"M&A Litigation in the Covid-19 Era"

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Audio Archive

Like every other aspect of business life, the Covid-19 crisis has had a profound impact on mergers and acquisitions. High stakes battles over attempted deal terminations and other issues are pending in the Delaware Chancery Court, and their resolution may well create new law in a number of important areas. During this webcast, our panel of experts will review these pending actions, discuss the issues at stake in them and their potential implications for deal participants, and address how the Covid-19 crisis may shape parties' approach to deal terms in future transactions.

Join these experts:

- **Steve Haas**, Partner, Hunton Andrews Kurth LLP
- **Katherine Henderson**, Partner, Wilson Sonsini Goodrich & Rosati
- **Kevin Miller**, Partner, Alston & Bird LLP

John Jenkins, *Editor, DealLawyers.com:* Hi. This is John Jenkins, editor of DealLawyers.com. I'd like to welcome you to today's program, M&A Litigation in the COVID-19 era.

I want to lead off by just reminding everybody that we have a lot of resources on the M&A implications of the COVID-19 crisis available on the website. You can access them by clicking on "Memos COVID-19 Issues" on the hot topic section of our — of our homepage.

The COVID-19 crisis and its economic impact have thrown a real monkey wrench into many deals that were pending when the crisis hit and have led many buyers to seek creative ways to terminate those deals. As a result, we've got a number of high stakes battles brewing over deal terminations and other issues. They're pending in Delaware Chancery Court and elsewhere, and their resolution may well create new law in a number of very important areas for deal makers.

We've got a great panel here today to get you up to speed on the latest developments in M&A litigation. Joining me today is Steve Haas. Steve is a partner at Andrews Kurth, and he's a proud fellow UVA alum. (I would be remiss if I failed to remind you that our alma mater remains the reigning men's basketball and lacrosse national champions.)

Then, we're also joined by Katherine Henderson, who is a partner at Wilson Sonsini, and Kevin Miller, who is a partner at Alston & Bird. With that, I'm going to turn it over to

Katherine to kick off today's panel with a discussion of the issues involved in litigating material adverse effect provisions. Katherine?

Litigating MAE Provisions

Katherine Henderson, *Partner, Wilson Sonsini:* Thanks, John. I want to go through a little bit of the background of how we've been litigating both the deal pieces and the role of MAE clauses. You know, years ago, we used to say no court has ever found one. It's sort of the holy grail. We'd be litigating it; it usually never gave us a case to settle, so we didn't have a lot of great guidance on what actually constituted an MAE.

In IBP years ago, then by Chancellor Shrine, we had some guidance — I think he didn't find one, but that essentially that was because it hadn't been durationally significant. That was sort of the guidance that we went under for years still not actually having found one, until along comes *Akorn* a couple of years ago where Vice Chancellor Laster was the first judge to actually find an MAE had occurred.

That was a pretty unique case with some egregious facts. You had a whistleblower alleging there was fraud on the FDA, and I think that led to a lot of the court's analysis. But he did, in fact, find an MAE had occurred based on changes on year-over-year revenue where the percentage change was actually less than had occurred in IBP.

He didn't talk about the durationally significant language that was in IBP, but he still found that that change was enough to constitute an MAE. So, that gave us guidance here on what could actually constitute an MAE.

Along comes COVID and upturns the world. We've been really thinking about, on the practitioner side, what could possibly constitute an MAE in this environment where you have the short term — arguably short-term effect on business that's affecting so many companies and businesses out there. We've had a number of cases that have come up as a lot of buyers are looking to get out of deals in this environment.

So, I want to talk through two of the key cases in this area, the first being the L Brands-Victoria's Secret litigation. Sycamore had agreed to buy L Brands' majority stake in the Victoria Secret business, and then along comes COVID. Victoria's Secret had to take a number of measures, shutting down stores, furloughing employees. They failed to pay rent on some stores, and Sycamore filed a lawsuit essentially saying that all of these measures violated the covenant to operate the business from the ordinary course.

We're going to talk about that in a bit, but what I'm going to focus on is the MAE. Essentially, they said that the MAE clause had also been triggered. L Brands filed those lawsuits, saying that this was buyer's remorse and that Sycamore had actually taken on the risk of a pandemic because there was a carve-out in the MAE provision which applied to pandemics.

Sycamore argued that there were two clauses to the MAE provision and that the pandemic carve-out only applies to the second one. There was a general provision in the MAE which basically said if certain facts prevented L Brands from closing, then that could be an MAE and there was no pandemic carve-out to that.

