Delaware Supreme Court Affirms *Akorn*

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Peter A. Atkins
Partner / New York
212.735.3700
peter.atkins@skadden.com

Edward B. Micheletti
Partner / Wilmington
302.651.3220
edward.micheletti@skadden.com

Four Times Square
New York, NY 10036
212.735.3000

One Rodney Square
920 N. King St.
Wilmington, DE 19801
302.651.3000

On December 7, 2018, the Delaware Supreme Court affirmed the Court of Chancery's decision in *Akorn, Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, which upheld, for the first time under Delaware law, the ability of a buyer to terminate a merger based on a post-trial determination that a material adverse effect (MAE) occurred. Our previous memorandum discussing the Court of Chancery's fact-intensive decision, and the specific provisions of the merger agreement at issue in the case, can be found here.

The Supreme Court's Decision Regarding Termination

The Supreme Court's three-page order largely confined its ruling to affirming the Court of Chancery's findings concerning the occurrence of an MAE, specifically declining to "address every nuance of the complex record." The Supreme Court, referring to *In re IBP, Inc. Shareholders Litigation and Hexion Specialty Chemicals, Inc. v. Huntsman*, held that the record "adequately supports" the Court of Chancery's decision that Akorn (the seller) had suffered a general MAE that excused any obligation to close by Fresenius (the buyer). It also similarly held that the record "adequately supports" the Court of Chancery's determination that Fresenius properly terminated the merger based on a breach of regulatory representations and warranties that gave rise to an MAE, and that Fresenius itself had not engaged in a prior material breach of a covenant that would have prevented Fresenius from terminating the agreement. The court further held, without explanation, that the record supported the finding that Fresenius did not breach its Reasonable Best Efforts Covenant and that its temporary breach of a so-called Hell-or-High-Water Covenant was not material.

The Supreme Court also explained in a footnote that because "the Court of Chancery issued extensive reasoning on all of the issues presented to it … there is no need for us to comment upon or to address this reasoning to decide this expedited appeal, [and thus] we refrain from doing so." In this regard, the Supreme Court explicitly declined to address whether Akorn breached the Ordinary Course Covenant and whether Fresenius was free to terminate the merger agreement for that additional reason, concluding that this was unnecessary since other grounds for termination were found to exist. Although the Supreme Court's affirmance stops short of being a complete approval of every aspect of the Court of Chancery's opinion, the opinion will need to be carefully considered by parties and counsel negotiating merger agreements, or litigating over the provisions contained therein.

Efforts Clauses

One aspect of the Court of Chancery's *Akorn* decision of particular interest for practitioners that negotiate and draft agreements concerns the default interpretation — that is, the meaning to be given under Delaware law absent any elaborating language in a contract intended to ascribe specific meaning – of "efforts" clauses, and the distinctions or lack thereof among the various types. Our memorandum analyzing this issue can be found here. Unfortunately, this aspect of the *Akorn* decision received minimal attention by the parties and the Supreme Court on appeal. In its opening Supreme Court brief, Akorn cited to *Williams Cos. v. Energy Transfer Equity*, 159 A.3d 264 (Del. 2017), as Vice Chancellor J. Travis Laster did in the Court of Chancery opinion, for the proposition that "reasonable best efforts" requires a party "to take all reasonable steps to solve

problems and consummate the transaction." Fresenius did not contest this definition in its brief. There was no further discussion in the briefs about the different levels of "effort" and what, if any, distinctions there are among the various possible efforts clauses. There was no discussion at oral argument about the level of effort required, only whether or not "reasonable best efforts" were made.

As noted above, however, the Supreme Court did state that because it was unnecessary in order to decide the case to comment on the Court of Chancery's "extensive reasoning on all of the issues presented" below, the Supreme Court was not doing so. Accordingly, among the areas the Supreme Court left open for further possible development is whether and on what basis to distinguish among various unelaborated "efforts" clauses that use different word formulations. Nonetheless, we remain of the view that the *Akorn* opinion and, more generally, Delaware law leave for contracting parties the ability through contract drafting to tailor the specific meaning of such provisions to meet their specific expectations, and thus avoid default interpretations imposed by Delaware law.