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ARTICLE

DEALS IN THE TIME OF PANDEMIC

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The COVID-19 pandemic has brought new attention to the period between signing and closing in mergers and acquisitions (M&A). Transactional planners heavily negotiate the provisions that govern the behavior of the parties during this window, not only to allocate risk between the buyer and seller, but also to manage moral hazard, opportunistic behavior, and other distortions in incentives. Prior literature, both academic and practitioner, has focused virtually exclusively on the material adverse effect (MAE) clause. COVID-19, however, has exposed an important connection between the MAE clause and the obligation for the seller to act "in the ordinary course of business" between signing and closing. This Article is the first to examine the interaction between the MAE clause and the ordinary course covenant in M&A deals. We construct a new database of 1,300 M&A transactions along with their MAE and ordinary course covenants—by far the most comprehensive, accurate, and detailed database of such deal terms that currently exists. We document how these deal terms currently appear in M&A transactions, including the sharp rise in "pandemic" carveouts from the MAE clause since the COVID-19 pandemic began. We then provide implications for corporate boards, the Delaware courts, and transactional planners. Our empirical findings and recommendations are relevant not just for the next pandemic or "Act of God" event, but also the next (inevitable) downturn in the economy more generally.

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INTRODUCTION

On February 20, 2020, Sycamore Partners, a private equity firm specializing in the retail and consumer sectors, announced a deal to buy a 55% stake in Victoria's Secret, the well-known retailer that operates under the Victoria's Secret and PINK brands. Pursuant to the transaction agreement, L Brands, the owners of Victoria's Secret, would create a newly formed subsidiary and transfer certain assets and liabilities related to the Victoria's Secret business to that subsidiary; and then Sycamore would pay L Brands approximately $525 million for a 55% equity interest in that new entity.[1] The deal was expected to close in the second quarter of 2020.[2]

The agreement included a "Material Adverse Effect" (MAE) clause, which permitted Sycamore to walk away from the deal if there was a Material Adverse Effect in the Victoria's Secret business. MAE was defined, in part, as any event or circumstance "that has a material adverse effect on the financial condition, business, assets, or results of operations of the Business."[3] However, the agreement also included a list of nine MAE "carveouts," including one stipulating that "the existence, occurrence or continuation of any pandemics . . . or acts of God" shall *not* constitute an MAE and therefore would not give Sycamore the right to walk away.[4] The agreement further included an MAE "carveback," under which a pandemic would again qualify as an MAE, thereby restoring Sycamore's right to walk away "to the extent (and only to the extent) that the Business is materially and disproportionately adversely affected [by the pandemic] . . . as compared to similarly situated businesses in the industry of the Business."[5] The agreement also included a requirement that L Brands would conduct the Victoria's Secret business "in the ordinary

1. Complaint at 2, SP VS Buyer LP v. L Brands, Inc., No. 2020-0297 (Del. Ch. filed Apr. 22, 2020), 2020 WL 1970736 [hereinafter Sycamore Complaint].

2. Id.

3. Transaction Agreement Between SP VS Buyer LP and L Brands, Inc. § 1.01 (Feb. 20, 2020), https://www.sec.gov/Archives/edgar/data/701985/000095010320003347/dp121693_ex0201.htm [https://perma.cc/3FTV-G7PH] [hereinafter Sycamore–L Brands Transaction Agreement].

4. Id.

5. Id.

course consistent with past practice" between February 20 and the closing, unless Sycamore consented in writing.[6]

Of course, shortly thereafter (or, arguably, shortly before), the world fell apart. COVID-19 struck individuals and the global economy with catastrophic force. On March 11, 2020, the World Health Organization declared a global pandemic.[7] As of that date, 114 countries had reported 118,000 total cases of COVID-19, with nearly 4,300 deaths.[8] In the following months, cases would skyrocket, with over 150 million confirmed cases and over three million deaths as of May 4, 2021.[9]

While it was, of course, not the most important implication of COVID-19, these developments raised questions for the Sycamore–L Brands deal, which was still pending. By March 20, L Brands had closed nearly all of its 1,600 Victoria's Secret and PINK brick-and-mortar stores, some under orders from state and local authorities.[10] L Brands also furloughed most of the employees in its Victoria's Secret business, reduced the base compensation for all remaining senior employees by 20%, and failed to pay rent during April 2020 for its retail stores in the United States.[11]

On April 22, Sycamore terminated its deal with L Brands and sought a declaratory judgment in the Delaware Chancery Court that its termination was valid. Interestingly, Sycamore did *not* claim that Victoria's Secret had "materially and disproportionately adversely" suffered from COVID-19 relative to other retailers (so as to avoid the MAE carveout), perhaps because all of retail was in freefall and it would be difficult to argue that Victoria's Secret had suffered more than the retail industry overall. Instead, Sycamore's primary claim was that L Brands violated the covenant requiring it to run Victoria's Secret "in the ordinary course consistent with past practice."[12]

L Brands did not challenge the fact that it was not operating the Victoria's Secret business in the ordinary course consistent with past practice. Matt Levine put it well in Bloomberg News: "I assert that there are zero businesses in the United States right now that are running 'in the

6. Id. § 5.01(a).

7. World Health Organization (@WHO), Twitter (Mar. 11, 2020), https://twitter.com/WHO/status/1237777021742338049 (on file with the *Columbia Law Review*).

8. Helen Branswell & Andrew Joseph, WHO Declares the Coronavirus Outbreak a Pandemic, STAT (Mar. 11, 2020), https://www.statnews.com/2020/03/11/who-declares-the-coronavirus-outbreak-a-pandemic [https://perma.cc/98EF-7USV].

9. See WHO Coronavirus Disease (COVID-19) Dashboard, WHO, https://covid19.who.int/?gclid=EAIaIQobChMI15LTsLuK7AIVoCCtBh1-5AR7EAAYASAAEgJzL_D_BwE [https://perma.cc/3G3A-9UUR] (last visited May 4, 2021).

10. Sycamore Complaint, supra note 1, at 2–3.

11. Id.

12. Id. at 20–21.

ordinary course consistent with past practice.'"[13] But L Brands defended its actions, in effect, by asking rhetorically: "What else did you want us to do?" L Brands was stuck between a rock and a hard place: either comply with the ordinary course requirement and watch its business go into the tank, or violate the ordinary course covenant in order to try to save the business, as best as possible.[14] Sycamore responded, in so many words: Your dilemma is not our problem. A contract is a contract, and L Brands violated the ordinary course covenant.[15]

While the Delaware Chancery Court was preparing to resolve these questions, on May 4, the parties agreed to call off their deal. Sycamore walked away without penalty, and L Brands announced that Victoria's Secret would be spun off and trade as a separate public company.[16] L Brands, which had traded as high as $100 per share four years earlier, took another 18% hit on its stock price and closed on May 4 at $9.82 per share.[17]

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The Sycamore–L Brands case study illustrates a new deal dynamic that the COVID-19 pandemic has repeatedly exposed since the start of 2020. Practitioners historically have focused on the negotiation of the MAE clause and its carveouts; and, as this Article will show, that clause has been growing rapidly over the past fifteen years. In contrast, the ordinary course covenant has not grown and is rarely negotiated as heavily. Historically, this covenant was meant to be a relatively innocuous provision that protects the buyer against moral hazard and other opportunistic behavior by the seller between signing and closing. But in a rapid and severe downturn, such as COVID-19, the ordinary course covenant can collide with the MAE clause. While the prior academic and practitioner literature has focused on the MAE clause, this Article is the first to examine the interaction between the MAE clause and the ordinary course covenant in mergers and acquisitions (M&A). We construct a new database of 1,300 M&A transactions along with their MAE and ordinary course covenants. We believe it to be the most comprehensive, accurate, and detailed

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13. Matt Levine, Money Stuff: A Pandemic Is Bad for Deals, Bloomberg News (Apr. 23, 2020), https://www.bloomberg.com/news/newsletters/2020-04-23/money-stuff-a-pandemic-is-bad-for-deals (on file with the *Columbia Law Review*).

14. See Complaint at 25–26, L Brands, Inc. v. SP VS Buyer L.P., No. 2020-0304 (Del. Ch. filed Apr. 23, 2020), 2020 WL 1969146 [hereinafter L Brands Complaint] (arguing that its actions were taken in the ordinary course, "as reflected by the fact that such steps are consistent with the steps that nearly every other retailer across the country has taken").

15. See Sycamore Complaint, supra note 1, at 20–21 (noting that "[t]he plain and simple fact is that L Brands has materially breached this covenant in a myriad of ways" and insisting that "[t]he current COVID-19 pandemic provides no relief to L Brands").

16. See Jordyn Holman, Victoria's Secret Owner Unveils Plan B After Sycamore Walks Away, Bloomberg News (May 4, 2020), https://www.bloomberg.com/news/articles/2020-05-04/victoria-s-secret-owner-cancels-sycamore-deal-ends-lawsuits (on file with the *Columbia Law Review*).

17. See id.

database of such deal terms that currently exists. We document how these deal terms currently appear in M&A transactions, including the sharp rise in "pandemic" carveouts from the MAE clause since COVID-19 (as illustrated by the Sycamore–L Brands agreement). The findings from this database paint a rich and previously undocumented picture of how M&A deals have evolved in their allocation of risk and constraints on the seller over the past fifteen years.

Our empirical findings and recommendations are relevant not just for the next "Act of God" event but also the next (inevitable) downturn in the economy more generally. Specifically, we provide implications of our empirical findings for corporate boards, the Delaware courts, and transactional planners.

For corporate boards, the data presented in this Article highlight why MAE clauses and ordinary course covenants should be a board-level issue, not to be delegated categorically to advisors. Our empirical analysis tells corporate boards specifically where to look in "stress testing" the deal documents. For example, whether the MAE carveouts have a causal requirement can be important for determining the scope of the MAE carveouts, yet this feature of MAE clauses has been completely overlooked by prior academic and practitioner commentators.

For the Delaware courts, a key question is how the ordinary course covenant should interact with the MAE clause. Some Delaware judges have suggested that the ordinary course requirement might permit extraordinary behavior when there are unexpected developments. Or, put differently (and in a manner that satisfies the contractual constraint), what is "ordinary course" changes in extraordinary circumstances. While we agree with the underlying intuition that the ordinary course requirement should not be a backdoor reallocation of risk back to the seller (because such allocation of risk is better accomplished through the MAE clause), we disagree that the ordinary course requirement should be so malleable—in effect, a "get out of jail free" card—in extraordinary times. Instead, this Article argues that the ordinary course requirement should be read according to its plain terms, which would not include, for example, unprecedented store closings and layoffs. This reading forces a negotiation between the seller and the buyer about the correct way to mitigate the damage to the company. Basic law and economics analysis shows why this renegotiation is socially optimal compared to unilateral action by the seller. In L Brands, the rock-and-a-hard-place problem would have been solved if L Brands had simply obtained written approval from Sycamore in advance of taking its mitigation actions. By reading the ordinary course requirement according to its plain terms, Delaware courts will force future sellers to negotiate with their buyers rather than try to exploit the old maxim "better to beg for forgiveness than ask for permission."

For transactional planners, our analysis provides guidance for where they should focus their efforts in negotiating MAE clauses and ordinary course covenants. On MAE clauses, for example, transactional planners should stipulate the target's industry—or, better yet, enumerate a list of comparable companies—in the merger agreement itself; this is particularly important in view of the proliferation of disproportionality carvebacks from the MAE.[18] And buy-side advisors can generally give the seller more leeway to run the business under the ordinary course requirement in a stock deal rather than a cash deal because the moral hazard problem for the seller is substantially diminished in a stock transaction.[19] These contours of MAE clauses are currently undetectable in the data, yet such structuring could be a significant "win-win" for the parties overall. Finally, to the extent that the Delaware courts read the ordinary course requirement consistently with its plain meaning, as this Article advocates, buy-side and sell-side advisors can work together to clarify how the MAE clauses should interact with that requirement.

This Article has three parts. Part I provides an in-depth discussion of MAEs and ordinary course covenants, with a review of the associated case law and literature. Part II details our findings on MAEs and ordinary course covenants from a database of 1,300 M&A transactions, with particular attention to the sharp rise in "pandemic" carveouts from the MAE clause since COVID-19. Part III examines the implications for corporate boards, the Delaware courts, and transactional planners in light of our findings.

I. BACKGROUND

In M&A, various legal and extralegal pressures often necessitate a delay between when the parties sign an agreement (the signing) and when they exchange the purchase price for ownership (the closing).[20] Corporate and securities laws, for example, impose stringent requirements that may cause such a delay regardless of the underlying deal structure.[21] For example, public company statutory mergers typically require securing shareholder approval (a process involving drafting and filing proxy statements), obtaining SEC clearance, and complying with mandatory notice periods.[22] Furthermore, parties cannot escape a lengthy process

18. We thank Robert Miller and Lucian Bebchuk for thoughtful commentary on drafting target-specific language.

19. See infra notes 41–45 and accompanying text.

20. See generally James C. Freund, Anatomy of a Merger: Strategies and Techniques for Negotiating Corporate Acquisitions 149 (1975) (discussing legal barriers to simultaneous signing and closing).

21. See Robert T. Miller, The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements, 50 Wm. & Mary L. Rev. 2007, 2017–18 (2009) [hereinafter Miller, The Economics of Deal Risk].

22. Id.; see also Robert T. Miller, Canceling the Deal: Two Models of Material Adverse Change Clauses in Business Combination Agreements, 31 Cardozo L. Rev. 99, 104 (2009) [hereinafter Miller, Canceling the Deal].

through pursuing a tender offer—an offer to purchase shares of stock directly from the stockholders—as such offers likewise require substantial delays.[23]

Antitrust and regulatory requirements present another barrier to simultaneous signing and closing. Transactions often require regulatory approvals that can only be obtained after the terms of the transaction have been finalized in a definitive agreement.[24] The most common of these approvals stems from the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (HSR Act), which requires a filing with either the DOJ or the FTC on the transaction's expected effect on competition.[25] The delay caused by compliance with the HSR Act can range from fewer than thirty days to over a year.[26] Furthermore, in addition to general antitrust clearance, combinations involving parties in certain regulated industries, such as banking, communications, and aviation, will generally require further clearance.[27] Transactions that raise national security concerns, such as those with a foreign party acquiring an American company, may also require further approvals.[28]

Third-party consents can also lead to delays between signing and closing. Third-party consents arise when a party has previously entered a contract, such as an important lease or credit agreement, that restricts the party's right to engage in subsequent business combinations without the third party's consent.[29] While these clauses provide valuable protection for the third party against the risk of a contractual relationship with a party controlled by a different entity, the time it takes to obtain such consents may cause a delay between signing and closing or result in the party breaching its agreement with a third party to forego obtaining consent.[30]

The nonsimultaneous signing and closing that results from these various pressures, among others, creates an unavoidable risk that the situation will change between when the parties reached an agreement and when the target company is exchanged for the previously-agreed-upon price. As Judge Richard Posner once put it, "When the simultaneity

23. Miller, The Economics of Deal Risk, supra note 21, at 2019. Under the Securities Exchange Act of 1934, the buyer must draft and file a "Schedule TO" with the SEC and hold that tender offer open for at least twenty business days. Id.

24. Id. at 2020; see also Miller, Canceling the Deal, supra note 22, at 104.

25. Miller, The Economics of Deal Risk, supra note 21, at 2020–21.

26. Id. at 2021.

27. Id. at 2021–22; see also Miller, Canceling the Deal, supra note 22, at 108 (noting that, for regulated industries, parties will generally need "approvals from the government agencies superintending the industry").

28. Miller, The Economics of Deal Risk, supra note 21, at 2022–23 (noting that the delay from regulatory approvals often exceeds the delay from compliance with corporate and securities laws).

29. Id. at 2023.

30. Id.

condition does not hold, two dangers to the process of exchange arise—opportunism and unforeseen contingencies—for which the law offers remedies."[31] As such, the parties typically rely on contractual language to allocate risk for negative, unforeseen contingencies post-signing and to address the moral hazard problem that arises when the seller has control of the company but bears little to no risk.[32]

Specifically, to allocate these risks and allow the seller to better signal its private information to the buyer to promote efficiency in closing or terminating the transaction,[33] parties usually make various representations and warranties in the merger agreement, including that during this interim period the target company has not suffered an MAE.[34] Additionally, parties use interim operating covenants, including the notable "ordinary course covenant," which requires the company to operate its business in the ordinary course. This covenant also addresses changes in strategic direction and the adequacy of a business response to particular circumstances. Because each party's obligation to close is typically conditioned on, among other things, the other party not having experienced an MAE or failing to operate the company in the ordinary course, these two clauses are essential in allocating risk and protecting parties from negative contingencies and moral hazards that arise after signing.[35]

This Part proceeds in five sections. Sections I.A and I.B discuss MAEs and ordinary course covenants in greater depth, exploring their structure, purpose, and nuances generally overlooked by prior scholarship. Next, sections I.C and I.D review the relevant case law and literature, identifying ordinary course covenants and their interaction with MAE clauses as largely unexplored in the field. Lastly, section I.E explores the impact of these clauses on cases during the COVID-19 pandemic.

A. *Material Adverse Effect Clauses*

While MAE definitions are heavily negotiated and incredibly complex,[36] these definitions typically follow the same general structure.

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31. See Richard A. Posner, Economic Analysis of Law 93 (7th ed. 2007).

32. See Miller, Canceling the Deal, supra note 22, at 104 (noting that often the primary concern is whether the buyer must purchase a company that has deteriorated).

33. See Albert Choi & George Triantis, Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions, 119 Yale L.J. 848, 851 (2010) (explaining that signaling private information and allocating risks are essential functions of contract in a world of asymmetric information).

34. Miller, The Economics of Deal Risk, supra note 21, at 2035–36 (noting the interchangeability of "MAE" and "Material Adverse Change" or "MAC"). This Article uses "MAE" or "Material Adverse Effect."

35. Id. at 2045.

36. See, e.g., Kari K. Hall, Comment, How Big Is the MAC?: Material Adverse Change Clauses in Today's Acquisition Environment, 71 U. Cin. L. Rev. 1061, 1063 (2003) (noting that "the MAC clause is normally one of the heavily negotiated parts of a merger agreement"

First, these clauses begin with a basic definition that an MAE is any event, fact, circumstance, change, or development that, individually (or in the aggregate), would (or could) reasonably be expected to have a material adverse effect (not further defined) on the target company and its subsidiaries as a whole, such as on its business, financial condition, or results of operations.[37]

Following this statement is a list of exceptions, also known as "carveouts," which exclude certain risks from the definition of MAE and therefore shift them back to the buyer.[38] These carveouts usually relate to changes in the general conditions of the economy, business, industry, financial markets, laws, or generally accepted accounting principles (GAAP), broader events like war and force majeure, and the announcement of, or actions related to, the transaction.

After the list of carveouts, the MAE definition typically includes a series of exceptions to the exceptions, also known as "carvebacks" or "carveins"— circumstances that will be MAEs and thus risks borne by the seller. Most typically, a carveback will provide that the earlier carveouts will be MAEs to the extent that they disproportionately affect the target company.[39]

These disproportionality carvebacks typically fall into one of two formulations: a standard, buyer-friendly formulation or a modified, seller-friendly formulation. The standard formulation for the carvebacks collectively is an exception from the carveouts to the extent such effect has a materially disproportionate adverse effect on the company, taken as a whole, relative to other companies in the same industry.[40] In contrast, in

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and that it "may be very specific as to what circumstances or events are included or excluded"); see also Cathy Hwang & Matthew Jennejohn, Deal Structure, 113 Nw. U. L. Rev. 279, 292 (2018). This complexity is likely part of a broader trend of increasing contractual complexity. See John C. Coates IV, Why Have M&A Contracts Grown? Evidence from Twenty Years of Deals 14 (Harv. L. Sch., John M. Olin Ctr. for Law, Econ. & Bus. Working Paper No. 333, 2016), https://ssrn.com/abstract=2862019 (on file with the *Columbia Law Review*) (noting that acquisition agreements have more than doubled in size over the course of a twenty-year period and have increased in linguistical complexity by more than ten grade levels).

37. See Miller, Cancelling the Deal, supra note 22, at 110–11. See generally Robert T. Miller, Material Adverse Effect Clauses and the COVID-19 Pandemic 2–6 (2020), https://ssrn.com/abstract=3603055 (on file with the *Columbia Law Review*) [hereinafter Miller, Material Adverse Effect Clauses] (describing the basic structure and making additional comments about how it has been interpreted). Some scholars have argued that vague MAE clauses may actually be more desirable and effective to achieve the goals underlying MAE clauses. See Choi & Triantis, supra note 33, at 854–55.

38. See Miller, The Economics of Deal Risk, supra note 21, at 2047, 2073–89, 2094–97.

39. See Miller, Material Adverse Effect Clauses, supra note 37, at 5.

40. See, e.g., Sycamore–L Brands Transaction Agreement, supra note 3, § 1.01 (providing a carveback stating "to the extent (and only to the extent) that the Business is materially and disproportionately adversely affected thereby as compared to similarly situated businesses in the industry of the Business").

other instances, the carveback has a seller-friendly parenthetical along the lines of the following: (But in such event, only the incremental materially disproportionate adverse effect shall be taken into account when determining whether there is a material adverse effect).[41]

To see the difference this parenthetical can have, consider a stylized hypothetical. Seller suffers a 60% decline in its business, while the rest of its industry suffers a 50% decline.[42] In the standard formulation of the carveback, Seller has arguably suffered disproportionately (60% vs. 50% in the industry), and so the whole 60% decline of the Seller can be considered in determining whether there is an MAE. This is, of course, a buyer-friendly result. When the parenthetical is added, only the incremental 10% can be considered in determining whether there is an MAE, which is far more seller-friendly. The hypothetical illustrates why the parenthetical is critically important (and, in fact, can be dispositive) in determining whether an MAE has occurred, yet this difference and its significance in disproportionality carvebacks remains largely unobserved in legal scholarship.

Returning to the earlier Sycamore–L Brands case study, we reproduce the MAE clause in its entirety to illustrate just how complicated and lengthy these clauses are:

> "Material Adverse Effect" means any state of facts, circumstance, condition, event, change, development, occurrence, result or effect (i) that would prevent, materially delay or materially impede the performance by Parent of its obligations under this Agreement or Parent's consummation of the transactions contemplated by this Agreement; or (ii) that has a material adverse effect on the financial condition, business, assets, or results of operations of the Business, <u>excluding, in the case of clause (ii), any state of facts, circumstance, condition, event, change, development, occurrence, result or effect to the extent directly or indirectly resulting from</u> (A) national, international, foreign, domestic or regional social or political conditions (including changes therein) or events in general, including the results of any primary or general elections, or any statements or other proclamations of public officials, or changes in policy related thereto, (B) changes in any economic, financial, monetary, debt, credit, capital or banking markets or conditions (including any disruption thereof) or trends, (C) changes in

41. See, e.g., Agreement and Plan of Merger Between Ferrari Group Holdings, L.P, Ferrari Merger Sub, Inc., and Forescout Technologies, Inc. § 1.1(t) (Feb. 6, 2020), https://www.sec.gov/Archives/edgar/data/0001145057/000110465920012189/tm206949d3_ex2-1.htm [https://perma.cc/786Y-N35L] (using the seller-friendly carveback language that "only the incremental disproportionate adverse impact may be taken into account in determining whether there has occurred a Company Material Adverse Effect").

