

Antitrust Covenants in the Spotlight Following Recent Failed Mergers

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WHEN THE CONSUMMATION of a transaction is subject to regulatory clearances or shareholder approvals, merging parties must allocate the risks created by these conditions precedent as part of their broader merger negotiations. Risk allocation clauses can create hazards for both buyers and sellers in transactions with material antitrust issues. In practice, merger agreements among competitors can leave one or both parties exposed if the deal fails to receive antitrust clearance. Although sellers may prefer provisions that place more of the antitrust clearance risk on the buyer, and vice versa, the language on which the parties ultimately agree will depend on their relative bargaining positions, priorities, and perceptions of the risk of failing to obtain clearance.

Sellers may be able to obtain antitrust protection in the agreement for a number of reasons: it may have a particularly valuable business or set of assets, its combination with the buyer may offer substantial synergies, or it has other proposals that offer greater certainty of close relative to the proposed buyer. In other instances, the parties may agree to allocate the clearance risk to the seller if the buyer is willing to offer a higher purchase price or if the seller has few or no other options. Just as the bargaining dynamics between a buyer and seller inevitably vary by transaction, there is no “one size fits all” approach for allocating antitrust risk.

Recent Delaware Chancery Court litigation following four failed, antitrust-sensitive mergers highlight these risks. After failing to receive antitrust clearances, the antitrust efforts covenants in the Anthem/Cigna and Sinclair/Tribune merger agreements have been front and center in the parties’ disputes. The Fresenius/Akorn dispute was over whether Akorn suffered a material adverse effect that would allow Fresenius to be free of its obligation to consummate the transaction. And the Vintage/Rent-a-Center dispute addressed whether a

party’s actions in pursuit of antitrust clearance could serve as the required notice to extend the outside date. These cases demonstrate the importance of counseling clients on their exposure related to these provisions and advising them on compliance once the deal is signed.

Key Antitrust Covenants

For antitrust practitioners, the key areas of risk that could thwart consummation often include feasibility of securing antitrust clearances with or without remedial conditions and the time or legal process (e.g., Second Request, litigation) necessary to address those hurdles. Parties allocate these antitrust risks using several merger agreement provisions. For example, the regulatory efforts covenant can detail the actions each party must take to receive the required clearances, including the obligation to litigate. This provision is often closely tied to other provisions, such as the general material adverse change (MAC) or material adverse effects (MAE) clause (terms often used interchangeably), which can serve as a cap on the obligations necessary to receive clearance. The termination or outside date clause often allows a party to abandon the transaction if the required clearances are not received within a set period. In certain antitrust-sensitive transactions, a buyer may also agree to pay the seller a reverse termination fee if clearances are not received by the time one or both parties terminate the agreement.

The Efforts Clause. Antitrust attorneys will often advise on the efforts a party will agree to undertake to receive antitrust clearance. This clause contains a number of elements that the parties use to allocate risk based on a standard hierarchy of effort.

- **Best efforts:** the highest standard, requiring a party to do essentially everything in its power to fulfill its obligation (for example, by expending significant amounts or management time to obtain consents).
- **Reasonable best efforts:** somewhat lesser standard, but still may require substantial efforts from a party.
- **Reasonable efforts:** still weaker standard, not requiring any action beyond what is typical under the circumstances.
- **Commercially reasonable efforts:** not requiring a party to take any action that would be commercially detrimental, including the expenditure of material unanticipated amounts or management time.

