Quinn Emanuel Private Equity Litigation Practice Alert

Report from the Front Lines: COVID-19 M&A Litigation in Delaware

Many high-profile transactions impacted by the COVID-19 pandemic have fallen apart between signing and closing, resulting in litigation – often in the Delaware Court of Chancery – focused on whether the buyer had an obligation to close. Buyers backing out of transactions generally have asserted the occurrence of a "material adverse change" or "material adverse event" ("MAE") and the failure of the to-be-acquired company to operate in the ordinary course of business. Sellers generally have disputed that COVID-19 caused the failure of closing conditions, and have sued for specific performance of buyers' obligations to close or damages. As these cases are tried, the resulting decisions are likely to shape the broken-deal legal landscape and guide MAE, ordinary course, and M&A contract trends.

Quinn Emanuel is litigation counsel in many of these high-stakes COVID-19 broken-deal cases, representing clients on both sides of the "v": buyers asserting rights to end obligations under M&A agreements, and sellers seeking to enforce them. The firm's recent representations include the below cases, which involve COVID-related assertions of MAEs and ordinary course departures, among other alleged claims:

- *AB Stable VIII LLC v. Maps Hotels and Resorts One LLC, et al.* – Quinn Emanuel represents affiliates of Mirae Asset Financial Group in a buyer-side case involving the purchase of 15 luxury hotel properties for a price in excess of $5.8 billion. This case was tried remotely in August 2020 in what was the first broken-deal trial in the COVID era. Closing arguments were conducted by Zoom in October 2020.

- *Forescout v. Ferrari Group Holdings, L.P., et al.* – Quinn Emanuel saved Ferrari-affiliate private equity firm Advent International half a billion dollars off the original purchase price in its acquisition of cybersecurity company Forescout Technologies; the case settled just days before a July 2020 trial.

- *The We Company v. Softbank Group Corp., et al.* – Quinn Emanuel represents investor The Vision Fund in two lawsuits resulting from the termination of Softbank's tender offer to purchase $3 billion in shares of WeWork stock, with trial scheduled in March 2021.

- *Snow Phipps v. Kohlberg & Co., et al.* – Quinn Emanuel represents seller private equity fund Snow Phipps and its portfolio company, DecoPac, in their dispute with Kohlberg & Co. over the sale of DecoPac, with trial scheduled in January 2021.

- *Juweel Investors Ltd. v. Carlyle Roundtrip LP, et al.* – Quinn Emanuel represents a co-buyer affiliate of GIC Private Limited in a dispute related to its acquisition of the American Express Global Business Travel service, with trial scheduled in November 2021.

Each of these cases is venued in the Delaware Court of Chancery, and each involves lawyers from Quinn Emanuel offices across the country. This note summarizes some of the learnings from these cases, including key arguments, challenges, and practical insights. Specifically, it discusses (1) MAE clauses; (2) ordinary course clauses; (3) COVID-19 related changes in law; (4) post-COVID-19 M&A contract trends regarding MAE and ordinary course clauses; (5) financing contingencies; (6) remedies; (7) timing issues; (8) expert discovery; and (9) selection of litigation counsel.

Material Adverse Effect Clauses

Many of the broken deal cases include claims by the buyer that the target has suffered an MAE under the parties' agreement. MAE clauses reflect a bargained-for allocation of risk between buyer and seller of adverse changes affecting the target between signing and closing, and they are commonly positioned as closing conditions in M&A agreements. An MAE clause may condition closing on the absence of an MAE in the target's business and may permit a buyer to terminate an agreement if the target has experienced a change of circumstances – an event or occurrence – that materially alters the basis for the transaction between signing and closing.

Basic Definition. The specific language and scope of what constitutes an MAE varies, but generally the basic definition refers to an event, change, or effect that is, or reasonably would be expected to be, materially adverse to the business, results of operation, or financial condition of the target.

Carve-outs. Most MAE definitions include a series of exceptions or "carve-outs" – *i.e.*, events, changes, or occurrences that the parties have agreed do not constitute an MAE and will therefore not excuse the buyer's performance. Carve-outs have increased in scope and number in recent years. While carve-outs vary by agreement in number, scope, and specificity, common carve-outs include general changes in economic, political, and industry conditions, changes in law, changes in GAAP, and changes caused by public announcement of the transaction. Carve-outs may also include "force majeure events," "acts of God," "acts of war or hostilities," and "natural disasters." Some MAE clauses include specific exclusions for "epidemics," "pandemics," "public health crises," or similar terms. By negotiating carve-outs for known risks that could have a material adverse impact on the target's business, sellers can seek to transfer the risk of such occurrences to buyers.