42. This hypothetical of course assumes that the industry is well defined and agreed upon by the parties and that the magnitude of the decline for the industry and the company can be pinned down with reasonable accuracy. In the real cases that we discuss infra, these assumptions are rarely, if ever, correct.

interest, currency or exchange rates or the price of any commodity, security or market index, (D) changes in legal or regulatory conditions, including changes or proposed changes to Applicable Law (including any proposed Applicable Law), GAAP or other accounting principles or requirements applicable to the Business, or standards, interpretations or enforcement thereof, (E) changes or conditions generally affecting the industry of the Business, (F) changes in, or any failure of the Business to meet, or the publication of any report regarding, any internal or public projections, forecasts, budgets or estimates of or relating to the Business for any period, including with respect to revenue, earnings, cash flow or cash position (it being understood that the underlying causes of such change or failure may, if they are not otherwise excluded from the definition of Material Adverse Effect, be taken into account in determining whether a Material Adverse Effect has occurred), (G) the occurrence, escalation, outbreak or worsening of any hostilities, war, civil unrest, police action, acts of terrorism, cyberattacks or military conflicts, whether or not pursuant to the declaration of an emergency or war, (H) the existence, occurrence or continuation of any pandemics, tsunamis, typhoons, hail storms, blizzards, tornadoes, droughts, cyclones, earthquakes, floods, hurricanes, tropical storms, fires or other natural or manmade disasters or acts of God or any national, international or regional calamity, (I) the execution, announcement, performance or existence of this Agreement, the identity of the parties hereto or any of their respective Affiliates or Representatives, the taking of any action to the extent expressly required or contemplated by this Agreement (including the Restructuring Transactions) or the pendency or contemplated consummation of the transactions contemplated by this Agreement, including any actual or potential loss or impairment after the date hereof of any agreement or contract or any customer, supplier, investor, landlord, partner, employee or other business relation due to any of the foregoing in this subclause (I), it being understood that this clause (I) shall not apply to the representations and warranties and related conditions contained in this Agreement that are primarily intended to address the consequences of the execution, announcement, performance or consummation of this Agreement or the transactions contemplated by this Agreement, or (J) actions taken, or not taken, at the written request of Buyer, <u>except in the case of clauses (A) through (D), (G) and (H) to the extent (and only to the extent) that the Business is materially and disproportionately adversely affected thereby as compared to similarly situated businesses in the industry of the Business</u>.[43]

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43. Sycamore–L Brands Transaction Agreement, supra note 3, § 1.01 (emphasis added).

This language shows the standard elements for an MAE definition. The first few lines provide the basic MAE definition ("any state of facts . . ."), while the underlined text beginning with "excluding" provides the carveouts. Lastly, the final few lines beginning with "except" provide the carvebacks, stipulating that certain carveouts *will* be MAEs if they "materially and disproportionately" adversely affect the target company.[44]

While the general structure of MAE clauses has been addressed by numerous scholars, one feature has gone largely unnoticed by prior commentators: the presence, or absence, of a causal requirement. Every MAE clause will specify whether the MAE must be caused by the enumerated categories ("arising from") or, instead, whether there is no causal requirement for carving out the enumerated categories ("related to").[45] In the Sycamore–L Brands MAE clause above, there was no causal requirement because the MAE only had to result "directly" (causal) "or indirectly" (noncausal) from the enumerated carveouts.[46] When there is a causal requirement, the carved-out category must *cause* the MAE. In contrast, when there is no causal requirement, the carved-out category must merely *relate to* the MAE to be carved out.

B. *Ordinary Course Covenants*

Like MAE clauses, ordinary course covenants—covenants that require that the company operate its business in the ordinary course—also address the delay between signing and closing. In general, a condition required for closing is that all preclosing covenants, including an ordinary course covenant, are satisfied. The failure to satisfy this ordinary course condition may allow the buyer to refuse to close the transaction or terminate the agreement entirely. An ordinary course covenant, therefore, helps ensure that the buyer receives the company in substantially the same condition as when the parties reached their agreement.

Specifically, ordinary course covenants help remedy the moral hazard problem that arises due to the incentive for the seller to act

44. Id.

45. Compare AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, No. 2020-0310-JTL, 2020 WL 7024929, at *53 (Del. Ch. Nov. 30, 2020) (MAE definition in transaction agreement carves out events "arising out of, attributable to or resulting from" the carveouts), with Sycamore–L Brands Transaction Agreement, supra note 3, § 1.01 (MAE definition carves out events "directly or indirectly resulting from" the carveouts). For an argument that "the 'causal' language just makes explicit what would otherwise be implied," and thus advocating for a limited reading of the phrase "related to," see Robert T. Miller, Pandemic Risk and the Interpretation of Exceptions in MAE Clauses, 46 J. Corp. L. (forthcoming 2021) (manuscript at 109 n.19), https://ssrn.com/abstract=3826378 (on file with the *Columbia Law Review*) [hereinafter Miller, Pandemic Risk]; see also id. at 110 n.19 ("Perhaps the best view is to construe 'arising from or related to' as a legal doublet like 'null and void' or 'cease and desist' and limit the meaning to the causal interpretation.").

46. Sycamore–L Brands Transaction Agreement, supra note 3, § 1.01.

opportunistically between signing and closing.[47] As noted, this problem exists because, if the deal closes, then some or all of the cost of this opportunistic behavior will be borne by the buyer who does not yet have control over the company's assets. For example, during the interim between signing and closing, the seller could make a one-time bonus payment to all employees or pay a one-time dividend to its shareholders.[48] Foreseeing the possibility (if not likelihood) of opportunistic behavior by the seller, the buyer would reduce its willingness to pay, thereby reducing the size of the zone of possible agreement (ZOPA)[49] and potentially thwarting a deal even though a deal space might otherwise exist.[50] The moral hazard problem is greatest in cash deals where the seller does not have a direct stake in the outcome, compared to stock deals where the seller may have an incentive to protect the company's value because of the seller's post-closing economic interest.[51]

The ordinary course covenant protects the parties against this moral hazard possibility. This covenant generally states that the seller will carry on its business in the ordinary course of business between signing and closing.[52] As attorneys Lou Kling and Eileen Nugent explain in their authoritative treatise: "[T]he Buyer wants to make sure the business it is

47. See Akorn, Inc. v. Fresenius Kabi AG, No. 2018-0300-JTL, 2018 WL 4719347, at *83 n.775 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018) ("Professor Subramanian explain[s] that . . . 'the moral hazard problem . . . involves the incentive for the seller to act opportunistically between signing and closing, because if the deal closes the cost of this opportunistic behavior will be borne by the buyer, who does not yet have control over the target's assets.'").

48. See Robert E. Bruner, Applied Mergers & Acquisitions 769 (2004) ("[Covenants] manage[] risks that might arise from the behavior of the parties between signing the agreement and closing the transaction. These risks might arise from opportunistic behavior such as a selling strategy of bait and switch in which the seller loots the firm just before closing.").

49. See, e.g., Guhan Subramanian, Dealmaking 9–10 (2d ed. 2020) (describing the ZOPA concept).

50. See, e.g., Ronald J. Gilson, Value Creation by Business Lawyers: Legal Skills and Asset Pricing, 94 Yale L.J. 239, 265 (1984) ("When the parties do have different time horizons, each has an incentive to maximize value in the period relevant to it, even at the expense of a decrease in value in the period relevant to the other party. This conflict reduces the value of the transaction.").

51. See, e.g., Miller, The Economics of Deal Risk, supra note 21, at 2038 ("During the interim period, however, a party remains in control of its own business . . . . [B]ut that party bears either none . . . or only some . . . of the risk associated with the business and so will tend to run the business suboptimally.").

52. See Lou R. Kling, Eileen T. Nugent & Brandon A. Van Dyke, Negotiated Acquisitions of Companies, Subsidiaries and Divisions § 13.03 (2020) ("An acquisition agreement will almost always obligate the Seller between signing and closing to operate the business only 'in the ordinary course' and not to undertake any actions not in the ordinary course without the prior written consent of the Buyer.").

paying for at closing is essentially the same one it decided to buy at signing."[53]

The typical ordinary course covenant structure involves a general affirmative ordinary course covenant followed by specific affirmative and negative covenants.[54] The general ordinary course provision is required because the parties cannot foresee and specify in advance all the possible ways that the seller could act opportunistically against the buyer. In law and economics terms, the parties cannot write a "complete contract" that enumerates all the opportunistic behaviors that the seller may engage in between signing and closing, hence the need for the ordinary course covenant.[55] For the most salient or predictable concerns, the specific affirmative and negative covenants provide clearer guidance on what the seller can or cannot do between signing and closing.

Ordinary course covenants vary according to how much flexibility they give the seller to run the business between signing and closing. For example, the ordinary course covenant may require the seller to operate the business "consistent with past practice."[56] A requirement to run the business consistent with past practice is generally more stringent, giving the seller less flexibility than a covenant that does not include this requirement.[57] In the absence of the "consistent with past practice" language, a court may apply an objective standard of ordinary course, looking to the operations of other similar companies in the industry *during* the preclosing period, rather than a subjective standard of the seller's practices *prior to* the preclosing period.[58] Thus, when there is no

53. Id.

54. See infra Exhibit 3.

55. See, e.g., Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 94 (1989) (arguing that contracts are sometimes "strategically" incomplete); Charles J. Goetz & Robert E. Scott, The Mitigation Principle: Toward a General Theory of Contractual Obligation, 69 Va. L. Rev. 967, 971 (1983) ("Ideally, the preformulated rules supplied by the state should mimic the agreements contracting parties would reach were they costlessly to bargain out each detail of the transaction.").

56. See, e.g., Sycamore–L Brands Transaction Agreement, supra note 3, § 5.01(a).

57. Kling et al., supra note 52, § 13.03 n.1 ("Arguably, an obligation to conduct business only 'in the ordinary course, consistent with past practice' is a stricter standard than one which merely refers to the 'ordinary course.'").

58. See Akorn, Inc. v. Fresenius Kabi AG, No. 2018-0300-JTL, 2018 WL 4719347, at *88–89 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018) (comparing Akorn's preclosing conduct to the preclosing conduct of a generic drug company when evaluating an ordinary course clause without a "past practice" qualifier); Nicholas V. Perricone, Pre-Closing Covenants: Operating in the Ordinary Course of Business, Nat'l L. Rev. (Jan. 29, 2020), https://www.natlawreview.com/article/pre-closing-covenants-operating-ordinary-course-business [https://perma.cc/6AU8-P5SG] ("It is unsurprising that the Chancery Court used an objective standard in the absence of language in the acquisition agreement requiring that the target's conduct in the ordinary course be consistent with its own past practice.").

qualification for "consistent with past practice," a seller could violate the ordinary course covenant even if behaving consistently with its past practices if its behavior is nevertheless below the industry standard. In contrast, when a seller is engaging in unusual conduct during the interim between signing and closing, such as in response to the COVID-19 pandemic, the absence of a past practice qualifier may be more beneficial for the seller if the courts look to other similarly situated companies, which are likely taking similar actions to mitigate pandemic-related harms.

The ordinary course covenant may also be qualified by a materiality condition, such as that the seller "shall carry on its business in all material respects in the ordinary course of business."[59] A materiality qualifier such as this is generally considered to afford the seller more flexibility to run the business than a covenant that does not include such a qualifier; slight deviations from the ordinary course may not be "material" and therefore would not violate the covenant.[60]

An ordinary course covenant may also be subject to an "efforts" qualifier or instead rely on a categorical requirement. These qualifiers specify the amount of effort that a seller must expend to ensure that the target company operates in the ordinary course. Absent an efforts qualifier, a contract would ordinarily impose a categorical requirement (e.g., that the company "shall" or "will" operate the business in its ordinary course). This type of requirement, akin to strict liability, imposes the highest obligation on the seller, and in doing so, it exposes a seller to liability regardless of the amount of effort it expends to act in the ordinary course.[61]

When an efforts qualifier is used, common variations include "commercially reasonable efforts," "reasonable efforts," and "best efforts."[62]

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59. See, e.g., *Akorn*, 2018 WL 4719347, at *18.

60. See Perricone, supra note 58 (noting that materiality qualifiers of this type "could lead to an unfortunate situation for a buyer" and that "buyers should be vigilant" concerning double-materiality qualifiers).

61. See *Akorn*, 2018 WL 4719347, at *86 n.789 ("An absolute duty to perform covenants or similar obligations relating to future actions will often be inappropriate . . . . In such circumstances, parties typically insert 'efforts' provisions." (quoting ABA Mergers and Acquisitions Committee, Model Stock Purchase Agreement with Commentary 268 (2d ed. 2010))); E. Allan Farnsworth, On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law, 46 U. Pitt. L. Rev. 1, 3 (1984) ("[C]ontract liability is absolute liability—that is to say, liability not based on fault. In the law of contracts, trying is not enough.").

62. See, e.g., Kenneth A. Adams, Interpreting and Drafting *Efforts* Provisions: From Unreason to Reason, 74 Bus. Law. 677, 679 (2019) [hereinafter Adams, Interpreting and Drafting] (detailing the "bewildering variety" of efforts standards and variation in verbs, determiners, pronouns, adverbs, adjectives, and nouns); Kenneth A. Adams, Understanding "Best Efforts" and Its Variants (Including Drafting Recommendations), 50 Prac. Law. 11, 12 (2004) (detailing examples of efforts qualifiers and noting the incidence of their usage).

Further complicating matters, these qualifiers can stand alone or be combined with one another.[63] In addition to a variety of adverbs and adjectives, some qualifiers include a determiner ("undertake *all* best efforts") or particular and distinct verbs ("exhaust" or "expend").[64]

Practitioners generally believe that there is a hierarchy among these various efforts standards, with "best efforts" as one of the highest standards.[65] Other efforts standards include the slightly less onerous "reasonable best efforts" and "reasonable efforts," which are likewise not well defined but considered to require substantial efforts while still affording the seller flexibility.[66] "Commercially reasonable efforts" is considered one of the most seller-friendly qualifiers in the hierarchy, implying a cost–benefit analysis where the economic disadvantages of operating in the ordinary course would enable the seller to act beyond the ordinary course without violating the covenant.[67] Lastly, some agreements may provide for "good faith efforts," considered by some to be the lowest standard, which may require no more than the good faith requirements already implied by law.[68]

Courts have taken a less finely tuned approach to these different wordings.[69] For example, in *Williams Cos. v. Energy Transfer Equity, L.P.*,

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63. See Adams, Interpreting and Drafting, supra note 62, at 679 ("Adjectives are also combined in twos (reasonable best efforts) and even threes (best good-faith reasonable efforts). And adjectives sometimes modify efforts separately, as in reasonable and prudent efforts."). Additionally, these clauses are further complicated by the fact that, irrespective of any efforts standard or a categorical requirement, there is generally an implied covenant of good faith inherent in all contracts. Restatement (Second) of Contracts § 205 (Am. L. Inst. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

64. See Adams, Interpreting and Drafting, supra note 62, at 680 (noting "all" and "every" as examples of determiners and "make," "exercise," "exert," "exhaust," "expend," "undertake," and "use" as examples of verbs).

65. See id. at 681; Robert E. Scott & George G. Triantis, Anticipating Litigation in Contract Design, 115 Yale L.J. 814, 835–36 (2006); Peter Atkins & Edward Micheletti, "Reasonable Efforts" Clauses in Delaware: One Size Fits All, Unless . . . , Harv. L. Sch. F. on Corp. Governance (Nov. 22, 2018), https://corpgov.law.harvard.edu/2018/11/22/reasonable-efforts-clauses-in-delaware-one-size-fits-all-unless [https://perma.cc/PF6D-HC8M].

66. See Adams, Interpreting and Drafting, supra note 62, at 681; see also, e.g., Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 754–55 (Del. Ch. 2008) (citing Bloor v. Falstaff Brewing Corp., 601 F.2d 609, 614–15 (2d Cir. 1979)) ("[A] promise to use best efforts does not strip the party of the 'right to give reasonable consideration to its own interests' and does not require the party to 'spend itself into bankruptcy.'").

67. See Adams, Interpreting and Drafting, supra note 62, at 681.

68. Id.

69. See, e.g., Robert S. Reder & Nicole A. Dressler, Delaware Corporate Law Bulletin: Delaware Court Refuses to Enjoin Buyer from Terminating Merger Agreement Due to Failure of Closing Condition, 71 Vand. L. Rev. En Banc 49, 57 (2018) (noting the "degree of circularity in the manner in which Delaware courts will approach these important concepts"); Scott & Triantis, supra note 65, at 835–36 ("While some courts interpret 'best

when the Delaware Supreme Court interpreted a contract that contained the phrases "commercially reasonable efforts" and "reasonable best efforts," it did not distinguish between them, noting that "covenants like the ones involved here impose obligations to take all reasonable steps to solve problems and consummate the transaction."[70] The Delaware Court of Chancery took a similar approach in *Akorn, Inc. v. Fresenius Kabi AG.*[71] Likewise, the Uniform Commercial Code (UCC) conflates "best efforts" with "reasonable efforts."[72]

Furthermore, irrespective of any efforts qualifiers, the ordinary course covenant may also include explicit exceptions. For example, an agreement may require ordinary course operations except as "consented to in writing by Buyer."[73] This consent exception can be further broadened by mandating that "such consent [is] not to be unreasonably withheld, conditioned or delayed."[74] The ordinary course covenant may also be qualified by the other terms of the agreement, such as an "except as provided in this agreement" qualifier.[75]

The ordinary course covenant in the Sycamore–L Brands agreement provides an illustrative example of the various qualifiers these covenants can contain that impact the seller's flexibility:

> From the date hereof until the Closing Date, <u>except as contemplated by this Agreement</u> or pursuant to the Restructuring Transactions, as required by Applicable Law or any Governmental Authority, as disclosed on Section 5.01(a) of the Parent Disclosure Schedule <u>or as consented</u> to in writing by Buyer (<u>such consent not to be unreasonably withheld, conditioned or delayed</u>), [L Brands] shall and shall cause its Subsidiaries to conduct the Business in the ordinary course <u>consistent with past practice</u> and to use their <u>reasonable best efforts</u> to preserve intact the business organizations of the Business and the relationships of the Business with third parties and to keep available the services of the Business's present officers and employees;[76]

efforts' as the equivalent of good faith, others impose a higher standard of reasonable diligence . . . .").

70. 159 A.3d 264, 272 (Del. 2017). But see id. at 275–76 (Strine, C.J., dissenting) (arguing that "commercially reasonable efforts" is "an affirmative covenant and a comparatively strong one").

71. See Akorn, Inc. v. Fresenius Kabi AG, No. 2018-0300-JTL, 2018 WL 4719347, at *87–88 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018) (declining to distinguish "commercially reasonable efforts" and "reasonable best efforts").

72. Adams, Interpreting and Drafting, supra note 62, at 687; see also U.C.C. § 2-306(2) cmt. 5 (Am. L. Inst. 2017) (equating "best efforts" with "reasonable effort and due diligence").

73. See, e.g., Sycamore–L Brands Transaction Agreement, supra note 3, § 5.01.

74. Id.

75. See infra section I.C.2.

76. Sycamore–L Brands Transaction Agreement, supra note 3, § 5.01(a) (emphasis added).

Here, the ordinary course covenant requires the seller to operate the business "consistent with past practice" and relies on a "reasonable best efforts" standard. This covenant also provides that consent may not be "unreasonably withheld, conditioned or delayed."

Adding another layer of complexity is when these covenants conflict—whether between the general and specific provisions within the ordinary course covenant or between the ordinary course covenant and the other interim operating covenants. While clear drafting can indicate which provision should govern in the event of a conflict, courts may be reluctant to find that a qualified specific provision provides an escape from the general obligation to operate in the ordinary course.[77]

C. *Prior Case Law*

1. *Material Adverse Effect Case Law.* — While the analysis is inevitably fact-specific in MAE litigation, Delaware courts have held that the adverse effect must be substantial, consequential, and long term on the "overall earnings potential of the target."[78] This section will examine each of the three leading MAE cases in turn: *IBP*, *Hexion*, and *Akorn*.

In *In re IBP, Inc. Shareholders Litigation*, Tyson Foods, Inc., the nation's leading chicken distributor, sought to enter a merger agreement with IBP, Inc., a beef and pork distributor.[79] Several months after Tyson signed the merger agreement to acquire IBP, Tyson asserted that IBP's declining performance (a 64% decline in quarterly earnings from a previous comparable quarter) and an impairment charge from improper accounting practices each constituted an MAE.[80] The court argued that broadly written MAE clauses, such as in *IBP*, function "as a backstop protecting the acquiror from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally-significant manner" and that therefore a "short-term hiccup

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77. See infra text accompanying notes 111–114.

78. In re IBP, Inc. S'holders Litig., 789 A.2d 14, 68 (Del. Ch. 2001). In measuring the earnings potential, courts have looked to the company's enterprise value, EBITDA (earnings before interest, taxes, depreciation, and amortization), and changes in revenues, operating income, and earnings per share. See, e.g., Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 740 (Del. Ch. 2008); Frontier Oil Corp. v. Holly Corp., No. 20502, 2005 WL 1039027, at *37 (Del. Ch. Apr. 29, 2005) (comparing anticipated litigation defense costs against enterprise value to evaluate whether costs constituted an MAE). While the case law does not provide a bright-line test for whether a company has suffered an MAE, scholars have attempted to distill the case law to an articulable standard. See, e.g., Miller, Material Adverse Effect Clauses, supra note 37, at 8 ("The lesson [from subsequent case law] seems to be that the 'overall earnings potential of the target' refers to its ability to generate free cashflow, which would at least normally be measured by EBITDA."). See generally Miller, Canceling the Deal, supra note 22 (discussing the merits of various models to determine whether a change is sufficient to constitute an MAE).

79. 789 A.2d at 21.

80. Id. at 69.

in earnings should not suffice."[81] Rather, absent evidence to the contrary, an MAE "should be material when viewed from the longer-term perspective of a reasonable acquiror."[82] In discussing the relevant fiscal periods, the court in *IBP* noted the cyclical nature of IBP's business and the relevance of comparing fiscal periods from similar points in the business cycle.[83] Relying on this reasoning, the court held that there was no MAE and that IBP was entitled to specific performance to enforce the merger agreement.[84]

In *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, the court likewise emphasized the "heavy burden" a party faces in using an MAE to escape its obligation to close.[85] On July 12, 2007, Hexion and Huntsman, two large chemical companies, entered into a merger agreement whereby Hexion would acquire Huntsman for $28 per share, or a total deal value of approximately $10.6 billion.[86] After the announcement of the deal, Huntsman reported several disappointing quarters, with a 3% decline in earnings before interest, taxes, depreciation, and amortization (EBITDA) relative to the prior year, a forecasted 7% to 11% decline in EBITDA in the coming year, and average analyst estimates for the year after falling 3.6% below the company's average for the prior three years.[87] Hexion began laying the foundation to excuse its performance obligations under the merger agreement, including through obtaining an opinion that the combined company would be insolvent.[88] Shortly thereafter, Hexion filed suit, arguing that it was not obligated to consummate the merger if the combined company would be insolvent and alleging that Huntsman had suffered an MAE.[89] Hexion also published the insolvency opinion through a press release.[90] Huntsman counterclaimed, arguing that Hexion had knowingly and intentionally breached the merger agreement, that

81. See id. at 67–68.

82. Id.

83. Id. at 67–71.

84. See id. at 71, 84. Then-Vice Chancellor Strine described Tyson's efforts to escape closing as mere "buyer's regret." Id. at 22. While *IBP* involved a strategic deal (a deal where the buyer is often another company that acquires the target for strategic reasons such as cost and revenue synergies) and not a financial deal (a deal where the financial buyer acquires the business to invest in it, improve it, and resell it), in practice, *IBP* and its progeny are generally considered to apply to both financial and strategic deals.