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■ *Good faith efforts*: the lowest standard, which requires honesty in fact and the observance of reasonable commercial standards of fair dealing. Good faith efforts are implied as a matter of law.¹

Although deal practitioners may generally follow these standards when drafting, “[c]ommentators who have surveyed the case law find little support for the distinctions that transactional lawyers draw.”² Indeed, the Delaware Chancery Court does not distinguish between “commercially reasonable efforts” and “reasonable best efforts,” and has noted that even “best efforts” is qualified by a reasonableness test.³ Under Delaware law, to determine whether a party has satisfied the “reasonable best efforts” clause (which may also sweep in commercially reasonable efforts and best efforts), the court looks at “whether the party subject to the clause (1) had reasonable grounds to take the action it did and (2) sought to address problems with its counterparty” before filing suit.⁴

In addition to assigning an efforts level, in drafting such clauses, counsel may explain in varying amount of detail what actions each party must take to attempt to receive clearance. The parties often do not provide much detail about the required undertakings for a transaction unlikely to receive significant scrutiny but may include more elaborate provisions for antitrust-sensitive matters. These provisions often include detailed requirements for how each party’s counsel must cooperate with the other. The parties may also identify which party controls the strategy and include a timeline each party must follow to meet certain milestones (e.g., filing a notification within a specific number of days after signing or complying with a Second Request within a set time period after issuance).

Parties may also allocate antitrust risk by agreeing to a certain level of commitment each party must undertake in furtherance of clearance. For example, a buyer may agree to make best efforts to take all measures necessary, proper, or advisable to receive the required clearances. A provision containing these agreed-to actions without any caveats is commonly known as a “hell-or-high-water” covenant because the buyer assumes all antitrust risk by agreeing to do everything necessary to remove antitrust impediments. In other words, the hell-or-high-water obligation has no defined limit on what the buyer must do to close the transaction.

A buyer is unlikely to accept this level of risk without first seeking input from antitrust counsel as to the likely antitrust outcomes. An educated buyer may take that risk in exchange for better bargaining leverage on other covenants that it believes pose higher exposure. The buyer may also agree to the hell-or-high-water covenant if it thinks that is necessary to be selected as the superior proposal among multiple competing offers.

Alternatively, a buyer may seek to cap what it would need to undertake to satisfy its antitrust efforts obligation. Common caps include limitations on the remedies a buyer must agree to accept to receive clearance, such as a modified hell-or-high-water covenant that expressly states that the

buyer will take all measures necessary, proper, or advisable to receive clearance except for making divestitures exceeding a certain value. Other provisions in the agreement may expressly disclaim either party’s requirement to engage in litigation to defend it.

Although parties utilize the efforts clause to allocate and clarify antitrust risks, specificity has its own risks. Because the merging parties produce a copy of the agreement to the antitrust agencies as part of their filing, specific provisions allocating antitrust risk may not only flag for the agencies that the parties perceive a potential antitrust risk, but also indicate how far they are willing to go before dropping the deal. As a result, some practitioners advise against detailing the obligations to avoid the chance that, in some circumstances, it could increase the overall risk of an agency investigation, challenge, or demand for settlement.⁵ This sometimes results in the parties relying on an MAE provision to limit exposure.

The MAE Clause. Parties negotiating a merger agreement often rely on an MAE provision to allocate the risks that arise between the signing and close of a transaction. Unless otherwise defined, an MAE refers to a sustained and severe business decline in the seller’s business during that interim period. The seller’s value may deteriorate despite its efforts to run the business in the ordinary course, including because of the uncertainty on the future of the business created by the pending transaction. In the event that the seller suffers an unforeseeable and very significant business decline that materially impairs its value, the buyer can use an MAE clause as a contractual out.

In the past, MAEs were boilerplate provisions that left out details necessary to determine which party bore important risks.⁶ Parties generally understood this clause to cover unforeseeable business risks, such as increased competition eroding the target’s margins or unanticipated unfavorable legal or regulatory action. This had the effect of permitting the buyer to rescind its agreement with the seller upon “any change, occurrence or state of facts . . . materially adverse to the business, financial condition, or results of operations”⁷ of the seller. Although parties today pay significant attention to the MAE provision, merger agreements still typically do not define what is “material.” This is likely because it can create opportunities to renegotiate the agreement or because attempts to define it can create more problems in the negotiations or subsequent litigation.⁸

In addition to the general MAE clause that limits a buyer’s overall risk, parties may use an MAE clause to cap the antitrust risk or use a variant that caps the divestiture as an MAE of the post-merger combined business. A cap tied to an MAE avoids specifying for agencies what the parties have agreed to undertake, but it has its own traps because of the ambiguity around what qualifies as an MAE.