What has been a really interesting decision — and I think we're all looking forward to it — but interestingly in this case, Sycamore wound up filing an amended complaint right after L Brands filed their complaint, which claimed the L Brands' claiming monetary damages actually terminated the equity commitment letter in that agreement.

So, a very interesting turn of events where you had three complaints filed in rapid succession, and the parties wound up walking away. We don't know all the specifics of why, but presumably something to do with that equity commitment letter and the monetary damages claim.

We didn't get the decision we were looking for in that case, which would have been a little bit tougher for the seller given the two clauses in the MAE provision. But along comes Forescout, which is the second really key case in this area. Full disclosure, my firm is representing Forescout.

That case is actually going to go to trial in mid-July before Vice Chancellor Glasscock. That should be the first case and decision on what constitutes an MAE in COVID. That MAE clause also has a carve-out for pandemic, so Forescout is, of course, arguing that Advent took on that risk in the merger.

There is a carve-out to the carve-out, of course, as these provisions tend to go, which says that there's a disproportionate effect on Forescout that it could constitute an MAE. So, I think that's going to be a key issue.

Advent is also making a somewhat novel argument on the solvency issue. Basically, they asked the company to put together a projection after COVID really started to have effect. The company did not actually do that, but Advent put its own set of projections together, which it then said constituted an MAE because it couldn't give a solvency representation for its financing and then that is the basis of the MAE. So, it's going to be very interesting issue on this MAE clause and whether the fact here constituted.

Interestingly, the projections that Advent put together say that the business is going to return to normal in 2021. So, I think we're really going to see analysis of the issue of whether that's durationally significant language really applies and that be durationally significant if the buyer is actually admitting that the business will return back to normal next year. That should be an interesting decision that will come out probably in the next few months.

These cases have really changed the way we're looking at these given the COVID effect could be arguably short term. So, how does that intersect with the IBP durationally significant language? What are parties doing about this now? We know how COVID is playing out. We could have effective ways. Are there things that folks should be doing in the drafting role?

I'd like to turn it over to Steve and Kevin to see what their thoughts are on that, and how they're seeing it playing out in the drafting.

Construction of MAE and Carveouts / Interim Operating Covenants

Steve Haas, *Partner, Hunton Andrews Kurth LLP:* Hey, thanks, Katherine. So, I'll try to unpack the MAE definition a little bit from transactional lawyer's perspective. I think you've hit on the first issue quickly. As you look at these agreements, the first question is, is this a single-pronged or a two-pronged MAE definition?

The prong that we traditionally think about in an MAE definition is a material adverse effect on the business financial condition, etc. of the target. However, some MAE definitions — and this was the case in L Brands — have a second prong, which is a material adverse effect on the seller's ability to complete the transaction and performance obligations.

I went back and looked at the Nixon Peabody MAC survey that comes out every year. I looked at the most recent one, and it reported that 64% of the MAE definitions that they covered did have that two-pronged approach.

So, as Katherine said, the complaint of Victoria's Secret-Sycamore Partners case involved an allegation by the buyer that the second prong was triggered because of the seller's extensive breaches of the interim operating covenants. It essentially made it impossible for the seller to satisfy the closing condition.

There are a lot of lawyers out there who might argue that the second prong isn't intended to address those kind of contract breaches. Rather, it's really talking more about the seller's ability to perform, that that speaks more towards corporate power or some extraneous event rather than simply breaching the contract so badly that you now cannot testify your closing conditions.

That typically will be addressed to a separate termination, if there has been a breach of the reps & warranties or covenants and that it can't be cured after notice prior to the outside date, and that typically will be a buyer's out.

If I go back then to the traditional prong of the MAE definition, there's still a lot of issues coming out of this litigation for deal lawyers to think about. I'll tick through them as I think about it.

First, is pandemic excluded from being considered? Even if it's not, the target may still argue that the effects of COVID-19 are excluded under a different carve-out, such as the exclusion for general economic effects or conditions affecting the industry generally. That's an argument that's being advanced in the Snow Phipps versus KK litigation right now.

Second, can the buyer consider the effects of the pandemic if the target has been disproportionately affected? Typically, you would see a carve-out for the pandemic that you can look to effect if the target's been disproportionately affected.

Then, that raises a bunch of new issues. What is the appropriate peer group? Right now, on the Simon Properties-Taubman litigation, that's an issue about what is the appropriate group of similar companies on which you're supposed to be judging the target.