85. 965 A.2d 715, 738 (Del. Ch. 2008).

86. Id. at 723.

87. Id. at 742–43; see also Akorn, Inc. v. Fresenius Kabi AG, No. 2018-0300-JTL, 2018 WL 4719347, at *53 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018) (recounting relevant estimates from *Hexion*).

88. See *Hexion*, 965 A.2d at 721.

89. Id. at 721–22.

90. Id. at 730.

Huntsman had not suffered an MAE, and that Hexion had to specifically perform its obligations under the merger agreement.[91]

The court found in favor of Huntsman on nearly every claim, noting that it "is not a coincidence" that "Delaware courts have never found a material adverse effect to have occurred in the context of a merger agreement."[92] The court reaffirmed the importance of a long-term impact, stating that the relevant inquiry 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."[93] Specifically, "poor earnings results must be expected to persist significantly into the future" to constitute an MAE.[94] Given this standard, the court held that the target company's failure to meet projections by a substantial margin, increased debt, and underperformance did not rise to the level of an MAE and thus refused to allow Hexion to terminate the merger on MAE grounds.[95]

It was not until *Akorn, Inc.* v. *Fresenius Kabi AG* in 2018 that the Delaware Court of Chancery held for the first time that a target company suffered an MAE that permitted the buyer to walk away from the deal.[96] In *Akorn*, pharmaceutical company Fresenius Kabi entered into a merger agreement to buy Akorn, a drug manufacturer.[97] After the parties signed the agreement, Akorn's financial performance steeply and continually declined, and Fresenius was alerted to substantial regulatory violations.[98] Following these developments, Fresenius asserted that Akorn had suffered an MAE—both a general MAE and a regulatory MAE from failure to comply with regulations in accordance with a representation—and that therefore Fresenius was relieved of its obligation to close the transaction.[99]

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91. Id. at 723.

92. Id. at 738.

93. Id. While the court left open the question of exactly how much of a diminution is sufficiently "consequential" to constitute an MAE, it held that the company had not suffered an MAE despite projected EBITDA declines of at least 10%. See id. at 743; see also Miller, Material Adverse Effect Clauses, supra note 37, at 10 ("This seems to imply that declines in cashflows up to 10% or 11% are not sufficient to cause a material adverse effect.").

94. *Hexion*, 965 A.2d at 738.

95. Id. at 762–63.

96. No. 2018-0300-JTL, 2018 WL 4719347, at *101 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018). Previously, the Delaware courts had been willing to award remedies such as a termination fee or even specific performance. See, e.g., United Rentals, Inc. v. RAM Holdings, Inc., 937 A.2d 810, 816–17 (Del. Ch. 2007) (discussing a termination fee for a financial deal); In re IBP, Inc. S'holders Litig., 789 A.2d 14, 83 (Del. Ch. 2001) (noting that "staggeringly large" and difficult to calculate damages warranted a practicable remedy of specific performance).

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

98. See id. at *1–2.

99. Id. at *2.

In reaching its decision, the Court of Chancery took great care to reaffirm the buyer's "heavy burden" in asserting an MAE and the long-term nature of MAEs, citing to *IBP* among others.[100] Nevertheless, the extraordinary facts in *Akorn* warranted a departure from precedent. In distinguishing *Akorn* from its predecessors, the court noted:

> [T]he difference between this case and its forbearers is that the [buyer's] remorse was justified. In both *IBP* and *Hexion*, the buyers had second thoughts because of problems with their own businesses spurred by broader economic factors. In this case, by contrast, Fresenius responded after Akorn suffered a General MAE and after a legitimate investigation uncovered pervasive regulatory compliance failures.[101]

The court emphasized that Akorn's performance "dropped off a cliff" for a "durationally significant" time, with year-over-year quarterly revenues that declined more than 25%, operating income that declined 86%, and earnings per share that declined more than 90% in each of the four quarters after the parties entered the agreement.[102] Additionally, these declines were not attributable to the general industry conditions, but rather were specific to Akorn.[103] Furthermore, an investigation of regulatory issues revealed "serious and pervasive data integrity problems" in breach of Akorn's representations in the merger agreement.[104] Regarding the regulatory MAE, Vice Chancellor J. Travis Laster held that an adverse effect equal to 21% of the business would be material in the long term for a reasonable acquirer.[105] Thus, given this factual background, the court held that Fresenius was not obligated to close the transaction.[106]

2. *Ordinary Course Covenant Case Law.* — Ordinary course covenants, unlike MAEs, are largely unexplored, and remarkably few cases address the intersection between these clauses. Perhaps the most noteworthy of the ordinary course covenant cases is *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*[107] In *Cooper Tire*, the Delaware Court of Chancery considered what it means to operate in the ordinary course of business when faced with an extraordinary event. In response to the announcement of the merger between target Cooper Tire & Rubber

100. Id. at *53.

101. Id. at *94.

102. Id. at *54–55.

103. Id.

104. Id. at *2.

105. Id. at *74; see also Miller, Material Adverse Effect Clauses, supra note 37, at 12 ("[T]he holding in *Akorn* clearly supports the proposition that a 20% reduction in the value of the company is a material adverse effect.").

106. *Akorn*, 2018 WL 4719347, at *101.

107. No. 8980-VCG, 2014 WL 5654305 (Del. Ch. Oct. 31, 2014).

Company and acquirer Apollo Holdings, workers at Cooper Tire's subsidiary went on strike.[108] Despite Apollo cooperating with Cooper Tire's efforts to respond to the strike, Apollo later asserted that Cooper Tire had breached the ordinary course covenant and, as such, Apollo was not obligated to close the transaction.[109] While the court found Cooper Tire's response to the strike was perhaps "a reasonable reaction," it nevertheless held that this response was not taken in the ordinary course of business.[110] Accordingly, sellers must contend with the very real risk that acting reasonably under the circumstances may be no defense at all.

Notably, *Cooper Tire* also provides guidance for interpreting the interaction between a general obligation to operate in the ordinary course and specific obligations for permitted (or prohibited) behaviors that would deviate from the ordinary course. The covenant in *Cooper Tire* imposed two separate obligations on Cooper Tire: (1) the obligation to and to cause its subsidiaries to "conduct its business in the ordinary course of business consistent with past practice," and (2) the obligation to and to cause its subsidiaries to "use its commercially reasonable efforts to preserve intact its present business organization . . . officers and employees . . . and goodwill."[111] Cooper Tire argued that, because the strike and other events resulted from actions of employees and a joint venture partner, the second efforts standard (requiring merely "commercially reasonable efforts") should govern rather than the prior unqualified obligation (requiring that Cooper Tire "shall . . . conduct its business in the ordinary course").[112] The court, however, refused to import the efforts qualifier of the latter clause into the meaning of ordinary course, noting that the events cannot be characterized as bearing solely on Cooper Tire's ability to maintain existing relations and employees because aspects of the disruption (including halting tire production and the inability of employees to access records and facilities) do not implicate Cooper Tire's ability to preserve its employees or maintain goodwill.[113] Rather, the court noted that the first clause, which was not qualified by an efforts standard, applied to the operations of a "subsidiary," and emphasized Cooper Tire's "failure to cause CCT—its largest subsidiary—to conduct business in the ordinary course."[114]

The court in *Cooper Tire* also provided clarification for interpreting ordinary course covenants that are qualified by the other terms in the agreement. Cooper Tire argued that, because its obligation to operate in

108. See id. at *4–6.
109. Id. at *14.
110. Id at *16–17.
111. Id. at *13–16.
112. Id. at *15–16.
113. Id. at *16–17.
114. Id. at *17.

the ordinary course was qualified by the language "except as . . . expressly contemplated by this Agreement," the exclusions from the MAE clause would also apply to the ordinary course covenant.[115] At issue were two clauses in the MAE definition that might influence the ordinary course covenant. The first defined MAEs as circumstances that would reasonably be expected to have a material adverse effect on Cooper Tire, subject to a set of exceptions, including circumstances attributable to the announcement of the merger, which allegedly included the strike at the subsidiary following the merger announcement.[116] The second clause, however, did not contain any qualifications. Rather, it broadly stated that facts and circumstances "that would reasonably be expected to prevent or materially delay or impair [Cooper Tire's] ability . . . to perform its obligations" under the agreement would nevertheless *also* be an MAE.[117] Vice Chancellor Sam Glasscock held that, because of this second clause, Cooper Tire was unable to rely on the first clause to escape liability for acting outside of the ordinary course, and thus Apollo was not obligated to close.[118] In reaching this decision, Vice Chancellor Glasscock noted that that the first clause cannot be considered in isolation but rather "that contractual provisions must be read to make sense of the whole."[119] He went on to provide that "the logical operation of the definition of Material Adverse Effect shifts the risk of any carved-out event onto Apollo, *unless* that event prevents Cooper from complying with its obligations under the Merger Agreement; the parties agreed not to excuse Cooper for any such breach."[120]

However, the ordinary course covenant is not an absolute prohibition on atypical conduct. Rather, a range of acceptable, if unusual, conduct may nevertheless constitute ordinary course. For example, in *FleetBoston Financial Corp. v. Advanta Corp.*, the seller of a consumer credit card business launched a "relationship management" campaign that offered extremely low interest rates to customers.[121] The court rejected the buyer's claim that such a campaign was in breach of the ordinary course covenant, in part because the accounts and interest rates "were consistent with [the seller's] past practice."[122]

Despite this holding, the court went on to observe the particular context giving rise to the conduct: the "increasingly fierce" competition and low interest rates among credit card companies in the summer and

115. Id. at *12, *17.
116. Id. at *18–19.
117. Id. at *19.
118. Id. at *20.
119. Id. at *19.
120. Id.
121. No. 16912-NC, 2003 WL 240885, at *25 (Del. Ch. Jan. 22, 2003).
122. Id. at *25–26.

fall of 1997.[123] The court provided that, when "[f]aced with the threat of an exodus of existing balances, [the seller] had only one alternative: match its competitors' strategy by offering attractive [interest rates] to its existing customers."[124] The court noted that nothing in the agreement or related documents indicated that the parties intended for the seller "to be contractually precluded from making relationship management offers that would be competitive in the marketplace."[125] Accordingly, while *FleetBoston* does not suggest that a seller may take *extraordinary* action in extraordinary times, it does illustrate that there is a degree of flexibility in acting within the ordinary course in response to unusual events. That is to say, the court may be willing to engage with the underlying context in evaluating whether conduct is in the ordinary course.

Although it is not the most noteworthy ordinary course covenant case, *Akorn* also provides an essential insight for interpreting these clauses. Recall that, in *Akorn*, largely known as an MAE case, Akorn's performance and behavior after signing sharply differed from its prior conduct.[126] Under the merger agreement, Akorn was required to use commercially reasonable efforts to operate in the ordinary course between signing and closing.[127] The ordinary course covenant in *Akorn*, however, did not contain a qualifier that behavior must be "consistent with past practice."[128] In determining whether Akorn acted in the ordinary course of business, the court compared Akorn's conduct between signing and closing with that of a "generic" company in the industry rather than the subjective standard of Akorn's practices pre-signing.[129]

D. *Literature Review*

Nearly fifteen years ago, Professors Ronald Gilson and Alan Schwartz examined a random sample of 223 acquisitions announced in 1993, 1995, and 2000 to evaluate developments in the use of MAE clauses.[130] The authors coded the acquisitions for the presence of various inclusions, exclusions, and qualifications that an MAE specifically or disproportionately

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123. Id. at *26.

124. Id.

125. Id.

126. See Akorn, Inc. v. Fresenius Kabi AG, No. CV 2018-0300-JTL, 2018 WL 4719347, at *1–2 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018).

127. Id. at *84.

128. See id. One of the authors (Professor Subramanian) served as an expert witness for Akorn in this litigation, presenting evidence that the ordinary course covenant was more seller-friendly than comparable deals, in part due to the absence of a "consistent with past practice" requirement.

129. Id. at *1 (comparing Akorn's preclosing conduct to the preclosing conduct of other specialty generic drug companies in the absence of a "past practice" qualifier).

130. Ronald J. Gilson & Alan Schwartz, Understanding MACs: Moral Hazard in Acquisitions, 21 J.L. Econ. & Org. 330, 349 (2005).

affects the target company.[131] Relying on this data, they reported a significant shift in transaction practice for MAE clauses.[132] The percent of transactions with one or more MAE exclusion had increased, from only 18.33% in 1993 to 83% in 2000.[133] Additionally, the average number of such specifications per transaction had risen from 0.67 per transaction in 1995 to 3.75 per transaction in 2000.[134] Furthermore, in an increasing number of transactions, the definition of MAE excluded "the two most obvious examples of exogenous risk" that would otherwise give acquirers an option to abandon the transaction: "changes in the U.S. economy and changes in the target company's industry."[135]

Professor Robert Miller, among others, would later critique Gilson and Schwartz's interpretation.[136] In his article, Miller examined 353 deals filed between July 1, 2007 and June 30, 2008 containing MAE clauses, looking to the categories ("objects"), exceptions, and disproportionate impact clauses.[137] He also compared MAE clauses between stock-for-stock, cash-and-stock, and hybrid deals.[138]

Miller found that the MAE definitions in stock-for-stock and cash-and-stock agreements "are substantially reciprocal" in 98% of deals containing MAE definitions for both parties and in 88% of deals with no MAE definition applicable to the acquirer.[139] Furthermore, Miller noted, MAE exceptions within the definitions for the target and acquirer in these deals

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131. Id. at 349–50. The agreements were coded for the following categories:

> (1) changes in global economic conditions; (2) changes in U.S. economic conditions; (3) changes in global stock, capital, or financial market conditions; (4) changes in U.S. stock, capital, or financial market conditions; (5) changes in the economic conditions of other regions; (6) changes in the target company's industry; (7) changes in applicable laws or regulations; (8) changes in the target company's stock price; (9) loss of customers, suppliers, or employees; (10) changes due to the agreement or the transaction itself; and (11) a miscellaneous category.

Id.

132. Id. at 350.

133. Id. at 350–51. Subsequent studies would find that virtually all firms have at least one exclusion and thus depart from this "simple binary classification." David J. Denis & Antonio J. Macias, Material Adverse Change Clauses and Acquisition Dynamics, 48 J. Fin. & Quantitative Analysis 819, 825 n.8 (2013).

134. Gilson & Schwartz, supra note 130, at 350.

135. Id.

136. See, e.g., Miller, The Economics of Deal Risk, supra note 21, at 2065–66 (noting that the idea that the acquirer is the superior bearer of exogenous risks "confuses cause and effect"); id. at 2102 (critiquing Gilson & Schwartz, supra note 130).

137. Id. at 2091–92, 2095–99. For the objects, he examined business, financial condition, results of operations, assets, liabilities, properties, condition (other than financial), operations, capitalization, and prospects. Id. at 2093.

138. Id. at 2097–98.

139. Id. at 2067, 2098.

"appear with similar frequency."[140] For example, in stock-for-stock deals, there was an exception for general economic conditions for 70% of targets and 69% of acquirers.[141] Miller observed a similar phenomenon in cash-and-stock deals.[142] Relying on his data, Miller argued that, contrary to Gilson and Schwartz's conclusion, "[i]t will not do . . . to say that acquirers are superior bearers of exogenous risks because this does not explain why parties commonly leave some exogenous risks on the party itself."[143]

Miller also examined the kinds of risks typically allocated to each party. Relying on his sample, he concluded that MAE exceptions typically allocate the following risks to acquirers: (a) general changes in the economy or in economic or business conditions (71%); (b) general changes in conditions in financial, credit, debt, capital, or securities markets (51%); (c) general changes affecting the industries or lines of businesses in which the party operates (68%); (d) general changes in law (61%); (e) changes in GAAP or other accounting matters (59%); (f) general changes in political or social conditions (38%); (g) acts of war (55%); (h) acts of terrorism (54%); and (i) natural disasters or acts of God, including hurricanes, earthquakes, and tornadoes (24%).[144] Risks resulting from the announcement of the agreement and associated actions by the parties were "shifted from the targets to acquirers in 79% of cash deals, 69% of stock-for-stock deals, and 76% of cash-and-stock deals, and from acquirers to targets in 69% of stock-for-stock deals and 73% of cash-and-stock deals."[145]

In another study, Professors David Denis and Antonio Macias constructed a sample of 755 acquisitions announced between 1998 and 2005.[146] Denis and Macias noted that more than 99% of the acquisitions in this sample contained an MAE clause, although the number and type of exclusions substantially varied.[147] Perhaps more notably, Denis and Macias found that MAEs were the underlying cause behind more than 66% of the terminated acquisitions and 80% of the renegotiated acquisitions.[148] Indeed, they argued that, "[o]n average, acquirers negotiate a 15% reduction in offer price when the target experiences an MAE."[149] They

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140. Id. at 2067–68, 2097.

141. Id.

142. Id.

143. Id. at 2070; see also id. at 2069 (noting that "Gilson and Schwartz speak as if merger agreements typically assign *all* exogenous risks to the acquirer," but as the data shows, "this is not right").

144. Id. at 2071.

145. Id. at 2072.

146. Denis & Macias, supra note 133, at 820.

147. Id. For example, nearly all of the MAE clauses in the sample contained at least one exclusion, with an average of nearly four exclusions. Id.

148. Id. at 820–21.

149. Id. at 821.

noted further that "the probability of an acquisition being completed is positively related to the number of MAE exclusions."[150] That is to say, that MAE structure affects the likelihood of completing a transaction and the likelihood in turn is reflected in market prices when publicly disclosed.[151] Consistent with their theory that MAE clauses are priced into the transactions, the authors found "a significant negative relation between the acquisition premium and the number of MAE exclusions."[152]

Additionally, Professor Eric Talley also released a study on MAEs, examining a data set of 528 MAE provisions from deals announced between 2007 and 2008.[153] In addition to critiquing Gilson and Schwartz's thesis,[154] Talley argued that his empirical analysis "is consistent with the claim that ambiguity (or the prospective anticipation of it) plays a significant role in determining deal structure."[155] Talley concluded that ambiguity aversion is thus "a helpful device for understanding contractual conditions and excuses."[156]

The COVID-19 pandemic—and resulting company and governmental actions—have spurred an outgrowth of MAE literature on the subject.[157] As Miller aptly described in one of his recent articles:

> [I]n evaluating the adverse effects suffered by a company in the current pandemic, it may be important to attempt to separate adverse effects arising (a) proximately from the COVID-19 pandemic itself, from (b) effects arising proximately from governmental orders suspending or curtailing the company's operations and only remotely from COVID-19, and from (c) effects arising proximately from actions taken by the company itself in response to COVID-19 or governmental lockdown orders or both.[158]

150. Id.

151. Id. In analyzing arbitrage spreads—the difference between the price offered to the target's shareholders and the current market price of the target's shares—they found that, following the announcement of an acquisition, acquisitions with an above-median number of MAE exclusions exhibited median arbitrage spreads significantly lower than the median spread for acquisitions with a below-median number of MAE exclusions. Id. (finding spreads of 5.2% for acquisitions with an above-median number of MAE exclusions compared to spreads of 7.3% for acquisitions with a below-median number of exclusions).

152. Id. at 822.

153. Eric L. Talley, On Uncertainty, Ambiguity, and Contractual Conditions, 34 Del. J. Corp. L. 755, 787, 805 (2009).

154. Id. at 799.

155. Id.

156. Id. at 805.

157. See, e.g., Miller, Material Adverse Effect Clauses, supra note 37, at 22; Mara H. Rogers, Amelia Xu & Geetika Jerath, COVID-19 Impact: Potential Risks and Problems in Signed M&A Deals, Harv. L. Sch. F. on Corp. Governance (Apr. 20, 2020), https://corpgov.law.harvard.edu/2020/04/20/covid-19-impact-potential-risks-and-problems-in-signed-ma-deals [https://perma.cc/8SFL-9ZDZ].

158. Miller, Material Adverse Effect Clauses, supra note 37, at 22.

Miller's recent article addresses three principal issues in applying a typical MAE clause to COVID-19: (1) whether the adverse effects stemming from COVID-19 and responses to it would fall within the definition of MAE, (2) whether the risks fall within an MAE exception, and (3) if relevant, whether the risks disproportionately affected the company (and, if so, whether the disproportionate effect is sufficient for an MAE).[159]

Miller provides that, while the analysis is fact specific, "for the large majority of companies, any reasonable estimate of their future cashflows must reflect a significant decline relative to projections made before the advent of COVID-19."[160] Miller notes that the risk of a pandemic itself may be expressly included in an enumerated MAE exception.[161] Alternatively, a court may use the canon of *ejusdem generis* to interpret a list of enumerated exceptions that does not expressly refer to pandemics as including a pandemic when the list is followed by a phrase like "and other natural disasters."[162] Miller also argues that government action in response to the pandemic, such as shutdown orders, likely falls within the common exception for changes in "Law," "Applicable Law," or "Regulations," which the agreement often defines expansively to include orders, rulings, and other similar governmental actions.[163]

Professors Matthew Jennejohn, Julian Nyarko, and Eric Talley surveyed the use of pandemic-related provisions in 1,702 MAE clauses from M&A transactions between 2003 and early 2020.[164] They found that only a minority of carveouts address a pandemic either explicitly (12%) or implicitly with catch-all terms, such as "force majeure" (36.2%).[165] The

159. Id. at 6.

160. Id. at 19 (referencing the 20% threshold in *Akorn*).

161. Id. at 22; see also, e.g., Sycamore–L Brands Transaction Agreement, supra note 3, § 1.01 (including "pandemics" as an exception to MAE).

162. Miller, Material Adverse Effect Clauses, supra note 37, at 23; see also Aspen Advisors LLC v. United Artists Theatre Co., 861 A.2d 1251, 1265 (Del. 2004) ("[W]here general language follows an enumeration of persons or things, by words of a particular and specific meaning, such general words are . . . to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." (internal quotation marks omitted) (quoting In re Delaware, 708 A.2d 983, 988 (Del. 1998))).

163. Miller, Material Adverse Effect Clauses, supra note 37, at 25 ("Such MAE Exceptions would thus almost certainly include the orders promulgated by state governors, mayors, and state or local government officials related to COVID-19."). In another recent article, Miller discusses the causality of MAE clauses and offers suggestions for determining whether an event or events constitute an MAE. See Miller, Pandemic Risk, supra note 45 (manuscript at 109–10, 109 n.19, 121–33).

164. Matthew Jennejohn, Julian Nyarko & Eric Talley, COVID-19 as a Force Majeure in Corporate Transactions, Mich. State L. Rev. (forthcoming 2021) (manuscript at 3), https://ssrn.com/abstract=3577701 (on file with the *Columbia Law Review*).