The Termination Clause, Outside Date, and Antitrust Break Fees. These three clauses are equally important, but sometimes overlooked. The parties must close by a date certain as defined by the merger agreement’s outside

date. If a party fails to meet its closing conditions by that outside date, the other party may terminate the transaction and potentially recover a fee from the breaching party. Because antitrust-sensitive transactions can take several months to resolve, a party must factor in timing that allows for those clearances. Each party faces exposure if the outside date allows for a lengthy period between when they sign and ultimately close. The seller may face a declining business because of the uncertainty caused by the transaction, while the buyer may have financing secured only for a limited time. But a party also faces risk if the parties' transaction has not been cleared by the outside date.

The outside date works closely with the termination clause. A party may terminate the transaction upon the occurrence of certain events outlined in the termination clause. For example, a party may have the right to terminate if the counter party fails to obtain termination of the mandatory Hart-Scott-Rodino (HSR)⁹ waiting period or other antitrust clearance by a certain date. A party might also negotiate for the right to terminate if the antitrust agency issues a Second Request, challenges the transaction, or has won (and the parties have lost) a final, non-appealable judgment. Parties frequently mitigate some of the risks by allowing either party or requiring both parties to agree to extend the outside date, usually for a set period, if antitrust clearance is still outstanding.

In certain antitrust-sensitive transactions, a buyer may also agree to pay the seller a reverse termination fee if antitrust clearances are not received by the time one or both parties terminates the agreement. This fee may provide an incentive to a risk-averse seller to enter into an antitrust-sensitive transaction and, if properly drafted, limit the buyer's liability for the failed transaction to that fee. A buyer may also benefit from a reverse-break fee by, for example, allowing the buyer to choose to pay the fee rather than agree to a burdensome remedial order.

Recent Litigation over the Efforts Clause

The Anthem/Cigna Efforts Clause. In July 2015, Anthem entered into an agreement to purchase Cigna for more than \$54 billion. The parties were well aware of the antitrust risk associated with combining two of the four national health insurers, and the merger agreement reflected this risk. Both parties agreed to undertake "reasonable best efforts" to take "any and all actions necessary" to satisfy antitrust concerns, unless doing so would result in an MAE.¹⁰ In other words, the parties agreed to a hell-or-high-water covenant subject to an MAE exception. The agreement included a \$1.85 billion reverse termination fee that Anthem would owe to Cigna if Anthem failed to attain regulatory approval by the outside date so long as Cigna had not willfully breached its obligations.¹¹

The United States—joined by 11 states and the District of Columbia—challenged the merger and, in February of 2017, the district court ordered a permanent injunction.¹² Anthem

appealed, but shortly thereafter Cigna sent its notice of intent to terminate the agreement and sued Anthem. In its complaint, Cigna alleged that Anthem engaged in numerous breaches of its antitrust efforts obligations with the aim to disadvantage Cigna as a competitor.¹³ Anthem filed its own suit, alleging that Cigna violated its best efforts obligations by: (1) refusing to assist Anthem's efforts to secure clearance from DOJ without litigation; (2) thwarting the parties' settlement opportunities with DOJ; and (3) failing to defend the merger before the DOJ, at trial, or on appeal.¹⁴ Cigna subsequently rebutted Anthem's characterizations of Cigna's breaches and explained that Anthem began building a record to avoid paying the reverse termination fee once it realized that the deal would not receive clearance.¹⁵ Cigna also asserted that, even if it had breached, its breach did not materially contribute to the failure of the merger.¹⁶

As of the time this article went to print, the Chancery Court had yet to rule on any of the claims and had urged the parties to settle their dueling lawsuits. If the case is tried rather than settled, the decision promises to be instructive in specifying what satisfies the antitrust efforts obligations in an antitrust-sensitive merger. Possible outcomes include:

