JONES DAY

ALERT

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Delaware Supreme Court Affirms Landmark Material Adverse Effect Ruling

The Delaware Supreme Court upholds a lower court's decision to allow Fresenius to sever its merger agreement with Akorn.

On December 7, 2018, the Delaware Supreme Court unanimously affirmed Vice Chancellor Travis Laster's opinion in *Akorn, Inc. v. Fresenius Kabi AG, et al.*, which found that Akorn suffered a material adverse effect ("MAE") permitting Fresenius to terminate its merger agreement with Akorn. Akorn had appealed the Delaware Chancery Court's ruling that (i) Fresenius was not required to close the transaction because Akorn had suffered a MAE due to its recent financial performance and (ii) Fresenius could terminate the merger agreement because Akorn's breach of its regulatory representations and warranties gave rise to a MAE. The Chancery Court's 246-page opinion described in detail the significant and sustained decline in Akorn's financial performance, as well as the widespread deficiencies in Akorn's regulatory and compliance functions that demonstrated that Akorn's regulatory representations were not accurate.

In the Supreme Court's order, Chief Justice Leo Strine noted that the *Akorn* decision properly applied established Delaware MAE jurisprudence and that the factual record supported the Chancery Court's decision. The Supreme Court's order specifically noted that the Vice Chancellor's opinion in *Akorn* was in line with the previous Delaware decisions *In re IBP, Inc. Shareholders Litigation* and *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.* Because the Supreme Court affirmed the lower court's ruling that Fresenius properly terminated the merger agreement due to a MAE, the Supreme Court did not address whether the lower court's finding that Akorn breached the ordinary course covenant in the merger agreement provided separate grounds for Fresenius to terminate the merger agreement.

The Chancery Court's opinion and the Supreme Court's three-page affirmation of such opinion are each significant because they represent the first time that Delaware courts have found (and affirmed) that a MAE occurred, permitting a would-be buyer to abandon a merger. While the *Akorn* decision is notable, the Supreme Court's order is a reminder that *Akorn* itself is not inconsistent with prior case law. Instead, *Akorn* affirms that the threshold for a MAE continues to be extremely high, but given the right circumstances, it is possible for a purchaser to declare a MAE.


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