165. Id. at 3–4. (discussing MAEs that expressly capture a pandemic with words like "disease" and "pandemic" and broader terms that may impliedly capture a pandemic, such as "force majeure"). The authors' decision to treat general carveouts, such as force majeures, as covering pandemics is susceptible to criticism. Indeed, Jennejohn et al. note

authors, however, document a trend of increasing use of such provisions, with a spike following H1N1 in 2009 followed by a steady rise through 2020.[166] Such terms, they note, are overwhelmingly qualified by "disproportional effects" language (carvebacks) to soften the effect of the carveout, with roughly the same frequency in pending deals.[167] Notably, unlike in our study, Jennejohn et al. examine only disproportionate carvebacks in the context of pandemics and acts of God, rather than at an individual level and within the overall clause, in general and over time.[168]

Despite the proliferation of MAE literature, both in general and following COVID-19, such articles largely ignore ordinary course covenants. Indeed, to our knowledge, not a single article provides a robust analysis of ordinary course covenants in acquisition agreements. In fact, the interaction between the MAE clause and the ordinary course covenant seems to have caught most academics and practitioners by surprise.[169] Perhaps the most noteworthy empirical work relating to ordinary course

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that when specific language is invoked, it is relatively evenly split between being an enumerated example of a general force majeure (57%) and standing alone without invoking the more general language (43%). Id. at 7. Such separate enumeration would seem to imply that the parties are not confident that pandemics fall within force majeures. See generally Miller, Material Adverse Effect Clauses, supra note 37, at 24 (noting the relevance of whether an event is "naturally occurring" or "the result of human agency" and whether the event is "beyond the control of human beings").

166. Jennejohn et al., supra note 164, at 4–5 (noting that, as of May 2020, nearly 24% of pending deals explicitly carve out pandemic-like contingencies and 42% implicitly carve out such events through general force-majeure-type provisions).

167. Id at 6. Jennejohn et al. also argue that, based on the data, whether COVID-19 triggers an MAE may center on the impact of the pandemic on a company compared to its peers. Id. at 7.

168. Id. at 6. In another recent work, Jennejohn, Nyarko, and Talley further explore contractual innovations in merger agreements. See Matthew Jennejohn, Julian Nyarko & Eric Talley, Contractual Evolution, 89 U. Chi. L Rev. (forthcoming 2022) (manuscript at 17–18, 31–34), https://ssrn.com/abstract=3810214 (on file with the *Columbia Law Review*) (discussing the development of MAE clauses over time, including over the course of the COVID-19 pandemic). While the article discusses a variety of provisions, including MAE clauses, it does not address ordinary course covenants or the intersection between the two clauses.

169. See, e.g., Pandemic Mayhem, M&A J. June–July 2020, at 1, 9–10 ("Lawyers should have examined every . . . other provision in the merger agreement that could be implicated by the MAC. They . . . caught just half the problem. A pandemic is not a MAC but everything that flows from it is going to breach your covenants? I just can't fathom how this happened." (quoting Rob Kindler, Vice Chairman & Global Head of Mergers & Acquisitions at Morgan Stanley)). A prominent M&A attorney observed to us in September 2020: "If you had told me in 2019 that there was going to be a global pandemic, and asked me what clauses in the merger agreement were going to be implicated, I wouldn't have picked the ordinary course covenant." A prominent corporate law academic emailed one of us in August 2020 to say: "I found the most interesting issue [in a practitioner presentation] is whether the 'ordinary course' covenant lets [the buyer] out. (Seems nuts to me.)" Far from "nuts," we argue in this Article that the ordinary course covenant should be enforced according to its plain terms and that such a reading is socially desirable. See infra section III.B.

covenants is the American Bar Association's biannual study on private deal points. While this report focuses more broadly on the prevalence of certain provisions in M&A transactions, it does include some analysis on the use of ordinary course covenants in acquisition agreements.

In the 2019 Private Deal Points Study (the "ABA Study"), the ABA analyzed 151 M&A deals executed or closed during the 2018 calendar year and first quarter of 2019.[170] In this sample, 97% of agreements included covenants to operate in the ordinary course.[171] Such clauses typically prohibit the seller from operating outside of the ordinary course, except as otherwise provided in the agreement or consented to by the buyer.[172] In 57% of the agreements, buyers were precluded from unreasonably withholding their consent.[173] The ABA Study likewise found that 85% of acquisition agreements included the qualifying language of "consistent with past practice."[174] Materiality qualifiers in ordinary course covenants were exceptionally rare—only 4 of 117 agreements were qualified by "in all material respects."[175] Perhaps surprisingly, only a minority (19%) of agreements in the ABA Study contained an efforts qualifier.[176] Lastly, the ABA Study found that approximately half of the ordinary course covenants included the carveout "except as otherwise provided in this Agreement," while 18% of the agreements contained no carveouts at all.[177]

E. *Outcomes of the 2020 Pandemic Cases*

In the midst of the pandemic, some buyers attempting to avoid an obligation to close are relying on both alleged MAEs and ordinary course violations.[178] Sellers, in contrast, are generally asserting that the MAE clauses carve out industry-wide events like COVID-19 and that measures to

170. Jessica C. Pearlman & Tatjana Paterno, Announcing the ABA's 2019 Private Target Mergers & Acquisitions Deal Points Study, Bus. L. Today (Jan. 14, 2020), https://businesslawtoday.org/2020/01/announcing-abas-2019-private-target-mergers-acquisitions-deal-points-study [https://perma.cc/PJG2-4ZRK].

171. Perricone, supra note 58.

172. See id.

173. Id.

174. Id.

175. Id. ("As one would suspect, materiality qualifiers are infrequently used in ordinary course covenants given that a typical covenant compliance condition is already qualified by materiality.").

176. Id.

177. Id.

178. In many deals, allegations of MAEs or ordinary course violations are explicit. In some deals, however, parties simply assert that they have no obligation to close, without expressly invoking such terms. See, e.g., Verified Complaint at 8, We Co. v. SoftBank Grp., No. 2020-0258 (Del. Ch. filed Apr. 7, 2020), 2020 WL 1820688 [hereinafter WeWork Complaint] (alleging that SoftBank stated that it had no obligation to close because a variety of conditions to closing had not been satisfied). Absent allegations of other breaches, MAE clauses and ordinary course violations provide the most likely route for escaping closing.

respond to COVID-19 are in the ordinary course. For example, in *Realogy Holdings Corp. v. SIRVA Worldwide, Inc.*, the buyer, a moving service provider, agreed to purchase a subsidiary of real estate services company Realogy in November 2019.[179] But several months later, the buyer argued that it was not obligated to close, alleging that the target company suffered an MAE because it had been disproportionately impacted by COVID-19 and that the seller had suffered an MAE because of its potential insolvency.[180] In response, the seller sought to compel the buyer to close, arguing that neither the seller nor the target company had suffered an MAE.[181] Specifically, with regard to the target company's purported MAE, the seller asserted that COVID-19 was covered by a carveout under the MAE definition and that there was no disproportionate impact on the target relative to its peers.[182] The parties settled before trial.[183]

In some cases, dissatisfied buyers have also turned to ordinary course covenants to attempt to escape closing in the wake of the pandemic. For example, in *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, the buyer of a portfolio of luxury hotels asserted that the seller's response to the pandemic, including temporary closures, adjusted staffing, and modified capital spending, violated its obligation to operate the hotels in the ordinary course of business.[184] The seller replied by arguing that measures designed to respond to economic downturns are part of the ordinary course of business—such as complying with governmental authorities and working to preserve relationships and avoid default.[185] Furthermore, the seller noted that most other luxury hotels in the United States, including those owned by the buyer, responded to the pandemic by implementing similar measures.[186] Vice Chancellor Laster ultimately found for the buyer, stating that "the weight of Delaware precedent" supports the interpretation of ordinary course as in accordance with business operations in normal circumstances.[187] Therefore, the seller breached the ordinary course covenant when it made extraordinary changes to its business in response to the COVID-19 pandemic, even if reasonable and consistent with its peers.[188]

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179. No. 2020-0311-MTZ, 2020 WL 4559519, at *1 (Del. Ch. Aug. 7, 2020); Realogy Holdings Corp., Quarterly Report (Form 10-Q) 15 (Nov. 5, 2020), https://www.sec.gov/ix?doc=/Archives/edgar/data/1398987/000139898720000116/rlgy-20200930.htm (on file with the *Columbia Law Review*) [hereinafter Realogy Quarterly Report].

180. *Realogy Holdings Corp.*, 2020 WL 4559519, at *5.

181. Verified Complaint at 31–34, *Realogy Holdings Corp.*, No. 2020-0311-MTZ (Del. Ch. filed Apr. 30, 2020), 2020 WL 2128566.

182. Id. at 31–32.

183. Realogy Quarterly Report, supra note 179, at 16.

184. No. 2020-0310-JTL, 2020 WL 7024929, at *2, *41 (Del. Ch. Nov. 30, 2020).

185. See id. at *67, *75–77.

186. See id. at *78 n.272.

187. See id. at *67–68.

188. Id. at *67–78.

In a minority of cases, the parties have agreed to mutual termination with no fees or penalties of any sort. In the substantial majority of resolved cases, however, the parties have reached settlement agreements that often involve the buyer paying a fee or the parties renegotiating a lower deal price. In the tables below, we have compiled a review of publicly available deals impacted by COVID-19 as of early March 2021:

Table 1: Pending, Threatened, or Potential Deal Litigation

Announcement Date	**Buyer**	**Seller**	**Notice**	**Resolution**
7/25/2019	Live Nation	Ocesa Entertainment	5/25/2020	Pending; alleged MAE and ordinary course (OC) violations[189]
11/27/2019	CorePower Yoga	Level 4 Yoga	4/2/2020	Pending; alleged MAE and OC violation[190]
2/28/2020	Alphatec (ATEC)	EOS Imaging SA	4/24/2020	Deal terminated; alleged MAE; no litigation at this time[191]
3/16/2020	Cinemex	Star Cinema Grill	4/2/2020	Stayed; further action involving the dispute is before the bankruptcy court; alleged MAE[192]

189. Dave Brooks, Live Nation Terminates $480M Acquisition of Mexican Promoter OCESA, Billboard (May 26, 2020), https://www.billboard.com/articles/business/touring/9390658/live-nation-ocesa-acquisition-terminated-mexican-promoter [https://perma.cc/GVN8-EUU6].

190. Verified Complaint at 11–12, Level 4 Yoga, LLC v. CorePower Yoga, LLC, No. 2020-0249 (Del. Ch. filed Apr. 2, 2020), 2020 WL 1670479; Damien R. Zoubek & Jenny Hochenberg, Cravath, Swaine & Moore LLP, COVID-19: Impact on M&A Agreements 5 (2020), https://www.cravath.com/a/web/rFAm3ky5MfRFkFj64g2utv/U13sC/purchase-agreements-and-the-pandemic.pdf [https://perma.cc/SH7N-9WLX].

191. See, e.g., Alphatec Holdings, Inc., Quarterly Report (Form 10-Q), at 24–25 (May 5, 2020), https://sec.report/Document/0001564590-20-024330 (on file with the *Columbia Law Review*); Alphatec Holdings Terminates Tender Offer Agreement with EOS Imaging, Business Wire (Apr. 27, 2020), https://www.businesswire.com/news/home/20200426005051/en/Alphatec-Holdings-Terminates-Tender-Offer-Agreement-EOS [https://perma.cc/GV5C-D7HV]. See also M&A Escape Hatches in the Era of COVID-19, Hughes Hubbard & Reed LLP (May 29, 2020), https://www.hugheshubbard.com/news/m-a-escape-hatches-in-the-era-of-covid-19 [https://perma.cc/CM27-5HVP] ("Alphatec Holdings Inc. terminated its acquisition agreement with EOS Imaging SA on MAC grounds, although, to date, the latter has not brought suit.").

192. Plaintiffs' Verified Original Complaint at 14–15, Khan v. Cinemex USA Real Estate Holdings, Inc. No. 4:20-cv-01178 (S.D. Tex. Apr. 2, 2020), 2020 WL 1808264; Shots Fired: Recent Claims to Terminate M&A Deals over COVID-19 MAEs, Troutman Pepper (Apr. 8, 2020), https://www.troutman.com/insights/shots-fired-recent-claims-to-terminate-manda-deals-over-covid-19-maes.html [https://perma.cc/V9WG-RB8G]; Zoubek & Hochenberg, supra note 190, at 5.

Table 2: Mutual Termination, Settlements, and Renegotiated Deal Prices

Announcement Date	**Buyer**	**Seller**	**Notice**	**Resolution**
10/22/2019	SoftBank	WeWork	4/2/2020	Settlement (revised tender offer)[193]
11/7/2019	SIRVA Worldwide	Realogy	4/25/2020	Settlement (terms not disclosed); release of all related claims[194]
11/25/2019	LVMH	Tiffany & Co.	9/9/2020	Settlement; deal recut at a 2.6% lower price[195]
12/17/2019	Carlyle / GIC	Juweel	4/8/2020	Settlement (terms not disclosed)[196]
1/12/2020	Woodward	Hexcel	4/6/2020	Mutual termination; no termination fees[197]

193. WeWork Complaint, supra note 178; Peter Eavis, WeWork's Path to Markets Is Cleared as Co-Founder and SoftBank Settle Suit, N.Y. Times (Feb. 26, 2021), https://www.nytimes.com/2021/02/26/business/wework-softbank-settlement.html (on file with the *Columbia Law Review*).

194. See Realogy Holdings Corp. v. SIRVA Worldwide, Inc., No. 2020-0311, 2020 WL 4559519 (Del. Ch. Aug. 7, 2020); Realogy Quarterly Report, supra note 179; Zoubek & Hochenberg, supra note 185.

195. Benjamin Horney, Tiffany, LVMH Lower Merger Price To $15.8B, Settle Dispute, Law360 (Oct. 29, 2020), https://www.law360.com/articles/1324006/tiffany-lvmh-lower-merger-price-to-15-8b-settle-dispute [https://perma.cc/X6LL-KX48].

196. See Verified Complaint, Carlyle Roundtrip LP v. Juweel Investors Ltd. et al., No. 2020-0351-JRS (Del. Ch. filed May 13, 2020), 2020 WL 2479734; Verified Complaint, Juweel Investors Ltd. v. Carlyle Roundtrip LP et al., No. 2020-0338-JRS (Del. Ch. filed May 11, 2020), 2020 WL 2488122; Jef Feeley, Mike Leonard, & Jennifer Surane, Carlyle, Certares Settle Suits Over Failed AmEx Travel Deal, Bloomberg (Feb. 9, 2021), https://www.bloomberg.com/news/articles/2021-02-09/carlyle-certares-drop-suits-over-failed-amex-stock-purchase [https://perma.cc/GH7E-YE7H]; Mark Vandevelde, Carlyle and GIC Call Off AMEX Travel Deal, Fin. Times (May 9, 2020), https://www.ft.com/content/caeb6f87-cdcb-4985-b613-8b1537a77c56 (on file with the *Columbia Law Review*); see also Zoubek & Hochenberg, supra note 190, at 5.

197. COVID-19 Pandemic Impacts Previously Announced M&A Transactions, Sullivan & Cromwell LLP (Apr. 13, 2020), https://www.sullcrom.com/files/upload/SC-Publication-COVID-19-Pandemic-Impacts-Previously-Announced-M&A-Transactions.pdf [https://perma.cc/F6PY-DQ77]; Woodward and Hexcel Announce Mutual Termination of Merger Agreement, Woodward (Apr. 6, 2020), https://newsroom.woodward.com/news/

1/16/2020	Far Point	Global Blue	5/2/2020	Deal amended; partial shift in consideration from cash to stock[198]
1/24/2020	Wex	eNett / Optal	5/7/2020	Settlement after Wex won at a preliminary trial; deal recut at a 66% lower price[199]
1/29/2020	Comtech	Gilat	7/10/2020	Settlement; Comtech to pay Gilat $70 million[200]
2/3/2020	CanCap / ACC	Rifco	3/27/2020	Mutual release and settlement; $1.5 million paid to Rifco[201]

press-release-details/2020/Woodward-and-Hexcel-Announce-Mutual-Termination-of-Merger-Agreement/default.aspx [https://perma.cc/6Z64-PTR9].

198. Dan Loeb's Far Point Urges Investors to Scrap Global Blue Buyout, Reuters (May 7, 2020), https://www.reuters.com/article/us-global-blue-m-a-far-point/dan-loebs-far-point-urges-investors-to-scrap-global-blue-buyout-idUSKBN22J1LH (on file with the *Columbia Law Review*); Global Blue and Far Point Announce Agreements to Facilitate the Closing of the Pending Business Combination, Bus. Wire (Aug. 16, 2020), https://www.businesswire.com/news/home/20200815005024/en/Global-Blue-Point-Announce-Agreements-Facilitate-Closing [https://perma.cc/S89V-3WPW] [hereinafter Global Blue and Far Point Announce Agreements].

199. Lucia Osborne-Crowley, WEX Settles U.K. Merger Suit with Slashed $577M Fintech Deal, Law360 (Dec. 18, 2020), https://www.law360.com/mergersacquisitions/articles/1339165/wex-settles-uk-merger-suit-with-slashed-577m-fintech-deal (on file with the *Columbia Law Review*); eNett, Travelport and Optal Respond to WEX's Attempt to Walk Away from Its Binding Agreement, PR Newswire (May 7, 2020), https://www.prnewswire.com/news-releases/enett-travelport-and-optal-respond-to-wexs-attempt-to-walk-away-from-its-binding-agreement-301054835.html [https://perma.cc/UB4E-FY98]; WEX Tries to Back Out of Optal, eNett Deal Due to Pandemic, PYMNTS (May 7, 2020), https://www.pymnts.com/news/b2b-payments/2020/wex-tries-to-back-out-of-optal-enett-deal [https://perma.cc/S3QP-8RR3].

200. Verified Complaint, Comtech Telecomms. Corp. v. Gilat Satellite Networks Ltd., No. 2020-0553-JRS (Del. Ch. July 10, 2020), 2020 WL 4001493; Comtech Telecommunications Corp. and Gilat Satellite Networks Ltd. Terminate Merger Agreement and Settle Litigation, GlobeNewswire (Oct. 5, 2020), https://www.globenewswire.com/news-release/2020/10/05/2103314/0/en/Comtech-Telecommunications-Corp-and-Gilat-Satellite-Networks-Ltd-Terminate-Merger-Agreement-and-Settle-Litigation.html [https://perma.cc/UL28-CBF8].

201. Robert C. Piasentin & Thomas van den Hoogen, Material Adverse Effect Clauses in a COVID-19 World, McMillan (June 23, 2020), https://mcmillan.ca/insights/material-

2/6/2020	Advent International	Forescout Technologies	5/15/2020	Settlement; sale price reduced from $33/share to $29/share[202]
2/10/2020	Simon Property	Taubman Centers	6/10/2020	Deal recut at an 18% lower price[203]
2/12/2020	Cast & Crew Indie Services	Oberman Tivoli & Pickert	4/6/2020	Settlement (terms not disclosed); suit voluntarily dismissed[204]
2/18/2020	Amherst Holdings	Front Yard Residential	5/4/2020	Deal terminated, Amherst to pay $100 million (cash payment, equity investment,

adverse-effect-clauses-in-a-covid-19-world [https://perma.cc/PVS5-3V75]; Rifco Receives $1.5 Million to Settle Dispute with ACC and CanCap, Rifco (July 30, 2020), https://www.rifco.net/2020/07/rifco-receives-1-5-million-to-settle-dispute-with-acc-and-cancap [https://perma.cc/UY4Q-KDFD].

202. Forescout and Advent International Reach Amended Merger Agreement, Forescout (July 15, 2020), https://www.forescout.com/company/news/press-releases/forescout-and-advent-international-reach-amended-merger-agreement [https://perma.cc/65TS-MQWM]; Forescout to Be Acquired by Advent International in $1.9 Billion Transaction, Forescout (Feb. 6, 2020), https://www.forescout.com/company/news/press-releases/forescout-to-be-acquired-by-advent-international-in-1.9-billion-transaction [https://perma.cc/B92D-FGM8]; Michael Novinson, Forescout Sues Advent for Allegedly Violating Acquisition Terms, CRN (May 20, 2020), https://www.crn.com/news/security/forescout-sues-advent-for-allegedly-violating-acquisition-terms [https://perma.cc/959D-PBW5].

203. Christina Cheddar Berk, Mall Owner Simon Property Group to Buy Rival Taubman Centers in $3.6 Billion Deal, CNBC (Feb. 10, 2020), https://www.cnbc.com/2020/02/10/simon-property-group-to-acquire-taubman-centers-for-52point50-a-share-in-cash.html [https://perma.cc/F5RF-MK38]; Jessica DiNapoli, Mall Operator Simon Property Abandons $3.6 Billion Acquisition of Taubman, Reuters (June 10, 2020), https://www.reuters.com/article/us-taubman-centers-m-a-simon-prop-grp/mall-operator-simon-property-abandons-3-6-billion-acquisition-of-taubman-idUSKBN23H2E0 [https://perma.cc/4ZB9-9XME]; Lauren Thomas, Mall Owners Simon and Taubman Revise Merger Terms, with $800 Million Price Cut, CNBC (Nov. 15, 2020), https://www.cnbc.com/2020/11/15/mall-owners-simon-taubman-revise-merger-terms-800-million-price-cut.html [https://perma.cc/DQA2-F5CH].

204. Verified Complaint for Specific Performance at 42, Oberman, Tivoli & Pickert, Inc. v. Cast & Crew Indie Servs., LLC, No. 2020-0257-PAF (Del. Ch. filed Apr. 9, 2020), 2020 WL 1820723 (showing that notice was given on April 6, 2020); Mike Leonard, Payroll Companies Settle Suit over Virus-Related Merger Collapse, Bloomberg L. (Apr. 20, 2020), https://news.bloomberglaw.com/mergers-and-acquisitions/payroll-companies-settle-suit-over-virus-related-merger-collapse (on file with the *Columbia Law Review*).

				and loan facility)[205]
2/18/2020	1-800-Flowers.com	Bed Bath & Beyond	4/1/2020	Settlement; deal recut at a 2.8% lower price[206]
2/20/2020	Sycamore Partners	L Brands	4/22/2020	Mutual termination and agreement to settle; no termination fees[207]

205. Patrick Clark, Front Yard Plunges as Virus Claims $2.3 Billion Housing Deal, Bloomberg (May 4, 2020), https://www.bloomberg.com/news/articles/2020-05-04/front-yard-plunges-as-amherst-nixes-single-family-rental-deal (on file with the *Columbia Law Review*); Front Yard Residential Announces Termination of Merger Agreement with Amherst and Provides Business Update, Front Yard Residential (May 4, 2020), https://ir.frontyardresidential.com/news-releases/news-release-details/front-yard-residential-announces-termination-merger-agreement [https://perma.cc/C2QA-2LAW].

206. Verified Complaint, Bed Bath & Beyond Inc. v. 1-800-Flowers.com, Inc., No. 2020-0245 (Del. Ch. filed Apr. 1, 2020), 2020 WL 1673893; 1-800-Flowers.com, Inc. Signs Definitive Agreement to Acquire PersonalizationMall.com, A Leading Online Retailer of Personalized Products, BusinessWire (Feb. 18, 2020), https://www.businesswire.com/news/home/20200218005342/en/1-800-FLOWERS.COM-Inc.%C2%AE-Signs-Definitive-Agreement-to-Acquire-PersonalizationMall.com%E2%84%A2-a-Leading-Online-Retailer-of-Personalized-Products [https://perma.cc/SE43-RY6X]; Bed Bath & Beyond Inc. and 1-800-Flowers.com, Inc. Enter into Settlement Agreement to Complete Sale of PersonalizationMall.com, Bed Bath & Beyond (July 21, 2020), https://bedbathandbeyond.gcs-web.com/news-releases/news-release-details/bed-bath-beyond-inc-and-1-800-flowers com-inc-enter-settlement [https://perma.cc/QM2N-SR4Z]; Bed Bath & Beyond Inc. Completes Sale of PersonalizationMall.com, Bed Bath & Beyond (Aug. 3, 2020), https://bedbathandbeyond.gcs-web.com/news-releases/news-release-details/bed-bath-beyond-inc-completes-sale-personalizationmallcom [https://perma.cc/E6UH-WKJ6].

