

Which Way Does the MAC Knife Cut

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The Delaware courts have long prided themselves on the contractarian character of their approach to interpreting and enforcing agreements. In the M&A context, this has meant holding parties to the transaction they agreed to do, as reflected in *IBP, Inc. v. Tyson Foods, Inc.*, 789 A.2d 14 (Del. Ch. 2001), and *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008). In those decisions, the Delaware Chancery Court declined to read a “material adverse change” (or “MAC”) clause broadly so as to allow a party to get out of its deal, stating in *Hexion* that a party seeking to invoke a MAC out bears a “heavy burden” to demonstrate that a MAC has occurred. Another strain of the contractarian approach, however, is to enforce contracts as written. This is the route taken in the October 1, 2018 decision in *Akorn, Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL (Del. Ch. Oct. 1, 2018), in which Vice Chancellor Laster, in a lengthy and detailed opinion, upheld Fresenius’ use of the MAC provision to avoid its obligation to acquire Akorn. The difference between this decision and the two earlier ones is that those were based upon general industry and macroeconomic factors and short-term effects while the recent decision is based upon specific factors having longer-term impact applicable to Akorn, the target.

The *Akorn* decision involved an action brought by Akorn seeking specific performance to compel Fresenius to close its acquisition of Akorn under their April 24, 2017 merger agreement. Fresenius responded by seeking a declaration that it validly terminated the merger agreement. The court identified three reasons to deny Akorn’s request and uphold Fresenius’ termination. First, it found that the significant and sustained downturn in Akorn’s performance due to factors specific to Akorn’s business was a MAC that prevented that condition to closing from being met. Second, it found that Akorn had breached its representation relating to regulatory compliance as a result of deficiencies in quality control and falsification of records uncovered due to whistleblower complaints and a resulting investigation and, because these could be expected to have a “material adverse effect,” Akorn could not satisfy the bring-down condition to closing, a basis entitling Fresenius to terminate the agreement. Finally, the court found that Akorn breached its covenant to operate the business in the ordinary course by failing to respond adequately to the regulatory concerns and reducing its quality control efforts, which breach entitled Fresenius to terminate the agreement.

By upholding the MAC out in *Akorn*, Vice Chancellor Laster has validated the extensive time and attention devoted to negotiating merger agreements and allocating risk and has confirmed that the contract provisions, including MAC clauses, will be enforced in accordance with their terms when justified by the facts.

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