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Update: Delaware Supreme Court affirms Chancery Court's decision in *Akorn, Inc. v. Fresenius Kabi AG, et al.*, in Material Adverse Effect case

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On Friday, December 7, 2018, just two days after oral argument of an expedited appeal, the Delaware Supreme Court upheld the Chancery Court's determination in *Akorn, Inc. v. Fresenius Kabi AG, et al.*, C.A. No. 2018-0300, that a Material Adverse Effect (an "MAE") existed, which justified termination of a merger agreement. In a two and one-half page Order, the Delaware Supreme Court held that the "record adequately supports" the Chancery Court's conclusion that Fresenius Kabi AG ("Fresenius"), the proposed acquirer, had no obligation to close its merger with Akorn, Inc. ("Akorn") and had properly terminated the merger agreement.

As more fully described in [our October 9, 2018 alert](#), while cautioning that there is no bright-line test to determine when an MAE exists, the Chancery Court applied ordinary contract interpretation principles to a heavily negotiated merger agreement and a complex set of facts developed during a five-day trial. In a detailed 246-page opinion, the Chancery Court held that an MAE had occurred and that Fresenius was not obligated to close the transaction because of it. The Chancery Court also concluded that Fresenius could walk away from the deal because of several breaches by Akorn as the target of the acquisition. Akorn had breached its representations regarding regulatory compliance, which the Chancery Court determined would be expected to have an MAE. Akorn also failed to use "commercially reasonable efforts" to carry on its business "in all material respects in the ordinary course of business" after signing the merger agreement. Each of these breaches and failures permitted Fresenius to terminate the merger agreement by its terms.

After expedited briefing, the Delaware Supreme Court held argument on December 5, 2018. During the argument, available [here](#), Akorn attacked the Chancery Court's decision by arguing that the lower court had "g[iven] the buyer here a termination option by permitting it to declare an MAE on the basis of risk they knew about when they priced the deal, contrary to existing law." In opposition, Fresenius argued that the Chancery Court's detailed and extensive findings demonstrated that there were "huge deficiencies in the quality system at Akorn [and that] all of Akorn's data during long periods of time were unreliable."

While some commentators have asserted that the Delaware Supreme Court gave little indication of its leanings during oral argument, the questions of the five justices certainly suggested that Akorn

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had an uphill battle to persuade them to overturn the detailed decision below. Indeed, during argument, the justices noted that an affirmance would require only that they agree with any one of the several grounds for termination and refusal to close identified by the Chancery Court.

But the Delaware Supreme Court did not limit its affirmance to just one argument. It first held that the record adequately supported the Chancery Court’s “determination ... that Akorn had suffered a[n] [MAE] under § 6.02(c) of the Merger Agreement that excused any obligation on Fresenius’s part to close.” After finding that a general MAE existed, excusing the refusal to close, the Court then also held that the record adequately supported the Chancery Court’s “declaration that Fresenius properly terminated the merger under § 7.01(c)(i) because Akorn’s breach of its regulatory representations and warranties gave rise to an MAE.” The Delaware Supreme Court agreed that Fresenius “had not itself engaged in a prior, material breach of a covenant that would have prevented Fresenius from exercising its immediate termination right under the Merger Agreement, adding a footnote explaining that it was rejecting both Akorn’s renewed argument that Fresenius had breached its “Reasonable Best Efforts Covenants” and the argument that Fresenius’s breach of a “Hell-or-High-Water Covenant” was material. At the same time, again in a footnote, the Court took pains to caution that it did not need to address *all* of the issues raised in the Chancery Court’s decision, having already found grounds allowing Fresenius to terminate the merger agreement. The Delaware Supreme Court therefore expressly refrained from determining whether Akorn had breached its “Ordinary Course Covenant.”

As the Delaware Supreme Court recognized, the record in this case was “complex” and the Chancery Court’s lengthy opinion included “extensive reasoning.” While there are many insights to glean from that reasoning, and there certainly will be battles ahead about the facts required to show an MAE, what is also certain is that the Delaware Supreme Court’s approach will encourage the Chancery Court to apply a laser-like focus to the specific words the parties use in their agreements.

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