Carve-back-ins. Some MAE definitions also specify exceptions to the exceptions, or "carve-back-ins" – *i.e.*, language qualifying carve-outs as inapplicable if the event, change, or occurrence described is disproportionately adverse to the target as compared to other similarly-situated companies or companies in the same industry. For example, an MAE definition may provide that an effect arising from a change in political conditions will not constitute an MAE unless such change disproportionately impacts the target as compared to its peers. Carve-back-ins are sometimes placed within specific, enumerated carve-outs; other times they are placed at the beginning or end of all the carve-outs. By negotiating carve-back-ins, buyers can seek to clarify that they do not bear risks that are target specific or that may uniquely impact the target. As a practical matter, buyers may deem negotiating carve-back-ins to be especially important in deals with numerous and broad MAE carve-outs.

Dual prong MAE definitions. Some MAE definitions specify that an MAE can be based on an adverse change that prevents the seller or target from performing their obligations under the agreement or from consummating the transaction (in addition to an adverse change on the target's business, results of operation, or financial condition). For dual-prong MAE definitions, carve-outs are sometimes only applicable to the prong related to an MAE on the target's business.

In the context of COVID-19, broken-deal cases are requiring courts to determine issues such as the impact of COVID-19 on targets, the expected durational significance of performance downturns attributable to COVID-19, whether the effects of COVID-19 fall within carve-outs, and whether COVID-19 has disproportionately impacted targets' businesses such that carve-back-ins apply.

In cases where targets have been clearly devastated by COVID-19, the focus in litigation is centered on application of the carve-outs and carve-back-ins, if any. Where MAE definitions do not include express carve-outs for pandemics or the like, parties have disputed whether more general carve-outs – such as carve-outs for changes in economic and industry conditions, changes in law, and "natural disasters" – encompass the downturn in target business resulting from COVID-19. In such cases, the presence, or absence, of causal requirements has emerged as a potentially important issue impacting the scope of the carve-outs. For example, some MAE clauses carve-out from the definition of MAE "any adverse effect arising from" the enumerated carve-outs (causal requirement). Other MAE clauses carve-out from the definition of MAE "any adverse effect relating to" the carve-outs (no causal requirement). Buyers have argued that MAE clauses that specify that an MAE must "arise from" an enumerated carve-out are narrower and more buyer-friendly. In the context of COVID-19, where MAE definitions include a causal requirement, buyers have argued that the effects of the pandemic do not constitute adverse effects "arising from" general carve-out conditions like economic or market conditions. In addition, in at least one case involving a dual prong MAE, a buyer has asserted an MAE on the target's ability to perform or consummate the deal and argued that carve-outs did not apply. Parties have also disputed whose burden it is to prove that carve-outs apply – with sellers arguing that buyers bear that burden, and buyers arguing that after they have established an effect that is material, adverse, and durationally significant, the burden shifts to sellers to establish that one or more carve-outs apply.

Where MAE definitions include carve-back-ins, parties in COVID-19 broken deal cases have disputed the proper benchmark for evaluating whether the target has been disproportionately impacted and what the relevant "industry" for comparison purposes should be. Where MAE definitions do not include carve-back-ins, parties have disputed whether a buyer can nevertheless seek to avoid a general carve-out (such as an industry change carve-out) on the ground that the effect was disproportionate and therefore not general. These are issues that we expect the Delaware Court of Chancery will rule on in the coming months.

More fundamentally, in the COVID-19 MAE cases, sellers and buyers are litigating disputes about the kinds of risks that MAE clauses are designed to shift. In these cases, parties have disputed whether it is appropriate to invoke policy-based rationales regarding the purpose of MAE clauses or whether to adhere to a more textualist approach. In certain cases, parties have focused on the rationales for including MAE clauses in transaction agreements. In others, parties have focused on the language of the agreement at issue, including whether or not there is language regarding particular risks or events. We expect the Delaware Court of Chancery will consider these arguments too in the near term in the context of COVID-19.

