

Changes to Material Adverse Effect Clauses Following Major Events: Evidence From COVID-19

Vincent Scala

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

CHANGES TO MATERIAL ADVERSE EFFECT CLAUSES FOLLOWING MAJOR EVENTS: EVIDENCE FROM COVID-19

VINCENT SCALA[†]

INTRODUCTION

In November 2019, LVMH Moët Hennessey Louis Vuitton, the world's leading luxury goods company, announced plans to acquire Tiffany & Company, the prominent American jeweler.¹ The transaction was reported to be worth more than \$16 billion, which would have been the largest deal ever in the luxury goods industry.² Following the announcement, LVMH's chief executive officer stated that Tiffany would "thrive for centuries to come."³ Nearly ten months later, the acquisition was in shambles as the parties squared off in a legal battle in the Delaware Court of Chancery.⁴ The companies were driven to litigation over anxieties about the economic impact of the COVID-19 pandemic on the luxury goods sector.⁵ From February to April 2020, Tiffany experienced a decline of 45% in worldwide net sales compared to the prior year.⁶ While the company returned to profitability from May to July 2020, Tiffany still experienced a decline of 29% in worldwide net sales compared to May to July 2019.⁷

[†] Senior Staff, *St. John's Law Review*, J.D. Candidate, 2022, St. John's University School of Law; M.B.A., 2016, St. Joseph's College; B.S., 2015, St. Joseph's College. I would like to thank Professor Keith Sharfman for all his help and guidance.

¹ See Lauren Hirsch & Elizabeth Paton, *Tiffany's \$16 Billion Sale Falls Apart in Face of Pandemic and Tariffs*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/09/09/business/lvmh-tiffany-deal-lawsuit.html>.

² *Id.*

³ *Id.*

⁴ See generally Verified Complaint, *Tiffany & Co. v. LVMH Moët Hennessey Louis Vuitton SE*, No. 2020-0768, 2020 WL 5517433 (Del. Ch. Sept. 9, 2020) [hereinafter Verified Complaint].

⁵ See Hirsch & Paton, *supra* note 1.

⁶ See *Tiffany Reports First Quarter Results*, BUSINESS WIRE (June 9, 2020, 6:30 AM), <https://www.businesswire.com/news/home/20170524005421/en/Tiffany-Reports-First-Quarter-Results> [<https://perma.cc/K8HQ-S7CW>].

⁷ See *Tiffany Reports Significant Improvement in Sales Trajectory and Profitability*, BUSINESS WIRE (Aug. 27, 2020, 7:30 AM), <https://www.businesswire.com/news/home>

According to Tiffany's complaint, LVMH sought to renegotiate the agreement starting in March 2020.⁸ By May 2020, LVMH's senior management ceased all informal communications with Tiffany's representatives.⁹ Then in June 2020, LVMH sent multiple letters to Tiffany expressing concern about the "dramatic upsurge of COVID-19 cases" in the United States.¹⁰ Tiffany sought specific performance of the merger agreement on the grounds that LVMH's breach of contract would cause "irreparable harm."¹¹ LVMH asserted that the COVID-19 pandemic qualifies as a "material adverse effect," which would prevent Tiffany from extending the "drop-dead" date of the merger and would effectively kill the deal.¹² In response, Tiffany argued that LVMH agreed to a "narrowly defined" material adverse effect ("MAE") clause that explicitly excluded general economic conditions unless such conditions had a materially disproportionate impact on the target company compared to its competitors.¹³ As foreshadowed by Luca Solca, an analyst at Sanford C. Bernstein, "COVID-19 has caused second thoughts on a number of proposed deals and the prices they were agreed at."¹⁴ LVMH and Tiffany eventually ended their bitter legal battle by agreeing on a discount of \$425 million.¹⁵

In March 2020, the World Health Organization ("WHO") declared the spread of COVID-19 a pandemic.¹⁶ Since this

/20200827005390/en/Tiffany-Reports-Significant-Improvement-in-Sales-Trajectory-and-Profitability [https://perma.cc/P743-BFZE].

⁸ See Verified Complaint, *supra* note 4, at 8.

⁹ *Id.* at 83.

¹⁰ *Id.* at 87.

¹¹ *Id.* at 109.

¹² *Id.* at 4.

