Michigan Business & Entrepreneurial Law Review

Volume 10 | Issue 2

2021

Rethinking MAC Clauses in the Time of *Akorn, Boston Scientific*, and COVID-19

Samuel Shapiro
UCLA School of Law

Follow this and additional works at: https://repository.law.umich.edu/mbelr

Part of the Business Organizations Law Commons, Contracts Commons, Courts Commons, and the State and Local Government Law Commons

Recommended Citation

Samuel Shapiro, *Rethinking MAC Clauses in the Time of Akorn, Boston Scientific, and COVID-19*, 10 MICH. BUS. & ENTREPRENEURIAL L. REV. 241 (2021).
Available at: https://repository.law.umich.edu/mbelr/vol10/iss2/6

https://doi.org/10.36639/mbelr.10.2.rethinking

This Note is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Business & Entrepreneurial Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

RETHINKING MAC CLAUSES IN THE TIME OF *AKORN*, *BOSTON SCIENTIFIC*, AND COVID-19

*By Samuel Shapiro**

ABSTRACT

The MAC clause is perhaps the most important clause in contract law, giving acquirers the ability to terminate even the largest agreements in the face of an often vaguely defined "Material Adverse Change." For decades, even though MAC clauses have been present in nearly every merger agreement, courts have almost universally refused to enforce them. But the Delaware Chancery Court's 2018 decision in Akorn *may finally change that. As the world deals with the economic uncertainty caused by COVID-19, courts may soon get more opportunities to decide whether or not they will follow* Akorn*'s lead and begin to allow companies to exit agreements. In this Article, I argue that they should.*

TABLE OF CONTENTS

INTRODUCTION 242
I. WHAT IS A MAC? 244
A. *Defining MACs* 244
B. *Common Exceptions and Carve-Outs* 245
C. *MACs in Practice: A Tool for Renegotiation* 246
II. HOW COURTS HAVE INTERPRETED MAC CLAUSES 248
A. *Pre-*IBP*: Uncertainty* 248
B. BPI 250
C. *Post-IBP* 252
1. An Immediate Shift Toward Seller-Friendliness..................252
2. *Hexion v. Huntsman* 253
3. The Financial Crisis 254
III. HOW *AKORN V. FRESENIUS* MAY CHANGE EVERYTHING 256
A. *The Background:* Akorn v. Fresenius..256
1. The Facts...256
2. The Holding 258
3. The Aftermath 259
B. *The Frustration Doctrine and How* IBP *Ignores Contract Law*...259

* J.D. Candidate, May 2021, UCLA School of Law. I would like to thank Professor Stephen Bainbridge of UCLA for his guidance.

1. Materiality 263
2. Purpose 266
3. Risk Allocation 267
4. Foreseeability 267
C. *Now What? Renegotiations Swing Even Further in Buyers' Favor* 268
D. *Finally, a Sign?* Channel Medsystems v. Boston Scientific 270
E. *What's Next? COVID-19 is Giving Courts Opportunities to Test* Akorn 273
CONCLUSION 277

INTRODUCTION

In any acquisition, lawyers are tasked with creating value, and allocating risk and uncertainty is one of the many ways they can do so.[1] Perhaps no tool at their disposal is as effective at allocating uncertainty as the Material Adverse Change (MAC) clause.[2] The MAC clause, a mainstay in nearly every modern acquisition, allows buyers the option to terminate a deal during the period between signing and closing in the event of an (often vaguely defined) "material adverse change."[3] While the existence of a MAC clause can provide parties with the peace of mind to sign a deal, the clause's capacity to single-handedly fell massive transactions has made it the most important clause in contract law today.[4]

1. *See* STEPHEN M. BAINBRIDGE & IMAN ANABTAWI, MERGERS AND ACQUISITIONS: A TRANSACTIONAL PERSPECTIVE 13-15 (2017) (explaining ways in which lawyers can add value to deals).

2. Material Adverse Change (MAC) and Material Adverse Effect (MAE) are often used interchangeably to describe these clauses. The definition of the two is close but not identical, so for purposes of simplicity, this Article will use MAC to describe both. For a detailed discussion of the differences between the two terms, *see* Kenneth A. Adams, *A Legal Usage Analysis of "Material Adverse Change" Provisions*, 10 FORDHAM J. CORP. & FIN. L. 9, 17–20 (2004).

3. NIXON PEABODY LLP, 2017 MAC SURVEY 4–5 (2017), https://www.nixonpeabody.com/-/media/Files/PDF-Others/mac-survey-2017-nixon-peabody.ashx?la=en. The well-respected survey found that some variant of a MAC clause is found in roughly 89% of large acquisition agreements. *Id*. at 5. This Article will assume that the buyer is always the party trying to claim a MAC has occurred (as does most scholarly literature on the subject), even though one study estimated that the seller is actually the party asserting that there's been a MAC up to 21% of the time. *See* Antonio J. Macias, *Risk Allocation and Flexibility in Acquisitions: The Economic Impact of Material-Adverse-Change (MACs) Clauses* 56 (Apr. 17, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1108792.

4. Andrew Schwartz, *A "Standard Clause Analysis" of the Frustration Doctrine and the Material Adverse Change Clause*, 57 UCLA L. REV. 789, 824 (2009) ("Beyond the huge sums at stake, invocation of a MAC clause in a sensitive corporate acquisition could trigger 'financial chaos' and a 'broader systemic crisis' with 'significant risks . . . for the financial system as a whole.' In short, the MAC clause is the most important standard clause in contract law today, and a clear and

Although MAC clauses have been around for a long time, the Delaware Chancery Court's 2001 decision in *IBP*[5] laid the groundwork for more than a decade of consistently seller-friendly rulings.[6] In case after case following *IBP*, courts refused to find that MACs had occurred, even in the face of circumstances and changes that might clearly seem "material" to anyone besides the judges that ultimately made the decisions.[7] During the financial crisis of the late 2000s, as buyers increasingly faced the prospect of being forced to acquire companies whose financial situations had rapidly deteriorated after deals had been signed, the *IBP* precedent often left them with very high legal barriers to clear in order to call off their agreements.[8] Buyers still were able to leverage the threat of MACs to force renegotiated deals with more favorable terms, but that threat was tempered by the lack of buyer-friendly court precedent.[9]

In 2018, however, the Delaware Chancery Court appeared to finally open the door for a change in tone. *Akorn v. Fresenius*,[10] which was subsequently affirmed by the state's highest court, marked the first time a Delaware court had ruled that a MAC had occurred.[11] In the wake of *Akorn*, there is uncertainty over how broadly the scope of the court's ruling should be treated, with some contending that the egregious facts of the case make this decision the exception, not the rule.[12] I argue the opposite, that the court's reasoning opens the door for future rulings to finally treat MAC clauses the way that contract law demands.[13]

---

sensible interpretation of the MAC clause is therefore in the public interest."); *see also* Michael J. de la Merced, *Cerberus Kills $1.1 Billion Deal With Innkeepers*, N.Y. TIMES: DEALBOOK (Aug. 22, 2011), https://dealbook.nytimes.com/2011/08/22/cerberus-ends-1-1-billion-innkeepers-deal/ (MAC invoked as reason to cancel $1 billion deal); *see also* Dana Cimilluca & Dennis K. Berman, *KKR, Goldman Cancel $8 Billion Harman Deal,* WALL ST. J., Sept. 22, 2007, at A3 (showing a scenario where MAC invoked as reason to cancel $8 billion deal).

5. *See* IBP, Inc., v. Tyson Foods Inc., 789 A.2d 14 (Del. Ch. 2001).

6. *See* Schwartz, *supra* note 4, at 827-28.

7. *See id.* ("[T]he materiality standard has been interpreted by courts to be so demanding that—absent a cataclysm of biblical proportions—it cannot be met.").

8. *See generally* STEVEN M. DAVIDOFF, GODS AT WAR: SHOTGUN TAKEOVERS, GOVERNMENT BY DEAL, AND THE PRIVATE EQUITY IMPLOSION 70 (2009).

9. *See id*.; *see also* Macias, *supra* note 3, at 1 (estimating that renegotiations occur before closing in 11% of acquisitions).

10. C.A. No. 2018-0300-JTL, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018).

11. The Ann. Surv. Working Grp. of the M&A Juris. Subcomm., Mergers and Acquisitions Comm., ABA, Bus. L. Section, *Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions*, 74 BUS. LAW. 437, 439 (2019).

12. *See* Albert H. Manwaring IV, *Extraordinary Circumstances MAE Allow a Buyer to Break a Bad Deal*, MORRIS JAMES DEL. (Nov. 25, 2018), https://www.morrisjames.com/pp/article-1018.pdf (arguing that the court in *Akorn* is merely applying existing precedent to an egregious set of facts and therefore the decision creates no new precedent); *but see* Richard W. Slack & Joshua M. Glasser, *The Material Adverse Effect Landscape After* Akorn v. Fresenius, 15 PRATT'S JOURNAL OF BANKRUPTCY LAW 29, 40–44 (2019) (making the case for ways in which *Akorn* could potentially impact future MAC enforcement).

13. *See also* Borders v. KLRB, 727 S.W.2d 357, 359 (Tex. App. 1987) ("a court cannot . . . make a new contract for the parties, one they did not make").

Although *IBP* and its successors defined materiality, duration, purpose, and foreseeability in ways clearly contrary to the intent of negotiators, *Akorn* finally rights decades of wrongs, giving buyers the contractual remedy that they deserve.

Part I of this Article explains how and where MAC clauses are incorporated into deals and the various exceptions and carve-outs buyers and sellers haggle over. Part II traces the evolution of MAC clauses, discussing how *IBP* set the stage for other seminal cases such as *Frontier Oil* and *Hexion* and how the impact of those rulings permeated through mergers and acquisitions law in the late 2000s and beyond. Part III details the *Akorn* decision and examines how the ruling may finally have opened the door for a more efficient, reasonable, and ultimately more buyer-friendly interpretation of MAC clauses. This also requires considering the impact of the Delaware Chancery Court's recent *Boston Scientific*[14] ruling, which, while adverse to *Akorn*, is ultimately distinguishable. The Article concludes by examining how COVID-19 and its aftermath will force courts to decide how *Akorn* will be applied, as the virus will likely cause a rise in terminated deals and present courts with more MAC claims than they've seen since the last financial crisis.

I. What is a MAC?

A. *Defining MACs*

MAC clauses typically serve two purposes within acquisition agreements.[15] First, they are used to establish a qualifying threshold for many of the representations and warranties made by both parties, reading, for example, that "a target has complied with all environmental laws *except as would not have a Material Adverse Effect*."[16] Setting this threshold prevents immaterial discretions and discrepancies from being used as a legal basis to threaten a large deal.[17]

Second, and most notable for the purposes of this article, MAC clauses can be used as a more general catch-all for circumstances that would allow a party, usually the buyer, to walk away from a deal entirely.[18] Given the amount of time, energy, and money that goes into most acquisitions, not to mention the attention these acquisitions draw from investors and the media, the potential in-

14. Channel Medsystems Inc. v. Boston Scientific Corp., No. 2018-0673-AGB, 2019 WL 6896462 (Del. Ch. Dec. 18, 2019).

15. NIXON PEABODY LLP, *supra* note 3, at 4.

16. *Id.* Another example of this is the "Weinstein Clause," which has been added in response to the recent #MeToo movement for the purpose of forcing merging companies to disclose any allegations of sexual harassment that may eventually result in a material adverse effect. *See* Elizabeth C. Tippet, *#MeToo Movement Finds an Unlikely Champion in Wall Street With the New "Weinstein Clause,"* CONVERSATION (Aug. 3, 2018, 6:41 AM). http://theconversation.com/metoo-movement-finds-an-unlikely-champion-in-wall-street-with-the-new-weinstein-clause-100938.

17. NIXON PEABODY LLP, *supra* note 3, at 4.

18. *Id.*

vocation of a MAC clause is no small issue, which is why they are included in roughly 90% of deals.[19] Even if a MAC is never invoked, its impact is omnipresent as the primary vehicle for fixing the cost-shifting problem present between buyers and sellers.[20] Between signing and closing, sellers still necessarily retain at least some control of their business, even though they no longer have a stake in the future performance of the business.[21] By forcing sellers to bear the cost of any downturn in performance, buyers are given an incentive to make sure the business continues to run smoothly until they've turned over the keys to the acquirer.[22]

B. *Common Exceptions and Carve-Outs*

While parties may agree to include a MAC in almost every deal, they rarely agree on exactly what that MAC should look like.[23] The process of negotiating such deals typically involves a tug of war between the opposing parties over what exceptions should be included.[24] Buyers usually look for the broadest possible clause, giving them the legal wiggle room to argue that a MAC has occurred in almost any circumstance.[25] Sellers, on the other hand, fight to include as many exceptions as possible.[26] Examining years of these deals shows that some exceptions are present in nearly all MAC clauses, while others are rarely seen except in the most seller-friendly of MACs.[27] One of the most common exceptions is for changes in the economy as a whole, which appears in a whopping 85% of deals (and this number rises to 96% in deals valued over one bil-

---

19. *Id.* at 6.

