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Material Adverse Change Clauses in M&A Deals: Current Enforcement Trends

Lessons on the Use and Interpretation of MAC Clauses From Hexion v. Huntsman and Other Recent Delaware Decisions

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:

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Thursday, April 30, 2009

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NEGOTIATING MATERIAL ADVERSE CHANGE CLAUSES

April 30, 2009

Sponsored by:	**Strafford Publications Continuing Legal Education**
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I. Purpose and Uses:

– Risk Allocation

- Backstop to protect buyer from post-sign occurrence of unknown/unforeseeable events and risks that threaten the seller's earnings potential for a durationally significant period of time (strategic buyer perspective)

- Scope and specificity may vary where a protracted pre-closing period is anticipated (as in the case of substantive regulatory approvals)

  Consummation Certainty: Buyer wants to define its risk tolerance and needs certainty regarding its ability to walk away from a transaction if the premise/rationale of the deal has fundamentally changed after signing and announcement (i.e., had we known this we never would have done this deal)

  Buyer also wants to know its maximum exposure and the recourse seller may have against it in the case of termination

  Seller, on the other hand, wants to strictly limit the circumstances under which Buyer can terminate the deal in the absence of material adverse changes in its business and wants remedies against Buyer in the case of a wrongful termination

  If a MAC has occurred, Buyer can terminate without any ($$$ or equitable) liability or obligation to Seller or, if it is still interested in doing the deal based on a new economic premise and model, it can use the MAC to seek to negotiate a new (reduced) purchase price

- Pornographic -- you know it when you see it?

  However, no Delaware Chancellery Court Justice has ever seen it. The Court in Hexion pointedly noted that "...Delaware courts have never found a MAE to have occurred in the context of a merger agreement. [And that it was] **not a coincidence**." This was perhaps intentionally prodding lawyers to create a meaningful definition for the term. This notion is in the line with the Delaware Court's judicial reluctance to read anything into the a contract that is not specifically written.

  Hexion Definition for whether an MAE has occurred: whether there has been an adverse change "consequential to the [target] company's long term earning power over a commercially reasonable period" --i.e. "years, not months."

  Additionally, the Court held that especially in the Cash merger context where all of the debt of the target is taken out, EBITA, and not earnings per share, is likely the more relevant metric in determining whether an MAE has occurred.

Thus, the event must undercut the business's ability to generate profits over the long-term, not just a short term issue.

- However, generally MAC clauses define what they are not rather than what they are.

- Accordingly, Seller wants a narrow construction of a MAC with multiple exceptions; buyer will negotiate a broad construction with "clawbacks" to the exceptions; usually involves a very nuanced negotiation; always a functioning of the parties' relative bargaining power

  Be careful, just because a situation ostensibly fits under one of these "clawbacks" does not mean that a MAC has occurred. See Hexion v. Huntsman. In Hexion, the Court held that facts indicating that Huntsman had faired substantially worse than its peers in the economic downturn were irrelevant without a prior showing that Huntsman's decline in business constituted a Material Adverse Effect.

- MAC is not a substitute for detailed representations and warranties and for less than comprehensive buyer diligence; it is not supposed to be an easily invoked buyer "out" or used as a means to win an easy purchase price adjustment for foreseeable risks, interim earnings "blips" or changes in the seller's ordinary course of business between signing and closing; it is not a vehicle for buyer's remorse

- Appears as a definition; exceptions to representations and warranties; closing condition or indirect "bring down"; separate representation re: changes since seller's last audited balance sheet date

– Difference in public M&A deals and private M&A deals (public M&A agreements use a MACMAE threshold for limiting or qualifying the representation and warranty detail and to negate insignificant breaches as a buyer "walkaway" threshold)

– Difference in views of financial buyers and strategic buyers (different view of how external factors affect the business; different view of short term swings in company performance)

II. <u>The MAC Clause Construct</u>:

– In many respects, the core definition has not changed in decades (the magnitude of exceptions has)

– Should not be considered just "boilerplate"

- Contains both objective and subjective standards; the word "material" is not defined

- Lead-in clause (definition)

  - Effect, development, occurrence, condition, state or facts, event, etc.

  - "Individually or in the aggregate" with all other effects, developments, occurrences, conditions, events, etc.

  - "taken as a whole" (measured on a consolidated basis vis-à-vis impact on a significant subsidiary)

  - Business, assets, earnings, condition (financial or otherwise), results of operations, properties, etc.

  - "Prospects"/"reasonably expected to result in"/other forward-looking phraseology; definitional inclusion or "rep-by-rep" specificity

- The Laundry List of Exceptions

  - Macroeconomic effects and events (general economy, credit markets, interest rates, exchange rates, lending moratorium, stock market volatility)

  - Industry effects (important to properly define the industry or sector in which the seller operates)

  - Consequences flowing directly from the pendency, announcement and consummation of the deal -- customer, supplier, employee impact, etc.

    * The debate over "anything expressly permitted or contemplated by the merger agreement"

  - Force Majeure (terrorism, war, civil insurrection, Hurricane Katrina); compare with impossibility of performance

  - Matters previously disclosed to buyer or publicly known

  - Seasonality and cyclicality in the seller's business

  - Not meeting forecasts, projections, street estimates, etc.

  - Stock price decline

  - Action taken with buyer's express consent

  - Changes in tax law, GAAP, other laws and regulations, material worsening of existing, threatened or proposed litigation or legislation (Sally Mae)

- The Exceptions to the Exceptions (“it was out; now it’s back in”)
  - “Disproportionate impact” in relation to seller’s industry peers
  - “But not the underlying cause”
- The “Market MAC”
  - General – changes in capital markets, credit markets, securities markets
  - Changes in interest rates
  - Changes in the availability or cost of capital
  - Changes in financial risk of investments in securities similar to target’s securities which render either (i) the applicable interest rate to be less than the market rate or (ii) reduce the financial return on the investment
  - Inability to syndicate
- Drafting Issues
  - Be as categorically specific as possible
  - Tactical utility in being “vague” (public v. private deal distinctions)
  - If a buyer has a specific concern, the concern should be addressed specifically, either in a customized MAC clause or in a closing condition
  - Keep in mind that broad “market MAC’s” will probably be interpreted narrowly
  - Quantification not usually desirable -- eliminates bargaining power
  - Draft carefully. Pay particular attention to any provision in the agreement that may conflict with the MAC clause, such as a termination fee clause. Make sure that the MAC clause, when read in the context of the entire agreement, reflects your intent
  - Consider the effect of forward-looking language, such as inclusion of “prospects,” ‘‘would have,” “could reasonably be expected to have”
  - Consider assigning the burden of proof as to whether or not a MAC has occurred (ostensibly endorsed by the Court in Hexion)