¹³ *Id.* at 27. Expectedly, the November 2019 merger agreement between Tiffany and LVMH did not explicitly address the COVID-19 crisis, as the virus outbreak did not occur until late 2019. See generally Agreement and Plan of Merger, Tiffany & Co., LVMH Moët Hennessy-Louis Vuitton SE, Breakfast Holdings Acquisition Corp., and Breakfast Acquisition Corp., Nov. 24, 2019 [hereinafter Tiffany & Co. Plan of Merger], <https://www.sec.gov/Archives/edgar/data/98246/000119312519299997/d840067dex21.htm> [https://perma.cc/HHC6-UW3T]. Notably, the agreement's MAE clause made no general mention of pandemics, epidemics, viruses, outbreaks, diseases, contagions, illnesses, sicknesses, or quarantines. *Id.* at 7–8.

¹⁴ See Hirsch & Paton, *supra* note 1.

¹⁵ *LVMH and Tiffany End Luxury Battle, Cut Price on \$16 Billion Takeover*, CNBC (Oct. 29, 2020, 4:32 AM), <https://www.cnbc.com/2020/10/29/lvmh-and-tiffany-agree-on-lower-price-for-16-bln-takeover.html> [https://perma.cc/XL9R-J42U].

¹⁶ WHO Director-General's Opening Remarks at the Media Briefing on COVID-19, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/dg/>

announcement, the pandemic has spread dramatically, with the WHO confirming 227,940,972 cases and 4,682,899 deaths as of July 2021.¹⁷ The COVID-19 pandemic has also caused significant economic struggles.¹⁸ Accordingly, MAE clauses have come into focus,¹⁹ as these contract provisions potentially provide an opportunity for those with buyer's remorse to terminate acquisitions.²⁰ Part I of this Note explains the elements and purposes of MAE clauses and examines past studies to show how parties have historically allocated risks following major events. Part II argues that this evolution of contracting is significant, especially in light of COVID-19. To quantitatively and qualitatively assess COVID-19's impact on contract terms, this Note reviews a sample of publicly-available merger and acquisition ("M&A") agreements from November 2019, February to May 2020, and August 2020.²¹ Based on this study, this Note argues that parties with negotiating power allocate known risks to increase the likelihood of deals going through, which effectively reserves MAE clauses for the unknown.²²

speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 [https://perma.cc/RL7K-6WA3].

¹⁷ *Weekly Operational Update on COVID-19*, WORLD HEALTH ORG. (July 26, 2020), <https://www.who.int/publications/m/item/weekly-operational-update-on-covid-19---20-september-2021> [https://perma.cc/ZSF2-VQER].

¹⁸ From January 5, 2020 to March 23, 2020, the S&P 500 declined from 3,265 points to 2,305 points, representing an approximate 29% nosedive. See *S&P 500 Index*, MARKET WATCH, <https://www.marketwatch.com/investing/index/spx> [https://perma.cc/KY4V-8GGV] (last visited July 4, 2021).

¹⁹ An MAE is "[a] term of art used as a materiality threshold to measure the negative effect of some event on the target business." PRACTICAL LAW GLOSSARY, MATERIAL ADVERSE EFFECT (MAE) (2021), WESTLAW PLG, 8-382-3618, [https://content.next.westlaw.com/8-3823618?_lrTS=20201111011750639&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/8-3823618?_lrTS=20201111011750639&transitionType=Default&contextData=(sc.Default)&firstPage=true) (last visited July 26, 2020).

²⁰ See Robert T. Miller, *Material Adverse Effect Clauses and the COVID-19 Pandemic* 1, 6 (U. Iowa Legal Stud. Working Paper No. 2020-21, 2020) [hereinafter *MAE Clauses and COVID-19*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603055.

²¹ The impetus for this study is Theodore Eisenberg and Geoffrey Miller's *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*. 30 CARDOZO L. REV. 1475 (2009). As part of this well-known study, Eisenberg and Miller reviewed publicly-disclosed contracts, including merger agreements, to study choice of law and choice of forum preferences. *Id.*

²² This review of real-time changes in contracts is akin to event studies that are prominent in economics, finance, and accounting research. See Don Cram, *The Event Study Webpage*, MIT (Jan. 18, 1997), <http://web.mit.edu/doncram/www/eventstudy.html> [https://perma.cc/77J5-M43H].