20. *See id.* at 4.

21. *See id.* In addition to concerns over the operation of the business after signing, there are also concerns of information asymmetry before signing. Without a MAC clause and other representations and warranties, there would be a "lemon problem" as buyers assume sellers are hiding problems from them that would lead to a lower acquisition price. In this way, MACs create value by reducing the need for buyers to discount valuations to account for such information asymmetry. *See* Yair. Y. Galil, *MAC Clauses in a Materially Adversely Changed Economy*, 2002 COLUM. BUS. L. REV. 846, 849 (2002).

22. Ronald Gilson and Alan Schwartz wrote an influential 2005 article on this problem, hypothesizing that while risk allocation is a purpose of MAC clauses, sellers should only be held responsible for material changes that are within their control. The policy purpose of these clauses, they say, is to incentivize sellers to make investments that complement a deal's synergies by giving the buyer a credible means of abandoning the deal. While external changes obviously can negatively impact a buyer's investment, it doesn't serve any policy purpose to use MAC clauses to put the burden of those changes onto sellers. There's a significant amount of moral hazard that's created once the seller turns from the principal of the business to the agent of the buyer, and MAC enforcement can be the vehicle for mitigating this moral hazard. *See* Ronald Gilson and Alan Schwartz, *Understanding MACs: Moral Hazard in Acquisitions,* 21 J.L. ECON. & ORG. 330 (2005).

23. NIXON PEABODY LLP, *supra* note 3, at 4.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 5-6.

lion dollars).[28] Following the 9/11 attacks on the United States, there was rampant speculation regarding whether such major calamities could or should impact acquisitions, and MACs began to include exceptions for acts of terrorism.[29] Today, clauses exempting such acts, or equivalent changes in political conditions or war, are present in around 80% of agreements.[30] Changes in laws or regulations are exempted in a similar number of agreements.[31] There is speculation that Brexit could trigger a similar discussion with deals involving England or Europe, although that effect has yet to become clear.[32] In the next decade it will be worth keeping an eye on whether companies start to include exceptions for climate change (and the resulting regulation) as a trigger for MACs, as even large companies have started to use the language "material adverse effect" to describe the effects of fossil fuel divestment on their businesses.[33] Other topics that pop up in a majority of agreements include the effects of the announcement of the deal (76%), changes in GAAP (80%), and perhaps most importantly, the failure by the seller to reach earnings or revenue projections (67%).[34]

C. *MACs in Practice: A Tool for Renegotiation*

Even though sellers may be willing to fight tooth and nail for each additional exclusion, it is possible that all of the time spent hashing out these details is for naught. Inconsistent judicial interpretations of MACs have left both buyers and sellers uncertain what the result of litigating their claims would be.[35] As a result, many argue that the primary effect of MACs is seen outside of the court-

---

28. *Id.* at 9.

29. *See* Keri K. Hall, *How Big is the MAC?: Material Adverse Change Clauses in Today's Acquisition Environment*, 71 U. CIN. L. REV. 1061, 1088–89 (2003) (giving examples of how agreements began to address terrorism in the wake of 9/11).

30. NIXON PEABODY LLP, *supra* note 3, at 10.

31. *Id.* at 11.

32. *See* SHEARMAN & STERLING LLP, BREXIT: ISSUES AND Q&A FOR BUSINESSES 10, 16 (2016), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/06/BrexitWhatDoestheVoteMeanforBusinessFIAFR062816.pdf (advising practitioners on how to approach uncertainty in the wake of Brexit and how MACs could help); *see also* Travers Smith LLP, *Brexit, Force Majeure and Material Adverse Change Clauses*, LEXOLOGY (Mar. 13 2019), https://www.lexology.com/library/detail.aspx?g=9e5ee57d-b402-4b78-93ad-09da0cda2094 (analyzing how a recent case could shed light on how courts will interpret MACs triggered by Brexit and determining that Brexit will likely be treated the same way that other macroeconomic changes have been).

33. Bill McKibben, *Money is the Oxygen on Which the Fire of Global Warming Burns*, NEW YORKER (Sept. 17, 2019), https://www.newyorker.com/news/daily-comment/money-is-the-oxygen-on-which-the-fire-of-global-warming-burns.

34. NIXON PEABODY LLP, *supra* note 3, at 13.

35. *See generally* Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play,* 71 FORDHAM L. REV. 1899 (2003) (arguing that MACs and other deal protection devices are burdened by the uncertainty of not knowing what the result of litigation would be).

room, as parties are incentivized to settle their claims by simply renegotiating the terms of the initial deal.[36]

There are plenty of instances where renegotiations forced by alleged MACs have gone public.[37] Perhaps the most notable example was in 2007, when private equity giant KKR asserted that a MAC had occurred in its $8 billion buyout of stereo maker Harman and announced its intention to cancel the transaction.[38] Although neither party could have been sure of how a court would have ruled if Harman disputed the MAC and brought the case to trial, the potential cost and uncertainty of litigation was enough to incentivize Harman to agree on a much smaller investment rather than a buyout.[39]

Although this was an extreme example of renegotiation, research has indicated that these renegotiations are consistently fruitful for buyers, leading to a 15% reduction in sale price on average.[40] This is clear evidence that MACs do affect deals, although it doesn't show how much of an impact the precise terms and exclusions of the clause have.[41] Like any type of out-of-court agreement, parties are forced to make their own estimates of what going to trial would mean, and estimating the trial outcome means estimating the chance of a judge or jury determining that a MAC has occurred. Given the friendly precedent, sellers have a lot of leeway to argue that they will prevail.[42] If that precedent

---

36. *See, e.g.*, Steven Davidoff Solomon, *In Abbott's Bid to Halt Purchase of Alere, the MAC Makes a Comeback*, N.Y. TIMES: DEALBOOK (Dec. 7, 2016), https://www.nytimes.com/2016/12/07/business/dealbook/abbott-laboratories-alere-mac-clause.html ("Thus a MAC invocation is really a renegotiation tool for a lower price.").

37. *See, e.g.*, Michelle Cortez, *Abbott and Alere Agree to Play Nice With $5.3 Billion Deal*, BLOOMBERG (Apr. 14, 2017), https://www.bloomberg.com/news/articles/2017-04-14/abbott-said-to-agree-to-buy-alere-at-lower-price-of-51-shr-ft (describing how two companies settled for lower purchase price after MAC was asserted); *see also* Mike Spector & Kris Hudson, *Cerberus Calls Off Innkeepers Deal*, WALL ST. J. (Aug. 23, 2011), https://www.wsj.com/articles/SB10001424053111903327904576524352061142240 (describing deal that was called off after buyer asserted that a MAC had occurred); Nick Brown & Jonathan Stempel, *Innkeepers Ends Dispute, To Sell Hotels for $1 Billion*, REUTERS (Oct. 19, 2011), https://www.reuters.com/article/us-innkeepers/innkeepers-ends-dispute-to-sell-hotels-for-1-billion-idUSTRE79I61E20111019 (describing the parties reconciling after renegotiating deal at $100 million lower purchase price).

38. Dana Cimilluca & Dennis K. Berman, *KKR, Goldman Cancel $8 Billion Harman Deal,* WALL ST. J., Sept. 22, 2007, https://www.wsj.com/articles/SB119040506637935532.

39. *See KKR, Goldman Cancel Harman Buy for Lesser Investment*, CNBC (Oct. 22, 2007, 4:40 AM), https://www.cnbc.com/id/21415054.

40. Macias, *supra* note 4, at 27.

41. One study argued that the terms don't affect deals at all, since markets do not react materially to the announcement of the precise terms of merger deals. *See* Jeffrey Manns & Robert Anderson IV, *The Merger Agreement Myth*, 98 CORNELL. L. REV. 1143, 1175 (2013). However, while this might mean that MACs have a muted impact, if this were strictly true, it would be hard to explain why there have been so many examples of successful renegotiations.

42. In his book on the history of deal-making leading up to the financial crisis, Steven Davidoff discusses MACs in detail and argues that the qualitative, uncertain nature of MAC clauses may benefit both buyer and sellers. While the benefits of the existence of the clause for buyers is obvious (see, the average 15% decrease in price), Davidoff argues that sellers appreciate that ability to argue that there's a chance that court's will find in their favor regardless of the gravity of the adverse event. A more quantitative threshold could essentially eliminate renegotiation and allow deals

were to flip, however, it is quite possible that we would see that 15% figure grow much larger.[43] As such, even though many disputes are settled out of court, how courts (particularly in Delaware) rule when disputes do get adjudicated is still extremely important to dealmakers everywhere.

II. HOW COURTS HAVE INTERPRETED MAC CLAUSES

A. *Pre-*IBP*: Uncertainty*

Before *IBP*, the case law surrounding the enforcement of MACs was inconclusive at best, and the lack of court decisions focused solely on interpreting MAC clauses left courts with no single case to point to as the gold standard.[44] The most cited cases often addressed specific aspects of MACs, focusing on deal-specific facts that couldn't be applied broadly, and no case established an effective framework for determining perhaps the most important factor, materiality.[45]

An early case, *Raskin v. Birmingham Steel*, was perhaps the closest the Delaware courts came to declaring a MAC had occurred prior to the 2018 *Akorn* decision.[46] In late 1989, Birmingham Steel announced its intent to merge with the Harbert Corporation.[47] After the merger agreement was reached, Birmingham announced that its earnings had declined by more than 50% from the same period the year before, sending Harbert shareholders into a frenzy and forcing their board to invoke the MAC clause.[48] While the parties settled out of court (a textbook example of renegotiation forced by the MAC clause) the Delaware Chancery Court considered the merits of the case before approving the settle-

to completely implode, which would likely benefit neither side. *See* DAVIDOFF, *supra* note 8, at 62 (arguing that the qualitative, uncertain nature of MAC clauses may benefit both buyer and sellers).

43. In a novel and compelling article, Y. Carson Zhou makes the case that even before *Akorn*, the Delaware standard for establishing a MAC was actually *buyer*-friendly because of how courts had adjudicated pre-trial motions in MAC cases. He says that the "factual nature of this inquiry means that courts are reluctant to reject a buyer's [MAC] assertion at the summary judgment or motion to dismiss stage. This favors the buyer by drawing out litigation, raising costs, and increasing deal uncertainty." Even if this is true, however, this doesn't mean that the overall standard set by Delaware courts is not seller-friendly, it just helps to provide an explanation of how buyers have managed to command 15% price drops during renegotiations. Y. Carson Zhou, *Material Adverse Effects as Buyer-Friendly Standard*, 91 N.Y.U. L. REV. ONLINE 171, 175 (2016).

44. *See* Sherri L. Toub, "*Buyer's Regret" No Longer: Drafting Effective MAC clauses in a Post-IBP Environment*, 24 CARDOZO L. REV. 849, 871 (2003).

45. *See id.* at 859.

46. *See* Raskin v. Birmingham Steel Corp., No. 11365, 1990 WL 193326 (Del. Ch. Dec. 4, 1990).

47. *Id*. at *1.

48. *Id*. at *2.

ment agreement and suggested that it would have been possible that even such a short-term drop would have been deemed material before *IBP*.[49]

In another example of a more buyer-friendly worldview before *IBP*, the Western District of Pennsylvania ruled that a MAC had occurred in the acquisition of an energy company.[50] In this unique case, the merger occurred in the shadow of a pending state law meant to deregulate the industry.[51] While both parties were aware of the coming law, neither was aware of what the impact would be, and so they added a MAC clause that came into effect only if one party was affected disproportionately to the other.[52] When the dust settled, one company faced a $1 billion impact, nearly eight times that of the other company, which the court ruled to be material.[53]

The uniqueness of the cases, however, made them the exceptions, not the rule. Even before *IBP* cemented the Delaware position on the issue, courts tended to lean toward seller-friendly rulings, or no rulings at all.[54] In *Pine State Creamery*, a court declined to rule that a MAC had occurred despite an accounting error that hid a $400,000 loss over a two month period.[55] The court ruled that in the absence of a materiality threshold, and given the seasonal nature of the business in question (dairy), they could not find a MAC without having a clearer picture of what the parties intended when they made the agreement.[56] Two other rulings within the same year declined to find a MAC because the clause in question did not include any mention of future business prospects and the courts declined to read in such an interpretation themselves.[57] It would only be another year, however, until Delaware would have the opportunity to finally sink its teeth into MACs.

---

49. *Id*. at *5. ("[T]he record is strong that the financial performance of Birmingham following the execution of the merger agreement constituted a material adverse change in financial conditions of Birmingham" although the court allowed that it is possible this might not have been a MAC if there was "a full record . . . placed in a larger context"); *see* Bryan Monson, *The Modern MAC: Allocating Deal Risk in the Post-*IBP v. Tyson *World,* 88 S. CAL. L. REV. 769, *786 (2015) (asserting that *Raskin* indicates that even a small short-term decline could satisfy the materiality standard prior to *IBP*).

