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Delaware Supreme Court Affirms Historic Material Adverse Effect Ruling

ALERT | December 7, 2018

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On December 7, 2018, the Delaware Supreme Court issued an order affirming the judgment of the Court of Chancery in *Akorn, Inc. v. Fresenius Kabi AG,* C.A. No. 2018-0300-JTL (Del. Ch. Oct. 1, 2018). As more fully discussed in a previous client alert, the Court of Chancery held that German pharmaceutical company Fresenius Kabi AG had properly terminated its agreement to purchase U.S. drug maker Akorn, Inc. because Akorn had suffered a material adverse effect (MAE). No prior Court of Chancery rulings had found a buyer justified in terminating a merger agreement on the basis of a claimed MAE.

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In its order, *Akorn, Inc. v. Fresenius Kabi AG,* No. 535, 2018 (Del. Dec. 7, 2018), the Delaware Supreme Court held that the factual record supported the Court of Chancery's finding that (i) Akorn had suffered an MAE, (ii) Fresenius was justified in terminating the merger agreement because of Akorn's breach of its regulatory representations and warranties in the merger agreement that resulted in an MAE, and (iii) Fresenius was not prevented from terminating the merger agreement based upon alleged breaches by Fresenius of certain reasonable best efforts and "hell-or-high-water" covenants. The Court did not reach the issue of whether Akorn had breached its obligation to use commercially reasonable efforts to operate in the ordinary course of business between signing and closing.

The Delaware Supreme Court's order confirms that *Akorn* will serve as a roadmap for parties in future transactions seeking to assess whether an MAE has occurred.