- (1) *Cigna's breach was not material to the outcome.* The court could avoid ruling on whether Cigna breached its best efforts obligation by finding that, even if Cigna did breach, its breach did not materially contribute to the failure of the merger. The court could look to the fact that both the DOJ and the district judge had available all relevant facts and materials necessary to determine whether the merger was likely to be anticompetitive. The court could conclude the outcome would have been the same regardless of whether Cigna breached.
- (2) *Cigna's breach was material to the outcome.* The court could find that Cigna's actions constituted a material breach. This could provide insights for future sellers about the level of cooperation required in supporting a buyer's regulatory strategy, even where the seller may disagree with the benefits of it.
- (3) *Cigna did not breach.* The court could find that Cigna did not breach its agreement. Such an outcome would indicate that where a party has a legitimate strategic dispute, or where it perceives that certain actions could harm its business image and the procompetitive rationale for the transaction, it would not be compelled to act under a "reasonable best efforts" standard.

The Sinclair/Tribune Efforts Clause. Tribune also relied on an efforts clause breach in its claim against Sinclair stemming from the failed Sinclair/Tribune transaction. In May 2017, Sinclair agreed to purchase Tribune for approximately \$3.9 billion. Both firms compete for broadcast television advertising in certain geographic markets, with Sinclair allegedly owning the largest number of local television stations of any media company in the United States.¹⁷

As the parties purportedly enjoyed a duopoly in several geographic markets and exceeded the Federal Communica-

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tions Commission cap on national audience reach, the parties anticipated DOJ and FCC scrutiny.¹⁸ In their merger agreement, Sinclair agreed to use reasonable best efforts to take “all actions” and do “all things” necessary to secure regulatory approvals.¹⁹ Tribune also negotiated for Sinclair to agree to divest stations in overlapping markets and to bring the combined company into compliance with the FCC’s cap on national audience reach, but gave Sinclair control over the regulatory strategy.²⁰

According to Tribune’s complaint, Sinclair failed to live up to its regulatory efforts obligations and engaged in willful breaches of the merger agreement:

Sinclair engaged in belligerent and unnecessarily protracted negotiations with DOJ and FCC over regulatory requirements, refused to sell stations in the ten specified markets required to obtain approval, and proposed aggressive divestment structures and related-party sales that were either rejected outright or posed a high risk of rejection and delay—all in the service of Sinclair’s self-interest and derogation of its contractual obligations.²¹

In particular, Sinclair allegedly failed to offer divestitures after the agencies made it clear what would be required to obtain a settlement. Sinclair’s alleged failure delayed DOJ clearance and also led the FCC in July 2018 to order a hearing to evaluate the legality of the deal under the Communications Act, which Tribune characterized as a “a de facto merger death sentence.”²² In August 2018, Tribune terminated the transaction and sued Sinclair for breaching the agreement’s regulatory best efforts covenants.²³

In its answer, Sinclair argued that its obligation to use reasonable best efforts was not limitless. First, it was not obligated to undertake any divestitures unless required to obtain clearance from the DOJ and FCC.²⁴ Second, having control of the regulatory strategy did not make it a guarantor of the regulatory outcomes.²⁵

Because the parties ultimately settled the dispute out of court in January 2020, we must wait for another dispute to shed light on what actions a buyer is required to undertake in a merger investigation and whether a reverse break fee can constitute a complete remedy for breach.

The Fresenius/Akorn Efforts Clause. The parties’ primary dispute was over the MAE clause; however, the Chancery Court also analyzed whether Fresenius breached its hell-or-high-water regulatory covenant to take all actions necessary to secure clearance and not take any action that could be expected to hinder or delay it.