50. Allegheny Energy v. DQE, Inc., 74 F. Supp. 2d 482, 518 (W.D. Pa. 1999), *aff'd,* 216 F.3d 1075 (3d Cir. 2000).

51. *Id*. at 485–88.

52. *See id.* at 490–91.

53. *Id*. at 518.

54. *See* Jonathon M. Grech,*"Opting Out"—Defining the Material Adverse Change Clause in a Volatile Economy*, 52 EMORY L.J. 1483, 1514 (2003) ("In the end, then, the court's "seller-friendly perspective" is consistent with prior interpretations of similarly broad clauses.").

55. *See generally* Pine State Creamery Co. v. Land-O-Sun Dairies, Inc., No, 98-2441, 1999 WL 1082539 (4th Cir. 1999).

56. *Id*. at 5–6.

57. Goodman Mfg. Co. L.P., v. Raytheon Co., No. 98 Civ. 2774 (LAP), 1999 WL 681382 (S.D.N.Y. Aug. 31, 1999); Pacheco v. Cambridge Tech. Partners (Mass.), Inc., 85 F. Supp. 2d 69 (D. Mass. 2000).

B. IBP

In 2001, the Delaware Chancery Court made the ruling that would define MAC clauses for the next two decades.[58] In 2000, Smithfield, the nation's largest pork producer, and Tyson, the largest poultry producer, began inquiring about the potential of buying IBP, then the largest beef producer and second largest pork producer.[59] Tyson saw an opportunity to dominate the market, viewing an acquisition of IBP as an opportunity "to create the world's preeminent meat products company."[60] As such, the stakes of the potential transaction were high, fundamentally realigning meat distribution in not just America, but potentially the world.[61]

The competition between Smithfield and Tyson escalated into a bidding war.[62] During this auction process, Tyson was made aware of many flaws within IBP, ranging from inaccurate projections and management shortcomings to accounting fraud within one of IBP's units.[63] Despite these red flags, Tyson's eagerness to put a stranglehold on the market led them not to pull back, but rather to increase their bid by over $4 per share and ultimately sign a merger agreement that did little to address these problems.[64]

The two quarters that followed the signing of the agreement were dismal for both Tyson and IBP, in the midst of a severe winter that negatively affected both companies.[65] Around this time, Tyson began to express doubts about following through with the transaction.[66] IBP had given them plenty to worry about, with increased SEC interest in the accounting improprieties compounding IBP's worrisome performance.[67] Tyson began to balk at moving forward, and eventually notified IBP of their intent to terminate the agreement, asserting

58. *In re* IBP, Inc. S'holders Litig., 789 A.2d 14 (Del. Ch. 2001).

59. *Id*. at 21.

60. *Id*. at 22.

61. *Id*.

62. *Id*.

63. *Id*.

64. *Id*. (According to Vice Chancellor Strine's opinion, the merger agreement "permitted IBP to recognize unlimited additional liabilities on account of the accounting improprieties . . . without demanding any representation that IBP meet its projections for future earnings, or any escrow tied to these projections.").

65. *Id*.

66. *Id*.

67. *Id*.

that a MAC had occurred.[68] Litigation ensued, and the Delaware Chancery Court heard the case in short order.[69]

Vice Chancellor Leo Strine's 64-page opinion offered a fact-intensive dive into the mistakes both parties had made in consummating the transaction. Strine ultimately ruled that a MAC had not occurred and ordered specific performance, chalking up Tyson's change of heart to buyer's remorse instead of a real material adverse change.[70] Strine's opinion reflected his view that there was concerted corporate effort on the part of Tyson to find any excuse to terminate a transaction that no longer looked financially feasible, not because of any new material developments, but rather as a result of deficiencies they were already aware of and had perhaps overlooked in their zeal for becoming the undisputed champions of American meat distribution.[71]

Strine denied Tyson's first argument, that IBP's poor first quarter performance was itself a MAC, by dismissing those numbers as mere short term concerns.[72] Acquirers of companies, he said, can only consider MACs when there are changes to the "business or results of operations that [are] consequential to the company's earning power over a commercially reasonable period, which one would think would be measured in years rather than months."[73] He referred to one quarter of earnings as a mere "blip,"[74] and offered that MAC clauses are "best read as a backstop protecting the acquirer from the occurrence of unknown events that substantially threaten the overall earnings potential of a target in a durationally-significant manner."[75] He then elaborated his position that the specifics of IBP's poor quarter did not rise to the level of materiality to be qualified as durationally significant.[76] He also dismissed Tyson's concerns about accounting improprieties as irrelevant, since they were insignificant in the

---

68. *Id*. at 23 (The merger agreement defined a MAC as follows: Section 5.10 . . . Except as set forth in Schedule 5.10 hereto . . . since the Balance Sheet Date . . . there has not been: (a) any event, occurrence or development of a state of circumstances or facts which has had or reasonably could be expected to have a Material Adverse Effect; (b) other than [limited list of exceptions].). IBP, Inc. and Tyson Foods, Inc., Agreement and Plan of Merger, FindLaw by Thomson Reuters [hereinafter Agreement], https://corporate.findlaw.com/contracts/planning/agreement-and-plan-of-merger-ibp-inc-and-tyson-foods-inc.html, (last visited Mar. 25, 2020).

69. *Id.* at 23.

70. *Id.* at 65 ("[I]t is useful to be mindful that Tyson's publicly expressed reasons for terminating the Merger did not include an assertion that IBP had suffered a [MAC]."); *Id.* at 84 (ordering specific performance).

71. *Id.* at 50–51 (detailing the process by which Tyson finally decided to terminate the agreement while making clear that a [MAC] was not considered until after that decision had been made).

72. *Id.* at 67.

73. *Id.*

74. *Id.*

75. *Id*. at 68.

76. *See id.* at 69–72.

grand scheme of the deal and Tyson's upper management made statements that showed they believed as such.[77]

Ultimately, Strine ordered specific performance, forcing the parties, bad blood notwithstanding, to complete the merger.[78] This decision had obvious consequences for the companies involved, but it also would define MAC jurisprudence for years to come.

C. *Post*-IBP

1. An Immediate Shift Toward Seller-Friendliness

Strine's decision left courts with some answers. It was clear that (1) prudent acquirers should avoid public statements like those made by Tyson's CEO that made it look like the MAC was just being used as a backstop to escape buyer's remorse, and (2) that sellers should seek to make sure their agreements were controlled by Delaware Law.[79] But *IBP* still did not give total clarity to some big questions, particularly in regards to the acceptable materiality threshold for triggering the new "durational significance" standard.[80] As a result, the next decade of court cases still lacked consistency, as courts were often left to pick and choose specific clauses of Strine's opinion to justify their result.[81] But one common thread was clear: Seller-friendly rulings made it nearly impossible for buyers to successfully litigate MAC disputes to completion.[82] Of course, this did not mean that buyers were left out in the cold, since using the threat of a

---

77. *Id.* at 23 ("Don Tyson abandoned the Merger agreement because of poor results in 2001, and not because of [the accounting issue].)"; *id.* at 70 (Strine notes that the part of the company with the accounting issue "is but a tiny fraction of IBP's overall business and that total shut-down of [that part] would likely have little effect on the future results of a combined Tyson/IBP.").

78. *Id.* at 84.

79. Bradley D. Peters, *Material Adverse Change Clauses Following the Tyson Decision*, 3 TRANSACTIONS: TENN. J. BUS. L. 19, 22 (2001). Although the Chancery Court decided *IBP* under New York state law, it adopted *IBP*'s holding under Delaware law in its 2005 decision in Frontier Oil Corp. v. Holly Corp., No. CivA. 20502, 2005 WL 1039027 (Del. Ch. Apr. 29, 2005).

80. DAVIDOFF, *supra* note 8, at 64.

81. *See* Robert T. Miller, *Cancelling the Deal: Two Models of Material Adverse Change Clauses in Business Combination Agreements*, 31 CARDOZO L. REV. 99, 130–43 (2009). Professor Robert T. Miller asserts that courts did in fact rely on a consistent framework to adjudicate MAC claims in the wake of *IBP*, a system he called the "Earnings Potential Model." *Id.* at 100. The model suggested that courts compared metrics like EBITDA over relevant fiscal periods to estimate the present and future earnings of affected companies and determine whether earnings had declined relative to historical standards. *Id.* These courts, however, had failed to identify precisely which fiscal periods should be compared and what threshold of materiality should be used over those periods. *Id.* In his article, Miller suggests a new model, which he calls the Continuing Profitability Model, using a more complicated system of discounted cash flow to determine whether or not an acquirer's equity is now less than it was at purchase. *Id.* at 101. If so, there has been a MAC. *Id.* at 101–02.

82. DAVIDOFF, *supra* note 8, at 64.

MAC to try to renegotiate more favorable terms would, at worst, lead to them simply going forward with a deal they had already agreed to.[83]

But *IBP* was not the only development that favored sellers. The mid-2000s saw an increase in the number of exclusions that sellers were including in MAC clauses, further limiting the grounds the buyers could use to assert a MAC.[84] Courts seemed to endorse this trend, rejecting claims that might previously have fallen within the ambit of broad MACs by essentially implying exclusions into MACs for specific claims. In *Great Lakes Chemical v. Pharmacia*, the Chancery Court said that it was incumbent on dealmakers to include language in MACs specifying whether the clause covers both internal and external changes if they want to guarantee that the court will consider both.[85] In *S.C. Johnson & Son v. Dowbrands*, a federal court in Delaware rejected a MAC claim on the basis that pending litigation could not be used as the grounds for a MAC in the absence of a specific provision including such a claim within the reach of the MAC.[86] Overall, courts were making it clear that there was a "substantial burden on a remorseful buyer attempting to prove a MAC."[87]

2. *Hexion v. Huntsman*

Perhaps the most important of the post-*IBP* cases was a 2007 Delaware Chancery Court ruling in *Hexion v. Huntsman*.[88] In early 2007, Hexion, a large manufacturer of chemical products, sought to purchase Huntsman, another chemical manufacturer.[89] After the merger agreement was signed, closing was delayed until the following year as the parties awaited regulatory clearance.[90] In that time, Hexion began to get cold feet, worried that the prospective combined entity might be insolvent.[91] Hexion initiated litigation, alleging that Huntsman's poor earnings reports since the signing of the initial agreement constituted a MAC.[92]

83. *Id.* at 65.

84. *Id.* at 66.

85. *See* Great Lakes Chem. Corp. v. Pharmacia Corp., 788 A.2d 544, 556 (Del. Ch. 2001) (stating that the interpretation that the agreement is only meant to encompass external changes "may ultimately prevail on a developed factual record" but that "had the parties intended to exclude from the provision's scope all external events that materially affect the Company's business, they could have included such an express limitation in their Agreement"). For more information on the differences between internal and external changes, *see* Gilson & Schwartz, *supra* note 22.

86. S.C. Johnson & Son, Inc. v. DowBrands, Inc.,167 F. Supp. 2d 657, 670–71 (D. Del. 2001) ("The sole decision by a third party to bring a lawsuit does not bring about any change in the company's assets . . . the Court concludes that the [litigation] does not constitute a basis for SCJ's claim that DowBrands breached . . . the Agreement.").

87. DAVIDOFF, *supra* note 8, at 64.

88. Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715 (Del. Ch. 2008).

89. *Id.* at 720–21.

90. *Id.* at 721.

91. *Id.*

92. *Id.* 721–22.

The court sided with Huntsman, citing *IBP*'s language in its finding that a MAC had not occurred.[93] While Huntsman's performance had declined, it had only suffered a 3% hit to its EBITDA from 2006 to 2007, and management only expected a 7% decline from 2007 to 2008.[94] Despite Hexion's projections that the following year would bring far greater declines that would greatly hamper Huntsman's future profitability, the court rejected these forecasts as "overly pessimistic.[95] The court cited several macroeconomic challenges faced by Huntsman (seemingly excluding external changes from the MAC definition) before stating "[u]ltimately, the burden is on Hexion to demonstrate the existence of [a MAC] in order to negate its obligation to close, and that is a burden it cannot meet here."[96]

While Vice Chancellor Lamb's ruling directly applied *IBP*'s reasoning to new facts (with the same result), it is important to note that he did so without even diving into the exclusions that attorneys had included in the original deal.[97] Instead, he rejected Hexion's argument by stating that a MAC had not occurred under the broad definition one would ascribe to the most general MAC clause.[98] This signaled the court's intention to set a high bar for MAC claims, a bar that became particularly important as America entered the financial crisis.[99]

3. The Financial Crisis

While Hexion's claim may have been the most notable MAC to be litigated, it was far from the only dispute in the late 2000s. Buyers began to threaten (and follow through on) MAC claims, particularly in lending industries that were most affected by the financial crisis.[100] In 2007, Accredited Home Lenders, a leading subprime mortgage lender, began to feel the effects of the slowing housing market as more and more borrowers began to default on loans that they perhaps never should have received.[101] Bear Stearns, Accredited's (now defunct) investment banker, sought a buyer to provide Accredited with much-needed

93. *Id.* at 738 ("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.").