    The Hexion Ct. said the burden is the party claiming MAC

III. <u>Interrelationship with Buyer’s Due Diligence and Other Provisions in the Agreement</u>

– The preamble to seller representations which carve out "risk factors" and forward-looking statements in the seller's SEC reports

– Schedules of exceptions to representations (express non-admission of a MAC)

– Elimination of "multilayering" and resulting ambiguity (representations that are qualified must be true in all respects; unqualified representations must be true in all material respects)

– Integration clause; non-reliance (on "parol matters'") clause; third-party beneficiary clause (Con Edison)

– Termination provisions vis a vis closing conditions (question of timing of assertion; right to cure)

– Remedies (specific performance, reverse break-up fees, etc.)

– Courts look to specific representations, warranties and closing conditions to glean what the parties deemed material enough to merit a specific, negotiated provision; the impact of other "quantified and "qualified" areas of the merger agreement (representations and warranties, pre-closing operating covenants, etc.); undercutting arguments

IV. Special Considerations

– Inconsistent MAC standards in acquisition agreements and loan commitment letters

  - debt commitments and today's broader-based "market outs"?

– Importance of choice of governing law (NY, Delaware, Tennessee); IBP (NY law applied by Delaware Chancery Court); Did Con Edison undercut IBP? Hexion follows/expands on MAC standard from IBP.

– Anticipatory breach; be careful with correspondences and "paper trails"; seller's public announcement of adverse events may be used by buyer to claim a MAC?

  Be extra careful as buyer of breaking covenants while trying to show a MAC has occurred--could result break-up fee liability or even liability for full economic damages

– MAC litigation won't be dismissed on motion for summary judgment because it is a very specific factual inquiry -- strong likelihood of trial on the merits; seller may be reluctant to showcase its "dirty laundry"

– Who benefits / is harmed more from asserting the claim, and when?

- Before a buyer asserts a MAC out or the seller seeks a judicial declaration that no MAC has occurred, the parties need to consider:

  - Despite the most recent and some prior judicial decisions, the law surrounding MACs remains fairly undeveloped and uncertain
  - how precise or vague is the MAC definition
  - how does the agreement read cumulatively; where arc the ambiguities?
  - was specific performance retained as a remedy; if so, to what extent?
  - how much $$$ expense, management time and distraction will ensue in a protracted litigation
  - how much negative information will be revealed publicly
  - what did the parties know (what should they have known)?
  - what do the paper trails and negotiating of prior drafts reveal?
  - can lost merger premium damages be recovered?

V. <u>Strategic vis-à-vis Financial Buyer Distinctions; Trends in the Current Tight Credit Environment</u>

- Historically, private equity buyouts were viewed as inherently more contingent (perhaps even “option contracts”)

  - Parent-fund’s “corporate veil” preserved; shell acquiror used
  - Focus was on strength of financing commitment at signing and the level of efforts required to get the commitment funded (however, sellers accepted the notion that private equity buyer needed some “out” if the financing wasn’t there)
  - But, if the funds were available on original committed terms, the private equity firm had to close
  - MACs had fewer exceptions
  - Financial buyers often at a competitive disadvantage because strategic buyers had no financing contingencies, bi-lateral specific performance was typical in strategic deals, and strategic buyers could pay a higher price based on operating and other merger synergies

- The Late-2004 and 2005 Sungard, Neiman Marcus and Hertz Buyout Paradigm Shift

- Financing became more readily available at lower interest rates and EBITDA coverages; private equity firm coffers were full with money that needed to be allocated for outsized returns and portfolio management fees, “clubs and consortiums” emerged to spread risk and execute carve ups; financing conditions limited or eliminated to “level playing field’ with strategic purchasers; portfolio company roll ups

- Reverse break-up fees emerged to compensate seller for failed financing or financial buyer unexcused failure to close (sometimes two-tiered: lower in the case of buyer’s failure to close due to lack of financing, and higher buyer’s failure to close due to willful breach)

- Limited, non-recourse, parent-sponsor guarantees of the reverse break-up fee emerged

- Specific performance waivers and limitations

- Complex alternative financing covenants (“debt marketing periods”) and the like

- Private equity buyers forced to accept strategic buyer’s panoply of exceptions to the MAC definition due to increased seller focus on deal consummation assurance and to compete with strategics in auctions, etc.

- Lenders eliminated syndication conditions and agreed to business MAC definitions and triggers in their debt commitments that were parallel (and often identical) to what was agreed to by the purchaser and seller in the merger agreement. This made the private equity buyer more comfortable with no financing conditions in the definitive agreement.

- Private equity buyers tended to successfully bargain for greater detail in the seller’s representations and warranties than a strategic buyer, already very familiar with seller’s industry, would obtain

– Where we are today?

- What is the bargaining leverage in the current credit environment and against the backdrop of headline busted buyouts and the dearth of large private equity deals since last August 2007?

  Major Issue: Bank financing. Banks are going to push for easy MACs in their financing agreements and in the deals themselves, especially if they are taking on debt. Banks do not want to be shopping the debt of a company that’s outlook has just turned cloudy.

VI. <u>Some Lessons from United Rentals (Cerberus) Solutia (Citi ,Goldman, DB), and Hexion/Huntsman</u>

- If the URI agreements had been clearly and consistently drafted, the court would not have inquired into the course of negotiations

- There may be tactical advantage to leaving certain provisions vague. Before doing so, he confident that the facts surrounding the preparation of the agreement will run in your favor if examined

- Do not run out of gas negotiating other parts of the agreement so that there is nothing left for the MAC discussion

- If opposing counsel clearly states that its interpretation of the MAC clause and the agreement is contrary to yours, you should state clearly your view. If you do not and the negotiations are examined, a court may accept opposing counsel's interpretation

- If you are a seller, do not treat a MAC clause as boilerplate or bank policy without substantive effect. Also, do not accept oral representations that are contrary to the MAC clause or other provisions in the agreement. Similarly, consider the effect of limiting the relevance of documents provided in the acquisition process such as the target's projections

- If you are a lender or buyer, do not make representations that MAC clause is boilerplate without significant legal effect

- If you are a buyer and you want to find a way out of the deal, try to find a basis other than using the MAC clause. MAC clauses provide only a "narrow" out and the party that invokes the MAC clause has the burden of proof.