Although MAE clauses generate a great deal of litigation activity, the only post-trial finding by the Delaware Court of Chancery that an MAE occurred and that a buyer's termination of an M&A agreement was valid on that basis was in *Akorn, Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL. In that case, in October 2018, Vice Chancellor J. Travis Laster found the buyer Fresenius had validly terminated a merger agreement governing its purchase of target Akorn because of Akorn's failure to comply with covenants and the existence of an MAE. Vice Chancellor Laster's 246-page decision, affirmed by the Delaware Supreme Court, is the necessary starting point that must be considered by any parties litigating an MAE and related issues.

While substantive decisions from the Delaware Court of Chancery generally remain forthcoming in the COVID-19 broken deal cases, in October 2020, the English High Court issued preliminary rulings on MAE clause interpretation in a decision that has been tracked by M&A litigators, *Travelport Ltd. vs. WEX Inc.*[2020] EWHC 2670. In that case, Buyer WEX asserted an MAE due to COVID-19 to exit a $1.7 billion deal to buy two travel payment providers, arguing that the pandemic carve-out did not apply because the targets were disproportionately impacted. Much of the decision concerned the meaning of the term "industries" in the MAE definition's carve-back-in. The court agreed with WEX that the benchmark for disproportionate impact against which the targets' performance should be compared should be the broader "business to business" payments industry rather than the more narrow "travel payments industry," as sellers had argued. "Industry," the court noted, "is a broader word; in its natural and ordinary meaning one would see it as capturing a group of participants in a broad sphere of economic activity. In advised or careful use it tends to connote scale and a high level of generality. Thus it is used to cover such areas as the steel industry, the automobile industry or the IT industry." In addition, the court found that it was an "oversimplification" to characterize the deal as "just a purchase of a travel payments business," noting "the objective purpose of the transaction was that this was not a deal with a single purpose[;] … [t]he present, predominant and known value was in travel; but the acquisition carried with it future value in other markets." Regarding burden of proof, the court ruled: "I prefer the view (as did the Vice-Chancellor in Akorn) that, consistently with . . . the general position as to parties bearing the burden of the issues which they assert, the burden in relation to the Carve-Outs is on the Sellers."

In the COVID-19 broken-deal cases, buyers declining to close M&A agreements have tended to cite the occurrence of an MAE as one of several grounds for relief from performance. Alongside MAE claims, buyers have brought other contractual claims, such as violations of ordinary course covenants; breaches of provisions regarding material customers, suppliers, and contracts; breaches of financing provisions; and breaches of information access provisions governing sellers' obligations to permit buyers' access to targets' records, books, properties, and information. Buyers have also pursued common law claims alongside MAE claims, including fraud claims.

Ordinary Course Clauses

M&A agreements typically include a covenant by the seller providing that, during the period between the signing and closing, the acquisition target will be operated "in the ordinary course" of business. Ordinary course clauses allocate risks and incentives between the parties, particularly with respect to decisions within the target's control regarding the conduct of its business, including in response to external changes. Ordinary course clauses ensure that the business the buyer is acquiring at closing is essentially the same as the one it contracted to buy. And ordinary course clauses may help to mitigate the "moral hazard" problem, *i.e.*, ensure the seller does not take actions to compromise the target's business before the buyer assumes ownership. From a seller's perspective, ordinary course clauses can protect the target (and seller) from the risk of a decline in value caused by strict restrictions on its conduct or changes in operation.

Like MAE clauses, ordinary course clauses vary in language. Some ordinary course clauses restrict the target to operating "consistent with past practice." Some are absolute, whereas others are qualified, for example, permitting deviations from the ordinary course that are immaterial, permitting deviations that would not cause an MAE, or requiring that commercially reasonable efforts be taken to operate in the ordinary course. Ordinary course clauses also commonly require that the target make affirmative efforts to preserve value or relationships between signing and closing.

In broken-deal cases in the COVID-19 environment, where the target's way of doing business has changed in response to the pandemic, compliance with ordinary course covenants has emerged as a heavily disputed matter. A key, threshold issue is the standard by which to assess the seller's actions and inaction during the period between signing and closing. This implicates several questions: Is the relevant inquiry whether the target's post-COVID operations were commercially reasonable and, if so, what does commercially reasonable mean? Is the standard whether the target's actions were consistent with operation of similar businesses in the post-COVID environment, *i.e.*, consistent with current industry standards? Or should the target's actions be measured against its own past practice, or against past industry practice? And if past practice is the standard, should the court look to past practice at the time of signing the agreement, or past practice in times of crisis? If an approach has never been taken before (or has never been taken to such an extreme degree), can it ever be part of the ordinary course and consistent with past practices? How can a target operate consistently with past practice if it has never operated in a pandemic?