I. BACKGROUND

A. *The Role of MAE Clauses in Risk Allocation*

The purpose of MAE clauses—otherwise known as material adverse change (“MAC”) clauses—is to allocate risks in M&A agreements that arise between the time of signing and closing.²³ MAE clauses carry significant consequences. The triggering of these provisions provides buyers with the opportunity to terminate their agreement without liability.²⁴ While contract provisions vary, MAE clauses have three common features: (1) a base definition, (2) specified exceptions, and (3) disproportionality exclusions.²⁵

A base definition is first introduced to define what an MAE is for the acquisition agreement.²⁶ This base definition will typically encompass “any event, fact, occurrence, circumstance, development or change” that has, or would reasonably be expected to have, an MAE on the target company.²⁷ As explicitly stated, the base definition includes an “expectation metric” that can be used to trigger the purchaser’s termination right.²⁸ It will also specify various “objects” of the target company covered by the MAE clause, such as the seller’s: business, financial condition, operating results, assets, liabilities, properties, capitalizations, and prospects.²⁹

Following the base definition, a list of exceptions—otherwise known as carve-outs—is included to exclude specific changes or events from triggering the MAE clause.³⁰ Typically, these exceptions address four distinct risks: (1) systematic risks, (2)

²³ See *MAE Clauses and COVID-19*, *supra* note 20, at 1. Signing refers to the time when the acquirer and seller enter their agreement, whereas closing refers to the time when the buyer pays the purchase price, and the ownership interest of the target company is transferred. *Id.*

²⁴ *Id.*

²⁵ *Id.* at 2, 4, 5.

²⁶ *Id.* at 2.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 2–3.

³⁰ *Id.* at 4. For example, LVMH’s merger agreement with Tiffany encompassed various carve-outs, such as: general industry conditions, general economic or political conditions, general capital market conditions, the failure to meet forecasted earnings, the execution of the acquisition itself, fluctuations in market price or trading volume, changes in credit ratings, changes in law applicable to the seller’s business, changes in GAAP, geopolitical conditions, acts of war or terrorism, and natural disasters. See *Tiffany & Co. Plan of Merger*, *supra* note 13, at 7–8.

indicator risks, (3) agreement risks, and (4) business risks.³¹ Specifically, systematic risks pertain to changes beyond the control of either party that would impact several companies, not just the seller.³² Examples include broad changes to economic, business, industry, market, political, and social conditions.³³ Additionally, systematic risks pertain to changes to generally accepted accounting principles (“GAAP”) and laws, along with *force majeure* events, such as war, terrorism, and natural disasters.³⁴

Meanwhile, indicator risks provide evidence that the value of the target company has been impaired.³⁵ Importantly, indicator risks do not, by themselves, impair the seller’s value but merely signal that a problem has occurred.³⁶ Examples include credit rating downgrades of company debt, missed earning projections, and changes in security prices and trading volumes.³⁷

Agreement risks are those related to publicly announcing the acquisition and fulfilling related contract requirements, including taking or refraining from specific actions.³⁸ Such risks may include the termination of employees or the loss of customers due to the acquisition.³⁹

³¹ See Robert T. Miller, *The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements*, 50 WM & MARY L. REV. 2007, 2008 (2009) [hereinafter *The Economics of Deal Risk*]; *MAE Clauses and COVID-19*, *supra* note 20, at 4–5; Todd H. Bartels & Zeshawn Qadir, *COVID-19 and Material Adverse Effect Clauses in Acquisition Agreements*, NAT. L. REV. (July 14, 2020), <https://www.natlawreview.com/article/covid-19-and-material-adverse-effect-clauses-acquisition-agreements> [https://perma.cc/V6ZM-RM3Q].

³² *MAE Clauses and COVID-19*, *supra* note 20, at 4–5; Bartels & Qadir, *supra* note 31.

³³ *MAE Clauses and COVID-19*, *supra* note 20, at 4–5

³⁴ *Id.* GAAP are the “uniform minimum standards of, and guidelines to, financial accounting and reporting” within the United States. *Frequently Asked Questions About the AICPA*, AICPA, <https://www.aicpa.org/about/faqs.html> [https://perma.cc/R4V4-N4U5] (last visited Sept. 16, 2021). Meanwhile, *force majeure* is French for “superior force.” *Force Majeure Clause*, ENACADEMIC, https://law.enacademic.com/5252/force_majeure_clause [https://perma.cc/U6AG-Y5EV] (last visited Sept. 16, 2021). In a contractual setting, *force majeure* refers to “an extraordinary event or circumstance beyond the control of the parties . . . that essentially frees both parties from liability or obligation.” Bashar Malkawi, *Force Majeure and Covid-19*, 12 BUS. STUD. J. (2020), <https://www.abacademies.org/articles/force-majeure-and-covid19-9413.html> [https://perma.cc/R4E7-S3GC].