- If you are a buyer and you are concerned about a specific occurrence, spell it out within the MAC clause. Be specific. Do not think that you can rely on the general MAC language.

- Manage the experts in the acquisition stage. The Hexion judge considered the writings (even notes) of Duff and Phelps (who delivered the insolvency opinion) and a junior broker at Merrill Lynch.

ANNEX I

Sample MAC Clause

"Material Adverse Effect" means, with respect to the Company, an effect, event, development, occurrence or change that is, or is reasonably expected to result in an effect that is, materially adverse to the business, properties, results of operations or condition (financial or otherwise) of the Company and its Subsidiaries, taken as a whole, or that prevents the consummation of the Merger or the performance by the Company of its covenants and undertakings under this Agreement; including but not limited to: (a) a failure to meet projections (by fifteen (15) or more percent); (b) a downgrade in the Company's credit rating; (c) loss of major customer (state specifically); and (d) the Company and its Subsidiaries are materially, adversely and disproportionately effected in comparison to other companies operating in the [name of industry] by (i) changes in conditions in the U.S. or global economy generally or the U.S. or global capital, credit or financial markets generally, including changes in the availability of capital or currency exchange rates; (ii) changes in applicable Law or general legal, tax, regulatory or political conditions of a type and magnitude that as of the date of this Agreement reasonably would not be expected to occur; or (iii) changes generally affecting [name of industry]; provided, however, except as set forth above, none of the following, individually or in the aggregate, shall be taken into account in determining whether there has occurred, or whether there is reasonably expected to occur, a Material Adverse Effect: (a) a decrease in the market price or trading volume of Common Stock (but excluding herefrom any effect, event, development, occurrence or change underlying such decrease to the extent that such effect, event, development, occurrence or change otherwise would constitute a Material Adverse Effect); (b) changes required by GAAP; (c) the effect of the negotiation, execution, announcement or pendency of this Agreement or the transactions contemplated hereby or the consummation of the transactions contemplated by this Agreement on the Company's relationships, contractual or otherwise, with customers, suppliers, vendors, bank lenders, strategic venture partners or employees; (d) earthquakes, hurricanes, floods, or other natural disasters; (e) any affirmative action knowingly taken by Parent or Purchaser that reasonably could be expected to result in a Material Adverse Effect (without giving effect to this clause (f) in the definition thereof); (f) any action taken by Company at the express request of Parent or Purchaser, or any action or omission required pursuant to the express terms of this Agreement (provided that the immediately foregoing exception neither is intended nor shall it prevent or affect any determination that an effect, event, development, occurrence or change resulting from the compliance by the Company and its Subsidiaries with the requirements of the first sentence of Section __ of this Agreement has resulted in or contributed to a Material Adverse Effect); (g) any deterioration in the business, results of operations, financial condition, liquidity, stockholders' equity and/or prospects of the Company and/or its Subsidiaries substantially resulting from circumstances or conditions existing as of the date of this Agreement that were generally known publicly as of the date of this Agreement; and (h) any material worsening from and after the date hereof of the matters set forth in Section ___ of the Company Disclosure Schedule.

Material Adverse Change Clauses in M&A Deals: Current Enforcement Trends

April 2009

Presented by Herbert F. Kozlov, Esq.

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Controlling Your Destiny Between Signing and Closing

- Much of a transactional lawyer's job is to provide certainty for the client.

- In the context of an acquisition, one of the most difficult places to engineer certainty is during the time between signing and closing.

Controlling Your Destiny Between Signing and Closing

- The viability and performance of some target companies now depends on a fickle credit market and the rapidly-changing landscape of economic legislation.
- Anticipating potentially dramatic changes in a target company can provide acceptable exit options for both sides.

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Controlling Your Destiny Between Signing and Closing

- Typically, buyers will insist on material adverse change (“MAC”) clauses – also called material adverse event (“MAE”) clauses.
  - **Who is really protected**?
- MAC clauses generally define circumstances that allow a buyer to terminate an otherwise binding obligation to close an acquisition as a consequence of some event impacting the target and occurring after the signing of the acquisition agreement.

MAC Clauses in Court

Recent dramatic changes in the availability and cost of debt financing and other market conditions have caused an increasing number of buyers and lenders to get cold feet and look to MAC clauses as a defense to closing the transaction.

- Hexion Specialty Chemicals & Huntsman Corp. (*Short-term performance declines do not constitute a MAC, and a liability cap may not apply in the face of knowing and intentional breaches*)
- United Rentals & Cerberus Capital Management (*Under the "Forthright Negotiator Principle", where a remedy provision is ambiguous, the court will adopt the interpretation which the seller knew or should have known the buyer relied upon*)
- Alliance Data Systems Corporation & Blackstone (*Acquisition sub's parent has no obligation for the shell company's obligations*)
- *Finish Line, Genesco & UBS* (*Short-term performance declines may, in certain circumstances, constitute a MAC*)
- Citigroup et. al & Solutia Inc (*MAC claim based upon a general decline in the credit market and the lenders' inability to syndicate loans – case settled*)
- Lone Star Funds & Accredited Home Lenders (*MAC claim based upon a general decline in the target's industry – case settled*)
- MGIC Investment Corp. & Radian Group (*MAC claim based upon a general decline in the target's industry – case settled*)
- Silver Lake Partners, ValueAct Capital Partners & Acxiom Corp. (*MAC claim based upon short-term performance declines – case settled*)
- Goldman Sachs, Kohlberg Kravis Roberts & Co. and Harman International Industries, Inc. (*MAC claim based upon target's failure to live up to Wall Street expectations – case settled*)
- Bain Capital, et al. & HD Supply, Inc. (*MAC claim based upon a general decline in the target's industry – case settled*)
- JC Flowers, et al. & Sallie Mae (*MAC claim based upon changes in legislation – case settled*)

When Will A MAC Let A Buyer Off The Hook?

- Recent cases have provided guidance, but little in the way of bright line tests, for how courts will construe MAC.
- If one rule has developed, it is that traditional MAC clauses favor sellers.
- To date, New York and Delaware Courts have ***never*** found a MAC to have occurred in the context of a merger agreement.
- But, MAC litigation can bring a target company to the negotiating table.