For example, in *AB Stable VIII LLC v. MAPS Hotels and Resorts One LLC*, 2020-0310-JTL (Del. Ch.), Vice Chancellor Laster raised the following inquiry at the outset of the case:

> 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. In other words, if you have flooding, is it the ordinary course of what you do consistent with past practice when you are in a flood, or is it ordinary course on a clear day when there hasn't been any rain? Here, we obviously have a colossal and viral-based rainstorm.

> But that's really the question: Are people doing things that are ordinary course when one is in a pandemic, and is that what the contract contemplates? Or, differently, as the defendant casts it, is this really a clear-day type provision where you have to deliver in the condition that they were when you signed?

The applicable standard in any given case, and the answer to these questions, may depend on the specific contract language at issue and the specific actions taken. In particular, buyers have focused on the presence, or absence, of an efforts qualifier, which they have argued is determinative of the applicable standard. We expect the Delaware Court of Chancery will consider these issues in the coming months.

Another key issue that has emerged is buyer consent. Ordinary course covenants often permit targets to depart from ordinary course operations with the consent of the buyer. Agreements may require that such consent be in writing, but may state that, on request, the buyer may not unreasonably withhold it. Some ordinary course clauses include a list of specific actions that may be taken only with the buyer's consent. Buyers have argued that the reasonableness of targets' responses to COVID-19 is not relevant where sellers have failed to seek their consent. On the other hand, sellers have argued that buyers' consent need not have been sought where the actions in question were reasonable, such that buyers could not reasonably have withheld consent if asked.

COVID-19-Related Changes in Law

A key issue that has emerged in MAE and ordinary course litigation in the COVID-19 broken-deal cases is the role of stay-at-home orders, quarantines, travel restrictions, public health guidance, and other government responses to the pandemic. As mentioned above, some agreements contain carve-outs from the definition of an MAE for conditions, events, or circumstances attributable to changes in law. Depending on how "changes is law" is defined in the applicable contract, it could be construed to encompass COVID-19 government response measures. In the broken-deal cases with such carve-outs, parties have engaged in discovery regarding whether the target's business downturn was caused by the government's COVID-19 response measures, including stay-at-home and quarantine orders, or by the pandemic itself, including customers' fear of getting sick. In addition, as a legal matter, where there is a "changes in law" carve-out and where the buyer is relying on the pandemic itself as an MAE, parties have debated whether evidence of a downturn in the target's business caused by government actions in response to COVID-19 is relevant to the question whether an MAE has occurred. In each case, resolution of these questions is specific to the particular language of the contract in question and the particular facts underlying the buyer's claims of an MAE.

Government responses to the pandemic have also been raised in the context of ordinary course claims. Even in cases where ordinary course covenants do not have exceptions for changes in law, sellers have argued that any failure to operate in the ordinary course should be excused where changes in applicable law or public health and safety guidance required such actions. This raises the question whether, if an operational change is mandated by COVID-19-related government orders, does that make it contractually permissible, as some sellers have argued and buyers have disputed? Buyers have argued that, even if certain operational changes made in response to COVID-19 are reasonable or mandated by law, this does not excuse a seller's deviation from the ordinary course. As with many broken-deal issues, resolution will likely be driven by the parties' agreement.

Post-COVID-19 M&A Contract Trends Re: MAE And Ordinary Course Clauses

We are seeing important changes in MAE and ordinary course clauses in M&A deals announced since the onset of COVID-19 that relate to several of the disputes that have emerged in the broken deal litigation. In particular, M&A contracts generally expressly discuss risks related to pandemics and COVID-19 specifically.

With respect to MAE definitions, since spring 2020, M&A contracts have generally contained express carve-outs for pandemics, epidemics, public health crises, or similar events, and most contain carve-outs for COVID-19 specifically. COVID-19 is often defined to include any mutations or second waves. Several contracts also include carve-outs for COVID-19-related government measures, such as stay at home orders, quarantines, and social distancing guidelines. Some more seller-friendly deals specify that COVID-19 carve-outs are blanket and excluded from disproportionate carve-back-ins.