Second, how do you actually demonstrate that disproportionate effect? I know in the Realogy Holdings versus SIRVA litigation, the buyer's arguing that the target from a pre-COVID financial position has rendered it more exposed than similar companies in the industry to this economic downturn.

Another interesting issue that I think about, although I don't think we've seen it yet in the COVID-19 litigation, is that even if the target has been disproportionately affected, what effects can the buyer consider? Is it the entire effect of the pandemic, or is it the extent to which the target has been disproportionately affected compared to those peer groups, the similarly situated companies? Again, I'm not aware that that issue has popped up in the COVID-19 litigation. It may have, but that was an issue back in 2007 in the Sallie Mae litigations.

The other big issue that transactional lawyers need to be thinking about and looking at all these busted deals and the lawsuits that are starting to be filed is in the interim operating covenants.

We're seeing a lot of claims. Katherine, you alluded to this as well that targets have breached their interim operating covenants. We saw that in Sycamore Partners, Victoria's

Secret, Level 4 Yoga versus CorePower Yoga and a bunch of other cases that are out there.

Mostly these sellers are claiming that the targets have breached their covenants to operate in the ordinary course, although there's also some claims that specific negative covenants have been breached. It's just one example. There was a claim that a seller had breached its debt covenant by drawing on its revolver.

What's interesting to me is we've actually seen these claims on the ordinary course covenants coming in different directions. In the Victoria's Secret case, the buyer alleged the seller wasn't operating in the ordinary course by closing its stores and furloughing employees. But, in contrast, in the Simon Properties-Taubman litigation, the buyer there is alleging that the seller didn't respond quickly enough to the pandemic.

I would think from a litigation perspective that this covenant breach is going to be an easier path for a buyer to get out of a transaction than declaring an MAE because the covenant is going to be subject to a materiality standard. That is the target is performed relevant to covenants in all material respects, but I think these cases are showing that it's not necessarily that clear cut even if it's an easier path in proving an MAE.

The issue that seems to be coming up here is what does ordinary course of business actually mean. I think Vice Chancellor Laster recently summarized this issue really well in a hearing that took place in *AB Stable VIII v. MAPS Hotel and Resorts One*.

I'm going to quote from the transcript where he said, "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 that the ordinary course of what you do consistent with past practice when you're on a flood, or is it ordinary course on a clear day when there hasn't been any rain?"

He continued to say, "We've obviously had a colossal and viral-based rainstorm. Are people doing things that are ordinary course when one is in a pandemic and is that what the contract contemplates or, as the defendant's cast it, is this really a clear day type provision where you have to deliver in the condition that they were when you signed?"

That's a really great way of encapsulating this issue. The answer to the question may turn on whether the ordinary course covenant is subject to reasonable efforts condition or whether it's absolute.

I would, for precedent, direct listeners to take a look at *Akorn v. Fresenius* as well as the *Cooper Tire* case. In *Akorn*, the seller agreed to use commercially reasonable efforts to carry on into business in all material respects in the ordinary course.

Thereby, Chancellor Laster said that, one, commercially reasonable effort standards are generally used to some sort of an acknowledgement that there are things that are outside of parties' control.

Second, he said they generally mean that you got to take all reasonable steps to maintain your operations in the ordinary course. And third, and specifically in the context of that case, he said the target would be judged based on what a generic pharmaceutical company would do in that situation.

In contrast, in *Cooper Tire*, there was a covenant to operate in ordinary course that was not qualified by an effort standard. There, the court referred to that covenant as an unconditional obligation to operate at the very course of business consistent with past practice.

In that case, the court found that actions resulting from an employee strike, among other things, constitute a breach of that covenant. This seems to suggest that, if you have an absolute covenant that may be in this category that Vice Chancellor Laster was talking about, that you've got to deliver the company essentially the same as it was prior to the pandemic at signing.

However, you know, if you parse *Cooper*, and I'm sure litigators like Katherine would do this, the court also found that the target there had made a "conscious effort" to disrupt the operations of the company.

So, I think it's confusing. It's an interesting issue. Maybe we'll get some answers out of some of these cases, maybe we won't. But I think that's one of the big things that people are focusing on right now.

I certainly think there's tension here. If you look at what a lot of these claims are saying that they're challenging value-preserving actions, that there are things that if the buyer really did have to close, they would have been glad that the targets did, for example, furlough employees or closed stores.

Second, MAEs are typically used to allocate the risk of macro events. In some of the cases, what you have is a buyer essentially saying that, even though they agreed to exclude the effects of a pandemic from the MAE definition, that that target necessarily operated outside the ordinary course by responding to that pandemic, whether it was a condition forced upon or through intentional actions taken in response.