94. *Id.* at 742.

95. *Id.* at 743 ("While the court recognizes that management's expectations for a company's business often skew towards the overly optimistic, especially in the presence of litigation, the court ultimately concludes that Hexion's projections reflect an overly pessimistic view of Huntsman's future earnings.").

96. *Id.* at 743 (citing crude oil and natural gas prices and an unfavorable exchange rate as macroeconomic challenges).

97. DAVIDOFF, *supra* note 8, at 73.

98. *Id.*

99. *Id.*

100. *See id.* at 66–73 (detailing the "MAC Wars" of 2007).

101. *Id*. at 49-50.

capital to avoid bankruptcy, and an auction ensued.[102] The eventual winner was Lone Star Funds, which commenced a tender offer on June 1, 2007.[103]

Just two months later, it became clear that the mortgage market had continued to deteriorate at a rate that neither party had contemplated.[104] After Accredited's independent auditors adjusted their projected third quarter losses from $64 million to $230 million, Lone Star indicated that a MAC had occurred, and thus they could not go through with the deal.[105] Accredited filed suit in Delaware.[106] Only a month later, the parties announced they had renegotiated their original deal for $3.35 per share less than the original offer, a 22% decrease.[107]

A similar result was achieved in the buyout of Sallie Mae by a consortium led by J.C. Flowers, Bank of America, and JPMorgan Chase.[108] Even though the financial crisis made it more likely than ever that businesses could completely combust, rather than just showing an earnings hiccup, companies continued to renegotiate deals rather than canceling them or bringing them all the way to trial. Approximately five to ten MAC claims were made public in the year after the Accredited lawsuit, and only two made it to the trial level.[109]

What we may never know is how this would have been different had the courts made it easier for those asserting MACs to successfully follow through with their claims. It's likely that a similar number of claims would settle out of court, given the incentives present in the legal system to do so, but it is hard to imagine that sellers would continue to get such favorable settlements.[110] One factor potentially working in favor of the sellers was intertwined with the reality of the mergers and acquisitions business around that time. As private equity firms began to dominate the industry, they sought to use the MAC as reputational cover for getting out of bad deals.[111] This reputational cover was especially important for them due to their status as repeat players in the industry,

---

102. *Id*. at 50-51.

103. *Id*. at 51.

104. *Id*. at 51-52.

105. *Id*. at 52-53.

106. *Id*. at 52.

107. *See id.* at 69.

108. *See id.* at 68-70 (however, the deal was later cancelled on other grounds).

109. *Id*. at 73. Aside from *Hexion*, only one other major case was ultimately decided by litigation. *See* Genesco v. Finish Line, No. 07-2137-II(III), 2007 Tenn. Ch. LEXIS 1 (Tenn. Ch. Dec. 27, 2007). That case involved two shoe retailers and was decided in a Tennessee court, under Tennessee law. Because of the unique venue and governing law, it had little precedential impact on other MAC cases. *Id.* at 71. For further analysis of the *Genesco v. Finish Line* litigation, see Bradley C. Sagraves & Bobek Talebian, "*Material Adverse Change Clauses in Tennessee: Genesco v. Finish Line*," 9 TRANSACTIONS: TENN. J. BUS. L. 343 (2008).

110. *See* Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), https://www.nytimes.com/2008/08/08/business/08law.html (detailing how settling is consistently a prudent move over going to trial, regardless of the expected outcome of litigation).

111. *See* DAVIDOFF, *supra* note 8, at 106 (discussing methods private equity firms used to get out of bad deals); *see also* Steven M. Davidoff, *The Failure of Private Equity*, 82 S. CAL. L. REV 481 (2009) (discussing private equity firms' failures and attempts to cover themselves.).

and a possible reason that courts were reticent to make rulings that MACs had occurred.[112] Regardless of any pretextual readings of judicial intent, even after the financial crisis faded away, it would be almost a decade before MAC jurisprudence would be challenged again in a big way.

III. How *Akorn v. Fresenius* May Change Everything

A. *The Background:* Akorn v. Fresenius

1. The Facts

In mid-2017, Fresenius, a German pharmaceutical company, signed an agreement and plan of merger with Akorn, an American pharmaceutical company.[113] Under the plan, each share of Akorn common stock would be converted into the right to receive $34 per share, which would have made the deal worth almost $5 billion.[114] Just one year later, however, Fresenius convinced a Delaware court to let it do what no acquirer had done in the state before: Walk away from a deal on the grounds that a MAC had occurred.[115]

The merger plan conditioned closing on three stipulations.[116] First, Akorn's representations must be true and correct, except where failure to be true and correct would not be reasonably expected to constitute a contractually defined MAC.[117] Second, Akorn must comply in all material respects with its obligations under the Merger Agreement.[118] Third, Akorn must not suffer a MAC.[119] Combined, these three factors made the qualifiers on the representations and warranties of the agreement very similar to those found in similar cases (such as *IBP* or *Hexion*) in which the court had ruled that there was no MAC.

Immediately after the agreement was signed, Akorn's business began to show a sharp decline.[120] Despite Akorn's official assurances at signing that its full year projections remained valid, the second quarter results showed another sharp drop in performance.[121] Akorn attributed the decline to "increased com-

---

112. *See* Davidoff, *supra* note 8, at 106.

113. Akorn, Inc. v. Fresenius Kabi AG, No. 2018-0300-JTL, 2018 WL 4719347, at *1, *4, *5 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018).

114. *Id*. at 1; *see also* Tom Hals, *Delaware judge says Fresenius can walk away from $4.8 billion Akorn deal*, Reuters (Oct. 1, 2018), https://www.reuters.com/article/us-akorn-m-a-fresenius-ruling/delaware-judge-says-fresenius-can-walk-away-from-4-8-billion-akorn-deal-idUSKCN1MB2PY.

115. *See Annual Survey*, *supra* note 11, at 439.

116. *Akorn*, 2018 WL 4719347, at *1.

117. *Id*.

118. *Id*.

119. *Id*.

120. *Id*.

121. *Id*.

petition and the loss of a key contract," but told Fresenius that "the downturn was temporary."[122] But another quarter of bad results was complemented by two disastrous reports, one from an anonymous whistleblower who alleged that Akorn's product development process was falling short of regulatory requirements and a second letter with "equally disturbing allegations about Akorn's quality compliance programs."[123] This prompted Fresenius to initiate its own investigation, which turned up "serious and pervasive data integrity problems."[124] Further tension between the two parties arose as Akorn made a poor showing in front of the FDA, its primary regulator, and Akorn's business performance continued to decline.[125]

On April 22, 2018, Fresenius gave notice that it was terminating the Merger Agreement on the basis of the three closing conditions being violated.[126] In other words, Fresenius was asserting a MAC.[127] Akorn immediately filed suit, setting the stage for the Chancery Court to once again weigh in on MAC clauses.[128]

122. *Id*. at *1–2.

123. *Id*. at *2.

124. *Id*.

125. *Id*. (Vice Chancellor Laster characterized the presentation as "not fully transparent" and "misleading.").

126. *Id*. ("Fresenius asserted that Akorn's representations regarding regulatory compliance were so incorrect that the deviation would reasonably be expected to result in a Material Adverse Effect. Fresenius also cited Akorn's failure to comply in all material respects with its contractual obligations under the Merger Agreement, including Akorn's obligation to use commercially reasonable efforts to operate in the ordinary course of business in all material respects. Fresenius also cited the section in the Merger Agreement that conditioned Fresenius's obligation to close on Akorn not have suffered a Material Adverse Effect.").

127. Akorn, Inc., Fresenius Kabi AG, Fresenius SE & Co. KGAA, Quercus Acquisition, Inc., *Agreement and Plan of* Merger, SEC ARCHIVES (April 24, 2017), https://www.sec.gov/Archives/edgar/data/3116/000095015717000499/ex2-1.htm. (The merger agreement defined a MAC as follows: "Section 3.06. Absence of Certain Changes. Since the Balance Sheet Date through the date of this Agreement . . . (b) there has not been any Material Adverse Effect or any effect, change, event or occurrence that would, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect . . . . Section 8.12. "Material Adverse Effect" means any effect, change, event or occurrence that, individually or in the aggregate (i) would prevent or materially delay, interfere with, impair or hinder the consummate of the Transactions or the compliance by the company with its obligation under this Agreement or (ii) has a material adverse effect on the business, results of operations or financial condition of the Company and its Subsidiaries, taken as a whole; provided, however, that none of the following, and no effect, change, event or occurrence arising out of, or resulting from, the following, shall constitute or be taken into account in determining or whether a Material Adverse Effect has occurred, is continuing or would reasonably be expected to occur: [long list of specific and economy-wide exceptions]." It's worth noting that this list of exceptions is far more extensive than the list accompanying the IBP and Tyson agreement cited in note 69.).

128. *Akorn*, 2018 WL 4719347, at *3.

2. The Holding

In his lengthy opinion, Vice Chancellor Laster ruled that Fresenius had suffered a MAC.[129] He said that the MAC condition in the agreement was "common," starting with a general statement and then carving out "certain types of events that otherwise could give rise" to a MAC.[130] Laster ruled that no carve out in the contract could be read to place "business risk" onto Fresenius, leaving the question of whether or not the deviation in the company's business performance was material.[131] He made it clear that he was abiding by *IBP*'s definition of materiality, saying that the effect must "substantially threaten the overall earnings potential of a target in a durationally-significant manner."[132] He also followed *Hexion*, evaluating the magnitude of Akorn's decline by comparing the company's performance against its results in the same quarter the prior year.[133] While he cited previous precedent and scholarship that suggested materiality thresholds, he noted that he did not consider these binding and that the ultimate inquiry is fact-specific.[134]

In this case, he noted that Akorn's EBITDA declined by 86% on a year-over-year basis (51% adjusted), a "departure from its historical trend."[135] He noted that he believed this decline to be durationally significant since it had already persisted for a year with no sign of reversing and could be attributed to similarly long-lasting factors such as new market entrants and the loss of a contract that was vital to growth projections.[136] He also considered valuations by analysts that projected a drop in EBITDA of more than a 60% for the coming year, more than five times the downturn expected across the industry as a whole.[137] He also rejected Akorn's argument that there could not be a MAC as long as Fresenius was still making a profit on the deal, explicitly invoking the frustration doctrine (which is discussed at length later in this Article).[138] Laster concludes his MAC analysis clearly and succinctly: "The record in this case established the existence of a sustained decline in business performance that is durationally significant and which would be material to a reasonable buyer. Akorn suffered a [MAC]."[139]

---

129. *Id*. at *47.

130. *Id*. at *51.

131. *Id*. at 52.

132. *Id*. at 53 (quoting *In re* IBP, Inc. S'holders Litig., 789 A.2d 14, 68 (Del. Ch. 2001)).

133. *Id*.

134. *Id*. ("These precedents do not foreclose the possibility that a buyer could show that percentage changes of a lesser magnitude constituted [a MAC]. Nor does it exclude the possibility that a buyer might fail to prove that percentage changes of a greater magnitude constituted [a MAC]").

135. *Id*. at *55.

136. *Id*.

137. *Id*. at *56.

138. *Id*. at *57; *see infra* Part III.B for a discussion of the frustration doctrine.

139. Akorn, 2018 WL 4719347, at *57. It's also worth noting that one of the other issues addressed in the holding was whether Akorn had breached the Ordinary Course Covenant, which required that Akorn use "commercially reasonable efforts to operate in the ordinary course of business

3. The Aftermath

The immediate reaction to Vice Chancellor Laster's decision and the Supreme Court's subsequent affirmation was that neither would have any meaningful impact on MAC jurisprudence, since the courts were simply faced with a unique set of glaring facts.[140] As Laster said:

> In prior cases, this court has correctly criticized buyers who agreed to acquisitions, only to have second thoughts after cyclical trends or industrywide effects negatively impacted their own businesses, and who then filed litigation in an effort to escape their agreements without consulting with the sellers. In these cases, the buyers claimed that the sellers had suffered contractually defined material adverse effects under circumstances where the buyers themselves did not seem to believe their assertions.
>
> This case is markedly different. Fresenius responded to a dramatic, unexpected, and company-specific downturn in Akorn's business that began in the quarter after signing . . . . Any second thoughts that Fresenius had about the Merger Agreement were justified by unexpected events at Akorn.[141]

But even though Laster did not indicate that this ruling was meant to change the standard set for MACs, what if the ruling was about more than just egregious facts? What if Laster meant to indicate that it was finally time for courts to move past the *IBP* framework for adjudicating MAC claims? At the very least, a compelling argument can be made that Laster's ruling gives courts the leeway to start to make more permissive MAC rulings in the future.