For example, in the publicly-available agreement for ConocoPhillips' acquisition of Concho Resources, announced in October 2020, the MAE definition includes a carve-out for "pandemics (including the existence and impact of the COVID-19 pandemic)," and excludes from the disproportionate carve-back-in "any Effect arising from, resulting from or related to COVID-19, COVID-19 Measures or the November 3, 2020 United States federal elections)."

In ordinary course covenants, since spring 2020, M&A contracts have frequently included COVID-19-related exceptions to the target's obligations to operate in the ordinary course of business. These exceptions could permit departures from ordinary course operations where, for example, extraordinary actions are needed to address COVID-19-related health and safety issues, business disruptions, or government orders. Some agreements condition application of the exceptions on the target's consultation with the buyer or the reasonableness of the actions taken. Some agreements also expressly define ordinary course of business to include the target's post-COVID-19 response measures and operations.

For example, in the publicly-available agreement for the acquisition of Portola Pharmaceuticals by Alexion Pharmaceuticals, announced in May 2020 and completed in July 2020, the ordinary course clause contained an express COVID-19 exception that "during any period of full or partial suspension of operations related to the coronavirus (COVID-19) pandemic, the Company may, in connection with the coronavirus (COVID-19) pandemic, take such actions as are reasonably necessary (A) to protect the health and safety of the Company's or Company Subsidiary's employees and other individuals having business dealings with the Company or Company Subsidiary or (B) to respond to third-party supply or service disruptions caused by the coronavirus (COVID-19) pandemic; provided, further, that following any such suspension, to the extent that the Company or any Company Subsidiary took any actions pursuant to the immediately preceding proviso that caused deviations from its business being conducted in the ordinary course of business consistent with past practice, to resume conducting its business in the ordinary course of business consistent with past practice in all material respects as soon as reasonably practicable."

Financing Contingencies

The failure of third-party financing has emerged as another key issue. Whether as an express contractual matter, or as a practical matter, availability of financing is often tied to the relief available to a seller in the event that the buyer does not consummate a transaction. Courts will need to determine who bears the risk of the failure of financing, what obligations buyers have to secure backup financing, and what remedies are available to sellers when financing fails. Resolution of these issues will likely turn on the specific financing provisions and deal structures at issue.

In instances where anticipated third-party financing has become unavailable, buyers may point to withdrawal of financing by lenders as excusing their obligations to close, whereas sellers may point to the same withdrawal as merely triggering buyers' obligations to find alternative financing. While some agreements provide that a buyer's obligation to consummate a transaction is contingent on its ability to obtain the financing contemplated at signing, many do not, and some contain clauses expressly disclaiming any financing condition. Even where agreements do not expressly condition specific performance on the funding of financing, if a buyer requires financing to fund the purchase price, and the buyer's sponsor or parent has not provided a full equity backstop, and third-party financing has become unavailable, a buyer may argue that as a practical matter it cannot consummate the transaction without the necessary financing. So, depending on contract terms and deal structure, where requisite financing is not available, buyers may claim that specific performance should be deemed impracticable, or even impossible. In certain cases, however, depending on the circumstances giving rise to the unavailability of financing, sellers may argue that buyers cannot invoke these practical difficulties where they have behaved inequitably or inconsistently with their contractual obligations, and may nonetheless be required to close.

One way parties sometimes allocate the risk of the failure of financing is by providing for payment of a "reverse breakup fee" (reverse in the sense that it is payable to the seller, not the buyer) if the buyer fails to consummate the transaction because of failure to obtain financing and it has been unable to prove the existence of an MAE or other violation of contractual provisions that would permit it to terminate the agreement. A buyer may or may not find it more attractive to pay the breakup fee than to consummate the acquisition, depending on the difference between the fee and the purchase price and taking into account any diminution in the target's value caused by COVID-19 and costs associated with any alternative financing needed to close. In some instances, a seller may accept receiving the breakup fee and retaining the target company, especially where sale to a different buyer for a comparable price is likely. In other situations where the seller is less sanguine about its possibility of finding another buyer who will pay a comparable price, the seller may press the argument that the buyer is required to find alternative financing, or it may even try to find alternative financing on its own. Not all financing is alike, though, and buyers may argue there are no viable alternatives available and they cannot be forced into a lending relationship to which they never agreed. In addition, if a target's business is suffering because of COVID-19, this could make finding alternative financing difficult. Whether or not buyers can prevail on such arguments or can pay a reverse break-up fee in lieu of closing is a context-specific inquiry that depends on specific contractual language.