It's possible courts may not be receptive to that, so there's certainly some tension between the MAE carve-outs versus these claims based on the ordinary course covenant.

I'll stop talking at that point and see if Kevin has anything that he wants to add.

Kevin Miller, *Partner, Alston & Bird LLP:* A couple of things, Steve, and that was just terrific from my perspective. One, I find it very interesting when reading the complaints to see whether the focus of the buyer's complaint seeking judicial declarations that have validly terminated the contracted is on a breach of the covenant, the interim operating covenant, or on the reps and warranties. It gives me a sense at the start as to which they think is the better argument.

In L Brands, for example, it was pretty clear that Sycamore was primarily relying on the breach of the interim operating covenant ordinary course provision and less so on the MAE to the reps and warranties spring down.

That may, in part, have been driven by one of the things we spoke about which is they had a flat interim operating covenant. It wasn't qualified by reasonable best efforts, commercially reasonable efforts, anything like that. It was a flat promise to conduct the business in the ordinary course consistent with past practice.

My guess would be that, Sycamore's view was, since the interim operating covenant was flat, they felt some of the case law provided a better path to termination if they focused the court's attention on the interim operating covenant breach.

The other thing is that sometimes ordinary course interim operating covenant has a carve-out for "except as required by law." But some people will immediately say, "Well, isn't that a carve-out that we can necessarily rely upon." In many cases, the responses to COVID-19 were not technically required by law. It was guidance from the government or voluntary actions, etc. You've got to be very careful as you start to think about what you can rely upon.

The last thing that I would mention is there was a sense from the filings in the L Brands litigation that L Brands felt that it had been consulting with Sycamore and that Sycamore was on board with the steps that it was taking, but for some reason they just didn't memorialize that understanding with a formal consent.

That may sometimes be a result of business people thinking there's a clear understanding and agreement about what they're doing and not focusing as they should on the requirements of the contract to get actual written consents to take certain actions that may otherwise be deemed in breach of their obligations under the contract.

It's a good reminder for people to pay close attention and focus on the provisions of the contract and make sure that even after signing, as people move forward towards things, that they continue to comply with requirements of the contract.

We had a similar case a while back where somebody didn't give a requisite notice within the timeframe required under the contract and the drop dead date passed permitting the counterparty to terminate the contract. Steve, I don't know whether you wanted to add anything further on that topic.

Haas: You brought up the buyer consent issue, and it's worth pointing out that many agreements provide that the buyer cannot unreasonably withhold or delay its consent when it's requested as an exception for one of the negative covenants.

There's certainly an argument the target company could make that it's unreasonable to withhold consent on what essentially is a value preserving action in an unforeseen and unprecedented crisis.

The second thing I'd add, and this gets in the weeds, but we're all corporate law nerds here, is this issue of operating under ordinary course if it's qualified by consistent with past practice. Normally, I would look at that language and I could say, "well, it's really not necessary because isn't that essentially what ordinary course means?" That need to be followed by consistent with past practice in ordinary course, what do you do in ordinary situations? So, you normally would look backwards.

Think about how a court might look at that language consistent with past practice and examining response within a pandemic for which there is no applicable past practice. It's something to think about. I have no answers. I'm just throwing out issues there.

Henderson: Yes, that's interesting because every case I've litigated about the deal case has involved the ordinary course covenant because it is so broad, a buyer can use it with almost any argument and you kind of get a kitchen thing sometimes of issues.

That's why, as you mentioned in L Brands, that it was the first thing because it's so broad you can make these arguments. A lot of times with, particularly in Delaware Court of Equity, you have things where if someone appears to be the black hat versus the white hat. The court can be swayed to find that the ordinary covenant has been violated if they think that the actor is the black hat, the bad actor.

It's interesting if we think about it and you keep the language as broad as it has been traditionally, right, just operating the ordinary course. I think a court has a lot of discretion to go either way on that. I wonder if you're seeing efforts to try to caveat it in a little bit more to address actions needed to address pandemics or COVID. Are you seeing that in the drafting process?

Haas: Yes. If you monitor agreements being negotiated and announced now, not back in March, but at least starting in May, you're seeing more carve-outs because Kevin really hit

the nail on the head.

A lot of the actions that these targets have taken were technical enough to be required by law. In some cases, closures were, but furloughing employees or mass closures of stores and locations wasn't necessarily required by law. It might have been consistent with government recommendations, but it wasn't required by law.