This issue arose in the context of Fresenius’s pursuit of a divestiture proposal that would satisfy the FTC’s concerns over the competitive overlap in sterile-drug manufacturing. Fresenius pursued in parallel two proposed divestiture packages to address FTC concerns with different projected clearance timelines. For about a week, Fresenius adopted the proposed strategy that could have delayed clearance by two or more months relative to the other proposal. Although Fresenius’s adoption of that proposal technically breached the covenant because the action could reasonably be expected to delay HSR clearance, the court determined that it was not material because Fresenius quickly switched over to pursuing the faster-track divestiture proposal and still positioned the parties to close within the original outside date.²⁶

This decision offers some guidance as to circumstances that would not be considered a breach. For example, a party’s pursuit of two divestitures packages in parallel is not a breach nor is its pursuit of a divestiture package that could delay timing if pursued briefly and it has no apparent affect on timing. Besides offering that a few months’ delay in clearance could be a material breach, the court did not address what other strategies a buyer may take that could trigger a breach.

Recent Litigation over the MAE Clause

Although an integral part of merger agreements, significant ambiguity has remained as to how, precisely, to define an MAE, and thus how to define a regulatory efforts clause capped at an MAE. The Chancery Court’s 2001 *In re IBP* decision sets out the basic framework for evaluating whether an MAE has occurred.²⁷ It involved the proposed acquisition by Tyson Foods, the nation’s largest chicken distributor, of IBP, the nation’s largest beef and second-largest pork producer. Tyson alleged two grounds for an MAE: (1) IBP was the subject of a costly SEC accounting-fraud investigation; and (2) IBP’s business was unlikely to meet financial projections it had provided to Tyson pre-signing due to a severe winter that increased its costs and generally poor economic conditions. Though it agreed that the accounting fraud represented the sort of foreseeable and deal-specific risk typically allocated to sellers, the Chancery Court found that industry-wide supply shocks and the SEC investigation were not sufficiently material to trigger the MAE provision.²⁸ *IBP* left open what benchmark should be used in evaluating long-run harm to the target’s business, as well as which fiscal periods should be compared when measuring earnings.²⁹

The Chancery Court addressed both of these open questions in its 2008 *Hexion* decision.³⁰ Hexion, the world’s largest producer of binder, adhesive, and ink resins for industrial applications, agreed to purchase Huntsman Corporation, a manufacturer of polyurethanes and other chemical products, for \$10.6 billion. Here, too, the acquisition raised antitrust concerns, with the FTC requiring divestitures.³¹ Subsequent to signing the agreement, Huntsman suffered a considerable decline in its business due to both increased crude and natural gas prices and the beginnings of the global financial crisis.

Hexion sought to get out of the deal, alleging that Huntsman had suffered an MAE. Recognizing the holding in *IBP* that industry-wide supply shocks would effectively be allocated to the buyer and not constitute an MAE, Hexion argued that an MAE arose from Huntsman being disproportionately adversely affected by the economic headwinds relative to other chemical manufacturers—a carve-out that it had specifically bargained for in the merger agreement.

Even though Hexion had carved out this risk from the MAE, the Chancery Court nonetheless found in favor of Huntsman, holding that its decline was not large enough to constitute an MAE. The Chancery Court held that no MAE could have occurred, as Huntsman’s 2009 projections “would represent a mere 3.6% decrease in EBITDA from 2006 to 2009” and were “essentially flat from 2007 to 2009.”³² Although it found that Huntsman’s decline was not sufficient to meet the threshold for materiality, the Chancery Court failed to clarify what level of decline would constitute an MAE.³³

The Chancery Court would resolve this last lingering issue in its 2018 *Akorn, Inc. v. Fresenius Kabi AG, Inc.*³⁴ decision. For the first time, the court found that a seller had suffered an MAE that would permit a buyer to avoid its obligation to close. Fresenius, a German pharmaceutical company, sought to acquire Akorn, an American pharmaceutical company, for approximately \$4.5 billion. After signing the merger agreement, Akorn’s business declined markedly as a result of increased competitive pressure, loss of customers, and delayed product launches. Akorn also faced regulatory challenges, including a complete response letter from the Food and Drug Administration that delayed launch of a new product, as well as whistleblower allegations sent to Fresenius questioning Akorn’s representations that it was complying with applicable FDA regulations. The parties’ attempts to investigate and resolve these issues ultimately broke down, with Fresenius filing suit alleging, among other things, that Akorn had suffered an MAE.