207. Verified Complaint, Sycamore Partners III, L.P. v. L Brands, Inc., No. 2020-0306 (Del. Ch. filed Apr. 24, 2020), 2020 WL 2061416 [hereinafter Second Sycamore Complaint]; L Brands Complaint, supra note 14; Sycamore Complaint, supra note 1; Sycamore Partners Confirms Mutual Termination of Transaction Agreement with L Brand*s*, PR Newswire (May 4, 2020), https://www.prnewswire.com/news-releases/sycamore-partners-confirms-mutual-termination-of-transaction-agreement-with-l-brands-301052299.html [https://perma.cc/S28Z-4UGZ].

Table 3: Litigation Outcomes

Announcement Date	**Buyer**	**Seller**	**Notice**	**Resolution**
9/10/2019	Mirae Global	AB Stable VIII LLC	4/17/2020	Buyer need not close; seller violated OC and must pay \$3.7 million in transaction expenses, attorneys' fees, and other costs[208]
2/28/2020	Duo Bank of Canada	Fairstone Financial Holdings Inc.	5/27/2020	Buyer must close; seller did not violate OC and negative effects did not constitute an MAE[209]
3/6/2020	KCAKE	Snow Phipps	4/14/2020	Buyer must close; seller did not violate OC and no reasonable expectation of an MAE[210]

II. NEW EVIDENCE ON MAE CLAUSES AND ORDINARY COURSE COVENANTS

In this Part, we present our empirical evidence on MAE clauses and ordinary course (OC) covenants over the past fifteen years. Section II.A provides an overview of the methodology. The next four sections provide our analysis of MAEs: the MAE "objects"; the carveouts generally; a drill-down on "Act of God" and "Pandemic" Carveouts; and finally, the presence, absence, and evolution of causality in the MAE clause. Section II.F provides a similar analysis of ordinary course covenants. Section II.G concludes with an examination of consent exceptions from both the MAE clause and the ordinary course covenant.

208. AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, No. 2020-0310-JTL, 2020 WL 7024929, at *105 (Del. Ch. Nov. 30, 2020).

209. Fairstone Fin. Holdings Inc. v. Duo Bank of Can., 2020 ONSC 7397, paras. 4–7 (Can.).

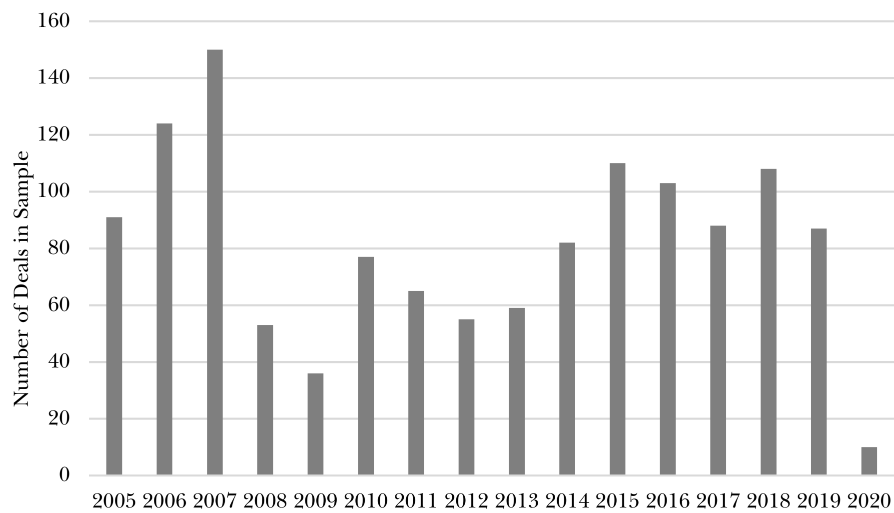
210. Snow Phipps Grp., LLC v. KCAKE Acquisition Inc., No. 2020-0282-KSJM, 2021 WL 1714202, at *2 (Del. Ch. Apr. 30, 2021) (noting the "durational insignificance" and "immateriality of the decline," and carveout for events "related to" government orders); Mike Leonard, Snow Phipps Says Kohlberg Breaking DecoPac Deal over Pandemic, Bloomberg L. (Apr. 20, 2020), https://news.bloomberglaw.com/coronavirus/snow-phipps-says-kohlberg-breaking-decopac-deal-over-pandemic (on file with the *Columbia Law Review*).

A. *Methodology*

We used the MergerMetrics database to construct a sample of all M&A deals announced between January 2005 and April 2020 with a transaction value of at least $1.0 billion in which a definitive agreement was available. We eliminated seven deals between affiliated parties in which the deal did not have an MAE clause. The resulting sample includes 1,293 transactions (the Deal Sample), which have an aggregate deal value of $8.5 trillion.

Exhibit 1 provides the number of transactions per year in the Deal Sample. It shows that the number of deals broadly follows M&A activity in general (which itself follows general economic activity). Exhibit 1 also shows ten deals announced in 2020. The last deal in the sample was announced on March 2, 2020, meaning that no deals larger than $1 billion were announced in the remainder of March or all of April.

Exhibit 1: Number of Transactions in Deal Sample



For each transaction in the Deal Sample, the MAE clause was downloaded. For each MAE clause, the introduction to the carveouts was analyzed to determine whether the MAE must "arise from" (or similar) the enumerated categories in order to be carved out (i.e., a causal requirement);[211] or whether the MAE must be "related to" (or similar) the enumerated categories to be carved out.[212]

211. Although the phrasing varied considerably, common phrasing that flagged a causal requirement included "arising from," "resulting from," "attributable to," "caused by," and "due to."

212. Although the phrasing varied considerably, common phrasing that flagged no causal requirement included "related to," "impact of," "resulting directly or indirectly," and

Each carveout was then analyzed and coded, using the coding system described in Exhibit 2.[213] MAE carveouts that did not fall into one of the categories listed in Exhibit 2 were coded as "Other."

Exhibit 2: Carveout Definitions

Code*	**Description**
ChEcon	Exception for change in economy or business in general
ChIndus	Exception for change in general conditions of the specific industry
ChSecM	Exception for change in securities markets
ChPrVol	Exception for change in trading price or trading volume of the company's stock
ChIntR	Exception for change in interest rates
ChExch	Exception for change in foreign exchange rates
War	Exception for acts of war, terrorism, or hostilities (human-made disasters)
God	Exception for acts of God (natural disasters)
AnnTran	Exception for effects of the announcement of the transaction
ChAction	Exception for changes caused by the taking of any actions required or permitted or in any way resulting from or arising in connection with the agreement

"arising in connection with." When phrasing included both causal and noncausal language (e.g., "resulting from or related to"), the noncausal language governed.

213. We began with the coding system developed in Eric Talley & Drew O'Kane, The Measure of a MAC: A Machine-Learning Protocol for Analyzing Force Majeure Clauses in M&A Agreements, 168 J. Institutional & Theoretical Econ. 181, 189 tbl.1 (2012). We then made adjustments: For example, we combined "exception for war or major hostilities" (EWar) and "exception for acts of terrorism" (ETerror) because these two carveouts invariably appear together; we deleted "exception for reduction of customers or decline in business" (ERedCust) because this carveout is typically incorporated into other, broader carveouts; and we added common carveouts such as "changes in prevailing law" (ChLaw) and "failure to meet forecasts" (FailForecast).

ChGAAP	Exception for changes in GAAP
ChLaws	Exception for changes in laws or regulations
FailForecast	Exception for failing to meet forecasts or analyst projections

* Codes are adapted from Talley & O'Kane. See supra note 213.

In total, 13,381 carveouts were analyzed and coded across the 1,293 transactions in the sample, yielding 10.3 MAE carveouts, on average, per deal. Each of these 13,381 carveouts was further coded according to whether it was categorically carved out from the MAE or carved out only if it did not affect the target company disproportionately relative to other companies in its industry or the economy overall.[214] Each coding was originally done using algorithms and then checked manually to confirm and correct the algorithms' output.[215]

For each deal in the Deal Sample, the ordinary course covenant was also downloaded. Virtually all of the ordinary course covenants included a general affirmative ordinary course covenant (GAOCC), a specific affirmative ordinary course covenant (SAOCC), and a long list of negative covenants. Exhibit 3 provides a typical formulation of the two affirmative ordinary course covenants:

214. The disproportionate carveback could be found in three places: within the carveout itself, at the end of all the carveouts, or at the beginning of all of the carveouts. All three of these were checked and incorporated.

215. We believe that this approach yields a significantly higher accuracy rate than the 70% to 80% accuracy reported by machine coding alone. See Talley & O'Kane, supra note 213, at 197 (reporting approximate 73% to 78% accuracy rate for machine coding alone). In addition, only manual coding can capture some of the nuances and details that are critical for assessing the overall MAE clause, such as the causal requirements. See infra section II.E.

Exhibit 3: Ordinary Course Covenant Definitions

[T]he Company shall, and shall cause each of its Subsidiaries to,	
(A) conduct its business in all material respects in the ordinary course of business consistent with past practice and	General Affirmative OC Covenant
(B) use commercially reasonable efforts to preserve intact its current business organization, assets, technology and franchises, keep available the services of the employees of the Company and its Subsidiaries, maintain in effect all of its material Permits, and maintain relationships with its significant customers, suppliers and distributors, and other Persons with which it has significant business relations.	Specific Affirmative OC Covenant
[+ typically many negative covenants]	

The GAOCC was coded according to whether it had a materiality qualifier, whether it had an efforts qualifier, and whether it had a "consistent with past practice" requirement.[216] The SAOOC was coded as to whether it had an efforts qualifier (and if so, whether it was "commercially reasonable efforts" or some other efforts qualifier). The ordinary course covenants were also coded overall as to whether there was a carveout for actions taken with the buyer's consent.

Exhibit 1 above shows that the number of deals in the Deal Sample compares favorably to the well-known Nixon Peabody study of MAE clauses for the last year in which the Nixon Peabody data is available.[217] The Deal Sample is also more detailed than the database of MAE clauses compiled by Jennejohn et al.,[218] and it is by far the most detailed and comprehensive database of ordinary course covenants that currently exists. To our

216. These are the three features of ordinary course covenants that practitioners generally flag as being relevant. See, e.g., Perricone, supra note 58. See generally supra section I.B (providing a more in-depth discussion of these three features).

217. Nixon Peabody LLP, MAC Survey: NP 2019 Report 3 (2019), https://www.nixonpeabody.com/-/media/Files/PDF-Others/mac-survey-2019-nixon-peabody.ashx?la=en [https://perma.cc/HS9K-PR7D] (noting "78 deals in our sample valued at $1 billion or more").

218. For example, the Jennejohn et al. sample examines the "disproportionality" qualifier only with respect to "pandemics" and "acts of God" (or their equivalents). See Jennejohn et al., supra note 164, at 6. Our analysis indicates that the disproportionality qualifier invariably applies to some carveouts but not others. The Jennejohn et al. sample also does not identify whether the carveouts include a causal requirement. See id. at 3–4; see also supra section II.E.

knowledge, the Deal Sample represents the most comprehensive, detailed, and accurate sample of MAE clauses and ordinary course covenants currently available among either academics or practitioners.

B. *MAE Objects*

This section examines the MAE "objects," or the triggers for an MAE. We find that an MAE is triggered by a material adverse effect on: results of operations (91.3% of the sample), financial condition (75.6%), assets or liabilities (59.6%), business (59.6%),[219] and properties (24.5%). None of these objects are terribly surprising. More interesting is the fact that "prospects" appears as an MAE object in only 1.5% of the sample, contrary to the claim in the authoritative Kling and Nugent treatise that "prospects" is a regular MAE object.[220]

Instead of identifying "prospects" as an MAE object, we find that 48% of MAEs have a forward-looking overlay on all MAEs by tethering the MAE object to a "reasonably likely" qualifier. The following hypothetical structure is representative:

> "Material Adverse Effect" shall mean any event, change, circumstance, effect, development or state of facts that, individually or in the aggregate <u>has, or would reasonably be likely to have</u>, a material adverse effect on the business, assets, financial condition, properties, liabilities or results of operations of the Company and its Subsidiaries, taken as a whole;

In contrast, the remaining 52% of MAEs do not include this forward-looking language:

> "Material Adverse Effect" with respect to any Person means any effect, change, event or occurrence that, individually or in the aggregate, <u>has a material adverse effect</u> on the business, assets, liabilities, results of operations or financial condition of such Person and its Subsidiaries taken as a whole;

Clearly, the MAE is more buyer-friendly with the "reasonably likely" language than without it. While a "reasonably likely" standard is probably not as forward-looking as an explicit "prospects" object, it clearly has the effect of expanding the reach of all the MAE objects.[221]

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219. There is 100% overlap between "assets or liabilities" and "business" MAE objects.

220. Kling et al., supra note 52, § 11.04[9] ("[S]ome [MAEs] include 'prospects' in the list of things that there has been no material adverse change in.").

221. In a recent MAE case, the court declined to give full weight to the forward-looking nature of the "reasonably likely" language in the MAE, in part because the parties did not include "prospects" as an MAE object. See AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, No. 2020-0310-JTL, 2020 WL 7024929, at *62–63 (Del. Ch. Nov. 30, 2020). Our data indicates that "prospects" is extremely rare as an MAE object. Perhaps "prospects" will reemerge as an MAE object in response to this ruling, as a way of ensuring that full weight is given to the forward-looking nature of the "reasonably likely" language.

Another interesting finding from our database is the complete absence of "liquidity" as an MAE object.[222] The absence of "liquidity" makes conceptual sense because liquidity (unlike solvency) is a short-term problem that presumably can be solved through bridge financing. For this reason, it cannot meet the "durational significance" requirement to trigger an MAE, at least in the large deals that comprise our sample. Anecdotally, we find that liquidity does appear as an MAE object in some smaller bank deals, where a liquidity issue can plausibly have durationally significant consequences.

To see the implications of the absence of liquidity as an MAE object, consider the deal between Far Point Acquisition Corp., a special purpose acquisition vehicle sponsored by Third Point LLC, and Global Blue, a tourism-tax-shopping-refund company owned by Silver Lake Partners.[223] Global Blue runs airport kiosks that enable shoppers to get sales tax refunds when they return home.[224] On January 16, 2020, Far Point announced that it would acquire Global Blue for $2.6 billion.[225] But when COVID-19 hit, Far Point wanted out of the deal. On May 7, Dan Loeb (the founder of Third Point) urged Far Point shareholders to vote against the deal.[226] In response, on July 14, Silver Lake (the owner of Global Blue) made certain unilateral concessions to bolster liquidity, presumably in an effort to sufficiently sweeten the deal and increase the odds that Far Point would close.[227] Whatever benefit the move might have for obtaining Far

222. One MAE references "liquid assets." See Agreement and Plan of Merger Among Brocade Communication Systems, Inc., Falcon Acquisition Sub, Inc. & Foundry Network, Inc., at A-3 (July 21, 2008), https://www.sec.gov/Archives/edgar/data/1009626/000089161808000366/f42362exv2w1.htm [https://perma.cc/9KM2-RBLF] ("'Company Material Adverse Effect' shall mean any effect, change, claim, event or circumstance that . . . would reasonably be expected to . . . have or result in a material adverse effect on, (a) the business, financial condition, cash position, liquid assets, capitalization or results of operations . . . .").

223. One of the authors (Professor Subramanian) was retained as an advisor to Far Point during the pendency of this deal.

224. How to Shop Tax Free, Global Blue, https://www.globalblue.com/tax-free-shopping/how-to-shop-tax-free [https://perma.cc/KDB9-5QVN] (last visited Feb. 16, 2020).

225. Global Blue and Far Point Acquisition Corporation (NYSE: FPAC) Announce Business Combination, Far Point & Global Blue, https://www.globalblue.com/corporate/media/press/article934552.ece/binary/Global_Blue_and_Far_Point_Acquisition_Corporation_Announce_Business_Combination.pdf [https://perma.cc/GQH3-VRSM] (last visited Jan. 28, 2021).

226. See Keith Campbell, Dan Loeb Wants to Scrap Global Blue Deal as Virus Hits Luxury Travel, Bloomberg (May 7, 2020), https://www.bloomberg.com/news/articles/2020-05-07/loeb-wants-to-scrap-global-blue-deal-as-virus-hits-luxury-travel (on file with the *Columbia Law Review*).

227. Specifically, Global Blue committed to not issuing a pretransaction dividend of 154 million euros ($176 million), converting 50 million euros of its preferred shares to ordinary shares, and offering a funding facility for $75 million to Global Blue. See Joshua Franklin, Silver Lake Offers Concessions to Secure $2.6 Billion Global Blue Deal, Reuters (July 14, 2020),

Point shareholder approval, it would not change the MAE calculus for the Far Point board because the MAE provision did not include a "liquidity" object. In August 2020, the parties announced an amended deal, with some of the consideration shifted from cash to stock.[228]

C. *MAE Carveouts Generally*

This section examines the general evolution of MAE carveouts since 2005. Exhibit 4 shows that the base MAE language has not increased in length since 2005. The mean number of words in the base MAE language is 65 words throughout the timeframe of analysis; the median is 60. Exhibit 4 further shows that the MAE carveout language has increased dramatically in length, from approximately 220 words in 2005, on average, to more than 600 words by 2020.

Exhibit 4: Length of MAE Clause & Carveouts

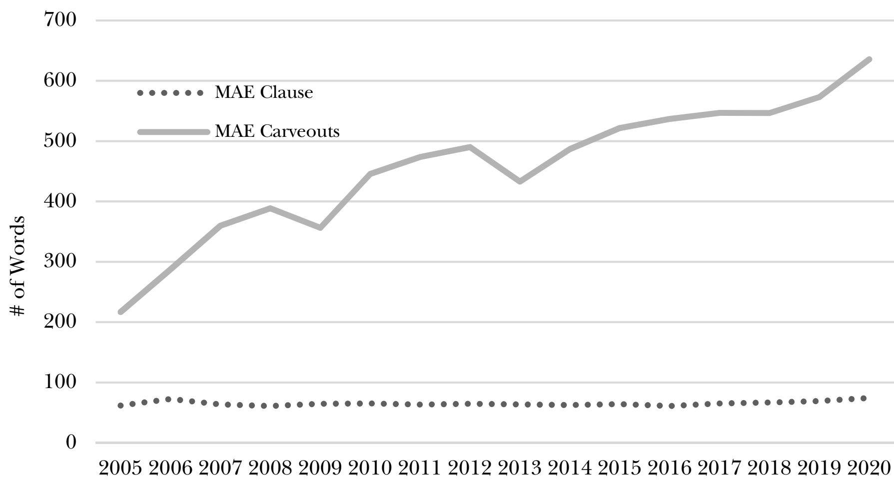


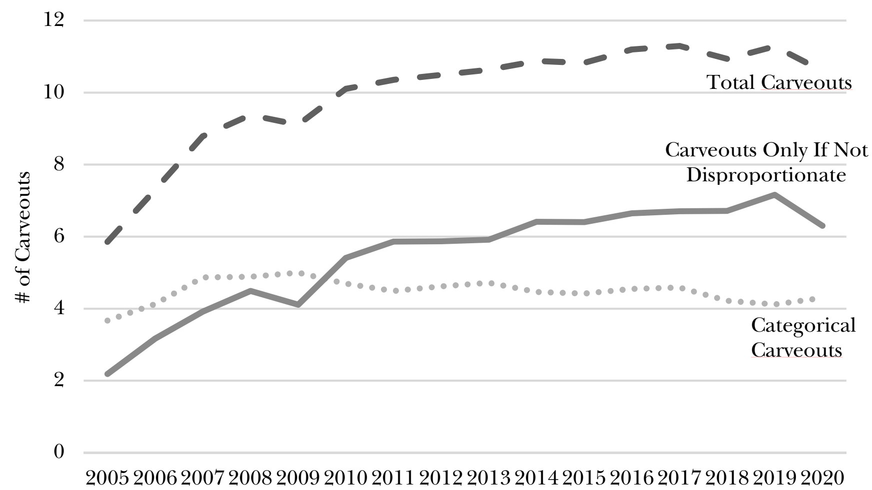
Exhibit 5 shows that the number of carveouts has correspondingly increased, from approximately six carveouts on average in 2005 to more than ten carveouts on average by 2020.[229] Exhibit 5 further shows that this increase is driven entirely by the increase in "only if not disproportional" carveouts, i.e., a "disproportionate carveback." The number of categorical carveouts has remained roughly unchanged during this timeframe.

Exhibit 5: Number of MAE Carveouts

https://www.reuters.com/article/us-globalblue-m-a-farpoint/silver-lake-offers-concessions-to-secure-2-6-billion-global-blue-deal-idUSKCN24F2MG [https://perma.cc/XVY4-DHUJ].

228. Global Blue and Far Point Announce Agreements, supra note 198.

229. For a related finding, see Coates, supra note 36, at 50 tbl.3 (finding that M&A agreements grew from 16,994 words in 1994 to 44,730 words in 2014).



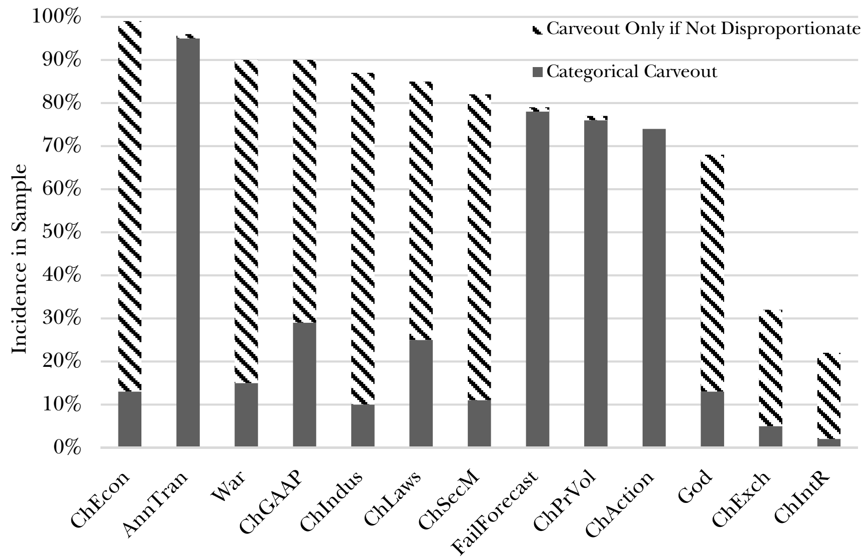
All else being equal, a categorical carveout is more seller-friendly than a disproportionate carveback, because a categorical carveout provides a broader exception to an MAE. A disproportionate carveback, however, also creates an additional source of litigation risk compared to a categorical carveout, because the buyer can now argue that the effect was disproportionate at the target company.[230]

Overall, the picture that emerges from the Deal Sample is an increase in carveout language and an increase in the number of carveouts. We conclude from this data that MAE carveouts have generally become more specific and more detailed over the past fifteen years.

Exhibit 6 provides the incidence of the carveouts that were coded in the Deal Sample.