So, you are seeing more carve-outs that allow targets to take actions in good faith in recognition of the safety of employees or customers. I've seen language staying consistent with guidance issued by government agencies. I've seen language that says you can take actions consistent with what your industry is doing.

So, we're definitely seeing a drafting response, but it's not addressing this broader issue, Katherine, of people using the interim operating covenant in a typical deal to sort of circumvent MAE, but it's much more tailored to the COVID-19 claims to recognize that targets have got to add some latitude. Right now, you couldn't possibly agree for most companies, at least that you're not going to take some action as this pandemic unfolds and nobody knows what lies ahead over the next couple of months.

Miller: I was actually really interested, Katherine, in what you just said about the black hat/white hat issue because I think that plays a large role in the way parties are posturing their litigation strategies.

We already talked about how Sycamore focused the court's attention on the flat covenant to operate in the ordinary course consistent with past practice because I think they viewed that as a very clear and simple argument to make to the court so they wouldn't have to get into arguments about the carve-out to MAE with regard to pandemics and whether things are disproportionate or not or any of the other debatable issues. They could just focus on a very flat, very specific, direct covenant to try and get the court's attention and say, "We're wearing the white hat."

The next day, L Brands files a complaint seeking specific performance and, as you said, monetary damages. And, what do they do? They tell the court that, "Hey, what's really going on here is they've got buyer's remorse. The fundamental deal was these guys at Sycamore bought the pandemic risk, and now they're trying to get out of it."

We shouldn't allow them to rely on technical arguments whether it's with regard to an MAE or an interim operating component. Look at the fact that we included the word "pandemic" in the carve-out's MAEs and understand that the basic fundamental business deal here was that Sycamore bought that risk and force them to close the transaction.

We sometimes get caught up in the weeds of these things. And then, when we turn to out litigators, we find out that litigators say, "What are our two-best arguments? Let's keep this simple, straightforward and focus the court's attention on what our best arguments are and convince them that we're wearing the white hat."

Henderson: Yes. It's absolutely the way I think we view it, particularly in these busted deal cases because that's largely where the judgments come out when they're looking at the thing holistically. And I think that's particularly true in Delaware.

We see most of these cases given their capabilities and their expertise, and when we go into it, you can make all of these contractual arguments and look at the word, compare this word, that word.

Oftentimes, if you've got an e-mail where the buyers say, "We got to get out of this. I don't care how," then you know that really turns the tide on how the court's going to look

at the contractual language.

You can do everything on your end ahead of time. If you've got that type of record, I think that's going to shift the case off. That's what I would talk to you about Akorn, this outlier and unique fact, but you've got now the case law stemming from that and we're going to be using that for cases where you perhaps don't have this extreme fact.

It's interesting if you leave the broad language in there. You're more open to those types of arguments as opposed to trying to get at the weeds and the different carve-outs and what nots. You can try to, set the court more and maybe just sway them from the black hat/white hat issue if you've got more specifics in there.

Dealing with Structural Issues PE / Buy Side Vote

Miller: Next, we thought we would quickly highlight some structural issues, the first arising in connection with sales to private equity or financial sponsors, and the second arising in connection with transactions requiring a buy side vote, a subcategory of that exact transaction which typically requires a buy side vote.

SPACs are particularly topical, given the recent spate of SPAC deals, some seeking to raise over a billion dollars. Dealogic recently reported that, through June 15 of this year, there have been 31 blank check IPOs raising $9.8 billion, compared to 26 IPOs raising only $5.9 billion at this time last year.

Both PE deals and SPAC deals have unique characteristics as compared to agreements with strategic acquirers. Among other things in PE deals, remedies are often limited to specific performance and a capped amount of money damages.

The interplay between the transaction agreement, specifically with the shell acquisition sub, the equity commitment letters provided by affiliates of the acquisition sub and the limited guarantees is critical, particularly as the target is only a third-party beneficiary and not a party to the equity commitment letter.

Often, you'll see, provisions like in the Forescout deal where the buyer agrees to enforce the equity commitment letter if the target is entitled to specific performance, but it didn't give the target a right to directly enforce.

The last thing I'd raise about PE deals — and we could go on forever — is that the ability to toll the drop dead date, which is, I believe, what happened in the Forescout-Advent transaction, may not always be a viable option if third party financing commitments are due to expire and can't be extended.

