
CRAVATH, SWAINE & MOORE LLP

COVID-19: Impact on M&A Agreements

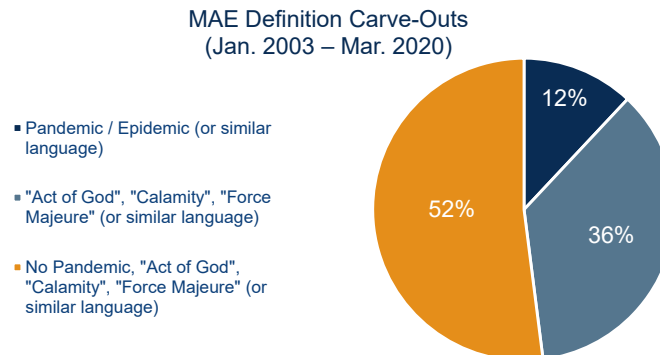
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World Before COVID-19

- **Material Adverse Effect (“MAE”) definitions routinely contained a carve-out for general economic, market or industry conditions, subject to a “disproportionate impact” exception to the carve-out**
- **MAE definitions sometimes contained a carve-out for *force majeure* events, natural disasters or acts of gods, which (if included) were routinely subject to a “disproportionate impact” exception**
 - More specific carve-outs for pandemics or epidemics were less common



- **Affirmative interim operating covenants (“IOCs”) requiring the target to operate in the ordinary course:**
 - sometimes went on further to say “in a manner consistent with past practice”;
 - were often qualified by a commercially reasonable efforts (or other efforts) standard; and
 - often contained an exception for actions required by applicable law
 - Inclusion of these provisions was deal-specific, but was generally not a topic of intense focus or negotiation
- **Access covenants routinely required that the target provide the buyer with “reasonable” access to its properties, personnel and books and records, and were not qualified by an efforts standard**

When COVID-19 Struck

- **The onset of COVID-19 gave rise to a wave of litigation starting in April 2020 relating to buyers' attempts to delay or terminate pending M&A deals which were signed before the crisis**
- **Despite COVID-19 having a clearly demonstrable negative impact on many targets' businesses, pure business MAE claims were not the primary grounds for challenging deals. This is in light of:**
 - the fact that most standard MAE definitions contain carve-outs for general economic, market or industry conditions
 - Practitioners and legal scholars have coalesced around the view that COVID-19 would be captured by these general carve-outs in most cases, even if there is not a specific carve-out for pandemics or epidemics, unless the facts and negotiation history of the specific case indicate otherwise
 - the difficulty of establishing disproportionate adverse impact on the relevant target business given the sweeping effects of COVID-19 on entire industries and market segments
- **As a result, buyers have pursued other contractual claims, and sometimes extra-contractual common law claims, or have coupled their business MAE claims with other more central claims**

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"Lessons Learned from COVID-19...So Far"