The Chancery Court analyzed whether Akorn suffered an MAE in two parts. First, the Chancery Court analyzed materiality. Without providing a definite threshold, the Chancery Court indicated that a 40 percent decrease in profits over a relevant time period would be presumptively material. Following *Hexion*, the Chancery Court noted that Akorn’s EBITDA declined by 51 percent from 2016 to 2017 and that the decline “can reasonably be expected to have durationally significant effects.”³⁵ Having found that Akorn’s decline was material, the Chancery Court next considered whether it stemmed from a risk allocated to Fresenius or Akorn. Over the objections of Akorn, the Chancery Court found that the cause of Akorn’s EBITDA decline was not “industry headwinds” allocated to Fresenius, but business risks allocated to Akorn—namely, “unexpected new market entrants who competed with Akorn’s three top products.”³⁶ The Chancery Court also considered whether Fresenius had assumed this risk by virtue of the fact that these business risks

were foreseeable. Although the Chancery Court concluded that Fresenius had not foreseen Akorn’s decline, it added that, even if Fresenius had, the agreement allocated these business risks to Akorn.

The *Fresenius* decision provides practitioners with a helpful general framework for finding an MAE. First, the Delaware courts will ask whether a given decline in the target’s business is material. To assess materiality, Delaware courts will look at changes in the target’s EBITDA on a year-to-year and quarter-to-quarter basis. As to the diminution in value sufficient to constitute a presumptive MAE, declines in EBITDA below 15 percent appear not to be material *per se*, whereas a 20 percent decline could be sufficient to meet the threshold for presumptive materiality.³⁷

Second, if the reduction is material, Delaware courts will next consider whether the merger agreement allocates the cause of decline to the buyer or the seller. As a default rule of construction, Delaware courts appear to understand the standard MAE clause to allocate economy or market-wide risks to the buyer. As the Chancery Court explained in *Fresenius*, both *IBP* and *Hexion* held that buyers could not rely on the “manifested consequences of widely known systematic risks”³⁸—even though in *IBP*, unlike *Hexion*, these risks had not been expressly carved out and assigned to the buyer. As a further default rule, Delaware courts will allocate more deal-specific business risks to the seller.

Finally, the Delaware courts will look to see whether the parties have contracted around this default risk allocation. The *Fresenius* court clarified that certain arguments will not avail a seller when attempting to shift a deal-specific risk to a buyer after the fact. Specifically, that a given deal-specific risk is foreseeable does not mean it will be allocated to the buyer—potentially a change from the traditional understanding of MAE provisions. As the *Fresenius* court stated, had the parties wished to define an MAE as “including only unforeseeable effects, changes, events, or occurrences” they could have done so in the merger agreement.³⁹ If a buyer wishes to place an economy- or market-wide risk on the seller, or the seller a deal-specific risk on the buyer, each will have to bargain for it in the merger agreement. Deal planners and their attorneys must act accordingly.⁴⁰

Recent Litigation over the Outside Date and Reverse Termination Fees

The outside date and antitrust reverse termination fees have also recently received scrutiny in litigation regarding Vintage’s attempted merger with Rent-a-Center for \$1.36 billion. Rent-a-Center, the seller, exercised its option to terminate the merger agreement upon reaching the outside date and demanded its termination fee. The parties had agreed to use commercially reasonable efforts to obtain HSR clearance. Vintage also had agreed to pay Rent-a-Center a \$126.5 million reverse termination fee if clearance was still outstanding by the outside date—set for six months from signing—so long as neither party had opted to extend it.