In certain COVID-19 broken deal cases, sellers have invoked the prevention doctrine in relation to disputes concerning the failure of financing. Under the prevention doctrine, a party cannot rely on the failure of a condition to excuse its performance when its own conduct materially caused that condition's failure. For example, in *Snow Phipps Group, LLC v. KCAKE Acquisition Inc., et al.*, C.A.

No. 2020-0282-KSJM (Del. Ch. Oct. 16, 2020), where the seller alleged that the buyer intentionally scuttled financing, Vice Chancellor McCormick denied the buyer's motion to dismiss the seller's specific performance claim, reasoning: "I agree with [seller's] argument that the prevention doctrine potentially forecloses [buyer] from avoiding specific performance due to the lack of debt financing."

Remedies

Although the remedies available to sellers and buyers vary and depend on what claims are brought, in the COVID-19 broken-deal cases, the remedies sought have included claims to specific performance and/or damages by sellers, and claims by buyers for declaratory judgments that terminations were proper.

Specific Performance. Specific performance is often the favored remedy of sellers in broken-deal cases. Under the common law, to be entitled to specific performance, a seller must prove by clear and convincing evidence that "(1) a valid contract exists, (2) he is ready, willing, and able to perform, and (3) that the balance of equities tips in favor of the party seeking performance." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010). Agreements sometimes expressly speak to the availability of specific performance or modify the default common-law standard: for example, agreeing to the availability of specific performance as a remedy on the ground that money damages would be inadequate, or not to assert the defense that money damages are an adequate remedy. As discussed above, however, the availability of specific performance may depend on the availability of third-party financing needed to close. In addition, because specific performance is an equitable remedy, its availability may be affected by equitable defenses such as laches and unclean hands where a contract does not modify the default common law standard.

Monetary Damages. Sellers have generally sought damages as an alternative to specific performance. Agreements may have provisions governing the extent to which damages are available. The amount of damages for certain breaches may be liquidated by agreement, for example, with a reverse breakup fee. Other agreements provide for a "cap" on damages, that is, that the damages awarded may not exceed a certain amount. Certain sellers have also sought compensatory damages as a supplement to specific performance in the form of, for example, disbursement of the buyer's deal deposit and other compensation they argue is necessary to make the seller whole. In addition, certain buyers have even asserted their own claims for damages, including attorneys' fees and litigation costs.

Declaratory Relief. Declarations of rights have been sought by both sellers and buyers in broken-deal cases. Buyers have generally requested declarations that they are relieved of their obligations to close or were justified in terminating agreements based on the occurrence of an MAE, ordinary course covenant violations, or other breaches. Sellers have sought declarations that all conditions to closing have been satisfied and that a buyer's refusal to close breached the parties' agreement. The specifics of these requests often depend on the parties' agreement and the particular facts at issue.

Timing Issues

Expiration dates for third-party financing, or other drop-dead dates in agreements, can drive the overall timing of broken-deal cases and result in extremely expedited trial schedules.

For example, in the *Forescout* case, Vice Chancellor Glasscock initially set trial just one week out, requiring the parties to take document, fact, and expert discovery, and prepare for trial, in a matter of days. Through a stipulation of the parties, the trial was ultimately moved six weeks later to a date chosen by the Court that would have permitted it to render a decision before the third-party debt financing "drop-dead" date. Although the drop-dead date subsequently became moot, the Court declined to reschedule the trial, which was to be conducted via Zoom. In those seven weeks, with a $2 billion transaction at issue, Quinn Emanuel took twenty-five remote depositions, filed seven expert reports, filed two motions to compel, and, in partnership with co-counsel and local counsel, reviewed over 200,000 documents, all while simultaneously learning the case and preparing for trial. Shortly before trial, the parties settled, with Quinn Emanuel's client, Advent, receiving a half-billion-dollar discount off the original purchase price.