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Presentation Overview

- The Basics of a MAC Clause.
- Hexion Specialty Chemicals v. Huntsman
- Other recent MAC Clause and Termination Fee Disputes.

Basics of a MAC Clause: Defining "MAC"

- Since a typical MAC clause gives the buyer the right to walk away from the deal if the target has suffered a "MAC", the crux of most MAC clause disputes necessarily revolves around the way "MAC" is defined in the agreement.
- While there is no standard definition, most "MAC" definitions follow a pattern similar to the following:
  - ***"an effect, event, development or change that, individually or in the aggregate, is materially adverse to the business, results of operations or financial condition of the company and its subsidiaries, taken as a whole."***

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Basics of a MAC Clause: Defining “MAC”

- Why So General?
  - Most definitions of “MAC” are very general and often there is no separate definition of “Material”, or if such a definition exists, it is often similarly broad and non-specific.
    - In drafting a MAC clause, why not establish specific dollar amounts as thresholds?
      - The risk: Whatever fixed dollar threshold is set, is there really a difference if you are a few dollars over or under?
  - The general nature of most “MAC” definitions is perhaps due to the fact that such broad language allows companies “to avoid both the expense of haggling over low-probability contingencies and the risk of specifying details that might prove underinclusive.” (115 Harv L. Rev. 1737, 1737 (2002))

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Basics of a MAC Clause: So, what then is "Material"?

- The Delaware Chancery Court began providing guidance in *IBP inc. v. Tyson Foods, Inc.,* 789 A.2d 14 (Del. Ch. 2001), applying New York law. The Court observed that a MAC clause:
  - "is best read 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. A short-term hiccup in earnings should not suffice…".
- The event must affect the buyer's long term strategy.
- Ultimately, the event must be "catastrophic" or significant in light of the enterprise value of the business. *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027 (Del. Ch. Apr. 29 2005).

Basics of a MAC Clause: So, what then is “Material”?

- MACs are rarely interpreted solely on the language contained in the MAC clause alone.
- Instead, courts often look to the circumstances surrounding the proposed transaction to ascertain the intention of the parties, including a determination of what a “reasonable acquiror” in similar circumstances would believe is material.

Basics of a MAC Clause: MAC Exceptions

- **As disputes over MAC clauses become more common, corporate lawyers have been drafting and negotiating more extensive MAC “carve outs” or exclusions. If a “carve out” event occurs, a MAC will be deemed not to have taken place. Typical carve outs include:**
  - *Changes in global or U.S. economic conditions;*
  - *Changes resulting from acts of terrorism or war;*
  - *Changes in global or U.S. stock, capital, or financial market conditions;*
  - *Changes in the target company’s industry that do not disproportionately affect the target;*
  - *Changes in applicable laws and regulations;*
  - *Changes in the target company’s stock price;*
  - *Failure of the target company to meet its financial projections;*
  - *Loss of customers, suppliers, or employees;*
  - *Changes arising due to the agreement or transaction, or announcement of the transaction;*
  - *Changes in generally accepted accounting principles; and*
  - *Other deal-specific carve outs.*

Basics of a MAC Clause: MAC Exceptions

- In negotiating carve outs to a MAC, sellers hope to curtail the buyer's ability to terminate the agreement and therefore have an interest in making the carve outs as broad and numerous as possible.
- Exceptions, like the MAC itself, are often not defined and many MAC clause disputes arise out of the exceptions to the clause rather than the clause itself.

Basics of a MAC Clause: Further Complications

- ***The "Likely" Modifier*** - MAC clauses often employ language such as "would not reasonably be expected to have" a certain effect.
    - Without further explanation of how the parties shall make this determination, such a provision opens the door for an argument over as yet unknown eventualities → whether a current event is ***likely*** to result in a MAC in the future.

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The Termination Fee Alternative

- Parties can limit their exposure to MAC clauses (and indeed, can make such clauses far less significant to the acquisition agreement) by including a reverse break-up fee that specifies and caps the seller's financial remedy in the event the buyer wrongfully fails to close.

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Recent Disputes: Hexion Specialty Chemicals, Inc., et al. v. Huntsman Corp.

- **BACKGROUND:** In July of 2007, Hexion Specialty Chemicals agreed to acquire Huntsman Corp. for $6.5 billion in cash (financed) and $4 billion in assumed debt. Over the next year Huntsman posted significantly lower than expected results, and Hexion engaged an investment management firm for a solvency opinion regarding the combined entity.
- **ALLEGED MAC:** Armed with the solvency opinion, Hexion argued that the deterioration in Huntsman's financial performance and the increase in Huntsman's net debt constituted a MAC.

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<u>Recent Disputes</u>: Hexion Specialty Chemicals, Inc., et al. v. Huntsman Corp. (continued)

- **<u>THE SUIT</u>:** Hexion filed suit in the Delaware Chancery Court, seeking a declaration that (i) Huntsman's business had suffered a MAC; and (ii) even if a MAC had not occurred, the combined entity would not be solvent, and under the merger agreement Hexion would therefore be excused from closing the transaction and in any case its liability would be limited to the $325 million reverse break-up fee.
- Huntsman counterclaimed, alleging that Hexion had committed knowing and intentional breaches of the merger agreement, and therefore the cap was not applicable.

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<u>Recent Disputes</u>: Hexion Specialty Chemicals, Inc., et al. v. Huntsman Corp. (continued)

- **<u>Court's Holding 1 (No Existence of a MAC)</u>:**
  - Reaffirmed the holdings in *Tyson* and *Frontier Oil*, by confirming that a "buyer faces a heavy burden when it attempts to invoke a [MAC] clause in order to avoid its obligations to close."
  - Ruled that Huntsman had not suffered a MAC because Hexion failed to show "an adverse change in target's business that is consequential to the company's long-term earnings power over a commercially reasonable period, which you would expect to be measured in years rather than months."

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Recent Disputes: Hexion Specialty Chemicals, Inc., et al. v. Huntsman Corp. (continued)

- **Court's Holding 2 (Knowing & Intentional Breach):**
  - Although Hexion had negotiated a specific cap on liability for not closing, the court ruled that in seeking the insolvency opinion, Hexion committed a knowing and intentional breach of the merger agreement, thereby exposing Hexion to potentially uncapped damages.
    - In failing to notify Huntsman of its concerns and, instead, seeking a solvency opinion that would avoid financing, Hexion breached its covenants to use reasonable, best efforts to obtain financing and give notice of its concerns about the combined entity.