230. See infra section III.C for further discussion on the implications of disproportionate carvebacks.

Exhibit 6: MAE Carveout Frequency (2005–2020)

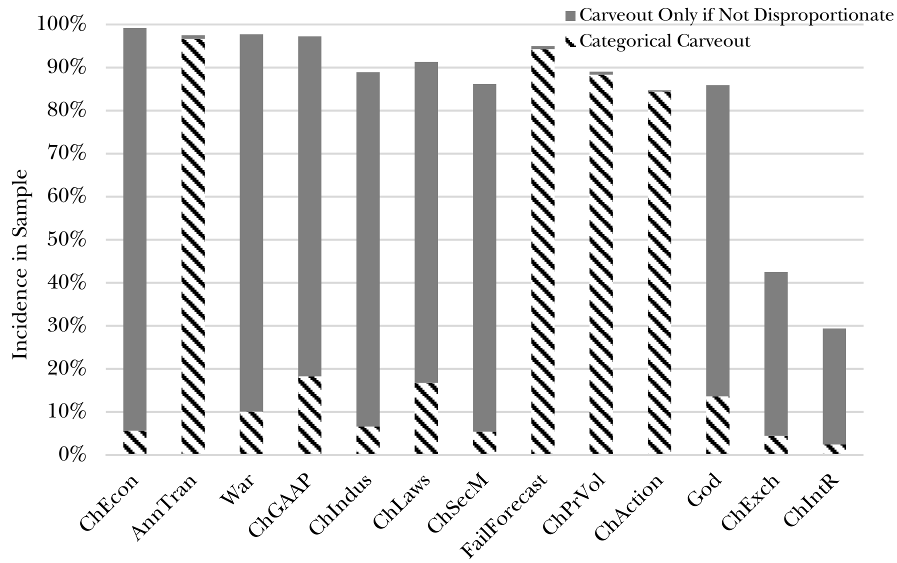


This figure shows that the Change in Economic Conditions Carveout (ChEcon) is virtually ubiquitous in the sample—appearing in 99+% of transactions. Since May 2009, the only time that this carveout (and/or the similar Change in Industry Conditions Carveout) did *not* appear is in the extraordinarily rare case where there were no MAE carveouts at all. Other carveouts that appear in 90+% of the sample are: Exception for the Effects of the Announcement of the Transaction (AnnTran) (95%); Acts of War, Terrorism or Hostilities (War) (90%); and Exception for Changes in GAAP (ChGAAP) (90%).

It is unsurprising that the four carveouts that are idiosyncratic to the target company—AnnTran, forecasts or analyst projections (FailForecast), trading price or volume of company stock (ChPrVol), and actions required or permitted by agreement (ChAction)—are almost universally categorical carveouts because these events, by definition, would *always* affect the target company disproportionately. The remaining carveouts, which *could* affect the target company disproportionately, are typically carved out only if the effect is not disproportionate.

Exhibit 7 provides the incidence for the same carveouts, but focuses solely on transactions in the Deal Sample announced since January 2010 (n=838).

Exhibit 7: MAE Carveout Frequency (2010–2020)



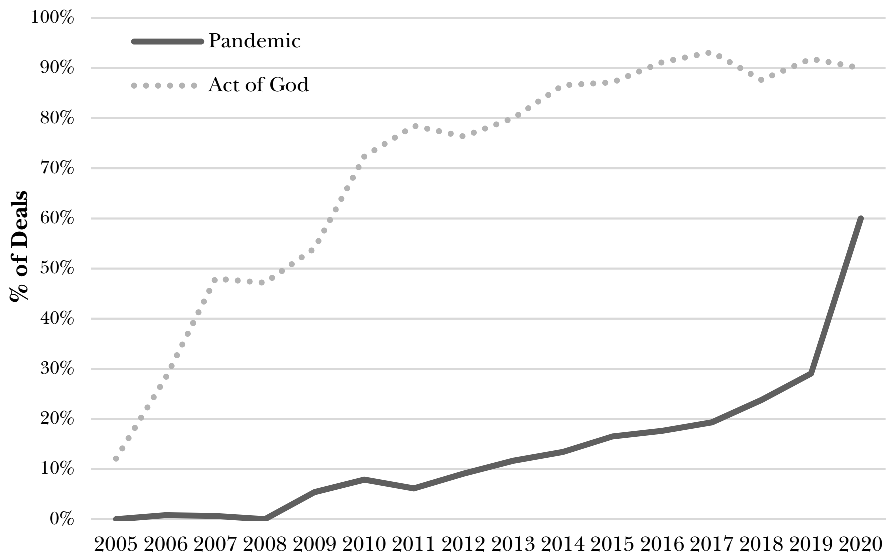
Not surprisingly, given the overall increase in the number of carveouts, the incidence of all carveouts increases significantly in this more recent timeframe. Five carveouts (ChEcon, AnnTran, War, ChGAAP, and FailForecast) are virtually ubiquitous in the sample, and another six carveouts appear in 80+% of deals: change in general conditions of specific industry (ChIndus), laws or regulations (ChLaws), securities markets (ChSecM), ChPrVol, ChAction, and Act of God. An Act of God Carveout appears in a full 85% of deals announced since 2010. The next section focuses on this particular carveout.

D. *"Act of God" and Pandemic Carveouts*

Exhibit 8 shows the evolution of "Act of God" and Pandemic Carveouts.[231] This chart shows that the incidence of both of these carveouts has increased dramatically since 2005.

231. "Act of God" includes carveouts for any of the following: force majeure, calamity, hurricane, earthquake, natural disaster, tornado, flood, or Act(s) of God (Act of God Carveout). "Pandemic" includes carveouts for any of the following: pandemic, epidemic, illness, disease, influenza, quarantine, and public health (Pandemic Carveout).

Exhibit 8: Act of God and Pandemic Carveouts



Act of God Carveouts have gone from approximately 13% incidence in 2005 to 90% incidence by 2020.[232] The specific triggers are: natural disaster (56%), earthquake (39%), hurricane (38%), flood (28%), tornado (26%), force majeure (18%), Act of God (13%), and calamity (11%).

Pandemic Carveouts have gone from nonexistent in 2005 to 29% by 2019, then spiking to 60% for deals announced in 2020.[233] Pandemic Carveouts are invariably layered on top of Act of God Carveouts: Only six deals in the Deal Sample include a Pandemic Carveout but not an Act of God Carveout.[234]

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232. The average incidence across the sample is 68% for Act of God Carveouts. Jennejohn et al. report only a 36% incidence of Act of God Carveouts for a similar timeframe of analysis. See Jennejohn et al., supra note 164, at 4 & Panel A. The difference is likely due to the fact that Jennejohn et al. do not include "natural disaster" as an Act of God Carveout. See Julian Nyarko, Coronavirus Terms, https://juliannyarko.com/wp-content/uploads/coronavirus/coronavirus_terms.txt [https://perma.cc/5JW7-FVHA] (last visited Jan. 28, 2021) (identifying fifty search terms but not "natural disaster"). In our database, "natural disaster" is by far the most common way that Act of God Carveouts are referenced.

233. See supra Exhibit 8.

234. Cf. Agreement and Plan of Merger by and Among Analog Devices, Inc., Magneto Corp. & Maxim Integrated Products, Inc., at A-3, A-11 (July 12, 2020), https://www.sec.gov/Archives/edgar/data/6281/000119312520192918/d934725dex21.htm [https://perma.cc/CR9A-XUMA] [hereinafter ADI–Maxim Merger Agreement] (including a carveout for "the continuation or worsening of the COVID-19 pandemic" but not for an "Act of God"). This deal is not included in the Deal Sample because it was announced after the timeframe of our analysis, but we examine it later in this Article. See infra section III.A.

As section II.C notes, virtually all MAEs have a carveout for Change in Economic Conditions (ChEcon).[235] The proliferation of Act of God Carveouts, against the backdrop of ChEcon Carveouts, suggests that practitioners believe that Act of God Carveouts address something different than what ChEcon Carveouts address.

Similarly, the proliferation of Pandemic Carveouts, against the backdrop of Act of God Carveouts, suggests that practitioners believe that Pandemic Carveouts address something different than what Act of God Carveouts address. Exhibit 8 shows that Pandemic Carveouts spiked in the first quarter of 2020. Practitioners added specific carveouts for pandemics even though 90+% of deals at this time already included carveouts for acts of God generally.[236] Even though pandemics are arguably acts of God, as the possibility of a pandemic became more salient toward the end of 2019, practitioners acted as if pandemics were potentially different than generic acts of God.[237]

Cravath, Swaine & Moore has reported that Pandemic Carveouts appeared in *all* deals greater than $100 million that were announced between April and September 2020.[238] This makes conceptual sense: Once COVID-19 hit, any deal that did not have a Pandemic Carveout would give the buyer too much optionality to walk away; sellers would reasonably insist that any MAE at the company due to a worsening of COVID-19 should be a buy-side risk.[239] Put differently, after March 2020, any buyer who was not willing to accept the effect of COVID-19 on the seller's business would not be a serious buyer.

In November 2020, Vice Chancellor Laster held in *AB Stable*, concerning the Mirae–Anbang deal, that the buyer bore the risk of COVID-19, despite the absence of an explicit carveout for pandemics, because the MAE *did* include a carveout for "calamity": "The COVID-19 pandemic fits within the plain meaning of the term 'calamity.' Millions

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235. See supra Exhibit 7.

236. See supra Exhibit 8.

237. See COVID-19 and "Material Adverse Effect" Provisions, Dechert LLP (Mar. 16, 2020), https://www.dechert.com/knowledge/hot-topic/coronavirus-business-impact/covid-19-and–material-adverse-effect–provisions.html [https://perma.cc/8QPL-CSCL]. The article notes:

> While this carve-out [for pandemics] is usually observed in only a fraction of M&A deals, we have observed a substantial increase in its usage in recent weeks, with two high-profile deals specifically calling out changes arising out of COVID-19 as excluded from the determination of an MAE. Others may rely on more general carve-outs such as calamities, natural disasters or acts of God, *but one can reasonably question whether these concepts capture a health crisis such as the coronavirus outbreak.*

Id. (emphasis added).

238. See Zoubek & Hochenberg, supra note 190, at 6.

239. See infra section III.A (noting that a disproportionality carveback on a Pandemic Carveout for a deal announced in August 2020 may give the buyer too much optionality).

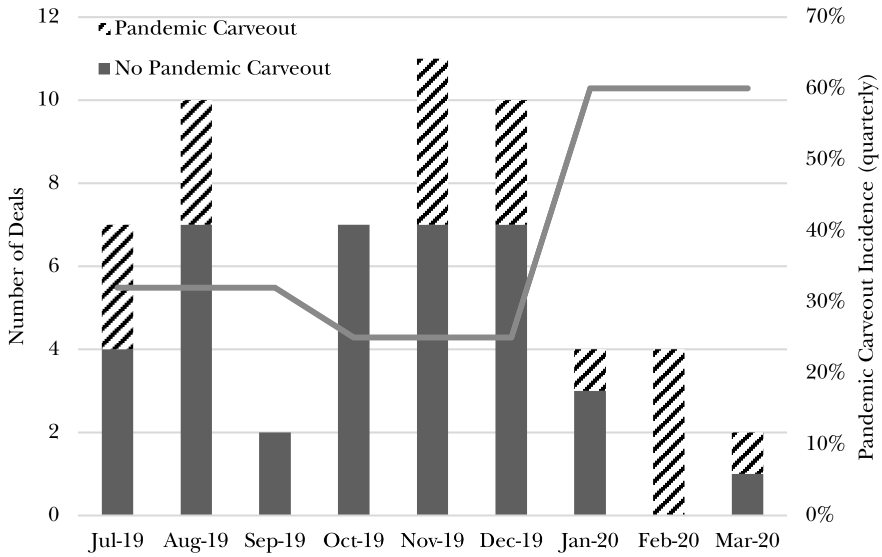
have endured economic disruptions, become sick, or died from the pandemic. COVID-19 has caused human suffering and loss on a global scale . . . . The COVID-19 outbreak has caused lasting suffering and loss throughout the world."[240] The Vice Chancellor's holding that COVID-19 constitutes a "calamity" might seem to be at odds with the finding presented in this Article, and further confirmed by Cravath, that Pandemic Carveouts have proliferated since COVID-19 struck. Specifically, if COVID-19 is a calamity, and calamity is oftentimes already carved out in the MAE, then why did practitioners need to explicitly carve out "pandemic" in 60% of deals in the first quarter of 2020 and in every deal since April 2020?

The answer might be found in the fact that the Mirae deal was signed in September 2019—before COVID-19 became a household word. Parties then might not have been sufficiently attuned to pandemic risk such that they would carve it out explicitly, but they would nevertheless have wanted to read "calamity" sufficiently broadly to capture a pandemic. A counterpoint to this explanation is that our data shows that a full 30% of deals in 2019 included a specific Pandemic Carveout—suggesting that sophisticated parties knew how to write a Pandemic Carveout into their deal even in 2019. Regardless of which way that debate is resolved, it is clear that not writing an explicit Pandemic Carveout in September 2020 would create a different inference than it might have in September 2019. That is, the court was willing to provide a relatively broad reading of "calamity" in a contract written in September 2019 but might not be so inclined to provide the same broad reading for a contract written in September 2020. And practitioners, of course, not willing to take that risk, have responded by explicitly allocating pandemic risk to the buyer through an MAE carveout.

Exhibit 9 provides further detail on the nature of practitioners' responsiveness to the COVID-19 pandemic.

240. AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, No. 2020-0310-JTL, 2020 WL 7024929, at *57 (Del. Ch. Nov. 30, 2020).

Exhibit 9: Pandemic Carveouts (2019:3–2020:1)



This chart shows that the incidence of Pandemic Carveouts actually trended downward during the second half of 2019—going from 30% incidence in deals announced in the first quarter to 25% incidence for deals announced in the fourth quarter—and spiked to 60% only in the first quarter of 2020. This suggests that practitioners responded to COVID-19 and that the increase in Pandemic Carveouts was not part of the general trend, documented in section II.B, toward more specific and more detailed MAE carveouts over the past fifteen years.

Practitioners may be layering more specific carveouts on top of Act of God Carveouts at least in part due to climate change. Acts of God are typically understood to be events not caused by humans (in contrast to, say, war or terrorism, which are clearly human-made). But with increasing evidence that climate change is caused by humans[241] and that climate change results in more extreme weather patterns,[242] it may no longer be clear whether, for example, the fires in northern California in the fall of 2020 are an act of God or a human-made disaster. More specific carveouts avoid a fight as to whether a particular event was a human-made disaster

241. See Climate Change: How Do We Know?, NASA: Global Climate Change, https://climate.nasa.gov/evidence [https://perma.cc/3JHH-QTSG] (last updated Mar. 3, 2021) ("The current warming trend is of particular significance because most of it is extremely likely (greater than 95% probability) to be the result of human activity since the mid-20th century and proceeding at a rate that is unprecedented over decades to millennia.").

242. Report: Climate Change is Making Specific Weather Events More Extreme, Nat'l Oceanic & Atmospheric Admin. (Dec. 9, 2019), https://www.noaa.gov/news/report-climate-change-is-making-specific-weather-events-more-extreme [https://perma.cc/A8RR-SLVX].

and therefore (arguably) not an act of God. A specific carveout for pandemics, for example, requires no investigation as to whether the pandemic was caused by humans. Relying instead on a general Act of God Carveout might arguably require such an investigation.

To summarize, the fact that practitioners layered Act of God Carveouts on top of Change in Economic Conditions Carveouts suggests that practitioners believed that they potentially addressed different things, and the fact that practitioners further layered Pandemic Carveouts on top of Act of God Carveouts suggests that practitioners believed that they also potentially addressed different things. The next section explains why both of these points might be particularly true when the carveouts collectively include a causal requirement.

E. *Causal Requirement for Carveouts*

Every MAE clause will specify whether the MAE must be caused by the enumerated categories in order to be carved out, or instead, whether there is no causal requirement in order for the enumerated categories to be carved out. One could read the carveout as narrower (i.e., more buyer-friendly) if there is a causal requirement than if there is not. When there is a causal requirement, the carved-out category must cause the MAE (e.g., a pandemic must cause the material adverse effect on the business in order to be carved out). When there is no causal requirement, the carved-out category must merely relate to the MAE in order to be carved out (e.g., a general economic downturn must relate to the material adverse effect on the business). In general, the Change in Economic Conditions (ChEcon) and Change in Industry (ChIndus) Carveouts become more consequential as a catch-all for adverse effects when there is no causal requirement because many negative effects (such as a pandemic) can lead to an economic downturn.[243]

Of the MAE clauses in the Deal Sample, 47% have a causal requirement, while the remaining 53% do not.[244] Exhibit 10 shows a significant downward trend in causal requirements, from 55% of deals in 2005 to 20% of deals by 2020.

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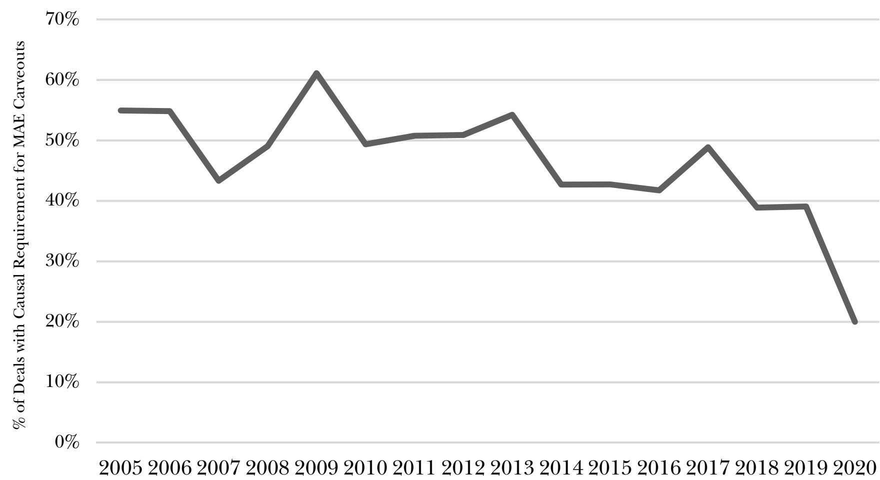
243. As Professor Robert Miller aptly commented in a recent presentation of this Article, "I wouldn't go around on the buy-side handing out 'related to,' without specifying precisely how it's related to."

244. For the methodology to determine what constitutes a causal requirement, see supra section II.A.

Exhibit 10: MAE Carveouts—Causal Requirement



In general, carveouts would seem to have a broader reach when there is no causal requirement. Conversely, transactional planners must negotiate carveouts more specifically when there is a causal requirement, because the causal requirement will narrow the reach of each carveout.

To see the causal requirement in action, consider LVMH's acquisition of Tiffany & Co., the well-known luxury goods retailer.[245] In November 2019, LVMH agreed to acquire Tiffany for $135 per share in cash, or $16.3 billion in total value.[246] But by September 2020, with the deal still not closed due to pending antitrust clearances, LVMH declared that the deal was off, arguing for an MAE and ordinary course violations at Tiffany.[247] The MAE clause in the merger agreement had a causal requirement, as well as carveouts for "any hurricane, tornado, flood, earthquake or other natural disaster," but no carveout for a pandemic.[248]

245. One of the authors (Professor Subramanian) was retained as an advisor to LVMH during the pendency of this deal.

246. LVMH Reaches Agreement with Tiffany & Co., LVMH (Nov. 25, 2019), https://www.lvmh.com/news-documents/press-releases/lvmh-reaches-agreement-with-tiffany-co [https://perma.cc/8NMK-SUE7].

247. Complaint at 2–4, 102–03, Tiffany & Co. v. LVMH Moët Hennessy-Louis Vuitton SE, No. 2020-0768-JRS (Del. Ch. filed Sept. 9, 2020).

248. Agreement and Plan of Merger by and Among Tiffany & Co., LVMH Moët Hennessy-Louis Vuitton SE, Breakfast Holdings Corp. & Breakfast Acquisition Corp. § 1.1 (Nov. 24, 2019), https://www.sec.gov/Archives/edgar/data/98246/000119312520001590/d841743ddefm14a.htm#rom841743_85 [https://perma.cc/JB9U-FHPS] ("[P]rovided, however, in the case of clause (a) no effect *arising out of or resulting from* any of the following shall be deemed either alone or in combination to constitute a Material Adverse Effect: . . . (viii) any hurricane, tornado, flood, earthquake or other natural disaster . . . ." (emphasis added)).

LVMH claimed that the causal requirement in the MAE clause limited the scope of ChEcon and other broad carveouts:

> [T]he Material Adverse Effect definition in the Agreement excludes only effects "arising out of or resulting from" any of the carved-out events. This means that the exclusions must be "causal" – the exclusions must have caused the Material Adverse Effect. Here the Material Adverse Effect resulted from the Pandemic . . . and not general economic or political conditions. For that reason, the generic carve-outs offer Tiffany no protection from harm caused by the Pandemic . . . . While the Pandemic has had and continues to have an impact on economic conditions and has triggered political responses, the effect on the Company does not result from such economic conditions or political responses but instead from the Pandemic. Simply put, Tiffany mistakenly conflates the cause of its downturn (the Pandemic) with the consequences of that event (e.g., economic and political implications).[249]

Tiffany responded that, "[b]efore February 2020, only a small fraction of merger agreements include[d] an explicit pandemic carve-out."[250] This is empirically incorrect: Our dataset indicates that Pandemic Carveouts appeared in approximately 30% of deals in 2019[251] and 60% of deals announced in the first quarter of 2020.[252] Putting aside the empirical point, Tiffany responded on the causal requirement:

> Every general economic or industry condition has an underlying cause, whether it be a credit crisis, an oil shortage, a stock-market crash, a terrorist attack or a pandemic. The drafters of a merger agreement need not anticipate every conceivable cause of an industry-wide decline and specifically identify each of those causes in the MAE definition for the broad exclusions for general economic or industry conditions to have effect. If they did, the definition of an MAE would go on for pages, and the broad exclusions would be rendered meaningless.[253]

Before these issues of contractual interpretation were resolved in the Delaware Chancery Court, the parties recut the deal in October 2020 at a 2.6% lower price; it closed in early 2021.[254]

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249. LVMH's Verified Counterclaim and Answer to Verified Complaint at 20–22, Tiffany & Co. v. LVMH Moët Hennessy-Louis Vuitton SE, No. 2020-0768-JRS (Del. Ch. filed Sept. 28, 2020), 2020 WL 5870414.

250. Tiffany & Co.'s Answer to Verified Counterclaim at 7, Tiffany & Co. v. LVMH Moët Hennessy-Louis Vuitton SE, No. 2020-0768-JRS (Del. Ch. filed Oct. 13, 2020), 2020 WL 6130727.

251. See supra Exhibit 8.

252. See supra Exhibit 9.

253. Tiffany & Co.'s Answer to Verified Counterclaim, supra note 250, at 6.

254. Press Release, LVMH, LVMH Completes the Acquisition of Tiffany & Co. (Jan. 7, 2021), https://r.lvmh-static.com/uploads/2021/01/lvmh-press-release-7-jan-2021.pdf [https://perma.cc/2JZJ-RVTD].

One month after LVMH–Tiffany settled, in November 2020, the *AB Stable* court declined to require a causal connection when interpreting an MAE clause specifying that events "arising out of, attributable to, or resulting from" the enumerated carveouts were excluded from the MAE definition.[255] The court explained that:

> The definition [of MAE carveouts] lists nine categories of effects, which are separated by the word "or." Section 9.5 of the Sale Agreement . . . provides that "[t]he term 'or' is not exclusive. The use of 'or' in its non-exclusive sense means that each exception applies on its face, not based on its relationship to any other exception or some other root cause."[256]

It is not clear to what extent, if at all, the court relies on this definition in Section 9.5. Although we have not done a systematic analysis, the equivalent of Section 9.5 does not seem to appear often in the Deal Sample. The court was also not presented with the evidence described in this Article, indicating that MAEs are almost exactly split between causal and noncausal language.