At the six-month mark, the transaction was still subject to FTC review, and neither party had sent formal notice to the other of its election to extend the outside date by three months. Although the parties could have continued toward closing without opting to extend, Rent-a-Center sent notice of termination and a demand for the reverse break fee. Three days later Vintage initiated litigation in the Chancery Court seeking to compel Rent-a-Center to continue its efforts to clear HSR and close the transaction.

Vintage argued that its and Rent-a-Center's regulatory efforts, including the parties' entry of a joint timing agreement with the FTC, were actions demonstrating notice of their intent to proceed with the transaction. The court noted, however, that the agreement contained clear language requiring express written notice, and rejected Vintage's argument.⁴¹ The court also rejected Vintage's claims that Rent-a-Center breached an implied covenant of good faith and fair dealing because Rent-a-Center had not committed a fraud.

The court left open for further briefing the question of whether Vintage is obligated to pay the reverse break fee.⁴²

Takeaways

In the years ahead, both buyers and sellers should be mindful of several broader trends when negotiating antitrust deal provisions.

The Efforts Clause. *Fresenius* clarifies that the Delaware Chancery Court does not generally distinguish between efforts levels. Deal attorneys should therefore consider detailing the specific actions each party must (or need not) undertake during the merger review process. Moreover, while buyers who agree to a hell-or-high-water covenant may want to lead the antitrust strategy, leading the strategy exposes the buyer to the seller's subsequent claim that a given strategy was a material breach of the merger agreement, especially for

those deals subject to antitrust challenge.

MAEs. After *Fresenius*—and amid the pending case stemming from the failed Anthem/Cigna merger—sellers' attorneys can no longer assume that no set of facts could sufficiently show that the seller would reasonably be expected to have an MAE. Attorneys on both sides should also understand the Chancery Court's view that defendants must bargain away business risks for which they do not wish to be held responsible.

Outside Dates. *Rent-a-Center* re-affirms the need for counsel to understand the potential outs the other side may use to exit a deal. Vintage not only lost its opportunity to acquire Rent-a-Center, but now also may be forced to pay a hefty reverse termination fee, all because it failed to pay attention to the outside date, thinking that the transaction was on track for clearance. A party should not misread the other side's cooperation in undertaking the antitrust efforts as their intent to proceed toward closing.

Conclusion

Antitrust practitioners need to be increasingly diligent about the language of regulatory-related provisions and covenants in transactional agreements. First, clients would benefit from having antitrust counsel work closely with the corporate counsel to ensure that covenants touching on antitrust are consistent with the prevailing law and that the client understands the obligations those provisions impose during the regulatory clearance process. Second, recent and pending litigation promises to clarify how these provisions actually work and what parties must do to satisfy their obligations. Finally, regardless of how the pending litigation is resolved, antitrust-related provisions are increasingly important going forward as means to settle disputes in failed transactions. ■

¹ *Akorn, Inc. v. Fresenius Kabi AG, Inc.*, No. 2018-0300-JTL, at 214 (Del. Ch. Oct. 1, 2018) (citing ABA MERGERS AND ACQUISITIONS COMMITTEE, MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY 268 (2d ed. 2010)).

² *Id.* (citing LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 13.06, at 13-44 to -49 & nn. 2-9, 11 (2018 ed.) (citations omitted)).

³ *Id.* at 214-16.

⁴ *Id.* at 225.

⁵ It is not advisable to try to withhold the agreed upon obligations of the party in a side letter. If that agreement is referred to in the merger agreement or is considered an addendum to it, it must be disclosed in the HSR filing, and a letter solely between counsel that is withheld on joint defense ground likely is not enforceable between the parties.

⁶ Ronald J. Gilson & Alan Schwartz, *Understanding MACs: Moral Hazard in Acquisitions*, 21 J.L. ECON. & ORG. 330, 331 (2005).

⁷ *Id.*

⁸ *Akorn*, No. 2018-0300-JTL, at 119-20.