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<u>Recent Disputes</u>: Hexion Specialty Chemicals, Inc., et al. v. Huntsman Corp. (continued)

- **<u>CONCLUSION</u>:** The court awarded partial specific performance to Huntsman, and required Hexion to use its reasonable best efforts to obtain financing, but did not go so far as to order consummation of the merger.
- **<u>THE SETTLEMENT</u>**: Hexion failed to obtain financing, and Huntsman agreed to let Hexion off the hook in return for:
  - The $325 million termination fee;
  - $425 million in damages; and
  - Hexion's parent company's purchase of $250 million in Huntsman convertible notes.

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Recent Disputes: United Rentals v. Cerberus Capital Management

- **BACKGROUND:** In 2007, Cerberus, operating through an affiliate, and United Rentals entered into a merger agreement which contained a provision that permitted Cerberus to terminate the transaction by paying a $100 million termination fee.
- The merger agreement also contained a specific performance provision, but it remained subject to the termination fee provision.
- During the course of negotiations, Cerberus indicated to United Rentals that it considered the termination fee to be United Rentals' sole and exclusive remedy against Cerberus for termination of the Agreement.
- **THE SUIT:** After Cerberus informed United Rentals that it would not complete the acquisition and would instead pay the termination fee, United Rentals initiated an action in the Delaware Chancery Court to compel specific performance.

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<u>Recent Disputes</u>: United Rentals v. Cerberus Capital Management (continued)

- **<u>COURT'S HOLDING</u>**: The court ruled that United Rentals was not entitled to specific performance.
  - The court determined that during negotiations, Cerberus had intended to limit United Rentals' remedy, in the event Cerberus terminated the acquisition without cause, to the payment of a $100 million termination fee.
  - The court held that (i) because of failures in the drafting process, the agreement was ambiguous as to remedies; (ii) there was no clear evidence of a common understanding among the parties on remedies; and (iii) ultimately, under the "forthright negotiator" principle, United Rentals knew or should have known from specific positions taken at negotiating sessions that Cerberus subjectively believed its only obligation on termination of the agreement would be payment of the termination fee.

<u>Recent Disputes</u>: Alliance Data Systems Corporation v. Blackstone Capital Partners

- **<u>BACKGROUND</u>**: In May 2007, a merger agreement was entered into between Alliance Data Systems Corporation ("Alliance"), Aladdin Solutions, Inc. and Aladdin Merger Sub, Inc. (together, "Aladdin"), two companies formed by Blackstone Capital Partners ("BCP") for the purpose of acquiring ADS.
- One of the conditions to Aladdin's obligation to close the deal was regulatory approval from the Office of the Comptroller of the Currency ("OCC") because Alliance owned World Financial Network National Bank. The merger agreement contained a provision that if all of the necessary regulatory approvals were not obtained, neither party had to consummate the merger.
- The merger agreement also contained specific language that Aladdin would use its "reasonable best efforts" to obtain the OCC's approval.
- When the OCC's approval was sought for the merger, the OCC refused to give approval unless Aladdin's and BCP's parent company Blackstone Group, L.P. ("Blackstone") would promise to provide any financial support necessary to make sure that World Financial complied with its minimum liquidity and capital requirements. Blackstone refused to make such a promise.

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<u>Recent Disputes</u>: Alliance Data Systems Corporation v. Blackstone Capital Partners (continued)

- **<u>THE SUIT</u>**: In January of 2008, Alliance filed suit in the Delaware Chancery Court seeking to recover the $170 million termination fee provided in the merger agreement, because of Aladdin's failure to complete the acquisition of Alliance.
  - Alliance claimed that under the terms of the merger agreement, Aladdin was responsible for forcing Blackstone and its affiliated funds to agree to what Alliance considered to be a fair proposal from the OCC, and because Blackstone did not agree, there was a breach of the merger agreement by Aladdin.
- **<u>COURT'S HOLDING</u>**: The court dismissed the complaint for failure to state a viable claim for breach of the merger agreement.
  - The court found that "any contractual claim against the defendants must be predicated on a breach by Aladdin because it is the only party, aside from [Alliance], that signed the Merger Agreement." The court noted that the complaint only faults Aladdin because Blackstone would not enter into arrangements with the OCC.
  - The court noted that while BCP, and through it Aladdin, was controlled by Blackstone, neither BCP nor Blackstone signed the merger agreement *(only Aladdin did)*. The merger agreement imposed no direct contractual obligations on either Blackstone or BCP to act to obtain OCC approval, and Aladdin made no contractual promise that it would get Blackstone to do so.
  - The court found that Alliance did not properly state a claim for breach of merger agreement. If it was Alliance's intention to hold Blackstone responsible for obtaining the OCC approvals, Alliance should have included such a provision in the merger agreement.

Recent Disputes: Finish Line, Genesco & UBS

- **BACKGROUND:** In June of 2007, in a highly-leveraged transaction financed by UBS, The Finish Line, Inc., a footwear chain, agreed to acquire Genesco Inc., a footwear marketer, for $1.5 billion.
- **ALLEGED MAC:** Finish Line and UBS contended Genesco had suffered a MAC, because Genesco has suffered two quarters of successive earnings declines.
- **THE SUIT:** Genesco sued Finish Line for specific performance in Tennessee (forum and jurisdiction selected by the merger agreement), and UBS was added as a 3rd party defendant.

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<u>Recent Disputes</u>: Finish Line, Genesco & UBS (continued)

- **<u>COURT'S HOLDING</u>:**
  - The court ruled that two quarters of poor performance ***could constitute*** a durationally significant, material change to a target company.
    - The court reconciled its holding with the *Tyson* holding, stating that in the case at bar there was a provision in the June 17, 2007 merger agreement that gave the target company the opportunity to cure a MAC by December 31, 2007, and that such a provision evidenced an acknowledgement by the parties that in the context of this merger a MAC could occur in three to four months.
      - The court's reliance on the merger agreement's "drop-dead date" as a means for determining durational significance was unprecedented and has been widely criticized.