Five months later, in *Snow Phipps Group, LLC v. KCAKE Acquisition, Inc.*, the court also declined to apply a causal requirement but relied specifically on the noncausal language in the MAE clause to do so:

> The language "arising from or related to" is broad in scope under Delaware law. A particular effect is excluded if it relates to an excluded cause, even if it also relates to non-excluded causes; any other interpretation impermissibly reads the broad term "related to" out of the contract. Thus, revenue declines arising from or related to changes in law fall outside the definition of an MAE, regardless of whether COVID-19 prompted those changes in the law.[257]

On one hand, there would seem to be a difference between "arising from" and "related to" (courts have given significance to far smaller differences in drafting) and the fact that the two different approaches are split almost exactly 50/50 in our sample should count for something. On the other hand, as Tiffany pointed out in its briefs, there is a root cause for every MAE carveout, and trying to discern root causes might be a fool's errand. The *AB Stable* court did acknowledge that "deal lawyers negotiate vigorously over language that is designed to make an MAE definition relatively more or less forward-looking."[258] Anecdotally, we are aware of situations where the attorneys went back and forth between "arising from" (buyer's proposal) versus "relating to" (seller's proposal). It would

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255. See AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, No. 2020-0310-JTL, 2020 WL 7024929, at *55–56 (Del. Ch. Nov. 30, 2020) ("The definition [of MAE] does not require a determination of the root cause of the effect.").

256. Id.

257. Snow Phipps Grp., LLC v. KCAKE Acquisition Inc., No. 2020-0282-KSJM, 2021 WL 1714202, at *35 (Del. Ch. Apr. 30, 2021) (citations omitted) (internal quotation marks omitted).

258. Id. at *61.

therefore seem appropriate that a court should also consider, and give meaning to, vigorous negotiation over the causal requirement.

F. *Ordinary Course Covenants*

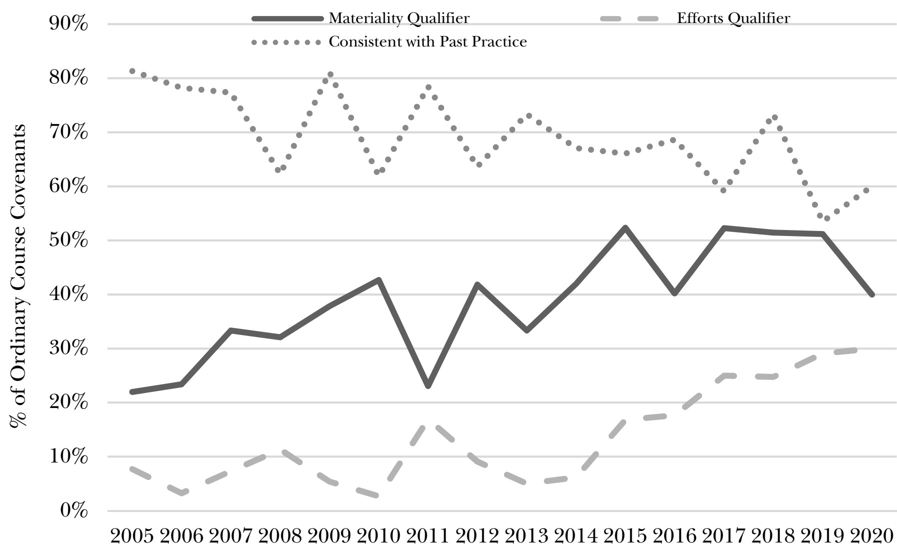
For each deal in the Deal Sample, we examined the most important features of the ordinary course covenant. As section I.B describes, the parties will invariably include two affirmative ordinary course provisions: the general affirmative ordinary course covenant (GAOCC) and the specific affirmative ordinary course covenant (SAOCC). Ninety-four percent of deals in the Deal Sample had a GAOCC and an SAOCC. The remaining 6% of deals had only a GAOCC.

As section II.A describes, the GAOCCs were coded according to whether they included a materiality constraint, an efforts qualifier, and a "consistent with past practice" requirement. A materiality constraint and an efforts qualifier generally loosen the ordinary course requirement (i.e., these features are more seller-friendly) because they provide more discretion for the seller in running the business in the ordinary course.[259] A "consistent with past practice" provision tightens the ordinary course covenant (i.e., this feature is less seller-friendly) because, when such a clause exists, the requirement to act in the ordinary course is tethered to past practice.[260] Exhibit 11 provides the incidence of these features among the GAOCCs in the Deal Sample.

259. See supra notes 58–68 and accompanying text.

260. See, e.g., Kling et al., supra note 52, § 13.03 n.1 ("Arguably, an obligation to conduct business only 'in the ordinary course, consistent with past practice' is a stricter standard than one which merely refers to the 'ordinary course.'").

Exhibit 11: General Affirmative Ordinary Course Covenant Features



Notes: Consistent with Past Practice includes "substantially the same manner as previously conducted." Materiality Qualifier does not include material compliance with law.

Exhibit 11 shows that GAOCCs have become generally more seller-friendly over the past fifteen years. The (seller-friendly) efforts qualifier has increased in incidence, from approximately 10% incidence in 2005 to 30% incidence in 2020; the (seller-friendly) materiality qualifier has also increased in incidence, from 20% to 40% incidence in the same time period; and the (buyer-friendly) "consistent with past practice" requirement has declined in incidence, from 80% in 2005 to 60% incidence by 2020.

Among the SAOCCs in the sample (which appeared in 94% of deals in the Deal Sample), we coded each according to whether it had a "commercially reasonable efforts" qualifier, a "reasonable best efforts" qualifier, or some other efforts qualifier; or instead whether it required absolute compliance with the restrictions contained in the SAOCC. Clearly, an efforts qualifier is a looser constraint on the seller's behavior than an absolute requirement. Less clearly, but still supported by the plain language and practitioner commentary, a "commercially reasonable efforts" qualifier is a looser constraint (i.e., more seller-friendly) than a "reasonable best efforts" qualifier.[261]

Exhibit 12 shows the distribution of the efforts qualifiers among the SAOCCs in the Deal Sample.

261. See supra section I.B.

Exhibit 12: Specific Affirmative Ordinary Course Efforts Requirements

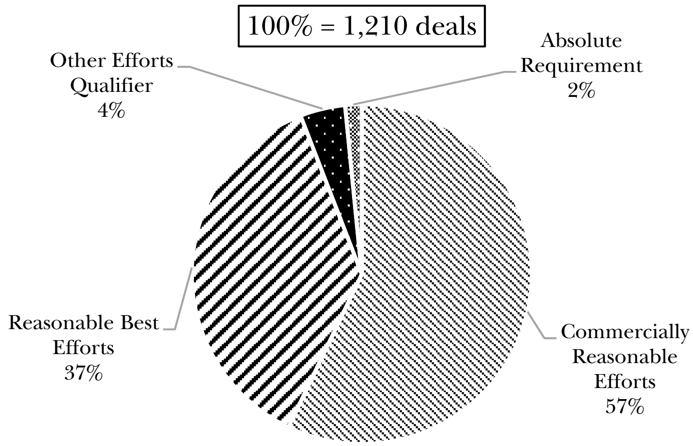


Exhibit 12 shows that the majority (57%) of specific ordinary course covenants include a "commercially reasonable efforts" qualifier, which is the loosest constraint on the seller's behavior. Another 37% included a "reasonable best efforts" qualifier. Only 2% of deals in the Deal Sample had an absolute requirement with regard to the specific ordinary course requirement.[262]

G. *Evidence on Consent Exceptions*

Finally, this section examines the extent to which the MAE clauses and ordinary course covenants in the Deal Sample included an exception for buyer consent. Exhibit 13 reports the results of this analysis.

262. Our use of the "General" and "Specific" terminology to reference the different parts of the ordinary course covenant is not meant to suggest that the specific clauses are an elaboration of what is required by the general clause. Instead, the GAOCC and the SAOCC are independent obligations of the seller.

Exhibit 13: MAE and Ordinary Course Carveouts for Buyer Consent

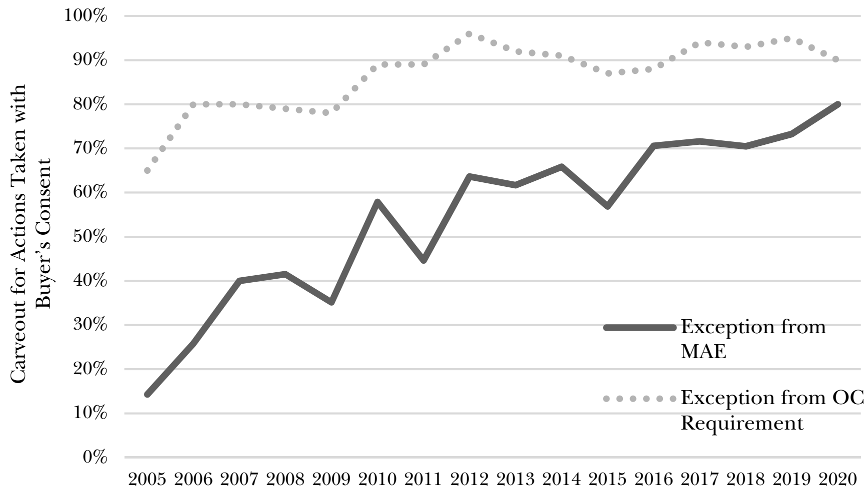


Exhibit 13 shows a significant increase in consent exceptions during the timeframe of analysis: from 15% incidence to 80% incidence for exceptions from the MAE clause, and from 65% incidence to 90% incidence for exceptions from the ordinary course requirement. But the consent exceptions are not necessarily tethered together. Across the sample, 39% of deals have a consent exception from the ordinary course requirement but not the MAE clause, and 5% have a consent exception from the MAE clause but not the ordinary course covenant. Less than half the sample (47%) has a consent exception from both the ordinary course requirement and the MAE clause.

Overall, 53% of the deals in the Deal Sample include a consent exception from the MAE clause and 86% include a consent exception for the ordinary course requirement.[263] Among the ordinary course consent exceptions, 79% specify that the buyer may not "unreasonably withhold" consent. Virtually all of these consent exceptions, for both MAE carveouts and ordinary course carveouts, specify that written consent is required—presumably to avoid any ambiguity as to whether the buyer provided consent.

III. IMPLICATIONS

We now turn to implications of our empirical findings for boards of directors, Delaware courts, and practitioners.

263. As would be expected, virtually all of the consent exceptions from the MAE clause are categorical carveouts (rather than "not disproportionate" carveouts).

A. *For Boards of Directors*

The data presented in Part II provides guidance for boards of directors, who are ultimately responsible for identifying and closing M&A deals. First and foremost, the wide variation in the data, combined with the experience from the COVID-19 pandemic, indicates why the MAE clause and the ordinary course covenant should be a board-level issue, not to be left solely to the transactional planners. These clauses overlap significantly with the business issues—perhaps more so than any other clauses in the merger agreement, other than the economic terms such as price.

Specifically, sell-side boards should be cognizant of how "tight" their deal is. Board-level stress testing of the deal documents should include understanding what kind of events are carved out from the MAE, and whether those carveouts have a disproportionality carveback. Sell-side boards should also understand whether the MAE must be caused by the enumerated carveouts (more buyer-friendly) or whether the MAE must only be related to the enumerated carveouts (more seller-friendly) in order to no longer qualify as an MAE.

Board-level monitoring of the MAE and ordinary course provisions is particularly important in the current macroeconomic environment. To see the point, consider the currently pending merger between Analog Devices, Inc. (ADI), a technology company, and Maxim Integrated Products, Inc., a developer of analog and mixed-signal products and technologies.[264] In July 2020, ADI and Maxim announced a $21 billion stock-for-stock deal, in which ADI shareholders will own 69% and Maxim shareholders will own 31% of the combined company.[265] The deal will take at least six months to close due to the need for a shareholder vote at both companies and significant regulatory approvals, including antitrust and national security reviews of various countries.[266] As one report explained: "Because of their geographically diffuse client lists, the corporations would need the approval of market watchdogs in China, the European Union, and the United States. Given current geopolitical conditions, gaining the assent of all three world powers could prove difficult."[267]

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264. See Michael Lucarelli, Andrea Calise, Andrea Duffy & Kathy Ta, Analog Devices Announces Combination with Maxim Integrated, Strengthening Analog Semiconductor Leadership, Analog Devices (July 13, 2020), https://www.analog.com/en/about-adi/news-room/press-releases/2020/7-13-2020-analog-devices-announces-combination-with-maxim-integrated.html [https://perma.cc/W5F5-ZEZ7].

265. Id. This deal is not included in the Deal Sample because it was announced after our cutoff date of April 2020.

266. See supra notes 20–30 and accompanying text (discussing impediments to simultaneous signing and closing).

267. Mario McKellop, Analog Devices Negotiates to Buy Maxim Integrated for Around $20 Billion, Burn-In (July 13, 2020), https://www.theburnin.com/market-watch/analog-

An anticipated closing date in 2021 means that the deal will have to navigate the spring of 2021, including new waves of COVID-19 cases as schools and restaurants reopen and social-distancing restrictions are loosened around the world. The MAE provision is symmetric and excludes (among other things) "any event, change, effect, circumstance, occurrence or development that results from or arises out of . . . the continuation or worsening of the COVID-19 pandemic," unless "such changes have a disproportionate adverse impact on the Company and its Subsidiaries relative to other participants in the industries in which the Company and its Subsidiaries operate."[268] Therefore, rather than knocking out COVID-19 risk categorically as a reason to walk away, the deal keeps COVID-19 risk on the table to the extent that the effect is disproportionate on the opposing party.

A disproportionality carveback may make good business sense for both parties because it furthers the goal that "the business . . . at closing is essentially the same one . . . at signing."[269] In the current macroeconomic environment, however, a disproportionality carveback may give the parties significant optionality to walk away if a new strain of COVID-19 is able to proliferate despite the vaccine. Given the havoc in the markets that would result from a significant new wave, it would be relatively easy for either party to argue disproportionality "relative to other participants in the industries in which the Company . . . operate[s]."[270]

In addition, the ADI–Maxim merger agreement is different from all of the deals in the Deal Sample because it carves out risks that "result[] from or arise[] out of . . . the continuation or worsening of the COVID-19 pandemic," rather than pandemic risk generally, and there is no more general carveout for acts of God.[271] This means that any other act of God in 2021, including (for example) the uncontrolled spread of a new type of coronavirus (potentially called COVID-21, to reference the 2021 inception

devices-negotiating-20b-maxim-integrated-acquisition-2020-07-13 [https://perma.cc/8Q6P-SUHJ].

268. ADI–Maxim Merger Agreement, supra note 234, at A-3 to A-4.

269. See Kling et al., supra note 52, § 13.03.

270. In section III.C infra, we provide suggestions on how to tighten the disproportionality carveback in ways that would reduce litigation risk.

271. Compare ADI–Maxim Merger Agreement, supra note 234, at A-3, with Agreement and Plan of Merger by and Among Morgan Stanley, Moon-Eagle Merger Sub, Inc. and E*Trade Financial Corporation 9 (Feb. 20, 2020), https://www.sec.gov/Archives/edgar/data/1015780/000119312520044851/d886839dex21.htm [https://perma.cc/YU5M-FJ7V] (carving out from the MAE "any acts of God, natural disasters, terrorism, armed hostilities, sabotage, war or any escalation or worsening of acts of war, epidemic, pandemic or disease outbreak (including the COVID-19 virus)"). No other MAE in the Deal Sample explicitly references COVID-19.

date)[272] would arguably not be carved out from the MAE.[273] This risk factor is particularly important because the MAEs collectively include a causal requirement, excluding developments "that result[] from or arise[] out of"[274] COVID-19 but not, say, COVID-21.

The ordinary course covenant in the ADI–Maxim agreement is straightforward, providing that Maxim "shall . . . conduct its business in the ordinary course in all material respects and use commercially reasonable efforts to maintain and preserve intact its business organization, keep available the services of key employees and maintain satisfactory relationships with customers, suppliers and distributors."[275] There is a carveout from the ordinary course requirement for actions taken with the consent of the counterparty, and such consent "shall not be unreasonably withheld, conditioned or delayed."[276] Section III.C discusses the importance of this type of consent carveout.

In general, the ADI–Maxim deal illustrates how the MAE clause and the ordinary course covenant provide for or block important exit ramps from the deal for one or both sides. The availability of these exit ramps might not be important in everyday times, but they can be critical in volatile environments such as the pandemic of 2020 or the financial crisis of 2008. Boards should stress test the deal documents to make sure that these exit ramps do more than simply reflect current market or theoretical best practices but instead truly capture the board's business objectives for the deal and the risks their company is willing to take.

B. *For Courts*

In a number of currently pending cases, courts in Delaware and other jurisdictions have been asked to address how the seller's obligations under the ordinary course covenant fit with the buyer's exit rights under the MAE clause. The specific question is whether the ordinary course covenant

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272. While one could also argue that the new strains of COVID-19 would not be carved out from an MAE, the mutation of the virus from the original COVID-19 into variants likely falls squarely within the meaning of "resulting from or arising out of" COVID-19. See Emma Court, Josh Wingrove & Jordan Fabian, New York COVID-19 Variant Expands Reach in U.S. with 735 Cases, Bloomberg (Mar. 1, 2021), https://www.bloomberg.com/news/articles/2021-03-01/new-york-covid-19-variant-drawing-concern-from-fauci-cdc (on file with the *Columbia Law Review*); Kai Kupferschmidt, Mutant Coronavirus in the United Kingdom Sets Off Alarms, but Its Importance Remains Unclear, Science (Dec. 20, 2020), https://www.sciencemag.org/news/2020/12/mutant-coronavirus-united-kingdom-sets-alarms-its-importance-remains-unclear [https://perma.cc/E9UB-7TGF] (noting a new strain "which goes by the name B.1.1.7").

273. The fact that the merger agreement specifically carves out "COVID-19" risk would improve the argument that COVID-21 was not carved out, because the parties knew how to carve out general pandemic risk and chose not to.

274. ADI–Maxim Merger Agreement, supra note 234, at A-3.

275. Id. § 4.1(b).

276. Id. § 4.1(a).

permits extraordinary behavior in extraordinary times. Vice Chancellor Laster posed the question well in a May 2020 hearing on Mirae's efforts to exit a deal to buy certain hotels from AB Stable for $5.8 billion:

> The real question is whether an ordinary course covenant means 'ordinary course' on a clear day or 'ordinary course' based on the hand you're dealt . . . . If you have flooding, is it the 'ordinary course' of what you do consistent with past practice when you are in a flood, or is it 'ordinary course' on a clear day when there hasn't been any rain?[277]

In our opinion, the straightforward contractual answer is that the ordinary course means "ordinary course when there hasn't been any rain." Vice Chancellor Laster ultimately reached the same conclusion in this particular case (thereby answering his own question),[278] in part because the ordinary course requirement in the sale and purchase agreement obligated the seller to act "only . . . consistent with past practice."[279] This requirement, the court held, tethered the seller's ordinary course obligation to what it had done in the past and not to, for example, what other companies in the industry were doing at the time of the crisis to mitigate the effect on their business.[280]

While it is theoretically possible and occasionally done,[281] there is very rarely an exception written into the ordinary course requirement for extraordinary times. Sellers have nevertheless argued that an implied exception should be read into the standard requirement: That is, the "ordinary course of business" changes in extraordinary times. In one recent case, for example, the seller argued that its "ordinary course of business" includes extraordinary actions that it took to protect the business during the financial crisis of 2008–2009.[282] Under this theory, any actions that it took in response to COVID-19 that were similar to actions

277. See Cravath, Swaine & Moore LLP, COVID-19: Impact on M&A Litigation 3 (2020), https://www.cravath.com/a/web/12964/5459297-1.pdf [https://perma.cc/J9VZ-4M2M] (alteration in original) (internal quotation marks omitted) (quoting Delaware V.C. J. Travis Laster).

278. AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, No. 2020-0310-JTL, 2020 WL 7024929, at *67–70 (Del. Ch. Nov. 30, 2020).

279. Id. at *65.

280. Id. at *70–71. It is not clear what the "only" qualifier added, if anything, to the court's conclusion. In the Deal Sample, we find that the "only" qualifier is rare and declining, going from approximately 10% of deals in 2005 to no deals in 2020.

281. See, e.g., Agreement and Plan of Merger by and Among Delta Airlines, Inc., Nautilus Merger Corporation & Northwest Airlines Corp. § 4.1(a) (Apr. 14, 2008), https://www.sec.gov/Archives/edgar/data/27904/000101968708001770/delta_8k-ex0201.htm [https://perma.cc/3HHJ-BAEE] [hereinafter Delta–Northwest Merger Agreement] (requiring each of Northwest and Delta to "conduct its business in the ordinary course for the airline industry, provided if changing events or circumstances warrant otherwise, each of Northwest and Delta may conduct its business in a commercially reasonable manner in light of such events or circumstances").

282. See Verified Complaint at 36–38, Juweel Invs. Ltd. v. Carlyle Roundtrip LP, No. 2020-0338-JRS (Del. Ch. filed May 11, 2020), 2020 WL 2488122.

taken during the financial crisis would be considered "ordinary course of business."

Such a reading, thus permitting extraordinary actions in extraordinary times, would ignore the plain language and plain meaning of "ordinary course of business." The ordinary course of business requirement should not be so malleable—in effect, a "get out of jail free" card—in extraordinary times.

If courts were to accept this straightforward and commonsensical reading of the ordinary course requirement, it raises the question of what sellers should do in extraordinary times. Sellers would argue that such a reading would leave them stuck between a rock and a hard place: either comply with the ordinary course requirement and watch the business go into the tank or violate the ordinary course covenant in order to try to save the business as best as possible.

There is, however, a third alternative. If the seller wants to take actions that preserve and protect the business in response to unexpected developments, but those actions would be outside the ordinary course of business, the seller should negotiate with the buyer. In that negotiation, the buyer can waive the requirement to act in the ordinary course, or the buyer could give consent for the specific actions that the seller recommends. The buyer has the correct incentives to make decisions to mitigate the downside effect of the unexpected developments because the buyer will bear the consequences of those decisions as much as, if not more than (in a cash sale), the seller. Once the buyer and seller reach agreement on the proper course of action, some MAE clauses explicitly carve out actions taken with the written consent of the buyer, and even if this MAE exception is not explicit, the merger agreement can be amended to permit the seller to take the agreed-upon actions.

This negotiation is socially optimal. In the absence of any need to reach agreement with the buyer on actions outside the ordinary course, the seller would be, in effect, playing with the buyer's money. The seller could take actions that are too risky, too cautious, or simply opportunistic with respect to the buyer. While the directional effect of the distortion in the seller's incentives cannot be determined at the level of theory, the fact that the seller's incentives are distorted in some way would lead to socially suboptimal outcomes. By forcing the renegotiation, then, the ordinary course covenant avoids this outcome. It prevents suboptimal behavior by the seller, which is a variation of the same moral hazard problem that ordinary course covenants are intended to protect against in the first place.

The consent exception to the ordinary course requirement invites a negotiation between the seller and the buyer but does not require it. This means that a seller, particularly in a cash deal, might simply sit on its hands, comply with the ordinary course covenant, and watch its business go into the tank while the buyer watches helplessly. This scenario, however, is unlikely because the buyer still has the threat of an MAE, and a seller's failure to negotiate with the buyer over a mitigation strategy would certainly increase the likelihood of an MAE. And of course, if the buyer successfully calls an MAE, the seller is left holding the pieces of a company that could have been saved. In particular, disproportionality becomes more likely (and certainly easier to prove) if others in the industry are adopting mitigation strategies and the seller is not. Furthermore, other contractual provisions, such as the specific affirmative ordinary course covenants, may obligate the seller to do more than idly stand by.