³⁵ *MAE Clauses and COVID-19*, *supra* note 20, at 5.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *The Economics of Deal Risk*, *supra* note 31.

Lastly, business risks are specific to the seller instead of the company's industry as a whole.⁴⁰ Such risks are "peculiar to the operation of the business."⁴¹ Notably, business risks are typically allocated to the seller, while systematic and agreement risks are usually allocated to the purchaser.⁴² Indicator risks are more likely than not to be allocated to the seller, but a significant minority of agreements shifts these risks to the buyer.⁴³

Although carve-outs limit the opportunities for buyers to invoke their MAE clauses, these exceptions are partially neutralized by disproportionality exclusions.⁴⁴ Such exclusions shift risks back to the seller, conditioned upon the seller being disproportionately affected compared to other companies within the same industry.⁴⁵ This exclusion is limited to the extent that the target company is disproportionately impacted.⁴⁶ Therefore, if a systematic risk is covered by an exception that is qualified disproportionately, courts will have to consider whether the net change to the target company qualifies as an MAE.⁴⁷ For example, if a systematic risk causes an average decrease in cash flows of 10% throughout an industry, but the seller itself suffered a 50% decline, then the net 40% reduction will be assessed to determine whether an MAE has occurred.⁴⁸

From a burden of proof perspective, the structure and order of an MAE clause are imperative.⁴⁹ The buyer typically has the initial burden of proving that the target company has endured an MAE in accordance with the base definition.⁵⁰ If successful, the

⁴⁰ *MAE Clauses and COVID-19*, *supra* note 20, at 4–5.

⁴¹ *Id.* at 5.

⁴² *The Economics of Deal Risk*, *supra* note 31.

⁴³ *Id.*

⁴⁴ *MAE Clauses and COVID-19*, *supra* note 20, at 5.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* See *Akorn, Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, 2018 WL 4719347, at *49 (Del. Ch. Oct. 1, 2018) (dicta) ("For example, a buyer might revise the carve-out relating to industry conditions to exclude changes that disproportionately affect the target as compared to other companies in the industries in which such target operates.").

⁴⁸ See *MAE Clauses and COVID-19*, *supra* note 20, at 5–6.

⁴⁹ *Id.* at 6.

⁵⁰ *Id.*; *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 739 (Del. Ch. 2008) ("[A]bsent clear language to the contrary, the burden of proof with respect to a material adverse effect rests on the party seeking to excuse its performance under the contract."). The buyer typically has the initial burden of proof because MAE clauses "are generally interpreted by courts to constitute *conditions subsequent* to the obligation to close [rather than as *conditions precedent* . . ." See Matthew Jennejohn, Julian Nyarko & Eric L. Talley, *COVID-19 as a Force Majeure in*

parties must then determine whether the underlying risk that caused the MAE falls within a specified exception.⁵¹ There is some uncertainty as to whether the purchaser bears this burden to prove that the materialized risk is not within the scope of an MAE exception.⁵² Notably, the Delaware Court of Chancery—which is at the forefront of litigation on business dealings⁵³—has suggested that the burden shifts to the seller to prove that the underlying risk does fall within the scope of a specified MAE exception.⁵⁴ Lastly, if an MAE exception is qualified by disproportionality exclusions, the burden of proof falls on the purchaser to argue that the seller has been disparately impacted compared to its peers and that this difference constitutes an MAE.⁵⁵

B. *The Evolution of MAE Clauses*

While the MAE clause has been a fixture in M&A agreements for most of the twentieth century, the clause has increasingly evolved from “a short boilerplate provision that received little attention in negotiations” to being “extraordinarily complex and detailed.”⁵⁶ This change has resulted from parties’ desire to document nearly all of the conditions and circumstances that would constitute an MAE, along with all the relevant carve-

Corporate Transactions 8 (Colum. L. and Eco. Working Paper No. 625, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3577701.

⁵¹ See *MAE Clauses and COVID-19*, *supra* note 20, at 6.