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<u>Recent Disputes</u>: Finish Line, Genesco & UBS

- **<u>COURT'S HOLDING (continued)</u>:**
  - ***However***, the court also ruled that Genesco's performance did not trigger the MAC clause, because it reflected a general market decline and therefore fell within one of the merger agreement's MAC exclusions.
  - The Court ordered specific performance pending a determination by the Southern District of New York that the combined entity was solvent.
- **<u>CONCLUSION</u>**: Ultimately, the parties settled the dispute. UBS and Finish Line paid a reverse break-up fee of $175 million ($136 million from UBS; $39 million from Finish Line; and $6.5 worth of Finish Line stock).

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Recent Disputes: Citigroup et al. & Solutia Inc.

- **BACKGROUND:** In October of 2007, a group of four banks executed a firm commitment to fund a $2 billion exit financing package to allow Solutia Inc. to emerge from bankruptcy. Under the terms of the commitment letter, the banks were required to fund the financing package regardless of whether they could syndicate the loan.
- **ALLEGED MAC:** The banks argued that a MAC had occurred because the credit market had deteriorated so much in the time between October and January that they could not find any takers to syndicate the loans. They cited a contract clause allowing them to terminate the deal for "materially adverse market changes."
- **THE SUIT:** Solutia filed suit in the Bankruptcy Court for the Southern District of New York seeking an order for specific performance from the banks.
- **CONCLUSION:** Shortly after the trial began, the parties settled the dispute. The banks agreed to fund the loan in exchange for Solutia agreeing to pay a higher interest rate.

Recent Disputes: Lone Star Funds & Accredited Home Lenders, Inc.

- **BACKGROUND:** In August of 2007, Lone Star Funds (a collection of private equity limited partnerships) agreed to buy Accredited Home Lenders, Inc., a nationwide mortgage banking company.
- **ALLEGED MAC:** Lone Star Funds argued that the credit market meltdown had resulted in a drastic deterioration of the financial and operational condition of Accredited Home Lenders, and therefore constituted a MAC.
- **THE SUIT:** Accredited Home Lenders filed suit in the Delaware Chancery Court to compel specific performance from Lone Star, arguing that the merger agreement provided that events that affect the economic markets or the industry generally would not constitute a MAC, unless such an event had a disproportionate effect on Accredited Home Lenders.
- **CONCLUSION:** The parties settled the dispute before it could be heard by the court. Lone Star Funds agreed to a lower purchase price ($11.75 per share down from $15.10 per share).
  - Note: Lone Star Funds had not negotiated for a capped reverse break-up fee in the merger agreement, so its potential exposure was especially high.

Recent Disputes: MGIC Investment Corp. & Radian Group Inc.

- **BACKGROUND:** In February of 2007, MGIC Investment Corp, the parent of a private mortgage insurance provider, executed a merger agreement with Radian Group, Inc., a credit enhancement company.
- **ALLEGED MAC:** MGIC argued that Radian had suffered a MAC when a sub-prime loan subsidiary owned by both MGIC and Radian lost more than $1 billion.
- **THE SUIT:** MGIC filed suit in the Eastern District of Wisconsin to obtain information that it claimed Radian was required to produce under the merger agreement in order to determine whether a MAC had occurred.
- **CONCLUSION:** The parties voluntarily terminated the deal and dismissed the suit.

Recent Disputes: ValueAct Capital Partners, Silver Lake Partners & Acxiom Corp.

- **BACKGROUND:** In May of 2007, ValueAct and Silver Lake agreed to acquire Acxiom Corp., and information services company, for $2.25 billion. UBS, Morgan Stanley, and Bank of America all provided financing for the transaction.
- **ALLEGED MAC:** ValueAct and Silver Lake alleged that a MAC had occured, because Acxiom had suffered an 89% drop in income from operations in the first quarter of 2007. Reports also surfaced that second quarter earnings were expected to be even worse.
- **CONCLUSION:** Parties reached an agreement to terminate the deal for a $65 million cash payment to Acxiom from ValueAct, Silver Lake, UBS, and Morgan Stanley. Bank of America refused to contribute because it was concerned about setting a precedent for future deals.

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Recent Disputes: Kohlberg Kravis Roberts & Co., Goldman Sachs & Harman International Industries, Inc.

- **BACKGROUND:** In April of 2007, Kohlberg Kravis Roberts & Co. and Goldman Sachs agreed to acquire Harman International Industries, Inc., an audio equipment maker, for $8 billion.
- **ALLEGED MAC:** Kohlberg and Goldman Sachs argued that a MAC had occurred because Harman's results for the immediately preceding quarter were well below Wall Street estimates. Harman's annual report on Form 10-K, however, did not appear to have disclosed a MAC. Kohlberg and Goldman argued further that Harman was in breach of a capital expenditure covenant.
- **CONCLUSION:** The parties agreed to terminate the merger agreement in exchange for the following: (i) Kohlberg and Goldman Sachs agreed to purchase $400 million in Harmon senior convertible notes; and (ii) a member of Kohlberg was added to Harman's board.
  - Note: Unlike Lone State Funding, Kohlberg and Goldman Sachs had negotiated for a reverse break-up fee of $225 million.

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<u>**Recent Disputes**</u>: Bain Capital et al. & Home Depot Supply, Inc.

- <u>**BACKGROUND**</u>**:** In June of 2007, and affiliate of Bain Capital, LLC agreed to purchase Home Depot Supply, Inc., Home Depot's wholesale supply unit, for $10.325 billion.
- <u>**ALLEGED MAC**</u>**:** The Bain affiliate argued that a MAC had occurred, because the decline in the housing market had resulted in a decrease in demand for Home Depot Supply's goods, which resulted in its profits decreasing by 22% during the second quarter of 2007.
- <u>**CONCLUSION**</u>**:** The parties agreed to a renegotiated deal with a lower purchase price of $8.5 billion (18% lower than the original price). Additionally, Home Depot agreed to (i) purchase a 12.5% interest in Home Depot Supply for $325 million and (ii) guarantee a $1 billion senior secured loan to Home Depot Supply.
  - Note: The banks financing the deal offered to pay the nearly $310 million termination fee if Bain walked away.

