewing which of its own past practices it was no longer performing). In this case, however, by including the phrase about past practices and modifying the key operative clause with the word "only" (*i.e.*, as noted, the typical formulation), "the parties created a standard that looks exclusively to how the business has operated in the past"–and the court "cannot look to how other companies responded to the pandemic or operated under similar circumstances."

The court stated that an MAE clause and an ordinary course covenant are not linked together and are to be analyzed separately (unless the parties specify otherwise in the agreement). The court observed that the parties' ordinary course covenant did not incorporate or refer to the MAE clause. Instead, "the parties selected a different materiality standard, which requires compliance with the Ordinary Course Covenant 'in all material respects.'" The court described an "in all material respects" standard as one that only "eliminates the possibility that an immaterial issue" (*i.e.*, a "small, *de minimis*, and nitpicky issue," which does not "alter the total mix of the information available to the buyer when viewed in the context of the parties' contract") could enable a party to claim breach of the covenant. The court viewed the formulation of the no-MAE representation as supporting this conclusion as it "points in the same direction." That is, the no-MAE representation, by providing that there were no changes, "*whether or not in the ordinary course of business*," that had or would reasonably be expected to have an MAE, the representation "distinguishes between the question whether the business was operated in the ordinary course and whether the business suffered a [MAE], and it makes the former irrelevant to the latter."

The court cited *Cooper Tire* as presenting an analogous context for analysis of an ordinary course covenant. Vice Chancellor Laster summarized that, in the court's 2014 decision in *Cooper Tire*, "even though management [of the target company] took actions that could have been characterized as an ordinary course response to [an extraordinary and unexpected event], what mattered for the [ordinary course] covenant was the departure from how the company had operated routinely in the past." In *Cooper Tire*, the target company suffered a strike by its workers, instigated by a minority investor in the target, which blocked use of the facility by the seller. In response, the seller adopted a policy of blocking payments to the company's suppliers, which would shut down all production, in order to pressure the

minority investor and workers to capitulate. The buyer refused to close, contending that the seller had breached the ordinary course covenant. The court agreed. As Vice Chancellor Laster discussed in *AB Stable*, the court did not regard the strike in *Cooper Tire* "as an extraordinary external event beyond management's control to which management necessarily had to respond. The unforeseen event itself and its consequences on Cooper's business resulted in a deviation from the ordinary course." Cooper deviated from the ordinary course of business when it stopped paying the joint venture's suppliers–even though management may have thought of this as "an ordinary response to an extraordinary event." The *Cooper Tire* court, Vice Chancellor Laster wrote, "held that this arguably reasonable response nevertheless reflected 'a conscious effort to disrupt the operations of the facility' and therefore fell outside the ordinary course of business."

The court distinguished *FleetBoston*. The court's 2003 *FleetBoston* decision involved the agreement of a seller of a consumer credit card business to conduct solicitation campaigns in the ordinary course. The seller, after signing, responded to intensified competition for customers among credit card companies by launching a new campaign that offered very low interest rates to customers. The buyer argued that the "unprecedented" campaign breached the ordinary course covenant. The court disagreed. The court found that, realistically, the company "had only one alternative" in the face of the interest rate competition–and that was to match its competitors' strategy by offering more attractive interest rates. Based on *FleetBoston*, the Seller in *AB Stable* argued that "a seller can take unprecedented actions as long as they are reasonable under the circumstances." However, Vice Chancellor Laster responded that, while *FleetBoston* "makes clear that an ordinary course covenant is not a straightjacket…it nevertheless constrains the seller's flexibility to the business's normal range of operations." He noted that what gave the court "the most pause" in *FleetBoston* was the buyer's contention that the business lowered its credit standards to attract less creditworthy customers and made inherently unprofitable offers. This "could have fallen outside the ordinary course of business," he wrote, but he found that the evidence was "too thin" to support a factual finding that this had in fact occurred. *FleetBoston* "thus does not suggest that when faced with an extraordinary event, management may take extraordinary actions and claim that they are ordinary under the circumstances," the Vice Chancellor concluded.