In the *AB Stable* case, in which Quinn Emanuel represents the buyer, Vice Chancellor Laster presided over a week-long full merits trial by Zoom just four months after the case was filed. In the lead-up to trial, hundreds of thousands of documents were produced and reviewed, twenty-six expert reports were submitted, forty-nine depositions taken, numerous discovery motions briefed, and pre-trial briefs filed.

On the other end of the spectrum, in the *Juweel* case, Vice Chancellor Slights denied the seller's motion to expedite (which Quinn Emanuel opposed), on the basis, among others, that an accelerated schedule could adversely affect the health of the participants, thereby eliminating specific performance as an available remedy. The case is now scheduled for trial in November 2021, with money damages as the available remedy.

Highly expedited cases like the first two above are best handled by sophisticated trial counsel. A litigation team that is focused from the beginning of the engagement on what arguments and evidence will matter at trial is an advantage. The Quinn Emanuel lawyers with experience in these cases can get up to speed very quickly, identifying the key facts and legal issues within a few days, and developing an effective plan of attack from the outset.

Expert Discovery

The COVID-19 broken-deal cases have involved a wide range of experts, including valuation experts, industry experts, M&A deal and contract experts, and financing experts, as noted in the table below. Given the fact-intensive issues and heavy focus on expert discovery in these cases, proper expert selection, analysis, preparation, and management is especially important. This process starts with getting up to speed quickly and identifying the operative legal and factual issues early on to enable the trial team to identify, early in the case, the subject matters requiring presentation of expert testimony.

Issue	Type(s) of Expert	Topic(s)
MAE	Valuation Economic Industry	• impact of COVID-19 on target's operational and financial performance; • target's post-COVID-19 performance as compared to past performance; • materiality of impact of COVID-19 on target's business;

		• whether carve-out conditions such as changes in law contributed to target's downturn; • diminution in value experienced by target as a result of COVID-19; • outlook for recovery and expected durational significance of COVID-19's effects on target; and • whether target disproportionately impacted by COVID-19.
Ordinary Course	Industry	• how target responded to COVID-19; • how conduct of target's business since COVID-19 compares to target's past practice, industry past practice, and/or current industry practice; • materiality of target's departures from ordinary course of business; and • reasonableness of target's COVID-19 response measures.
M&A Contract	M&A transactions Deal economics Customs and practices of M&A practitioners	• industry custom and practice regarding, and economics of, MAE clauses, ordinary course covenants, and other key terms; and • trends in MAE clauses and ordinary course covenants in comparable M&A agreements.
Financing	Corporate finance Industry	• availability of third-party financing for deals; and • costs and risks associated with financing options.

Selection of Litigation Counsel

When a deal is broken and leading to litigation, the first instinct might be to use litigation counsel from the same firm as the transaction lawyers to litigate it, on the theory that the transaction firm is already on the scene, it will have a shorter learning curve, there will be easier communications between transaction lawyers and litigation counsel at the same firm, and that firm will have a greater investment in defending the client's position. But there are multiple pitfalls inherent in this "one-firm" approach.

First, the corporate lawyers close to the deal, and their litigation partners at the firm, are subject to natural unconscious biases that make it difficult for them to exercise the kind of independent judgment required of litigation counsel in high-stakes cases like these. These biases include:

- *Anchoring bias*: a cognitive bias towards an initial estimate or starting point;

- *Confirmation bias*: a person's strong views about what documents mean and why they did a good job;
- *False consensus bias*: a person's belief that their own interpretation based on what they intended and thought they did is the only sensible interpretation; and
- *Self-protection bias*: the tendency to offer theories and strategies that protect the firm as well as the client, when they are not necessarily best for the client, which may constitute an ethical conflict.

Using independent counsel as trial counsel eliminates these biases and permits a fresh look at the facts and circumstances of the case. Deal counsel may be too close to the transaction to see the greater issues and themes that have developed as time has elapsed. And the significance of COVID-19 may have decreased as the target company developed effective ways to deal with the crisis, making it necessary to gather and analyze additional context and develop a more robust theme for trial.