The other thing I wanted to focus on, again, which Katherine already alluded to, is thatwe had three complaints in three days. The first by Sycamore seeking a declaration that it had validly terminated the transaction; the second the following day L Brands seeking specific performance and monetary damages; and then, the third, on April 24 filed by Sycamore Entities seeking a declaratory judgment that the equity commitment letter had automatically terminated when L Brands had filed its complaint seeking monetary damages.

We don't have a copy of the equity commitment letter. It was filed under seal with the court, but it was quoted in the second Sycamore complaint. Apparently, under the terms of the equity commitment letter as quoted in the second Sycamore complaint, it appears that L Brand'sseeking of monetary damages automatically terminated the equity commitment letter. The consequence is that, if the equity commitment letter is gone, even if you have a breach under the transaction agreement, specific performance may no

longer be an effective remedy because there's no way for the acquisition subsidiary to obtain the funds to actually close the transaction.

As Katherine said, a week after Sycamore filed the second complaint, the parties agreed to walk away from the transaction without the payment of any fees from either party to the other. Ostensibly from L Brands' perspective, they put out a press release saying that it was time to get back to business and running their companies and not be distracted by the litigation.

That's not a unique outcome. For example, in the Woodward Excel transaction, where two strategics decided to walk away because they no longer believed they would be able to achieve the benefits of the transaction originally contemplated.

Jumping to SPACs, SPACs also have some unique characteristics as compared to agreements with strategic acquirers. The first is that virtually all of the funds raised in the SPAC deal are held in trust to fund a possible redemption of outstanding shares in the event that SPAC doesn't consummate a de-SPACing transaction within a specified period of time, typically two years.

Typically, under the SPAC's charter, most SPAC transactions require shareholder approval.That's a separate charter requirement distinct from any stock exchange required shareholder approval.

Essentially stockholders get a chance not only to vote on the de-SPACing transaction, but if they don't like the de-SPACing transaction, they can elect to get their shares redeemed.

Just as an aside, one of the interesting consequences of the ability to get your shares redeemed if you don't like the de-SPAC transaction is that we don't see a lot of fairness opinions on the buy side in SPAC acquisitions.

The view typically is that if you're giving shareholders a choice — they can vote for the de-SPAC transaction and own a share in the pro forma combined company or they can get redeemed but they are not being dragged along by the will of the majority — a fairness opinion is not necessary.

Marching through it further, another consequence of the SPAC structure is that the merger agreements often don't provide for reverse termination fees because all of the funds raised in a SPAC ideal are tied up in a trust fund and they're being preserved for possible redemptions.

As a consequence, SPAC boards don't have to worry about the consequences of pulling their recommendations to stockholders because they're not going to be giving the target a right to terminate that triggers the payment of the termination fee. They can freely fulfill their fiduciary duties and update their recommendation to stockholders.

The last thing I would say is a more general broader consequence. If stockholders vote the deal down, the SPAC gets to walk away without having to litigate. It's done. Their stockholders didn't approve, the deal can't be consummated, it's over.

There may be some cases where the transaction agreements may provide for payments in that case, but it's not something that you would see in a lot of transactions and certainly not in a SPAC transaction given that virtually all of its cash is locked up in the trust fund and not available to pay a termination fee.

The fun part is that this is actually currently playing out in real time. Back in January, Far Point Acquisition, a SPAC backed by Dan Loab's Third Point Fund, agreed to buy Global

Blue, an international shopping tax refund firm, affiliated with Silver Lake.

As you can imagine, Global Blue's prospects as an international shopping and tax refund company were hit relatively hard by the COVID-19 crisis. But Far Point didn't have to declare a MAC or, otherwise, seek to terminate the merger agreement.

And it doesn't necessarily look like it's going to have to litigate either. Instead, Far Point recently filed a revised preliminary proxy statement in which it recommended that Far Point's stockholders vote against the deal. If the deal gets voted down, it's over and there is no liability to Far Point.

What makes this transaction really interesting is that, in connection with the signing of the merger agreement, Far Point stockholders — principally affiliates of Third Point — agreed to vote 25% of the outstanding Far Point shares in favor of the merger. So, you had a 25% stockholder vote lockup on the buy side. But that's enough to get the deal done.

So, what happens? Silver Lake, which is the backer of Global Blue and still wants this deal to go through, went into the market and I think they bought 12% of Far Point's shares, which, together with the 25% lockup means that they're a little bit closer; they're at 37% of Far Points shares being committed to vote in favor of the merger even though the Far Point Board is currently recommending against.

We don't know what position arbs are taking in the transaction. You may have arbs that are similarly buying into Far Point's shares with the intention of voting in favor of the acquisition because they have hedged their economics and are better off if the transaction goes through because they have a net long position on the Global Blue side of the deal.