B. *The Frustration Doctrine and How* IBP *Ignores Contract Law*

In 2009, University of Colorado School of Law Professor Andrew Schwartz published an article that used a conceptual tool he called a "standard clause analysis" to interpret MAC clauses and argue that based on his analysis, MACs were being consistently misapplied by courts and practitioners.[142] While his analysis is markedly different than the reasoning that had been used by courts before and after its publication, I argue *Akorn* both explicitly and implicitly

---

in all material respects" before closing. *Id*. at 88. Laster concluded that they had breached the covenant, using many of the same reasons that had impacted the MAC decision. *Id*. One analysis pointed out that this finding was notable because Laster appeared to use a much lower threshold for breach than he used for the MAC analysis. Annual Survey, *supra* note 11, at 447. Since ordinary course covenants are common in merger agreements, it also pointed out that this reasoning could be used by buyers in the future to avoid the need for even asserting a MAC. *Id*. However, it also observed that the Delaware Supreme Court expressly refrained from commenting on that portion of the opinion. *Id*. "[W]e also do not address whether. . . Akorn breached the Ordinary Course Covenant").

140. Manwaring, *supra* note 12 ("While this is the first time the Court of Chancery has permitted a buyer to terminate a merger agreement based on a 'material adverse effect' on the seller's business, the Akorn decision simply represents an application of Delaware's policy of freedom of contract to an egregious set of facts.").

141. *See* Akorn, 2018 WL 4719347, at 3–4.

142. Schwartz, *supra* note 4.

adopts his reasoning for the first time, providing a framework for future courts to follow.

Schwartz begins by explaining one the core tenets of contract law, default terms, which apply in the absence of an explicit term addressing a particular matter.[143] Contracting parties are free to add their own, specific, custom language to account for their personal preferences or more complex situations, but if they do not add language that addresses any given default terms, courts use the default terms as gap-fillers.[144] Over time, lawyers developed "standard clauses" as a happy medium between the simple, untailored default terms and the time-consuming, complex custom terms that lawyers can add.[145] Schwartz points to the impracticability doctrine as an example of this framework.[146] The default term for impracticability dictates that a party to a contract may be excused from performance of the contract if changed circumstances render performance impossible or exceedingly difficult.[147] Contracting parties may add any terms they choose to cover impracticability, but if the parties don't add anything, then courts will likely choose to assume the parties intended to incorporate the default term definition of impracticability.[148] However, modern contracts commonly include a Force Majeure clause, which addresses the same issues that the default term would, but expressly creates its own definition of impracticability.[149] Force Majeure clauses are thus the "standard clause analog" for impracticability.[150]

Schwartz then describes the doctrine that is relevant for our purposes: frustration.[151] The frustration doctrine closely parallels that of impracticability, but instead of excusing performance that has become impossible, it excuses performance that has become worthless.[152] To show the frustration doctrine in practice, and distinguish it from impracticability, Schwartz uses the example of an

143. *Id*. at 794.

144. *Id*.

145. *See id.* at 796 (defining "standard clause" and asserting that "Standard clauses are therefore an efficient way to obtain an individualized agreement at modest cost.").

146. *Id*. at 801.

147. *Id*.

148. *Id*.

149. An example from a contracts textbook of a Force Majeure clause: "If any party fails to perform its obligations because of strikes, lockouts, . . . [list of situations] . . . or other causes beyond the reasonable control of the party obligated to perform, then that party's performance shall be excused for so long as the cause for failure to perform persists." GEORGE W. KUNEY & ROBERT M. LLOYD, CONTRACTS: TRANSACTIONS AND LITIGATION 815 (4th Ed. 2017).

150. Schwartz, *supra* note 4, at 801.

151. *Id*. at 802.

152. *Id*. ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." (quoting RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. L. INST. 1981).)).

early twentieth century British case.[153] In 1902, the owner of an apartment along a famous London street agreed to rent out the space during the coronation of King Edward VII.[154] After the coronation was postponed due to the future king falling ill, the would be tenant refused to pay for the apartment, arguing that the purpose of the contract (viewing the coronation) had been frustrated, a viewpoint that a court eventually agreed with.[155] This marked the creation of frustration doctrine, and it became a default rule of contract law in both England and America.[156]

Keeping with his hypothesis that all default rules must have a standard clause that allows them to be modified within the context of specific contracts, Schwartz uses the four elements of frustration to predict what such a standard clause would look like in a modern contract.[157] In order to "be excused under the frustration doctrine, part[ies] must first show that [their] 'principal purpose' in making the contract was frustrated by an unexpected change in circumstances."[158] This principle purpose "must be so completely the basis of the contract that . . . without it the transaction would make little sense."[159] Since this is the default frustration term, a standard clause could modify this term by broadening the number of purposes that could be frustrated.[160] Next, frustration mandates that the stated purpose must be "totally or nearly" frustrated.[161] A standard clause could lower this bar, using terms like "material" or "considerably" instead of "totally."[162] Next, frustration requires an "extraordinary event," a standard similar to the previous two elements, but adds a requirement of unforeseeability.[163] While Schwartz points out that unforeseeability is relevant, but not dispositive, in applying the frustration doctrine, a standard clause could either expressly state the events or types of events that it encompasses, or could eliminate the requirement entirely.[164] Lastly, frustration requires that the trig-

---

153. *Id*. (citing Krell v. Henry, [1903] 2 K.B. 740 (C.A.)).

154. *Id*. at 803.

155. *Id*.

156. *Id.* (citing the adoption of the doctrine in RESTATEMENT (FIRST) OF CONTS. § 288 (1932) and RESTATEMENT (SECOND) OF CONTS. § 265 (AM. L. INST. 1981) as proof of its acceptance).

157. *Id*. at 805–12.

158. *Id*. at 805.

159. *Id*. at 805–06 quoting RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. L. INST. 1981).

160. *Id.* at 806.

161. *Id*. ("Mere unprofitability or even significant losses are insufficient. Rather, a party's contractual objectives must have been completely thwarted by the changed conditions such that the other party's performance is rendered worthless. Nothing short of a cataclysm or catastrophe will satisfy this element.").

162. *Id*. at 807 (Schwartz points out that whatever term is used, it must set a higher bar than "slightly," as such a low threshold could potentially be ruled unenforceable due to a lack of consideration.).

163. *Id*. at 808–09.

164. *Id*. at 809–10.

gering event be exogenous, out of control of the contracting parties.[165] Similar to the last element, a standard clause could either expressly state the types of exogenous events that would trigger it, or eliminate the term altogether.[166]

Keeping these elements in mind, Schwartz describes several examples of such standard clauses that are commonly used in their respective industries, including the Morals clause in celebrity endorsements[167] and the Walkaway clause in vehicle financing agreements.[168] But most importantly, he cites the MAC clause as an example of a standard clause analog of the frustration doctrine at work in "the most economically significant private contracts on earth."[169]

Schwartz posits that MAC clauses alter the common law definition of frustration in several ways. Most notably, they employ "the term 'material,' thereby establishing a standard lower than the 'total' or 'complete' loss of value that the common law would ordinarily demand."[170] Additionally, MAC carve-outs serve to closely define what kind of events, foreseeable or otherwise, qualify as frustrating the relevant purpose.[171] Thus, the MAC clause is perhaps the closest clause "to being a generic standard clause analog of the frustration doctrine" that exists today.[172] Schwartz, however, is dismayed by what he sees as a failure by courts "to recognize the MAC clause's relationship with the frustration doctrine."[173] Case law, he says, "has viewed the MAC clause as 'sui generis' and has attempted to interpret it in a vacuum, yielding a muddled and unclear interpretation."[174] He argues that his analysis, which treats the MAC clause as a customization of the elements of the default rule, "provides at least three key insights" regarding how courts should have been interpreting MAC clauses all along.[175]

---

165. *Id*. at 811–12.

166. *Id*. at 812.

167. *Id*. at 812–15 (giving examples of misbehaving celebrities who rendered endorsement deals useless by potentially tarnishing the reputation of the company that was paying for them to be the face of their product, most notably football star Michael Vick, whose involvement and eventual incarceration for his role in a dogfighting ring left his agreement with Nike of no use to the sports apparel giant).

168. *Id*. at 816 (focusing on the Hyundai Assurance program, later copied by many competitors, which "allows the buyer to stop making payments and return the vehicle 'in case of certain life-altering circumstances' that render the car much less valuable than expected, such as unemployment or the loss of a driver's license. All these events must be exogenous—unemployment must be involuntary; the loss of one's license must not have been due to drunk driving.").

169. *Id*. at 817.

170. *Id*. at 822.

171. *Id*.

172. *Id*. at 823.

173. *Id*. at 825.

174. *Id*.

175. *Id*.

At the time Schwartz published his article, the Delaware Chancery Court had yet to find that a MAC had occurred in even a single case.[176] While law review articles are influential, they are not binding on courts, and so while future judges may have found Schwartz's analysis persuasive, many of his claims may have fallen on deaf ears due to the lack of strong case law precedent for him to cite to.[177] After *Akorn*, however, that may change. In the next section, I describe how each of Schwartz's insights into viewing MAC clauses as a frustration clause analog provides a clearer set of guidelines for interpreting them, and how *Akorn* may finally have provided the long-awaited judicial precedent to back up his theory.

1. Materiality

The meaning of "material" has been the most contentious point raised over and over again in the court cases that have dealt with MACs.[178] Just as no Delaware case before *Akorn* found that a MAC had occurred, no judicial opinion settled on a firm definition of what materiality threshold is appropriate for these cases either. Contract law has long defined material breaches as those that "deprive the injured party of the benefit that it justifiably expected," while securities laws have defined materiality as "important to the reasonable shareholder."[179] Vice Chancellor Strine's seminal *IBP* opinion importantly defined matemateriality as changes that "substantially threaten the overall earnings potential of the target in a durationally-significant manner,"[180] and the *Hexion* opinion suggested that a "heavy burden" was carried by anyone trying to enforce in a MAC.[181] While the language of these two cases has been routinely adopted in subsequent decisions, the lack of positive MAC verdicts shows that the "materi-

176. *Id*. at 791. I'd be remiss to ignore *Cooper Tire & Rubber Co. v. Apollo (Mauritas) Holdings Pvt. Lt.*, No. 8980-VCG, 2014 WL 5654305 (Del. Ch. Oct. 31, 2014), where the Chancery Court seemed to indicate they were leaning towards ruling that MAC had occurred, but ultimately decided to leave the issue unaddressed and determined the case on other grounds. Y. Carson Zhou notes that "The court focused even more heavily on the contractual text than in IBP or Hexion, and (buyer-friendly) decision turned on deciphering the complex interaction between contractual provisions." Zhou, *supra* note 43, at 183. Unfortunately, because the court did not ultimately address the MAC clause directly, it offers little direct support for Schwartz (or Akorn).

177. The Writing Ctr at Georgetown Univ. L. Ctr., When and How to Use Secondary Sources and Persuasive Authority to Research and Write Legal Documents (2014) (explaining that primary sources, such as case law, can be mandatory, binding authority, while secondary sources, such as law review articles, can only be persuasive authority).

178. *See, e.g.*, Allegheny Energy v. DQE, Inc., 74 F. Supp. 2d 482, 517 (W.D. Pa. 1999), *aff'd*, 216 F.3d 1075 (3d Cir. 2000) ("Although there is a common understanding of what the term 'material' encompasses, the inherent relatively of this word makes it ambiguous in the absence of any qualifying language"), Pine State Creamery Co. v. Land-O-Sun Dairies, Inc., No. 98-2441, 1999 U.S. App. LEXIS 31529, at *16 (4th Cir. 1999) ("[I]t is simply a question of degree regarding the point that Pine State's operating losses would become 'material'").

179. Schwartz, *supra* note 4, at 826.

180. *In re* IBP, Inc. S'holders Litig., 789 A.2d 14 (Del. Ch. 2001).

181. Hexion Specialty Chems., Inc. v. Huntsman Corp*.,* 965 A.2d 715, 738 (Del. Ch. 2008).

ality standard has been interpreted by courts to be so demanding that—absent a cataclysm of biblical proportions—it cannot be met."[182]

This "catastrophe" standard is a perfect example of what Schwartz sees as the disconnect between how standard clauses should be applied and how courts have enforced MACs.[183] The frustration doctrine already allows buyers to escape deals if the company they are acquiring experiences a catastrophe.[184] Reading the same threshold into MAC clauses, clauses that lawyers "expend considerable resources drafting and negotiating," treats the MAC clause the same as the default rule.[185] "This interpretation does violence to the foundational principles of freedom of contract and to the interpretive rule that a contract should be read so as not to render any term meaningless."[186] "Instead, courts should recognize that the MAC clause, as a standard clause analog of the frustration doctrine, is intended to contract around—not reiterate—that doctrine."[187]

Schwartz's prescription for fixing this misconception is twofold. First, he suggests lowering the MAC threshold (maybe "severe" or "devastating" rather than "catastrophic").[188] Second, he recommends doing away with *IBP*'s "durational significance" requirement, recognizing that (1) "even a short-term loss or other problem can have long-term consequences for the value of a business as a going concern" and (2) "the typical MAC clause says nothing about duration."[189]

It's in this department where *Akorn* first appears as the knight in shining armor. Vice Chancellor Laster begins his analysis typically, citing the *IBP* and *Hexion* language.[190] Then, he cites an article and a case that each cited a possible materiality threshold (40% and 50%) before saying that these "precedents do not foreclose the possibility that a buyer could show that percentage changes of a lesser magnitude constituted [a MAC]. Nor does it exclude the possibility that a buyer might fail to prove that percentage changes of a greater magnitude

182. Schwartz, *supra* note 4, at 827-28. Schwartz points to a Texas case as perhaps the most glaring example of this "impossibly high" benchmark. Borders v. KRLB, Inc., 727 S.W.2d 357 (Tex. App. 1987) (holding that even though an acquired radio station lost half of its listeners between signing and closing, the court ruled that the station had not "lost its ability to function as a business entity" and thus the materiality threshold was not breached.).