Second, with the "one-firm" approach, the transaction partners may have too much influence over key litigation decisions, such as who from the deal team should testify, whose opinion is most important, whether the other side's positions have merit, and what is the best approach for presenting the client's case to a mediator, arbitrator, or judge. A client may be better served with an independent litigator who can more easily say, "No offense, but that construction of the wording makes no sense," or "Your position goes against current law and we need to find a way to resolve this quickly." Reframing the work of the transaction lawyers can be a delicate conversation to have under the best of circumstances, and more likely to proceed well if done by lawyers from a separate firm. Ultimately, the natural tendency to support the work of one's colleagues raises the potential for biased decisions – the opposite of what a client needs when defending a lawsuit. In the words of Nobel-prize winning psychologist Professor Kahneman, the ideal advisor is "a person who likes you and doesn't care about your feelings."

Third, the transaction lawyers and their firm may be motivated by self-protection. Whether they even realize it or not, there is an almost inevitable tendency to offer litigation theories and strategies that protect the firm as much as the client – when in fact the firm's and the client's interests are not truly aligned. Litigation counsel can face internal pressure to justify the deal language, the negotiations, the documents, and the advice given by their deal partners, especially when the deal lawyer is the partner who literally put work on that litigator's desk.

Litigation counsel must be unconstrained in telling the transaction partners the contract has flaws, the strategy must be repositioned, or the terms are ambiguous and it is important to rethink what the parties meant. Using independent counsel makes these conversations easier (or in some cases, *possible*) and frees up the advocate to make the tough strategic decisions required throughout the litigation. Independent counsel will ask the tough questions, and make sure they get answered. This is essential not only for proper case development overall but for the "tough" witness preparation that should take place before witnesses testify at deposition and trial. Witnesses, and case outcome, benefit from strong witness preparation by unbiased trial counsel.

Fourth, where lawyers' representation of the client is constrained by concern for their firm or their partners who are deal counsel, this can be an ethics violation because it amounts to a concurrent conflict of interest. A concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be *materially limited* by the lawyer's responsibilities to another client, a former client or a third person or by a *personal interest of the lawyer*." ABA Model Rule of Professional Conduct 1.7 (emphasis added). A competing "personal interest of the lawyer" includes risks to the lawyer's partners or to his or her firm. Such conflicts may extend to the firm as a whole. ABA Model Rule 1.10.

When litigation and transaction counsel are from one firm, there are multiple ways in which representation of a client may be "materially limited." As discussed above, this can happen when the lawyer pursues litigation strategies that favor the deal lawyers or their firm. It can also happen when a deal lawyer is to appear as a fact witness. There are any number of specific facts about the background and negotiation of the deal that could be the basis of testimony, although they may be hard to anticipate at the beginning of a case. The actions that the transaction firm took, or failed to take, can easily become a focus of discovery and testimony leading to arguments for counsel disqualification. In some instances, the transaction lawyer may even be deemed litigation counsel, for example, by conducting an investigation before any litigation is filed. This too may provide grounds for disqualification.

Using litigation counsel from the transaction lawyers' firm may put the client's privileged communications at risk. Like any other case in which counsel is playing a witness role, managing the scope and content of the transaction lawyers' testimony to avoid waiver of privileged communications is extremely important. Parties may not use privileged information as a sword and a shield. Not only is the experience of seasoned trial counsel essential to navigate this issue well, but when the deal lawyer is a witness and the litigation attorney is from the same firm, the other side can dispute whether their conversations are covered by the attorney-client privilege, given that the deal lawyer was a participant in the underlying events. A dispute over the disclosure of the transaction lawyers' work can be a costly and time consuming issue to litigate and can result in disqualification of the litigators.

Using litigation counsel from the transaction firm can also negatively impact credibility, as it may suggest the trial lawyer has a personal stake in the litigation. Litigators from the same firm as transaction counsel may also be hesitant to aggressively question their partners, or even put them on the witness list, although that may be needed for a successful result. In contrast, use of independent litigation counsel tends to enhance the transaction counsel's, and the client's, credibility, because it gives the appearance that someone who is removed from the transaction is asking transaction counsel the hard questions and fearlessly seeking the truth.

Finally, the one-firm approach may materially limit litigation counsel's representation of the client when called on to give advice about the scope of settlement or about the possibility the case will settle. The risk is heightened when the transaction firm has a direct financial interest in the outcome as a result of, for example, a success fee or kicker contingent upon closing the challenged transaction. The litigation attorney then has a financial interest as a partner of the transaction firm in the outcome of the dispute, including such factors as when and for how much the dispute is resolved.

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If you have any questions about the issues addressed in this Client Alert, or if you would like a copy of any of the materials we reference, please do not hesitate to contact us.

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