⁵² *Id.*; see also Kenneth A. Adams, *A Legal Usage Analysis of “Material Adverse Change” Provisions*, 10 *FORDHAM J. CORP. & FIN. L.* 9, 47 (2004).

⁵³ Delaware is the primary domicile of choice for the majority of United States companies, including more than two-thirds of the Fortune 500 and 80% of all companies that are publicly traded. DEL. DIV. OF CORP, SEC’Y STATE, 2019 ANN. REP. STAT. (2019), <https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2019-Annual-Report.pdf>. This is the result of policymakers maintaining statutes that enable flexibility in corporation formation and organization, which ensures the state is the “worldwide leader in corporate jurisprudence.” *Id.*

⁵⁴ See *MAE Clauses and COVID-19*, *supra* note 20, at 6; see also *Akorn, Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, 2018 WL 4719347, at *59 n.619 (Del. Ch. Oct. 1, 2018) (dicta) (“[A] preferable and more nuanced allocation would require [the buyer] to bear the burden of showing a material decline in [the seller’s] performance. At that point, [the seller] would have the burden of proving that the cause of the decline fell into one of the exceptions in the MAE definition.”).

⁵⁵ See *MAE Clauses and COVID-19*, *supra* note 20, at 6.

⁵⁶ See Andrew C. Elken, *Rethinking the Material Adverse Change Clause in Merger and Acquisition Agreements: Should the United States Consider the British Model?*, 82 *S. Cal. L. Rev.* 291, 293 (2009).

outs to these elements.⁵⁷ Modern MAE clauses present a variety of practical issues.⁵⁸ For instance, the contentious negotiations and detailed drafting associated with MAE clauses lead to hefty transactional fees.⁵⁹ Since MAE provisions have become grounds for a standoff between parties, the clause may be a barrier in negotiating a successful agreement.⁶⁰ Even if the agreement is signed, MAE clauses may cast doubt on whether the transaction will actually close.⁶¹

Given these modern complexities, parties often get tied up in expensive disputes and litigation to determine whether a purchaser can exercise its termination right under an M&A agreement.⁶² Due to uncertainty surrounding the finalization of acquisitions, arbitrage opportunities and inefficiencies may develop in securities markets.⁶³ Despite the intense negotiations and extenuating drafting of MAE clauses, these provisions are unlikely to address the types of events that give rise to legal disputes, which are inherently unforeseeable.⁶⁴

⁵⁷ *Id.*

⁵⁸ *Id.* at 293–94.

⁵⁹ *Id.* For example, from 2012 to 2015, M&A legal fees paid to outside counsel more than doubled. *Enterprise Legal Management Trends Report: 2015 Year-End Edition*, COUNSELLINK, <https://www.counselink.com/wp-content/uploads/2017/04/CounselLink-2015-Full-Year-web-1.pdf> [<https://perma.cc/P7UK-39ZZ>] (last visited Sept. 16, 2021). As of 2015, M&A partners had the highest median bill rate out of all legal practice areas, totaling \$629 per hour, as compared to \$562 for corporate and tax partners, \$560 for regulatory and compliance partners, \$392 for labor partners, and \$185 for insurance partners. *Id.* While total fees fluctuate by deal, West Covina's acquisition of Clippinger Chevrolet had a total purchase price of \$12,308,675, which was accompanied with acquisition-related legal costs of \$116,293, representing an approximate 1% fee. *West Covina Motors, Inc. v. Comm'r*, 98 T.C.M. (CCH) 615, *1 (T.C. 2009).

⁶⁰ *See* Elken, *supra* note 56, at 293–94.

⁶¹ *Id.*

⁶² *Id.* *See, e.g.*, *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 723, 740 (Del. Ch. 2008) (litigating over a \$10.6 billion merger to determine whether disappointing earnings compared to peers within the chemical industry and an unexpected increase in net debt collectively constituted an MAE); *In re IBP S'holder's Litig. v. Tyson Foods, Inc.*, 789 A.2d 14, 47 (Del. Ch. 2001) (litigating over a merger to determine whether accounting fraud that led to incremental charges of \$32.9 million, \$12 million, and \$108 million constituted an MAE); *Channel Medsystems, Inc. v. Bos. Sci. Corp.*, No. 2018-0673-AGB, 2019 WL 6896462, at *4, *6 (Del. Ch. Dec. 18, 2019) (litigating over a \$275 million merger conditioned on the approval of a key product by the Food and Drug Administration to determine whether falsified materials included in the application processes constituted an MAE).