To me, this is one to watch because it's playing out in real time in the midst of the COVID-19 pandemic without having to resort to litigation.

Haas: Hey, Kevin, that was a great summary. I really think the Far Point situation highlights the risk when you need a buy side shareholder vote. You made the excellent point that there may not be any litigation here because Far Point does not need to necessarily prove an MAE or even a breach of a covenant.

The agreement says that the Far Point board needs to determine in good faith after consulting with their advisors that a failure to make a change in recommendation would reasonably be expected to constitute a breach of their fiduciary obligations.

Based on comments the Delaware jurists have made at conferences, if those directors, if they subjectively believe that this deal does not make sense, even if the change economics would not support an MAE, then they have a fiduciary obligation to make a candid recommendation do shareholders and that's a pretty tough position to be in.

Typically, a seller is going to deal with that through a termination fee and maybe there are some reputational issues, so the target board don't change their recommendation for a so-called intervening event. But here, as you noted, because it's a SPAC, there's not even a termination fee. So, it's a really interesting situation.

Covid-19's Unique Deal Certainty Issues

Henderson: That's a good segue to the final topic we want to cover, which is can litigation actually get you what you need these days. Litigating in a COVID world has been not without its challenges.

Many courts across the country have shut down. What do you do if you've got a foreign selection provision which requires you to, for example, litigate in New York State court? New York State courts were closed down for a while.

It has created new issues and new things to think about with respect to these types of clauses which perhaps we didn't give that much thought to in the past, like which court is going to be able to get you the relief you need if you need it?

These cases often have to happen extremely quickly. You've got a seller in the state of uncertainty; you need a quick decision; you've got drop-dead dates in your contract. Oftentimes, we've gone to the Delaware Court Chancery because it has expertise, it can move quickly, you can file the trial in a few months in Delaware. That wouldn't be odd traditionally, but in a COVID world, we've seen challenges and we've seen some pushback from the court.

We used to think of getting expedition in Delaware in these types of other cases as a given, not that difficult to get and that has not necessarily been the case in the COVID world.

You see judges acknowledging the real difficulties when we're all sheltered in place and no one can get into their companies and you actually get this now. So, in the WeWork case, for example, Chancellor Bouchard did not grant the expedited trial that the special committee asked for.

Full disclosure, my firm did represent the special committee in that case, but he cited just the realities of not being able to get to a trial that quickly. There was also the consideration that he thought monetary damages could be an adequate remedy there.

In a case that we may have seen get quicker expedition in the past, Bouchard was not willing to do it. Similarly, he denied expedition, again sort of citing the realities of the current world and saying, "I can't possibly get you a decision in the timeframe you need."

That case also involved an arguable delay of the parties in actually going to court and asking for relief. This is also very interesting to me many of these cases don't actually lead to litigation. You've got back and forth negotiations, you're trying to get the parties to come to some agreement, sometimes there's a renegotiation.

In this case, it could actually hurt the parties in sort of engaging in those negotiations ahead of time and not going right to court. I think you have a real question now of can you afford to do that. You need to go in maybe even preemptively so that you can go to court and ask for a schedule if you've got your drop-dead date kind of approaching.

The other interesting issue, as I mentioned, a lot of courts just were closed down. I actually had a number of deals that never went into litigation, but we were on the precipice, and we were really struggling to see are we going to be able to get relief from the court that is the selected court in the contract.

You know, if it's not Delaware, here in California there were courts that were essentially closed down at the court level. Federal courts, it was a toss-up. Can you get any sort of TRO relief in the timeframe you need?

We had real struggles with those issues in COVID. There was an interesting case in Delaware where the parties actually went to Vice Chancellor Laster even though the contract requires New York litigation and said, "We can't get relief in New York. Can you help us?" He actually was willing to do that, which I thought was really interesting.

I would not really count on that going forward, but he did actually decide the case given that the New York courts were closed down. He wound up denying expedition anyway because he thought the New York court could grant non-expedited relief so that would be sufficient for the parties.

It was an interesting case and I think it really begs the question of, if you're negotiating contracts right now, you got to pay more attention to the forum and the drop-dead date and maybe you need to actually build in a little bit of extra time to account for the fact that super litigation is a hard to come by these days.

The courts are increasingly viewing it as a privilege and not a right, so you've got to be thinking, "Do I need to go over an extra time? What courts do I want to be able to go to if I need to? Should I be thinking about the schedule in the drop-dead date timeline?"