⁹ Hart-Scott-Rodino Antitrust Improvement Act of 1976, as amended, Section 7A of the Clayton Act, 15 U.S.C. § 18a.

¹⁰ Verified Complaint ¶¶ 34-37, *Anthem, Inc. v. Cigna Corp.*, No. 2017-0114-JTL (Del. Ch. Feb. 17, 2017).

¹¹ Cigna Corporation's Combined Opening and Answering Post-Trial Brief at 63, *Anthem Inc. v. Cigna Corp.*, No. 2017-0114-JTL (Del. Ch. May 24, 2019) [hereinafter Cigna Brief].

¹² *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir.).

¹³ Verified Complaint, *Cigna Corp. v. Anthem, Inc.*, No. 2017-0109-JTL (Del. Ch. Feb. 17, 2017) [hereinafter Verified Complaint].

¹⁴ *Id.* ¶¶ 38-119; see also Anthem's Corrected Opening Post-Trial Brief at 2-3, *Anthem, Inc. v. Cigna Corp.*, No. 2017-0114-JTL (Del. Ch. Apr. 22, 2019).

¹⁵ Cigna Brief, *supra* note 11.

¹⁶ *Id.* at 82.

¹⁷ Verified Complaint, *supra* note 13, ¶ 2, *Tribune Media Co. v. Sinclair Broad. Grp., Inc.*, No. 2018-0593-JTL (Del. Ch. Aug. 9, 2018).

¹⁸ *Id.* ¶¶ 2-3, 52-53.

¹⁹ *Id.* ¶ 5.

²⁰ *Id.* ¶¶ 3, 45.

²¹ *Id.* ¶ 7.

²³ *Id.* ¶ 30.

²³ *Id.* ¶ 35.

²⁴ Sinclair's Answer, Affirmative Defenses, and Verified Counterclaim to the Verified Complaint ¶ 3, *Tribune Media Co. v. Sinclair Broad. Grp., Inc.*, No. 2018-0593-JTL (Del. Ch. Aug. 29, 2018).

²⁵ *Id.* ¶ 27.

²⁶ *Akorn*, No. 2018-0300-JTL, at 240–45.

²⁷ *In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14 (Del. Ch. 2001).

²⁸ *Id.* at 70–71.

²⁹ Robert T. Miller, *Canceling the Deal: Two Models of Material Adverse Change Clauses in Business Combination Agreements*, 31 *CARDOZO L. REV.* 99, 131–33 (2009).

³⁰ *Hexion Spec. Chem. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008).

³¹ *Id.* at 729; *Hexion LLC*, FTC Dkt. C-4235 (Nov. 14, 2008), <https://www.ftc.gov/enforcement/cases-proceedings/071-0212/hexion-llc-et-al-matter> (decision and order).

³² *Hexion*, 965 A.2d at 743.

³³ Miller, *supra* note 29, at 153–56.

³⁴ No. 2018-0300-JTL (Del. Ch. Oct. 1, 2018).

³⁵ *Id.* at 58. The Federal Drug Administration issues a complete letter response to a company when it has concerns about a company's data integrity in prior submissions. This letter requires a company to respond completely to those concerns.

³⁶ *Id.* at 144.

³⁷ See generally *id.* at 187–90.

³⁸ *Id.* at 153–54.

³⁹ *Id.* at 152–53.

⁴⁰ More recently, the Chancery Court concluded that a buyer had not proven an MAE where the seller had made inaccurate representations in the merger agreement because the evidence did not support the conclusion that they would be expected to have an MAE on the seller's business. *Channel Medsys., Inc. v. Boston Scientific Corp.*, No. 2018-0673-AGB (Del. Ch. Dec. 18, 2019).

⁴¹ *Vintage Rodeo Parent, LLC v. Rent-a-Center, Inc.*, No. 2018-0927-SG, 4–5 (Del. Ch. Mar. 14, 2019).

⁴² *Id.* at 66.