⁶³ *See* Elken, *supra* note 56, at 293–94.

⁶⁴ *Id.*

This development of the MAE clause has, in part, been sparked by recent major events, such as terrorist attacks, wars, natural disasters, and international calamities. The impact of these catastrophes on contract provisions has been captured over the last two decades by Nixon Peabody's annual MAC surveys.⁶⁵ The firm samples publicly disclosed M&A agreements and tabulates the percentage of MAE clauses with certain elements and exceptions.⁶⁶ Significantly, these studies have shown that parties adapt contract terms to known risks.

For example, between July 3, 2002, and June 2, 2003, 15% of analyzed agreements contained an MAE exception for changes caused by acts of war or terror.⁶⁷ This measure represents a significant increase from the previous study period of September 11, 2001 to July 3, 2002, which showed that only 7% of transactions contained language related to acts of war or terror.⁶⁸ The 2003 survey asserted that the "wars in Afghanistan and Iraq undoubtedly played a large role in this increase," in addition to the terrorist attacks of September 11th.⁶⁹ Notably, 38% of contracts with a minimum value of \$100 million in the 2003 survey addressed acts of war or terror.⁷⁰ Comparatively, less than 10% of such transactions in the 2002 survey contained MAE exceptions for war or terrorism.⁷¹ These studies show that larger deals are more likely to include MAE exceptions, and parties increasingly negotiate provisions to address known risks.

By the period of July 1, 2004 to June 1, 2005, 19% of all sampled agreements included MAE exceptions for war, major hostilities, and terrorism.⁷² This continued increase "likely stem[med] from the frequency of terrorist incidents around the world and the United States' increased military involvement in

⁶⁵ See *infra* notes 66–67, 72, 74, 77, 80, 82, 84 and accompanying text.

⁶⁶ See generally NIXON PEABODY, MAC SURVEY NP 2019 REPORT (2019) [hereinafter MAC SURVEY (2019)], <https://www.nixonpeabody.com/-/media/Files/PDF-Others/mac-survey-2019-nixon-peabody.ashx?la=en> [<https://perma.cc/5NVT-NYNS>].

⁶⁷ See NIXON PEABODY, SECOND ANNUAL MAC SURVEY 2 (2003) [hereinafter MAC SURVEY (2003)], https://www.nixonpeabody.com//media/Files/Alerts/MAAdvisor_07002003.ashx [<https://perma.cc/M4E3-AY2Y>].

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See NIXON PEABODY, FOURTH ANNUAL MAC SURVEY 3 (2005) [hereinafter MAC SURVEY (2005)], https://www.nixonpeabody.com//media/Files/Alerts/MAAdvisor_10172005.ashx [<https://perma.cc/44Y2-AU2Q>].

conflicts abroad.”⁷³ This number ballooned to 61% from June 1, 2006 to May 31, 2007 due to “growing unease with continued hostilities in Iraq and the Middle East, continued trepidation” stemming from the 2001 World Trade Center and 2005 London Underground attacks, and “worries about impending warfare.”⁷⁴ Given the prevalence and increasing global awareness of terrorism and war, exceptions for these events have become a prominent fixture in MAE clauses, as 93% of M&A agreements between June 1, 2018 and May 31, 2019 addressed major hostilities.⁷⁵ Similarly, 91% of contracts in the 2019 survey included MAE exceptions for acts of terror.⁷⁶

A similar trend was observed with MAE exceptions for acts of God following natural disasters. For example, during the period of June 1, 2005 to May 31, 2006, 9.5% of M&A agreements addressed events of weather and other acts of God.⁷⁷ Meanwhile, by the 2007 survey, 23% of contracts included MAE exceptions for events of weather and other acts of God, which represents over a 140% increase from 2006.⁷⁸ This increase was speculated to be the result of “heightened concerns in the wake of recent catastrophic weather events, such as the Southeast Asia tsunami in 2004 and Hurricane Katrina in 2005.”⁷⁹ There was another significant increase during the period of June 1, 2009 to May 31, 2010, as MAE exceptions for acts of God appeared in 38% of reviewed contracts.⁸⁰ This increase was seemingly the result of earthquakes in Haiti during January 2010 and Chile during February 2010.⁸¹

The following period of June 1, 2010 to May 31, 2011 was relatively consistent, as 40% of M&A agreements included MAE

⁷³ *Id.*

⁷⁴ NIXON PEABODY, SIXTH ANNUAL MAC SURVEY 7 (2007) [hereinafter MAC SURVEY (2007)], https://www.nixonpeabody.com/-/media/Files/Alerts/MAC_survey_2007.ashx [https://perma.cc/X2A5-GGCH].