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Recent Disputes: JC Flowers et al. & Sallie Mae

- **BACKGROUND:** In February of 2007, JC Flowers, JP Morgan Chase and Bank of America entered into an agreement to purchase Sallie Mae. At the time of signing, all of the parties were aware of pending federal legislation that would be adverse to a significant part of Sallie Mae's business.
- **ALLEGED MAC:** Flowers contended that Sallie Mae suffered a MAC when President Bush signed legislation that authorized cuts to the loan subsidies that were deeper than those that were anticipated by the parties. This contention was made notwithstanding the fact that the risks of the pending legislation were disclosed in Sallie Mae's 10k and carved out of the MAC definition in the merger agreement.
- **THE SUIT:** Sallie Mae filed suit in the Delaware Court of Chancery seeking an order that: (i) no MAC had occurred; (ii) Flowers breached the merger agreement; and (iii) because of the breach, Sallie Mae could terminate the agreement and collect a $900 million break-up fee from Flowers. Flowers argued that fact that the new legislation was more adverse than the 10k disclosure and was sufficient to constitute a MAC. Sallie Mae argued in response that in order for the new legislation to constitute a MAC there must have been a material adverse effect over and above what was disclosed in the 10k.

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Recent Disputes: JC Flowers et al. & Sallie Mae (continued)

- **CONCLUSION:** Sallie Mae dropped its suit and walked away from a $900 million break-up fee, in exchange for which Sallie Mae received $31 billion in new financing.
  - Note: Vice Chancellor Strine, in his scheduling conference remarks, gave strong indication that he would have ruled on this case consistently with *Tyson* and favored Sallie Mae:
    - "I have to say, the defendants, the weakness from their position is this idea that, basically, one penny on top of what is outlined in the agreement more makes you count the whole thing as an MAE. That is not intuitively the most obvious reading of this. On the other hand, the plaintiffs' position could have been much more clearly drafted if they wished to say that, essentially, all the legislation was a baseline, and you measure the incremental effect." (Transcript of Scheduling Conference at 34*, SLM Corp. v. J.C. Flowers et al.,* Civ. No. 3279-VCS (Del. Ch. Oct. 22, 2007)).

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If you have any questions or would like additional information on the material covered in this *Alert*, please contact one of the authors:

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Important Deal Termination Decision from Delaware Court

No 'Material Adverse Effect' Occurred to Relieve Purchaser of Obligation to Close $10.6 Billion Acquisition

On September 29, 2008, Vice Chancellor Stephen P. Lamb of the Delaware Court of Chancery issued his highly anticipated decision in the litigation filed by Hexion Specialty Chemicals, Inc. seeking to terminate its obligation to consummate the $10.6 billion merger through which it planned to acquire Huntsman Corporation, a Salt Lake City-based specialty chemical manufacturer. *See Hexion Specialty Chemicals Inc. v. Huntsman Corp.*, C.A. No. 3841-VCL, slip op. (Del. Ch. Sept. 29, 2008). The decision follows a rare trial to determine whether a potential purchaser may opt out of a previously agreed-upon merger and the extent to which the purchaser may do so without incurring liability to the target. The decision also provides critical guidance from the Court of Chancery on how it will determine whether a downturn in the target's business constitutes a "Material Adverse Effect," a term that has become commonplace in mergers and acquisitions. Finally, the *Hexion-Huntsman* litigation represents a cautionary tale for merger partners (and their counsel) who may find themselves experiencing buyer's remorse after signing a merger agreement.

In his 89-page post-trial opinion, Vice Chancellor Lamb ordered Hexion to comply with its obligations under the parties' merger agreement, finding that Huntsman's business had not suffered a "Material Adverse Effect" that would have permitted Hexion to terminate the agreement without penalty. In addition, the court found that Hexion, in part through its efforts to obtain an "insolvency opinion" that it believed rendered it unable to obtain financing for the transaction, knowingly and intentionally breached its obligation under the merger agreement to use its "reasonable best efforts" to close the merger. As a result of this finding, Hexion's liability to Huntsman for any damages caused by its breaches (and the liability of its majority owner, private equity firm Apollo Global Management) potentially may exceed the agreement's $325 million termination fee.

Background

On July 12, 2007, Hexion agreed to acquire Huntsman for $28 per share in cash. Hexion proposed to fund the merger through debt financing provided by Credit Suisse and Deutsche Bank pursuant to a commitment letter. Under the terms of that commitment letter, funding from Hexion's lenders was conditioned upon confirmation from Hexion, Huntsman, or an outside appraiser that the combined company will be solvent.

Almost one year later, on June 18, 2008, Hexion and several Apollo affiliates filed a complaint in the Court of Chancery seeking to terminate the proposed merger. Earlier that same day, Hexion's board of directors had received an opinion from valuation firm Duff & Phelps that the combined Hexion-Huntsman entity would not be solvent.

Based on the Duff & Phelps opinion, Hexion concluded that it would be unable to secure funding from Credit Suisse and Deutsche Bank under the commitment letter. As a result, Hexion sought from the Court of Chancery a declaratory judgment that it was not obligated to close the merger if the combined company would be insolvent. Hexion further sought a declaration that, if it was unable to consummate the merger because of a lack of financing, its liability to Huntsman would be limited to the $325 million termination fee provided in the merger agreement.

Hexion also asked the court to determine whether, because of the alleged “deterioration in Huntsman’s financial performance and increase in Huntsman’s net debt,” Huntsman had suffered a “Company Material Adverse Effect,” as defined in the merger agreement. *As is typical in most merger agreements, the occurrence of an MAE would permit Hexion to terminate the merger without paying any fee to Huntsman.*

On July 2, 2008, Huntsman filed its own counterclaims against Hexion and Apollo. Among other things, Huntsman alleged that Hexion breached the merger agreement by failing to use its “reasonable best efforts” to secure financing and consummate the merger. Huntsman also alleged that Hexion’s breaches of the merger agreement were knowing and intentional, thereby entitling Huntsman to damages above and beyond the $325 million termination fee.

The Merrill Lynch Discovery Order

Vice Chancellor Lamb agreed to hear the parties’ declaratory judgment and specific performance claims on an expedited basis, and scheduled trial to begin September 8, 2008. During discovery, the court issued a significant opinion compelling Huntsman to produce materials prepared by its investment banker, Merrill Lynch, after litigation had commenced June 18. In doing so, the Vice Chancellor rejected Huntsman’s contention that it had retained Merrill Lynch as a “litigation consultant” and, as such, its work product was protected under Rule 26(b)(4)(B). The court held that, since Merrill Lynch was a “key fact witness” in its role as financial adviser on the merger, Huntsman could not “use] the façade of litigation consulting as an excuse to withhold discoverable documents prepared by or relating to Merrill Lynch’s continuing activities in that role.” *See Hexion Specialty Chemicals Inc. v. Huntsman Corp.*, C.A. No. 3841-VCL, 2008 WL 3878339 (Del. Ch. Aug. 22, 2008).