We note the following open issues:

It is an open issue whether changes a company is "legally required" to make could constitute a breach of an ordinary course covenant. The court stated that there are "credible and contestable contractual, conceptual, and policy-based arguments for both positions" and "it is not clear which position ultimately would prove more persuasive." In this case, the court did not reach a definitive holding because the Seller "never seriously contended" that the "drastic changes" it made in response to the pandemic were required by law. The Seller did not brief the issue; its executives testified that the changes were made for commercial reasons; and the Seller did not point to "any government order [that] required [the Hotels or] any particular class of amenities to shut down." The record showed that state and local governments had issued stay-at-home orders in all of the jurisdictions in which the Hotels were located, but Strategic had implemented "sweeping changes" at a point shortly *before* any such orders were issued. The court found that it was unclear whether any governmental orders required hotels to shut down or limit amenities–but, even if they had, the court stated, that still would not have legally obligated Strategic to make other changes (such as layoffs, cuts to sales efforts, and decreased expenditures).

It is an open issue whether the court would consider as a measure of compliance with an ordinary course covenant that the company's responses to an extraordinary event were consistent with its responses to previous extraordinary events. As we read the opinion, it does not address this issue. It

may be that the court would view no other extraordinary event as being sufficiently similar to this pandemic to provide a reasonable basis for this analysis. The opinion appears to us, however, not to foreclose this argument by a seller in a context involving other extraordinary events. We anticipate that the analysis would depend on the extent to which the past event was similar to the event at issue; how often such an event had occurred; and how similar the company's responses had been in each instance.

The Material Adverse Effect Representation

The court held that the term "calamities" encompasses the COVID-19 pandemic. "MAE" was defined in the Sale Agreement as "any event, change, occurrence, fact or effect that would have a material adverse effect on the business, financial condition, or results of operations of [Strategic and its subsidiaries], other than any event, change, occurrence or effect arising out of, attributable to or resulting from…natural disasters or calamities [or certain other specified exceptions] (the "MAE Definition"). The Court relied on a dictionary definition of "calamity"–"a serious accident or bad event causing damage or suffering"–and found that the term encompasses the COVID-19 pandemic. The court observed: "Millions have endured economic disruptions, become sick, or died from the pandemic"; "COVID-19 has caused human suffering and loss on a global scale, in the hospitality industry, and for Strategic's business"; and "the COVID-19 outbreak has caused lasting suffering and loss throughout the world." The court rejected the Seller's argument that the omission of the word "pandemic" from the list of exceptions to MAE must have been intentional by the parties, evidencing that they had intended *not* to except a pandemic. The court found the data presented by two prominent law professors (who, respectively, represented the parties), following their examination of a large sample of transaction documents entered into during the year before the Sale Agreement was signed, to support the court's interpretation of the term "calamities." The court found that "strong conclusions" could not be reached based on the data they presented, but that the data indicated that "it is possible to reject the proposition that general terms like 'calamity,' 'natural disaster,' 'Act of God,' or '*force majeure*' never can encompass pandemic risk because a meaningful number of agreements make explicit connections among these terms."

The court rejected the Seller's argument that because the word "calamity" appeared as part of the phrase "natural disasters or calamities" it should be read as referring to phenomena that have features similar to "natural disasters." The court stated that the interpretive canon that would "yoke" the word "calamities" to "natural disasters" because they are used in the same phrase would apply only if the term were "ambiguous." First, the court stated, "the term 'calamities' is not ambiguous." Second, when the doctrine applies, "its principal function is to imbue a collective term with the content of the other terms in the list." For example, the court explained, in a provision referring to "oranges, lemons, grapefruits, and other fruit," the term "other fruit" could be interpreted to mean other familiar types of *citrus* fruit (and not encompassing melons). As the phrase "natural disasters and calamities does not fit this model…, the plain language of the term "calamities" therefore controls," the court wrote.

The court held that the term "natural disasters" also "arguably" encompasses the COVID-19 pandemic. Relying on the dictionary, the court described the "plain meaning" of "natural disaster" as a "sudden and terrible event in nature (such as a hurricane, tornado, or flood) that usually results in serious damage and many deaths." The court found that the COVID-19 pandemic "arguably" fits this definition, given that "it is a terrible event that emerged naturally in December 2019, grew exponentially, and resulted in serious economic damage and many deaths." The court rejected the Seller's more limited view of natural disasters as being only "sudden, single events" that are "attributable to the classic elements of nature" (earth water, fire, and air) and that "threaten direct damage to property." The court reasoned that some *but not all* natural disasters are sudden (for example, a drought generally arises over a lengthy

period); some, but not all, arise from the "four earthly elements" (for example, a meteor strike would not arise from these elements); and "[t]here is also no reason to prioritize property damage over the suffering of living beings."