183. Schwartz, *supra* note 4, at 828.

184. *Id*.

185. *Id*.

186. *Id*. *See also* Hexion, 965 A.2d ("It is a maxim of contract law that, given ambiguity between potentially conflicting terms, a contract should be read so as not to render any term meaningless.").

187. Schwartz, *supra* note 4, at 828.

188. *Id*. at 829.

189. *Id*. at 830. I disagree with his first argument here, since "durationally-significant" could easily be construed to encompass short-term losses with far-reaching impacts, but I agree with his second argument for why even durational significance is not an appropriate standard.

190. Akorn, Inc. v. Fresenius Kabi AG, No. 2018-0300-JTL, 2018 WL 4719347, at *53 (Del. Ch. Oct. 1, 2018).

constituted" a MAC.[191] Next, he does what seemingly no major court decision had done in the previous decade, directly invoking Schwartz's analysis:

> More broadly, the black letter doctrine of frustration of purpose already operates to discharge a contracting party's obligation when his "principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." This common law doctrine . . . (restates Schwartz). In lieu of the default rule that performance may be excused only where a contract's principal purpose is completely or nearly completely frustrated, a contract could "lower this bar to an achievable level by providing for excuse when the value of counterperformance has 'materially' (or 'considerably' or 'significantly') diminished." That is what the parties did in this case. It should not be necessary for Fresenius to show a loss on the deal before it can rely on the contractual exit right it negotiated.[192]

Laster uses the frustration clause analysis to discredit Akorn's contention that no MAC had occurred unless the circumstances had changed so much that Fresenius stood to make zero profit from the transaction.[193] Finding a MAC had occurred in a transaction in which the acquirer still stood to make a profit marked a clear departure from the "catastrophe" requirement of materiality. Some may argue that given the high drop in past and projected EBITDA, these were a severe set of facts that the court was faced with.[194] But nevertheless, I find it impossible to argue that any deal in which the acquirer stands to profit constitutes the "total" or "complete" loss of value that Schwartz found that previous courts had required.[195] While Laster doesn't set a defined lower materiality threshold, he at least acknowledges that the appropriate definition of materiality departs from the common law and recognizes that the existence of MAC clauses demands a lower threshold.[196]

---

191. *Id*. The case Laster cites is *Raskin v. Birmingham*, No. 11365, 1990 WL 193326, at *5 (Del. Ch. Dec. 4, 1990). The article he cites observes that most (non-Delaware) courts have recognized the materiality threshold as being breached once profits decrease by at least 40%. Lou. R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* § 11.04[9], at 11–66 (2018 ed.).

192. *Akorn*, 2018 WL 4719347, at *57.

193. *Id*. at *56.

194. E.g., Manwaring, *supra* note 12 ("[T]he Akorn decision simply represents an application of Delaware's policy of freedom of contract to an egregious set of facts").

195. *See* Schwartz, *supra* note 4, at 827-28 ("[T]he materiality standard has been interpreted by courts to be so demanding that—absent a cataclysm of biblical proportions—it cannot be met").

196. Richard W. Slack & Joshua M. Glasser argue that Laster did actually try to create some guidance for what an objective materiality threshold would be. They argue that Laster's reference to Kling and Nugent's 40% threshold was an endorsement (if lukewarm) for using such a threshold for drops in financial performance that would trigger a general MAC. They also argue that Laster sets a 20% threshold for departures from represented conditions when he rules that the 21% drop in overall valuation constitutes an MAE. I disagree that Laster was trying to establish an exact benchmark. He clearly states that the 40% threshold is not dispositive (see text accompanying note 191). Regarding the 20% indicator, he bases his analysis on several academic studies that point to 20% being used as a threshold in non-merger situations, including the threshold at which a drop in stock prices becomes a bear market. 2018 WL 4719347, at *75 (Del. Ch. Oct. 1, 2018). He repeatedly uses the phrase "cross-check" to hammer home the point that he is using these studies and indicators to con-

2. Purpose

The second frontier at which MAC clauses and the frustration doctrine interact is purpose. The frustration doctrine only applies in situations where a party's principal purpose in entering a transaction has been frustrated. Thus, it follows that MAC clauses should be read as altering this default rule. However, "the leading MAC case law holds that the clause can be triggered only when the principal purpose of a corporate acquirer—to purchase a profitable business as part of a long-term corporate strategy—is thwarted."[197]

Before *Akorn*, Schwartz noted that the then-recent *Hexion* case provided hope that factors beyond the principal purpose could be considered.[198] The *Hexion* court hinted that the courts could consider a purpose other than the usual one ("purchasing the target as part of a long-term strategy") if "evidence to the contrary" was presented.[199] Of the four elements of frustration that Schwartz identified, this is the element that *Akorn* does not address explicitly. However, there are several paragraphs dedicated to whether the synergistic value created by the deal can be considered when evaluating the magnitude of the change in value.[200] Laster concludes that Akorn should only be evaluated as a standalone company, but crucially hints that might not have been the case if the definition had explicitly mentioned the combined company.[201] While this doesn't specifically address secondary purposes as the basis for a MAC claim, it does show that courts will at the very least consider any purposes that are explicitly listed in the merger agreement, rather than uniformly evaluating every MAC claim by the effect on the long-term profit potential of the target corporation.

firm his intuition that Fresenius would consider the breaches material. *Id*. This kind of logic reinforces that he's making the correct decision in this case, but isn't trying to create a 20% threshold for all future breaches of representations. That being said, I don't entirely dismiss Slack and Glasser's analysis. If a future Chancery Court decision comes to a similar conclusion, then it would be reasonable for practitioners to assume that 20% is the standard for breaches in representation. As Slack and Glasser put it: "Litigants . . . will have to explain why they believe that Vice Chancellor Laster's quasi-bright-line of 20 percent is off. Future cases will likely test whether an over-20 percent valuation hit automatically counts as quantitatively significant." Slack & Glasser, *supra* note 12, at 38–39. So far, we have had an indication that Laster's decision will be cited favorably, as seen Dermatology Assocs. of San Antonio v. Oliver St. Dermatology Mgmt. LLC, No. CV 2017-0665-KSJM, 2020 WL 4581674, at *27 (Del. Ch. Aug. 10, 2020). In that decision, the court favorably cited to *Akorn* in ruling that the departure of several important physicians from a group, which led to an 11% decline in total revenue, was a material change in line with past decisions. *Id.*

197. Schwartz, *supra* note 4, at 830.

198. *Id*. at 832.

199. Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 738 (Del. Ch. 2008).

200. *Akorn*, 2018 WL 4719347, at *56.

201. *Id*. ("In my view, the plain language of the definition of [a MAC] makes clear that any [MAC] must be evaluated on a standalone basis . . . . If the parties had contemplated a synergistic approach, the definition would have referred to the surviving corporation or the combined company.").

3. Risk Allocation

Next, Schwartz argues that MAC clauses alter the default risk allocation that exists under the frustration doctrine.[202] In the event of purpose being frustrated by an event out of both parties' control, the frustration doctrine allows the party asserting it to place the risk of those events on the other party.[203] In acquisitions, this means that frustration places the risk of these exogenous events on the seller, since it is the buyer that asserts frustration in the case of frustrated purpose.[204] As the standard clause analog to frustration, MAC clauses allow parties to shift the risk of exogenous events from the seller back to the buyer by allowing the parties to carve out certain events (such as changes in GAAP practices or general economic conditions) and prevent those events from being used to cancel the deal.[205] The idea that MAC clauses allocate risk away from the seller using carve-outs was not a novel idea when Schwartz wrote his article,[206] but *Akorn* repeated it once again, stating "the typical [MAC] clause allocates general market or industry risk to the buyer and company-specific risks to the seller . . . (which it accomplishes by) placing the general risk of [a MAC] on the seller, then using exception to reallocate specific categories of risk to the buyer."[207] On its own, this quote is simply restating something already known by the practitioners who write these agreements, but Laster's explicit adoption of Schwartz's wording and theory is another step towards showing his adoption of Schwartz's general theory of MAC interpretation.

4. Foreseeability

Finally, the frustration doctrine requires that "only unforeseeable risks can provide grounds for excuse," since if parties meant to exclude specific risks, they would have contracted around them.[208] Again, the very existence of a MAC clause (combined with softening sentiment toward the frustration requirement of unforeseeability)[209] should signal the intent of the parties to allow for foreseeable risks.[210] Despite this, the *IBP* court seemed to endorse the unforeseeability requirement, stating that the MAC clause should be viewed as a

202. Schwartz, *supra* note 4, at 832.

203. *Id*.

204. *Id*.

205. *Id*. at 832–33.

206. *See generally* Gilson & Schwartz, *supra* note 22 (describing in detail how carve-outs and exception allocate risk between buyer and sellers).

207. Akorn Inc. v. Fresenius Kabi AG, No. 2018-0300-JTL, 2018 WL 4719347, at *49 (Del. Ch. Oct. 1, 2018). The article also directly quotes Schwartz on the matter, saying "[T]he risk of a target MAC resulting from a carved-out clause is allocated to the acquirer, while the risk of a target MAC resulting from any other cause is allocated to the target." *Id*. at n. 532 (quoting Schwartz, *supra* note 5, at 822).

208. Schwartz, *supra* note 4, at 833.

209. *See id.* At 809-10.

210. *See id.* at 834.

"backstop protecting the acquiror from the occurrence of *unknown events*."[211] Schwartz views this as foolish for a number of reasons.[212] First, MAC clauses do not mention foreseeability, even though they have other language specifying what types of changes do qualify.[213] Second, most events that qualify under a MAC clause (like management shortcomings) are foreseeable by the nature of businesses.[214]

By ruling that a MAC had occurred, the *Akorn* decision implicitly and explicitly endorses both of these points.[215] First, the court directly says that "the parties could have defined [a MAC] as including only unforeseeable effects, changes, events, or occurrences. They did none of these things."[216] This part of the decision even cites to Schwartz.[217] Second, while the factors leading the MAC in *Akorn* were "unexpected,"[218] they certainly were not unforeseeable. Schwartz said that in a situation such as this one, "a huge dropoff in profits due to gross mismanagement" is "quite foreseeable," a proposition that any follower of the news would likely find unsurprising.[219] Thus, by finding a MAC had occurred, Vice Chancellor Laster endorsed Schwartz's contention that foreseeability is not a requirement of MAC clauses.[220]

C. *Now What? Renegotiations Swing Even Further in Buyers' Favor*

What does this all mean for the future of mergers and acquisitions law? There are three primary possible outcomes.

First, Schwartz's theory could have been incorrect or at least flawed, leaving any conclusions from it irrelevant. While his logic seems sound, one potential hole in his argument was pointed out in an article by Professor Judd F.

---

211. *In re* IBP, Inc. S'holders Litig., 789 A.2d 14 (Del. Ch. 2001) (emphasis added).

212. *See* Schwartz, *supra* note 4, at 834.

213. *Id*.

214. *Id*. Schwartz also argues that "an unforeseeability requirement would come close to reading the MAC clause out of existence because, in the cosmic sense, everything is foreseeable." *Id*.

215. *Akorn,* 2018 WL 4719347, at *61.

216. *Id*.

217. *Id*. at n. 629 ("*[S]see also* [Schwartz] (providing additional arguments why [MAC] provisions should not be interpreted to contain an implied foreseeability term).").

218. *Id*. at *61 ("[T]he evidence shows that the events that resulted in a General MAE at Akorn were unexpected.").

219. Schwartz, *supra* note 4, at 834.

220. *See* Akorn*,* 2018 WL 4719347, at *61. The opinion also states that "assuming for the sake of argument that Akorn was correct and Fresenius had foreseen [the events], I do not believe that would change the result given the allocation of risk under the definition of a [MAC] set forth in the Merger Agreement." *Id*. While this seems like the golden quote that clearly supports Schwartz, the reference to the specific Akorn and Fresenius merger agreement seems to diminish its broad applicability. That being said, there is nothing out of the ordinary about the terms of that merger agreement and thus one would be forgiven for thinking this quote puts the foreseeable/unforeseeable debate to rest for good.