For all of these reasons, reading the ordinary course covenant according to its plain words (which then forces the negotiation) is better, as a policy matter, than reading the ordinary course covenant to permit extraordinary actions when unforeseen circumstances arise. The latter approach would permit the seller to take actions unilaterally, with the associated distortion in the seller's incentives due to the pending deal. And, of course, the latter approach would create uncertainty between the parties as to when exactly the ordinary course covenant permits actions that are not in the ordinary course.

To see the importance of enforcing the ordinary course covenant according to its plain terms, consider Simon Property Group's $3.6 billion acquisition of Taubman Centers, Inc., announced in February 2020.[283] Once COVID-19 hit with full force, Simon attempted to exit the deal, claiming an MAE and violations of the ordinary course requirement. With regard to the ordinary course claim, Simon's argument was not that Taubman had done too much but rather that it had violated the ordinary course requirement by doing too little:

> Acting in the ordinary course requires companies to respond to changing market conditions and, when faced with a crisis, to take appropriate actions. Other retail real estate owners and retail stores have recognized that, when faced with the COVID-19 pandemic, appropriate ordinary course actions—and critical actions for their survival—include reducing operating expenses and capital expenditures dramatically to maintain cash and mitigate losses. Taubman has not taken such actions . . . .[284]

In November 2020, the parties settled their litigation with a recut deal at an 18% lower price,[285] thereby leaving this question unresolved. If the courts ultimately endorse this argument, however, perhaps in one of the still-pending ordinary course cases, pity the poor seller in the next economic downturn. If the seller does too much, it violates the ordinary course covenant (L Brands),[286] and if it does too little, it also violates the

283. Berk, supra note 203.

284. Complaint at 28, Simon Prop. Grp., Inc. v. Taubman Ctrs., Inc., No. 2020-181675-CB (Mich. Cir. Ct. filed June 10, 2020).

285. Thomas, supra note 203.

286. See supra note 12 and accompanying text.

ordinary course covenant (Taubman).[287] Only the seller who does exactly what the buyer would have wanted can effectively run this gauntlet; and of course, any buyer who wants to exit the deal anyway would never admit to this. Far better to enforce the ordinary course requirement according to its plain terms, which then forces the negotiation between buyer and seller over a mitigation strategy.

To see the bite of this proposed approach, consider the recent decision in *Fairstone Financial Holdings Inc. v. Duo Bank of Canada*.[288] In that case, Justice Koehnen of the Ontario Superior Court of Justice (Commercial List) held that the negative effects of COVID-19 on the seller did *not* constitute an MAE, and the seller did *not* violate the ordinary course covenant.[289] Accordingly, Duo Bank of Canada was ordered to close on its acquisition of Fairstone Financial Holdings Inc.[290] The court's findings that the alleged changes to Fairstone's branch operations model, payment collection process, employment policies, expenditures, and accounting measures, as alleged by Duo, did not violate the ordinary course requirement as a factual matter make sense. However, the court's observation in dicta that even if Fairstone's conduct was outside the ordinary course, Duo would have had to provide its consent is concerning because, under the contract, such consent could not be unreasonably withheld.[291] Therefore, the court suggested that Duo constructively consented to any actions that Fairstone took that might have been outside the ordinary course.

The court's approach of inferring constructive consent to exceptions from the ordinary course requirement represents poor policy because it short-circuits the negotiation between buyer and seller over the optimal mitigation approach. In the next emergency, sellers (at least in Canada) will potentially make use of the constructive consent of the buyer to make changes that fall outside the ordinary course requirement. In doing so, they will be playing at least in part with the buyer's money, with all the attendant moral hazard problems and other distortions in incentives. It is far better to force the negotiation by rejecting the possibility of constructive consent than to give the seller a "get out of jail free" card in times of crisis. This is the approach that the Delaware Chancery Court took in *AB Stable*.[292] For these reasons, the Delaware approach got it right and

287. See supra note 284 and accompanying text.

288. 2020 ONSC 7397 (Can.).

289. Id. paras. 4–7.

290. Id. paras. 375–376.

291. Id. paras. 296–303.

292. AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, No. 2020-0310-JTL, 2020 WL 7024929, at *72–73 (Del. Ch. Nov. 30, 2020). The court also stated:

> Seller admitted that it never sought Buyer's consent, but urged that if it had, then Buyer could not reasonably have withheld its consent. According to Seller, consent therefore should be deemed given, meaning

the Canadian approach got it wrong, at least as a policy matter, in their differing interpretations of the ordinary course requirement.

Enforcing the ordinary course covenant according to its plain words would also allow the parties to negotiate around the negotiation default. For example, the merger agreement could identify conditions under which the ordinary course requirement no longer applied.[293] Or the merger agreement could loosen the ordinary course requirement to give the seller sufficient flexibility to respond to unexpected developments.[294] Arguably, the currently existing "commercially reasonable efforts" qualifier to a general ordinary course covenant could be read to allow such flexibility. By reading the ordinary course covenant by its plain terms, then, courts would be forcing a socially optimal negotiation or more precise

> that Seller did not breach the Ordinary Course Covenant. [However,] [c]ompliance with a notice requirement is not an empty formality. Notice to the buyer is a prerequisite because it permits the buyer to engage in discussions with the seller and if warranted, seek information about the situation under its access and information rights. The buyer then can protect its interests.

Id. at *81–82.

293. See, e.g., Delta–Northwest Merger Agreement, supra note 281, § 4.1(a) (stating, except as written on the disclosure schedules or otherwise agreed, each party will "conduct its business in the ordinary course for the airline industry, provided if changing . . . circumstances warrant otherwise, each . . . may conduct its business in a commercially reasonable manner in light of such . . . circumstances").

294. See, e.g., Transaction Agreement and Plan of Merger Among General Electric Merger Co., Baker Hughes Inc., Bear Mergersub, Inc. & Bear Newco, Inc. § 6.01(a) (Oct. 30, 2016), https://www.sec.gov/Archives/edgar/data/808362/000095010316017539/dp69954_ex0201.htm [https://perma.cc/2SCB-RUAU]. This agreement states:

> BHI and the BHI Subsidiaries shall use their commercially reasonable efforts to maintain their assets and preserve intact their respective business organizations, to maintain their assets and significant beneficial business relationships with suppliers, contractors, distributors, customers, licensors, licensees and others having business relationships with them and to keep available the services of their current key officers and employees; *provided that strategic decisions to restructure businesses, mothball assets or reduce or increase headcount as a result of changes to market or competitive conditions if commercially reasonable will be deemed to be in the ordinary course and consistent with past practices* . . . to the extent such actions are (i) consistent with actions taken in the thirty-six (36) month period prior to the date of this Agreement and (ii) consistent with actions being taken by competitors of BHI.

Id. (emphasis added). See generally Morgan Hollins, Luke Laumann & Gregory Pryor, The Pandemic's Impact on Pending M&A, Law360 (Apr. 24, 2020), https://www.law360.com/articles/1266582/the-pandemic-s-impact-on-pending-m-a [https://perma.cc/T38P-ZG7B] ("Another approach . . . is to specifically incorporate MAE exclusions into the [ordinary course] covenant . . . . [C]hanges made outside of the ordinary course that are . . . in line with changes made by other market participants and that arise from the pandemic . . . would not be considered a breach of covenant by the seller.").

drafting of ordinary course clauses going forward. Section III.C discusses this implication for drafting and transactional practice.

C. *For Transactional Planners*

Transactional planners can also benefit from the empirical evidence presented in this Article. As a threshold point, somewhat mundane though important in practice, this Article presents the most robust and nuanced analysis to date of the incidence of MAE carveouts that appear frequently in merger agreements, overall and over time.[295] This Article is also among the first to present the incidence of disproportionate carvebacks at the level of individual carvebacks, the incidence of causal requirements for MAE carveouts, and the variation across ordinary course covenants.[296] All of this data can be useful for practitioners arguing for "market" (i.e., standard) terms in their M&A agreements.

Transactional planners should also recognize that the proliferation of disproportionality carvebacks—from approximately two per deal in 2005 to six per deal in 2020[297]—creates an additional source of litigation risk between the parties. With a disproportionality carveback, the buyer can argue that an MAE occurred because of a disproportionate effect on the target's business "compared to other participants in the industries in which the Company conducts business."[298] This right creates two sources of uncertainty: (1) the peer group of comparable companies that should be used to assess disproportionality and (2) whether the effect on the target company was disproportionate relative to that peer group. While the second source of uncertainty is inevitable and can only be worked out ex post, the peer group question can be—and should be—resolved in advance. Yet we find only a handful of MAEs in the Deal Sample (<1%) resolve the peer group question in advance.[299] Clearly, specifying the peer

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295. Jennejohn et al. present the incidence of only carveouts relating to acts of God and pandemics. See Jennejohn et al., supra note 164, at 3–7.

296. See supra sections II.E–.F.

297. See supra Exhibit 5.

298. See supra notes 39–40 and accompanying text.

299. See, e.g., Agreement and Plan of Merger by and Among Kayak Software Corporation, Priceline.Com Incorporated & Produce Merger Sub, Inc. § 5.1(a) (Nov. 8, 2012), https://www.sec.gov/Archives/edgar/data/1075531/000110465912076666/a12-26615_1ex2d1.htm [https://perma.cc/8PD8-JK3Z] (carving out changes "generally affecting the online travel industry and/or the online advertising industry . . . provided [that] it has a disproportionately adverse effect on the Company and its Subsidiaries, taken as a whole, *compared to other companies operating in the online travel industry and/or the online advertising industry*" (emphasis added)); Agreement and Plan of Merger by and Among Station Casinos, Inc., Fertitta Colony Partners, LLC & FCP Acquisition Sub § 1.1 (Feb. 23, 2007), https://www.sec.gov/Archives/edgar/data/898660/000110465907013651/a07-6586_1ex2d1.htm [https://perma.cc/3V2N-ZGC9] (carving out effects "from general changes or developments in, the travel, hospitality or gaming industries . . . except [those that have] a materially disproportionate impact on the assets or liabilities, business, financial condition

group is easier on a "clear day," when the merger agreement is being negotiated, than through ex post litigation. When the parties are negotiating the merger agreement, neither side will know what kinds of companies will be affected by the (unknown) market and industry risks between signing and closing. As such, the parties can agree on a peer group relatively easily. After litigation ensues, both sides will choose peer groups opportunistically to either show or not show a disproportionate effect on the target company. Transactional planners should reduce ambiguity by specifying the peer group in advance.[300]

In the Simon–Taubman deal that section III.B discusses, Simon argued that Taubman operated within a broad retail sector that included grocery stores, open-air centers, and indoor shopping malls.[301] Against that broad industry, Simon argued that Taubman was hit disproportionately, which therefore gave Simon the right to exit.[302] Taubman argued that it operated only in the narrower industry of indoor shopping malls, and within that industry, it did not suffer disproportionately.[303]

Note that the threshold question of Taubman's industry will be virtually dispositive in determining whether Taubman has suffered disproportionately relative to its industry and therefore whether Simon

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or results of operations of the Company . . . *relative to other participants in the travel, hospitality or gaming industries*" (emphasis added)).

300. Commenting on earlier drafts of this Article, some transactional attorneys suggested that specifying the target's industry in advance would be unlikely to occur because it would raise yet another potential obstacle to an overall agreement. However, by December 2020, anecdotal evidence from recently signed deals and discussions with practitioners indicate that specifying the industry in the merger agreement has already become far more common. See, e.g., Agreement and Plan of Merger Among AstraZeneca PLC, Delta Omega Sub Holdings, Inc., Delta Omega Sub Holdings, Inc. 1, Delta Omega Sub Holdings, LLC 2 & Alexion Pharmaceuticals, Inc. § 1.01 (Dec. 12, 2020), https://www.sec.gov/Archives/edgar/data/899866/000114036120028237/nc10017928x1_ex2-1.htm [https://perma.cc/EQW9-C2X7] [hereinafter AstraZeneca–Alexion Merger Agreement] (providing disproportionality carvebacks from the MAE if the effect "is disproportionately adverse relative to the adverse impact of such event, change, effect, circumstance, fact, development or occurrence on the operations in the *biopharmaceutical industry of other participants in such industry*" (emphasis added)); Agreement and Plan of Merger by and Among Salesforce.com, Inc., Skyline Strategies I, Inc., Skyline Strategies II, LLC & Slack Technologies, Inc., at A5–6 (Dec. 1, 2020), https://www.sec.gov/Archives/edgar/data/1108524/000119312520307389/d18386dex21.htm [https://perma.cc/23DR-LSVM] (providing disproportionality carvebacks from the MAE if the "[e]ffect has had a disproportionate adverse effect on the Company or any Company Subsidiary relative to other companies *operating in the business collaboration technology industry*" (emphasis added)).

301. Andrew McIntyre, What to Watch as Simon Looks to Exit $3.6B Taubman Deal, Law360 (Aug. 17, 2020), https://www.law360.com/articles/1300686/what-to-watch-as-simon-looks-to-exit-3-6b-taubman-deal (on file with the *Columbia Law Review*).

302. Id. We are aware of another deal in which the parties argued for entirely different industries (financial services versus travel) in the MAE litigation. The parties in this deal ultimately settled.

303. Id.

has the right to exit. This industry definition question could have been resolved far more easily in advance, when the deal was negotiated, because neither side would have the crystal ball necessary to advocate for a particular industry definition. Yet the merger agreement only specified a carveback if the effect on Taubman is disproportionate "compared to other participants in the industries in which [Taubman] operate[s]."[304] The absence of an industry definition in the merger agreement was an unforced error.[305]

On the ordinary course covenant, there is similarly a lack of sensitivity of the deal terms to the underlying economic concerns and business risks. One would expect to see buy-side advisors giving the seller more leeway to run the business under the ordinary course covenant in a stock deal rather than a cash deal because the moral hazard problem for the seller is substantially diminished in a stock transaction. (Because the seller is receiving stock, it will bear at least some part of the downside from its poor decisions between signing and closing, unlike in a cash deal.) Yet this wider discretion in stock deals is not evident in the Deal Sample. Similarly, one would expect to see a greater incidence of exceptions from the ordinary course requirement for actions taken with the buyer's consent when the ordinary course covenant is tighter (i.e., constrains the seller's behavior more) because the exception for buyer's consent becomes more important as a "safety valve" when the ordinary course requirement is tighter. But this contour is also not seen in the data.

Buy-side advisors seem to generally negotiate as tight an ordinary course covenant as possible, irrespective of transaction consideration, suggesting a less-than-full reflection of the buyer's own interest to let the seller run the business with a relatively free hand if the seller is getting stock. As with the MAE clause, a greater awareness of the underlying business motivations and economic rationale would facilitate win-win structures on the ordinary course covenant.

Finally, and perhaps most importantly, enforcing the ordinary course covenant according to its plain terms, as section III.B advocates, would

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304. Agreement and Plan of Merger by and Among Simon Property Group, Inc., Simon Property Group, L.P., Silver Merger Sub 1, LLC, Silver Merger Sub 2, LLC, Taubman Centers, Inc. & Taubman Realty Group Limited Partnership § 7.02(c) (Feb. 9, 2020), https://www.sec.gov/Archives/edgar/data/1022344/000110465920015273/tm206965d1_ex2-1.htm [https://perma.cc/WT79-ZLHZ].

305. This type of error can also be seen in another recent deal. See Bonnie Eslinger, WEX Wins Round in Payment Providers' Suit over $1.7B Deal, Law360 (Oct. 12, 2020), https://www.law360.com/articles/1318996/wex-wins-round-in-payment-providers-suit-over-1-7b-deal (on file with the *Columbia Law Review*) (reporting on the U.K. High Court ruling that "there is no travel payments industry," as the sellers were arguing for, and disproportionality should instead be measured against the broader payments industry that the buyers were advocating for). WEX ultimately recut the deal at a 66% discount. See Osborne-Crowley, supra note 199 (describing the recut deal at $577.5 million, down from the $1.7 billion original price).

force buy-side and sell-side counsel to create mechanisms for accommodating unforeseen events between signing and closing. Both parties would then have a strong interest in permitting the seller to engage in actions outside the ordinary course. The simplest way to achieve this would be a continued proliferation of the exception to the ordinary course covenant for actions taken with the consent of the buyer.[306] This "escape hatch" from the ordinary course requirement permits the negotiation between the seller and the buyer about how best to mitigate the effect of unforeseen events between signing and closing. For the reasons described in section III.B, this forced negotiation is socially optimal compared to a regime in which the seller can act unilaterally to respond to unforeseen events.[307]

This escape hatch should specify that only the "prior written consent" of the buyer is valid to endorse actions taken by the seller outside the ordinary course. The written requirement avoids ambiguity (and inevitable litigation) about whether the buyer provided its implied or constructive consent. And the requirement that consent must be obtained in advance prevents the seller from contemplating a ratification strategy of begging for forgiveness rather than asking for permission.

In exchange for requiring the prior written consent of the buyer, the seller might negotiate for a qualification that the buyer's consent "shall not be unreasonably withheld." Unlike a general consent exception, which can be added as an amendment to the merger agreement if and when the buyer and seller agree on a plan of action in response to extraordinary developments, a clause specifying that such consent shall not be unreasonably withheld cannot be added after the fact, because it defines the way in which the parties will negotiate in the first place. Therefore, adding a consent exception as part of the original merger agreement is useful for the sole purpose of being able to add a qualification that the buyer's consent "shall not be unreasonably withheld."[308]

306. See COVID-19 Spawned "Busted Deal" M&A Litigation and MAEs, Winston & Strawn LLP (May 11, 2020), https://www.winston.com/en/thought-leadership/covid-19-spawned-busted-deal-manda-litigation-and-maes.html [https://perma.cc/927U-ANWV] ("*[S]eeking buyer consent when implementing changes that are arguably required in response to the pandemic*, but may not otherwise be in the ordinary course or in compliance with interim operating covenants . . . and similar prophylactic steps will prove essential for sellers avoiding or succeeding in litigation." (emphasis added)).

307. Approximately sixty deals in the Deal Sample (4.6% of the overall sample) have an MAE clause that references the ordinary course requirement. The typical approach is to clarify that actions taken to comply with the merger agreement are *not* MAEs, except that actions taken in the ordinary course *can* be MAEs. While this particular formulation would not provide the seller more flexibility to run the business when there are unforeseen circumstances, the examples illustrate how transactional planners have foreseen this general class of problem and will certainly draft to address it more explicitly going forward.

308. A recent deal explicitly makes the connection between the buyer's obligation to reasonably consent and the seller's economic environment. See AstraZeneca–Alexion

In a recent deal of which the authors are aware, the buyer consented to all of the actions that the seller took in order to mitigate the effect of COVID-19 on the seller's business. The ordinary course covenant had an exception for buyer consent, and the covenant further specified that consent could not be unreasonably withheld. When the buyer later threatened to exit the deal, it only argued for a contractual exit right under the MAE clause, not the ordinary course covenant. The parties ultimately renegotiated their deal on terms that were more favorable to the buyer.

This constraint on potential opportunistic behavior by the buyer would be more important in a cash deal rather than a stock deal. In a stock deal, the buyer and seller would have an aligned interest in mitigating the downside effect on the business. In that scenario, the negotiation over unforeseen developments should be relatively easy, drawing from the seller's expertise in the business and the buyer's incentive to save it. In a cash deal, however, the buyer might withhold consent in order to preserve its right to declare an MAE or a breach of the ordinary course covenant. In that scenario, the ordinary course requirement would in effect be a backdoor mechanism for allocating downside risk back to the seller. The requirement that consent shall not be unreasonably withheld would reduce the likelihood of this outcome.

Of course, in order to be effective, the escape hatch in the ordinary course covenant must also carry over to the MAE clause. In particular, the MAE clause should specify that the specific actions taken with the buyer's consent do not constitute an MAE without extinguishing the buyer's right to call an MAE on underlying causes. For example, if a retail chain closes stores with the buyer's consent, the action of store closings should not trigger a violation of the ordinary course covenant or in itself be an MAE, but the underlying effect on the business can still potentially be an MAE.

Empirical evidence from the Deal Sample indicates that practitioners are increasingly constructing the escape hatch, though often only in the MAE clause and not in the ordinary course covenant. As section II.G documents, less than half the sample (46%) has a consent exception from both the ordinary course requirement and the MAE clause. In order to maximize the clarity of the escape hatch, practitioners should more explicitly link the exception in the MAE clause with the exception in the ordinary course covenant.[309]

An alternative approach, not necessarily mutually exclusive, would be to build broader ordinary course covenants into the original deal, which

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Merger Agreement, supra note 300, § 1.02 (xvii) ("[I]t is understood that among the factors applicable to determining whether Parent or the Company has 'unreasonably withheld, conditioned or delayed' consent . . . are prevailing external economic, industry and regulatory circumstances.").

309. See e.g., Hollins et al., supra note 294.

would allow the seller to respond to unforeseen developments with greater unilateral discretion. While standard law and economics principles indicate that the negotiation forced by a narrow ordinary course covenant is socially desirable,[310] a seller with more leverage might negotiate for a broader ordinary course covenant as well, potentially in addition to the buyer consent exception. Arguably, the currently utilized "commercially reasonable efforts" qualifier that sometimes appears on the ordinary course covenant might permit this outcome, but we would predict that sophisticated practitioners would not rely on such nebulous (and untested) language. Instead, we believe it would be wiser, as a drafting matter, to specify the conditions that would trigger a release from the ordinary course requirement—a natural touchstone, of course, would be conditions that would potentially trigger an MAE.

In general, the consent requirement is a cleaner way to manage the interaction between the MAE clause and the ordinary course covenant, but only if, contrary to current practice, the consent exception appears in both of these provisions. Alternatively, or in addition, the parties could specify ex ante the conditions that release (or relax) the ordinary course requirement, but such ex ante specification would be far more difficult as a drafting matter. And even if transactional planners were able to draft language that both sides could agree to, such language would likely be vague and prone to litigation, which is of course the primary reason to try to manage the interaction of deal terms in the first place.

CONCLUSION

The COVID-19 pandemic has exposed an interaction, and vulnerability, between the MAE clause and the ordinary course covenant in M&A deals. Deals such as Sycamore's acquisition of L Brands did not have to fall apart, but they did due to less-than-perfect drafting by the transactional planners or less-than-perfect execution by the businesspeople involved. Had L Brands obtained consent from Sycamore before taking its dramatic actions to close stores and furlough employees, for example, the deal likely would have closed in May 2020 as planned despite the world falling apart around them. To that extent, these failed deals represent unforced errors, with their attendant social costs; but these unforced errors could only have happened in a deal environment that had not fully contemplated and accommodated the interaction between critical deal terms.

This Article presents new evidence on the MAE clause and ordinary course covenant—deal terms that have evolved considerably over the past fifteen years and, it turns out, have become critically important for dealmaking when there are extraordinary events between signing and closing. This Article provides a level of detail for these terms that has previously not existed and highlights their critical features, many of which

310. See supra section III.B.

have been unnoticed by prior commentators. It also provides the implications of our empirical findings for corporate boards, Delaware courts, and transactional planners. This Article has sought to assist critical players in the M&A marketplace to allocate risks between signing and closing more precisely and efficiently. The result would be more stable deals and improved efficiency in the overall M&A marketplace.