The other issue you've got to pay more attention to is the notice provision because I've had situations in the past few months where notice was required to be given by in-person delivery or by fax. I had companies that had shut down; we couldn't do in-person delivery, faxes were not working.

It's really important to be thinking through those issues now, which we probably didn't pay as much attention to in a pre-COVID world. Are you going to be able to get out a really quick notice? Are you allowed to do it by e-mail?

We need to be paying more attention to that to make sure that the contractual provisions allow us to get done what we need to get done if we even go back into a second wave of shelter in place.

Miller: To me, one of the really interesting issues is, and you just alluded to it, was expedited proceedings are not a right, but are only granted at the discretion of a court.

I think that the court was saying regardless of whether there was laches or unnecessarily delays, "I'm sorry, we don't have the bandwidth to just take this on and get you a decision within the timeframe you're requesting." Even though, as a matter of equity we thought it would be great to give you expedited proceedings, it's just not practical.

That raises a question in my mind that says, "what if you don't know that the counterparty is going to refuse to close, the buyer is going to refuse to close?"

You're very close to the drop-dead date and maybe you innocently thought everything was going okay, that you were both working towards a common goal and that even though the buyer may not be obligated to confirm, "We're going to close the deal," that they haven't indicated that they weren't going to close.

That's going to pose potentially insurmountable problems if you get blindsided and then have to turn to the court and say, "It's 10 days before closing. It's two weeks before closing. We need your assistance because they just told us they're not going to be there." Those are hard situations.

Haas: I wonder if the issues are different depending on whether you're dealing with a strategic or financial buyer. A lot of the arguments being made in the Delaware court on this issue is whether you could have expedited trial prior to the outside date.

Most merger agreements and the termination right based on the outside date say that it's not available to a party whose failure to perform is the reason the transaction has not been completed by the outside date.

Therefore, if you have a buyer who wrongfully refused to close, then the termination should be null and void. If you got at least a strategic buyer with no financing contingency, I wonder if maybe that's not as critical.

I mean, obviously, a target does not want to be bound by interim operating covenants for an extended period of time on a transaction that may or may not go through. Maybe the issue is different doing a strategic whereas, if you're dealing with a financial buyer – and Kevin, I think you've alluded to this earlier — if the debt commitment letters expire, you're then dealing with an empty shelve and acquisition vehicle.

While maybe you've got a right of specific performance, the force to try to seek alternative financing, practically speaking, it's unlikely that we can get alternative financing if they don't want to go through with the transaction.

Miller: In the financial buyer case, you may have access to a limited amount of money from a limited guarantee or otherwise, but you're not going to get the benefit of the deal that you thought you had.

Part of the discussion that we've had today sheds some light on the types of the buyers that may be better buyers from a target's perspective. That point you just alluded to, Steve, you know, for many targets they'd say, "I'd rather sell to a strategic because I don't have to deal with the uncertainty of the financing for the financial sponsor disappearing on me and limitations on my potential remedies."

The SPAC situation is the extreme case of that because the stockholders just vote the deal down and, while that's may also happen in a stock transaction with a strategic buyer, you don't even have the potential benefit of a termination fee.

Haas: Yes. Katherine, to answer your question, I haven't seen a huge shift on forum provisions. There's already such a heavy bias towards Delaware that that tends to be where all these transactions are placed.

It's critical for deal lawyers to understand the Delaware developments and that the expedited trial may not be available. We've all assumed they would be and, again, as both of you pointed out, that your case is particularly alarming where the court said that that seller waited too long to file a suit and try to expedite.

It's easy to second guess what was going on, but it's very possible that the seller there was not aware that they were dealing with a true breach or was maybe trying to resolve it amicably before throwing it into a large public dispute. It's really important for transactional lawyers to be watching this and that they may need to tell Katherine to run into court much earlier than they prefer.

Henderson: Yes. Just to give a plug there, I always like to get involved early when these things first start popping up. Sometimes you think not much of it and all others just this deal closing issues.

The first risk of any issue, particularly now given that we're seeing a lot of buyer's remorse, I think it is important to get litigators involved and really strategize through next steps and timing and making sure you're on top of the issues, giving all the notices you need to give because I think it can make a difference on whether you can actually get relief from the court.

Jenkins: Well, thank you very much. This was quite a discussion. We've covered an awful lot of ground in a short period of time. It was terrific. I want to thank all of our panelists

for a really great discussion. I'd also like to thank everyone for joining us today. This concludes today's webcast. Have a good day.