Sneirson, who argued that reading contract law principles into merger agreements can be inappropriate because merger agreements should be guided by corporate law principles in addition to contract law principles.[221] Many principles of contract law are guided by the simple premise of two parties coming to an agreement, but the reality of corporate environments is that deals involve many fiduciaries acting on behalf of the entity they represent who must be responsive to the accompanying fiduciary duties they owe.[222] This conflict has left courts juggling a variety of frameworks to view deal protection methods through, and Delaware courts have seemed to flip-flop between several different approaches.[223] While Sneirson ultimately endorses contract law principles, his analysis could shed light on a crucial flaw in Schwartz's theory: If contract law cannot be strictly followed in corporate law cases, then perhaps the Chancery Court's decision to ignore some of its basic principles in previous MAC cases can be forgiven. Other scholars, however, have weighed in in favor of contract law supremacy, with one even specifically addressing the *IBP* ruling and positing that subordinating contract values to corporate principles in mergers is "unnecessary and improperly devalues contract doctrine."[224] Following Sneirson's concluding sentence, where he suggests "corporate law should recognize and consider contract . . . and incorporate, where appropriate, useful lessons from these other areas of [contract] law," I think that Schwartz's analysis still holds up.[225] But perhaps future courts may disagree.[226]

A second, more likely possibility is that Schwartz's analysis was correct, but that courts will determine that Vice Chancellor Laster's *Akorn* opinion did not generally adopt Schwartz's theory, but instead cherry-picked several parts of it to solidify his point in a case that had uniquely egregious facts. I will discuss what this looks like in the following section.

221. *See generally* Judd F. Sneirson, *Merger Agreements, Termination Fees, and the Contract-Corporate Tension*, 2002 COLUM. BUS. L. REV. 573 (2002). It is important to note that this article is not a direct response to Schwartz (it came out three years earlier). While it concerns termination fees, rather than MACs, the shared status of both types of clauses as deal protection devices makes the analysis sufficiently relevant.

222. *See id*. at 574.

223. *See id*. at 606–07. Delaware courts suggested contract law supremacy in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), corporate law supremacy in *Paramount Communications, Inc. v. QVC Networks, Inc.* 637 A.2d 34 (Del. 1994), and then suggested a four-factor balancing test in *ACE Ltd. v. Capital Re Corp.*, 747 A.2d 95 (Del. Ch. 1999). *See id* at 606–08.

224. Celia R. Taylor, *When Good Mergers Go Bad: Controlling Corporate Managers Who Suffer a Change of Heart*, 37 U. RICH. L. REV. 577, 580–81 (2003). Ironically, Taylor's endorsement of contract law led her to a different conclusion than Schwartz, characterizing *IBP* as "an important example of an appropriately balanced approach." *See id*. Of course, Schwartz's specific quarrel with *IBP* was not whether VC Strine applied contract law, but how he did so. *See* Schwartz, *supra* note 5, at 826-27 (citing *IBP* as the first in a line of several decisions that created a materiality standard without regard for preexisting case law interpreting materiality in contracts).

225. Sneirson, *supra* note 221, at 629.

226. Given that Schwartz's article was published in a prominent law review and doesn't appear to have been meaningfully critiqued by any other scholars in the decade since it was published, I would lean towards his theory being generally accepted by other scholars, if not yet by courts.

The third possibility is that Laster's opinion will give courts the ammunition they need to reverse the trend of seller-friendly rulings and finally give the text of merger agreements the meaning it was intended to have (and deserves).

In the final section of his article, Schwartz gives an example of what this could look like in practice.[227] In late 2008, financial giants Bank of America and Merrill Lynch agreed to a $50 billion acquisition agreement that would have created the largest bank in the country.[228] Before closing, the financial crisis had set in, and Merrill posted a staggering $15 billion loss in the fourth quarter of that year alone.[229] Despite this astonishing number, Bank of America closed the deal on New Year's Day 2009.[230] Schwartz argues that it seemed like they had no choice.[231] After all, there still had not been a successful MAC claim in Delaware by that time.[232] The primary issue was that even though Merrill Lynch had lost an astounding $15 billion, the parties may have believed that such a short-term loss was meaningless based on the existing precedent.[233] And they likely would have been right.[234] This was a clear example of a company making a decision that it likely would not have if courts correctly interpreted MAC clauses as a standard clause analog to the frustration doctrine.[235]

D. *Finally, a Sign?* Channel Medsystems v. Boston Scientific

In the immediate aftermath of *Akorn*, there were no important indications of how future courts would apply Vice Chancellor Laster's reasoning.[236] That

---

227. *See* Schwartz, *supra* note 4, at 835–38.

228. *Id*. at 835.

229. *See id*.

230. *Id*.

231. *See id* at 835–36. In the end, the decision not to sue and claim a MAC was made by the government as much as Bank of America. *Id*. at 836. Fearing that financial chaos would ensue if a MAC was asserted, the Treasury Secretary threatened to replace the bank's directors and then secretly offered $20 billion in taxpayer financing. *Id*. However, regardless of the external pressure, the entire situation was informed by the existing court precedent, and thus the analysis is still relevant (if less convincing). *See id*. at 835–36. For more details on the government intervention, see *Bank of America and Merrill Lynch: How Did a Private Deal Turn Into a Federal Bailout?: Joint Hearing Before the H. Comm. on Oversight and Gov't Reform and the Subcomm. on Domestic Po'ly*, 111th Cong. (2009) [hereinafter "*Hearings*"].

232. Schwartz, *supra* note 4, at 837.

233. *Id*. Ben Bernanke, former Chairman of the Federal Reserve stated in the subsequent hearings that the leading precedent held that "short-term losses, no matter how large" could not qualify as a MAC. *See id*. at 837 & n.280 (quoting *Hearings*, *supra* note 231).

234. *See id.* (calling Chairman Bernanke's statement "correct").

235. Although in this case, this result could have led to serious further damage to the financial system. *See id.* at 838 ("The government felt strongly that if Bank of America invoked the MAC clause, it could have seriously damaged the then-fragile financial system.").

236. My research indicates that none of the ten occasions on which *Akorn* was cited in opinions before December 2019 were related to MACs. See, e.g., *Himawan v. Cephalon, Inc.*, No. 2018-0075-SG, 2018 WL 6822708, at *7 (Del. Ch. Dec. 28, 2018) (citing *Akorn* as a source for various standards of "efforts" clauses).

changed in late December 2019, when the Chancery Court weighed in on the potential termination of a deal between two medical technology companies.[237] In the decision, Chancellor Bouchard ruled that no MAC had occurred, a decision that some felt was proof that *Akorn* was simply a one-off case, not a "watershed moment that would make such findings more common."[238] But examining the text of Bouchard's opinion leads to no such conclusion. In fact, Bouchard's reasoning remains consistent with Laster's, with perhaps the only salient difference being a set of facts that even Schwartz would likely agree do not represent a MAC.

In 2017, Boston Scientific entered into an agreement with Channel Medsystems, of which Boston was already a minority owner, to purchase the remaining outstanding equity of the company for $275 million.[239] The agreement was conditioned on FDA approval of Cerene, Channel's only product, and would close following FDA approval.[240] Less than two months after signing the agreement, Channel discovered that its Vice President of Quality, Dinesh Shankar, had used falsified documents to pilfer approximately $2.6 million from the company.[241] After discovering this, Channel immediately took action, notifying Boston Scientific of the fraud, hiring a forensic accounting firm to determine the extent of Shankar's misdeeds, and filing a remediation plan with the FDA (who accepted the plan and indicated that Shankar's fraud would *not* affect the approval of Cerene).[242] Despite this assurance from the FDA, Boston announced its intent to terminate the merger agreement in May 2018, alleging that Shankar's misconduct led to an uncurable breach of the agreement.[243] In March of 2019, the FDA approved Cerene, a timeline consistent with what the parties expected at the time the agreement was made and six months before the contractual deadline for such approval, thus effectively eliminating what would have been the primary grounds for a MAC.[244] In his ruling, Chancellor Bou-

---

237. *See* Channel Medsystems, Inc. v. Boston Sci. Corp., No. 2018-0673-AGB, 2019 WL 6896462, at *1 (Del. Ch. Dec. 18, 2019).

238. Jason M. Halper et al., *The Delaware Court of Chancery Rejects Termination of Merger Agreement Based on Material Adverse Effect*, NAT'L. L. REV. (Jan. 8, 2020), https://www.natlawreview.com/article/delaware-court-chancery-rejects-termination-merger-agreement-based-material-adverse; *see also* Amy L. Simmerman et al., *Delaware Court of Chancery Declines to Find Material Adverse Effect and Orders Specific Performance of a Merger*, WILSON SONSINI (Jan. 6, 2020), https://www.wsgr.com/en/insights/delaware-court-of-chancery-declines-to-find-a-material-adverse-effect-and-orders-specific-performance-of-a-merger.html ("[T]he new decision, consistent with prior case law, reflects that buyers claiming [a MAC] face a heavy burden and that *Akorn* was not a turning point in Delaware law.").

239. *Boston Sci. Corp.*, 2019 WL 6896462, at *5.

240. *Id*. at *4.

241. *See id*. at *1. Shankar pled guilty for fraud and is now in prison. He has since repaid almost the entirety of the $2.57 million. *Id*. at *7.

242. *See id*. at *6–12.

243. *See id*. at *13.

244. *See id*. at *14 ("[Boston Scientific's quality expert] confirmed that the FDA's approval necessarily reflects its conclusion that Cerene is safe and effective . . . and that its clinical data is

chard ruled that no MAC had occurred and ordered specific performance of the agreement.[245]

At first glance, this decision runs counter to *Akorn*, making it clear that at the very least, *Akorn* did not pave the way for years of courts siding with buyers and counterbalancing the previous two decades. But closer examination reveals that Bouchard's opinion positively cites to *Akorn* in several places without ever calling into question Vice Chancellor Laster's reasoning. In addition, the opinion is overall at least partially consistent with the Schwartz analytical framework, even though the flagrant facts of the case force a different result.

Channel argued that the fact that Shankar falsified only six test reports (out of 138 submitted to the FDA)[246] could not possibly be considered material, especially since they had no impact on the FDA's decision.[247] Bouchard disagreed, stating that "[d]epending on the circumstances, a single test report generated from falsified content may be significant enough to establish material noncompliance."[248] This lower threshold of materiality is reminiscent of *Akorn*, with Bouchard even drawing a large block quote from Laster's opinion and including Laster's observation that a MAC can occur "without the effect on the target's business being felt yet."[249]

Bouchard made sure to emphasize that his ultimate decision was impacted by "a lack of good faith" on the part of Boston Scientific, "corroborated by contemporaneous evidence that [the company] was looking for a way out of its deal with Channel due to growing concerns that Cerene would be difficult to market and the proposed transaction was complicating a potential divestment of part of Boston Scientific's business."[250] Bouchard appeared to believe that Boston Scientific's position (that Shankar's fraud would necessitate starting from scratch) was "not objectively reasonable" given the FDA's indication that *product approval would not be affected*.[251] Additionally, Boston Scientific switched from that position just a few weeks before trial (when the FDA gave final approval) to a focus on the need for retesting of the product, a self-serving malleability that Bouchard felt made their new argument "not credible."[252] The emphasis on corrupt motive as the precipitating factor is reminiscent of Vice

reliable, describing FDA approval as 'the proof in the pudding'. [T]his meant that the FDA 'had all of the information [it] needed to make an informed decision' when approving Cerene. Due to the FDA's approval, Channel can market Cerene in the Unites States immediately.").

245. *See id*. at *1.

246. *Id*. at *6.

247. *See id*. at *21.

248. *Id*.

249. *Id*. at * 25 (citing Akron, Inc. v. Fresenius Kabi AG, No. 2018-0300-JTL, 2018 WL 4719347, at *46 (Del. Ch. Oct. 1, 2018)).

250. *Id*. at *38 (citing Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 755-56 (Del. Ch. 2008)).

251. *Id*. at *31.

252. *Id*. at *29.

Chancellor Strine's *IBP* reasoning.[253] But part of the reason that *IBP* was ascribed such doctrinal significance since was that at the time it marked the most in-depth Delaware interpretation of a MAC clause. Now that this field has been flushed out more thoroughly over the past two decades, future courts should recognize *Boston Scientific* for what it is—a clear case of pretextual reasoning by a self-serving party to escape a bad deal, not an example of a MAC.

For a proponent of *Akorn*'s relaxed MAC standard, *Boston Scientific* is not the ideal subsequent case. But it is important to recognize that even though the two opinions reach different decisions, the court had little choice but to reject the MAC claim given that the FDA's approval of Cerene negated the main premise on which the claim was based. The court even separately found that Boston had breached its own responsibility to use commercially reasonable efforts to close the deal, a circumstance that left little room for finding that a MAC had occurred.[254] Despite the case coming to a different result than *Akorn*, the chief takeaway is that Chancellor Bouchard's opinion adopts much of *Akorn*'s reasoning without expressing any disagreement, which, if anything, proves that Laster's opinion will likely be cited in many more future decisions. While *Boston Scientific* may not be a ringing endorsement of *Akorn*'s message, the two opinions share reasoning that is entirely consistent. *Boston Scientific* is simply an example of a court with no other option given the egregious facts at hand, and it certainly does not preclude future courts from using *Akorn* as the *future standard* for the next generation of MAC cases, paving the way for a more relaxed (and correct) interpretation of contract law.