The court reasoned that the "structure" and "content" of the MAE definition in the agreement also supported its interpretation of "calamities" to encompass the pandemic. First, the court noted that, as is typical, the MAE definition in the agreement "broadly shifts systemic risk to Buyer" (through its express exceptions for general industry changes or developments, changes in political or economic conditions or financial markets, and changes in law). This "structural risk allocation in the definition thus points in the same direction as the plain-language interpretation," the court stated. Given that "[t]he risk from a global pandemic is a systematic risk... it makes sense to read the term 'calamity' as shifting the risk to the buyer." Second, the court viewed the "content" of the MAE definition–specifically, its "seller-friendly nature"–as also supporting the interpretation of 'calamities' to include pandemic risk. The court viewed the provision as seller-friendly (*i.e.*, that the Buyer assumed "a greater-than-normal range of risks") because: the specified exceptions eliminated any effects arising from existing events that the Buyer knew about when the agreement was signed; there was no exclusion from the exceptions for events having a disproportionate effect on Strategic as compared to other firms in its industry; and the forward-looking nature of the clause was limited (by not including "prospects" in the list of factors that could result in an MAE, and by including a proviso that specified that an MAE would be "measured only against past performance" and not again projections or forecasts).

The court reasoned that policy considerations also supported rejecting the Seller's narrow interpretation of the term "calamities." Drafters of MAE definitions "must contemplate" three types of risks, the court observed: "known knowns, known unknowns, and unknown unknowns." The court wrote: "Drafters can use specific terms to address known knowns and known unknowns, but only broad terms can encompass unknown unknowns. To read a term like 'calamities' narrowly would interfere with the drafters' ability to allocate systemic risk for as-yet-unknown and as-yet-unimaginable calamities. By contrast, reading a term like calamities broadly allows drafters to carve out known knowns and known unknowns through exclusions." The court offered as an example that, if parties believe that the seller is better suited than the buyer to shoulder the risk of a pandemic, then the drafters could say "natural disasters and calamities (excluding pandemics)."

The Fraud Case

Unrelated to the COVID-19 pandemic issues, the Buyer claimed it had a right not to close based on non-satisfaction of the specific closing condition in the Sale Agreement that required that Strategic's title on deeds to the Hotels (and the insurance coverage relating thereto) be resolved. The court agreed. The court readily concluded that the title and insurance issues were not resolved and indicated that the Seller may well have engaged in fraud in connection with the deeds. The court also concluded that the Buyer had not breached its obligation to use "commercially reasonable efforts" to facilitate resolution of the title and that, even if it had, it was not the Buyer's actions, but the Seller's fraudulent acts, that caused the failure of the condition.

Practice Point

- **Avoiding the result of an extraordinary event not constituting an MAE but the buyer being entitled to terminate the deal in any event based on the target's responses to the event constituting a breach of the ordinary course covenant.** MAE clauses generally allocate all risk to

the buyer, then reallocate some of those risks to the seller through specified exceptions, and then return some of those risks back to the buyer through exemptions from the exceptions. The materiality standard, as noted above, is a very high one–essentially, that the event resulted in a material negative change in the company's fundamental, long-term value. By contrast, an ordinary course covenant typically requires that the target company must be operated in the ordinary course of business consistent with past practices "in all material respects." As discussed, the court reaffirmed that "in all material respects" is a far lower standard than "MAE"; and confirmed that, unless the parties specify otherwise, an ordinary course covenant and an MAE are not linked in any way and are to be analyzed separately. Thus, although a buyer has agreed (in the MAE clause) that certain specified extraordinary events will *not* provide a basis for an MAE that would permit the buyer not to close, the buyer nonetheless may be permitted not to close based on the target's *responses* to that same event constituting a breach of the ordinary course covenant (even though the responses may be dictated by the extraordinary circumstances and thus largely non-volitional). This result is arguably inconsistent with the traditional purposes of MAE clauses and ordinary course covenants–the former being to allocate risk when extraordinary events occur between signing and closing and the latter to restrict decision-making by the seller that would result in essentially voluntary changes to the business between signing and closing.

A seller may seek to avoid this potential result through changes to the typical drafting of the ordinary course covenant–for example, by imposing an MAE standard (rather than "in all material respects") and/or by explicitly excepting from the general restriction certain specified (or all) actions taken in response to certain specified (or all) extraordinary events (possibly, unless such actions would have an MAE). Over the course of the pandemic, drafting practice has generally evolved such that, in newer agreements, the parties typically do except from the covenant specified responses to this ongoing pandemic. Going forward, parties may wish to consider whether broader exceptions should be made to cover other extraordinary events (or unexpected events even if they are not extraordinary) that may occur.

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