The Trial

At the six-day trial, the court was presented with two key issues:

- Whether the combined Hexion-Huntsman entity will be insolvent, and thus whether Hexion could terminate the merger for lack of financing in exchange for payment of the $325 million termination fee
- Whether Hexion is excused from closing the merger—without paying any penalty—because Huntsman suffered an MAE

Hexion argued that the post-merger company would be insolvent under any of three recognized solvency tests—balance sheet, ability to pay debts when due, and capital adequacy. As a result, Hexion contended that it was unable to secure financing to close the merger either pursuant to Credit Suisse’s and Deutsche Bank’s commitment letter, or from any alternative source. According to Hexion, its failure to close the merger therefore would be neither deliberate nor intentional, and pursuant to the terms of the merger agreement, Huntsman would be entitled to no more than the $325 million termination fee.

In response, Huntsman argued that the merger agreement requires Hexion to use its “reasonable best efforts” to close the merger, regardless of whether it can secure financing. In fact, Huntsman accused Hexion of knowingly and intentionally breaching the merger agreement by seeking the “insolvency opinion” from Duff & Phelps, and then furnishing that opinion to its banks.

The parties similarly differed on whether Huntsman’s recent decline in earnings constituted an MAE. The merger agreement defined an MAE as specifically excluding any event “resulting from or relating to changes in general economic or financial market conditions,” unless the event has had a “disproportionate effect” on Huntsman “as compared to other Persons engaged in the chemical industry.” While Hexion and Huntsman argued whether or not Huntsman’s poor financial performance was long term and “material,” their experts also presented diverging views as to the appropriate peer group to include within the “chemical industry” and how to measure “disproportionality” compared with that group.

The Court's Opinion

MAE Analysis. In his post-trial opinion, Vice Chancellor Lamb first considered whether Hexion's obligation to close the merger was excused by the occurrence of an MAE. Citing its earlier decision in *In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14 (Del. Ch. 2001), the court observed preliminarily that "[f]or the purpose of determining whether an MAE has occurred, changes in corporate fortune must be examined in the context in which the parties were transacting…. The important consideration therefore 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." Slip op. at 39.[1] The court further stated that a target's pre-closing decline in earnings "to constitute a material adverse effect … must be expected to persist significantly into the future." *Id.* at 40.

Vice Chancellor Lamb's opinion made other significant rulings concerning how the court determines whether an MAE has occurred. For example, the court held that, regardless of whether an MAE clause is framed as a representation, a warranty, a condition to closing or otherwise, the burden of proving an MAE "rests on the party seeking to excuse its performance under the contract." Slip op. at 42. In considering the appropriate benchmark to use in examining a target's business operations, the court rejected the use of earnings per share, opting instead to consider Huntsman's EBITDA as "a better measure of the operational results of the business." *Id.* at 43.

Applying this analytical framework, the court found that, while Huntsman had suffered through a difficult year since signing the merger agreement, its performance was not sufficiently impaired to constitute an MAE.

First, Vice Chancellor Lamb rejected Hexion's argument that Huntsman's failure to meet its management's 2007 projections was an MAE, finding that Huntsman expressly disclaimed in the merger agreement making any representations or warranties concerning those projections. Instead, the court examined Huntsman's EBITDA for each relevant year and quarter, and compared it with the prior year's equivalent period—for example, Huntsman's 2007 EBITDA was 3 percent lower than 2006, and projections for 2008 EBITDA estimated a decrease of 7–11 percent from 2007. In sum, the Court found that these declines "do not add up to an MAE, particularly in the face of macroeconomic challenges Huntsman has faced since the middle of 2007 as a result of rapidly increased crude oil and natural gas prices and unfavorable foreign exchange rates." Slip op. at 50-51.

Vice Chancellor Lamb also declined to focus on Huntsman's two most troubled divisions, holding instead that the MAE should be determined based on an examination of the company as a whole. Having found that Hexion did not carry its burden of proving the existence of an MAE in the first instance, the court found it unnecessary to consider whether the merger agreement's "disproportionate effect" carve-out applied.

Second, the court considered whether Hexion had knowingly and intentionally breached the merger agreement and, thus, whether its liability for any failure to close would exceed the agreed-upon $325 million termination fee. Drawing upon traditional criminal law notions of intent, the Vice Chancellor concluded that "a 'knowing and intentional' breach, as used in the merger agreement, is the taking of a deliberate act, which act constitutes in and of itself a breach of the merger agreement, even if breaching was not the conscious object of the act." Slip op. at 59-60. Applying this definition, the court found that Hexion knowingly and intentionally breached its obligations under the merger agreement to (1) "use its reasonable best efforts" to consummate financing with Credit Suisse and Deutsche Bank, and (2) notify Huntsman within two business days if, for any reason, Hexion "no longer believes in good faith that it will be able to obtain all or any portion of the Financing." *Among other things, the court held that Hexion's solicitation of the insolvency opinion from Duff & Phelps, and its subsequent failure to notify Huntsman once it believed that opinion compromised its ability to secure financing, were deliberate breaches of these covenants.*

The court further concluded that, even if the combined entity would be insolvent, the merger agreement contained no "financing out" clause for Hexion that would excuse it from closing the merger. As a result, Vice Chancellor Lamb declined to resolve the solvency issue, holding that such an issue would not arise unless and until the lenders determined whether to fund the transaction under the Commitment Letter.

Interestingly, the merger agreement contained express provisions permitting specific performance of the agreement, but particularly excluded specific performance of the purchaser's obligation to close the merger. Accordingly, Huntsman was not entitled to an order specifically directing Hexion to close the merger.

However, the court did order Hexion to perform its other obligations under the agreement, including its obligation to pursue financing of the transaction. If Credit Suisse and Deutsche Bank later agree to fund the transaction, Hexion could nonetheless decide not to close. As the court noted, however, doing so could potentially render Hexion liable to Huntsman for contractual damages in excess of $325 million, based on the court's finding of a knowing and intentional breach.

* * * * * *

[1] Significantly, the Court recognized that, while *IBP* interpreted a material adverse effect clause under New York law, its "logic … is no less applicable" to Delaware law. Slip op. at 39 n.53.