E. *What's Next? COVID-19 is Giving Courts Opportunities to Test* Akorn

In November 2019, the first known case of the novel coronavirus (COVID-19) was discovered.[255] Within months, the respiratory virus had inspired a worldwide panic.[256] What started as a localized health concern became a pandemic, infecting over 140 million people and leading to more than three million deaths at the time of this Article.[257] Reacting to potential chaos and the effects of restrictive measures imposed by both individuals and governments across the world, financial markets fell into freefall.[258] On March 12, 2020, the day after

253. *In re* IBP, Inc. S'holders Litig., 789 A.2d 14 (Del. Ch. 2001).

254. *Boston Sci. Corp.*, 2019 WL 6896462, at *1.

255. Josephine Ma, *Coronavirus: China's First Confirmed Covid-19 Case Traced Back to November 17*, S. CHINA MORNING POST (Mar. 14, 2020, 12:45 AM), https://www.scmp.com/news/china/society/article/3074991/coronavirus-chinas-first-confirmed-covid-19-case-traced-back.

256. *See Coronavirus: World in 'Uncharted Territory'* BBC (Mar. 2, 2020), https://www.bbc.com/news/world-51712437.

257. *See Coronavirus World Map: Tracking the Global Outbreak*, N.Y. TIMES (April 3, 2021, 12:12 AM), https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html.

258. *See Travel Limits, Economic Fears Stoke Market Plunge*, N.Y. TIMES (Mar. 12, 2020), https://www.nytimes.com/2020/03/12/business/stock-market-today.html.

the World Health Organization had officially categorized the disease as a pandemic,[259] the Dow Jones dropped by 10%, the largest such drop since 1987.[260] As the world ramped up its efforts to stop the spread of the virus, businesses faced an uncertain future.[261] The mergers and acquisitions community braced for impact, with many prominent law firms publishing predictive guides for clients and attorneys, many of which focused on the MAC as an area to watch.[262] Two major impacts on MACs were expected. First, an increase in the number of companies invoking the MAC clause, forcing courts to confront *Akorn*'s impact, was expected.[263] Second, a change in MAC clauses themselves was expected, as dealmakers bargained over whether to include COVID-19 (and general pandemic) related exceptions.[264]

During the financial crisis of the late 2000s, there was a strong decline in merger and acquisition activity.[265] But while there was a short-term decline in merger activity at the outset of the pandemic, deal-making quickly rebounded, with an estimated 17-20% increase in merger activity in the second half of 2020 over the first half.[266] However, the beginning of the pandemic saw major deals broken as economic uncertainty joined forces with financing concerns, travel restrictions, due diligence complications, and supply chain disruptions to leave buyers uncertain of how to evaluate their prospective targets.[267]

---

259. *See Coronavirus Confirmed as Pandemic by World Health Organization*, BBC (Mar. 11, 2020), https://www.bbc.com/news/world-51839944.

260. *Travel Limits, Economic Fears Stoke Market Plunge*, *supra* note 258.

261. *See id.*

262. *See* James Anderson et al., *Coronavirus/COVID-19: Implications for Commercial and Financial Contracts*, SKADDEN, ARPS (Feb. 26, 2020), https://www.skadden.com/insights/publications/2020/02/coronavirus-covid19-implications; *see also,* Marcia Ellis et al., *The Impact of the COVID-19 Outbreak on PE Investors and their Portfolio Companies in Asia – Part 1*, MORRISON FOERSTER (Feb. 20, 2020), https://www.mofo.com/resources/insights/200220-covid-19-pe-investors-portfolio-companies-asia-part-1.html; *see also* Scott A. Barshay et al., *Is the Coronavirus a Material Adverse Effect?,* PAUL WEISS (Mar. 6, 2020), https://www.paulweiss.com/practices/transactional/mergers-acquisitions/publications/is-the-coronavirus-a-material-adverse-effect?id=30800.

263. *See* Barshay, et al, *supra* note 262.

264. *See* Caroline Blitzer Phillips, Vinson & Elkins LLP, *Does the COVID-19 Outbreak Constitute a Material Adverse Effect? Plus Other Impacts on M&A Transactions,* JD SUPRA (Mar. 13, 2020), https://www.jdsupra.com/legalnews/does-the-covid-19-outbreak-constitute-a-85203/. Other representations and warranties will be affected as well. We will likely see more negotiation regarding the "ordinary course of business" covenant (which *Akorn* also addressed) as well as an increase in representations and warranties insurance (which will likely be tweaked to avoid many of the known risks of COVID-19). *See id.*

265. *See* JEFF GELL ET AL., THE BOSTON CONSULTING GROUP, ACCELERATING OUT OF THE GREAT RECESSION 7 (June 2010), https://image-src.bcg.com/Images/BCG_Accelerating_Out_of_the_Great_Recession_M_and_A_Jul_10_tcm108-117898.pdf (estimating that total merger value was almost cut in half between 2008 and 2009).

266. *Global M&A Industry Trends,* PWC (Apr. 21, 2021, 12:34 PM), https://www.pwc.com/gx/en/services/deals/trends.html.

267. *See* Benjamin Horney, *7 Major M&A Deals That Broke Down Due to COVID-19,* LAW360 (Jan. 11, 2021, 8:39 PM), https://www.law360.com/articles/1342476/7-major-m-a-deals-

Further complicating the broken deals was uncertainty over whether or not the exceptions already present in most agreements would cover COVID-19. A study conducted by Harvard Law School professor John Coates found that while only 33% of large merger agreements in the year before the pandemic used MAC definitions that excluded "pandemics, epidemics, public health crises, or influenzas," 87% contained exclusions for "natural disasters, crises, or calamities."[268] In a late-2020 decision, the Chancery Court hinted that it would allow this second, broader, and more prevalent definition to encompass COVID related MAC claims, ruling that such language was sufficient to preclude a MAC claim in a $5.8 billion hotel deal between a Chinese insurance company and Korean financial services conglomerate.[269] *Akorn* itself, interestingly enough, was an example of a deal that would likely except the pandemic from its MAC definition. Unlike, *IBP*, which lacked many exceptions,[270] *Akorn*'s agreement had a long list of potential occurrences that were specially exempted from the MAC clause.[271] Specifically, it exempted anything "resulting from or attributable to . . . pandemics . . . , force majeure events or other comparable events."[272] In light of the WHO's decision to officially deem the virus a pandemic, it seems clear the effects of COVID would be excepted under this type of language.

Thus, it appears that COVID itself will not be a major instigator for a new spate of illuminating MAC litigation. As the world adapts to the post-COVID era, it appears negotiators will negotiate exclusions that will leave no doubt in the minds of the courts that they intend to exclude the virus. Morgan Stanley's $14.5 billion acquisition of E*Trade (the largest Wall Street acquisition since the last financial crisis) has already provided an example of what a more specific clause might look like.[273] The merger agreement excluded any "epidemic,

---

that-broke-down-due-to-covid-19 (summarizing seven large deals that were called off either due to or concurrently with the beginning of the pandemic); *see also* Ann Marie Uetz, et al., *Managing the Commercial Impact of the Coronavirus: Impacts on the Corporate & Securities Landscape, Including M&A and Public Company Reporting Considerations*, FOLEY & LARDNER LLP: INSIGHTS (Mar. 13, 2020), https://www.foley.com/en/insights/publications/2020/03/coronavirus-corporate-securities-ma-reporting (outlining the kind of disruptions that were expected by dealmakers at the start of the pandemic); *see also* Richard Harroch et al, *The Impact of the Coronavirus Crisis on Mergers and Acquisitions*, FORBES (Apr. 17, 2021), https://www.forbes.com/sites/allbusiness/2020/04/17/impact-of-coronavirus-crisis-on-mergers-and-acquisitions/?sh=6796a842200a (explaining that concerns such as due diligence complications and financing uncertainty slowed down dealmaking at the outset of the pandemic).

268. AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, C.A. No. 2020-0310-JTL, 2020 WL 7024929, at *63-64 (Del. Ch. Nov. 30, 2020).

269. *See id.* at *57–59.

270. *See* Agreement, *supra* note 68.

271. *See* Akorn, Inc., Current Report, Exhibit 2.1 (Form 8-K) (Apr. 24, 2017).

272. *Id*. at § 8.12 (defining "Material Adverse Effect").

273. *See Analysis: Morgan Stanley, E*Trade Merger Excludes Coronavirus*, BLOOMBERG LAW (Feb. 20, 2020, 3:25 PM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-morgan-stanley-e-trade-merger-excludes-coronavirus.

pandemic or disease outbreak (including the COVID-19 virus)" that would reasonably be expected to result in a MAC.[274] Similar to how companies began to increase exceptions for acts of terrorism in the wake of 9/11, it would be surprising if all other deals in the near future do not include similar language, particularly as companies factor in the expected impact of the virus into the initial deal price.[275] Besides the *AB Stable* hotel deal, there have been very few other broken deals that have resulted in Chancery Court decisions, and anticipated major litigation frequently does not make it to trial.[276] One case to keep an eye on is *Agspring v. NGP*, which favorably cited to *Akorn*'s relaxed standard at the pleadings phase, but does not appear to have reached any further stage yet.[277]

But even though COVID does not appear to be directly instigating substantially more MAC litigation, the economic uncertainty it may bring to the world over the next few years still could be a source of future litigation. Much of the pandemic's effects cannot be known in the very short-term, but regardless of what the fallout ends up being, the broken mergers of 2020 and the possibility of future economic uncertainty could force courts to take a more definitive stand on MAC clauses. As explained above, they would be correct to choose *Akorn* as their guide for doing so.

---

274. *Id*.

275. *Id.* The article notes that another large deal signed in late February for the purchase of wells and pipelines includes an exclusion for "an outbreak of disease" but does not specifically name COVID-19. *See id*; *see also* Barshay et al., *supra* note 262 ("As the COVID-19 outbreak continues, it is likely that sellers will negotiate for more specific references to pandemics and epidemics in exceptions to the definition of [a MAC], just as terrorism exceptions became more commonplace following the events of September 11, 2001.").

276. Katelyn Crawford et al., FOX ROTHSCHILD LLP, *DE Court of Chancery Weighs Terminating M&A Deals Under Material Adverse Effect Clauses*, JD SUPRA (May 8, 2020), https://www.jdsupra.com/legalnews/de-court-of-chancery-weighs-terminating-21410/ (detailing four recent MAC claims and the grounds for each, most notably in the purchase of L Brands (Victoria's Secret) by Sycamore Partners). Three of the claims were settled in some form, and the other appears to still be pending. Carleton English, *L Brands*, *Sycamore Partners Reach Mutual Agreement' Terminating Sale of Victoria's Secret*, BARRONS (May 4, 2020, 5:22 PM), https://www.barrons.com/articles/l-brands-sycamore-partners-abandon-victorias-secret-deal-51588627374; Gillian Tan, *SoftBank Commits $1 Billion to WeWork Amid Membership Drop*, BLOOMBERG https://www.bloomberg.com/news/articles/2020-08-13/softbank-injects-1-1-billion-into-wework-as-membership-drops (Aug. 12, 2020 8:17 PM); Rich Duprey, *Bed Bath & Beyond Settles Lawsuit With 1-800-Flowers*, THE MOTLEY FOOL (Jul. 22, 2020, 1:08 PM), https://www.fool.com/investing/2020/07/22/bed-bath-beyond-settles-lawsuit-with-1-800-flowers.aspx; Rose Krebs, *Yoga Studio Chain Can't Nix Suit Over Frozen Purchase Deal*, Law360 (Aug. 19, 2021, 6:09 PM), https://www.law360.com/articles/1302554/yoga-studio-chain-can-t-nix-suit-over-frozen-purchase-deal

277. *See* Agspring Holdco, LLC v. NGP X US Holdings, L.P., C.A. No. 2019-0567-AGB, 2020 WL 4355555, at *17 & n.162 (Del. Ch. July 30, 2020) (citing Akorn, Inc. v. Fresenius Kabi AG, 2018 WL 4719347, at *53 and Raskin v. Birmingham Steel Corp., 1990 WL 193326, at *5 (Del. Ch. Dec. 4, 1990) to support that 47% reduction in forecasted EBITDA was sufficient to support an MAE claim at the pleadings stage).

CONCLUSION

Courts have spent most of last twenty years dismissing even the most justified of MAC claims; and, in doing so, have violated the most basic principles of contract law. The Delaware Chancery Court's 2018 decision in *Akorn*, finding that a MAC had occurred, finally will give future courts the precedent they need to begin applying a more coherent (and correct) judicial philosophy. As we begin the decade faced with economic uncertainty brought on by COVID-19, courts could see an increase in MAC claims coming before them, giving them the opportunity to cement *Akorn* as the guiding precedent for the future of MAC jurisprudence.