⁷⁵ MAC SURVEY (2019), *supra* note 66, at 10.

⁷⁶ *Id.*

⁷⁷ NIXON PEABODY, FIFTH ANNUAL MAC SURVEY 3–4 (2006) [hereinafter MAC SURVEY (2006)].

⁷⁸ MAC SURVEY (2007), *supra* note 74, at 7.

⁷⁹ *Id.*

⁸⁰ NIXON PEABODY, 2010 NIXON PEABODY MAC SURVEY 8 (2010) [hereinafter MAC SURVEY (2010)], https://www.nixonpeabody.com/-/media/Files/Alerts/MAC_Survey_2010.a shx [https://perma.cc/D2DT-EGKQ].

⁸¹ *Id.*

exceptions for acts of God.⁸² Within this period, another earthquake occurred in Japan during March 2011, which continued to raise the consciousness of potential global economic concerns.⁸³ By the period of June 1, 2014 to May 31, 2015, approximately 61% of M&A agreements featured MAE exceptions for acts of God.⁸⁴ This increase from 40% in 2011 to 61% in 2015 suggested that “Hurricane Sandy, the 2012 storm . . . lingers in the minds of targets, bidders, and their counsel.”⁸⁵ By 2019, MAE exceptions for acts of God appeared in 77% of transactions due to “recent natural disasters and increased weather volatility.”⁸⁶

The most relevant trend for COVID-19 is the increase of MAE exceptions related to changes in political conditions and international calamities. According to the 2006 survey, nearly 22.8% of M&A agreements addressed changes in political conditions, and 1.5% of transactions included MAE exceptions for international calamities.⁸⁷ However, just one year later, the 2007 survey showed that 37% of deals included changes in political conditions, and 8% addressed international calamities.⁸⁸ These increases likely resulted from “the threat of pandemic spread of infectious diseases such as SARS and [the] Avian influenza virus.”⁸⁹ While temporary, these increases perhaps foreshadow the impact that COVID-19 will have on MAE clauses, especially considering the virus’s economic implications.

As COVID-19 continues to evolve, there has been a large influx of scholars and firms assessing the legal significance of the pandemic.⁹⁰ Recently, Professor Robert Miller assessed whether

⁸² NIXON PEABODY, 2011 NIXON PEABODY MAC SURVEY 9 (2011) [hereinafter MAC SURVEY (2011)], https://www.nixonpeabody.com//media/Files/Alerts/140085_MAC_Survey_2011.ashx.

⁸³ *Id.*

⁸⁴ NIXON PEABODY, NIXON PEABODY MAC SURVEY 9 (2015) [hereinafter MAC SURVEY (2015)], https://www.nixonpeabody.com//media/Files/Alerts/181079_NP_MAC_SURVEY_2015.ashx?la=en.

⁸⁵ *Id.*

⁸⁶ See MAC SURVEY (2019), *supra* note 66, at 9.

⁸⁷ See MAC SURVEY (2006), *supra* note 77, at 5.

⁸⁸ See MAC SURVEY (2007), *supra* note 74, at 8.

⁸⁹ *Id.* at 7.

⁹⁰ COVID-19 has become a hot topic in recent practice alerts, as many firms are considering the legal ramifications of the pandemic. See, e.g., *Force Majeure Under the Coronavirus (COVID-19) Pandemic*, PAUL WEISS (Mar. 16, 2020), https://www.paulweiss.com/practices/litigation/litigation/publications/update-force-majeure-under-the-coronavirus-covid-19-pandemic?id=30881#_edn1 [<https://perma.cc/VKH5-P8YF>].

the virus and its economic implications would trigger MAE clauses.⁹¹ Since MAE clauses are extensively negotiated, Miller concluded that the enforcement of a purchaser's termination right is ultimately dependent upon the specific facts of each case and the exact language of the underlying contract.⁹² However, due to the general structure of these clauses, the first issue will be whether a company has suffered an MAE, which will likely be determined by examining cash flow projections utilized by the parties at the time of entering their agreement and cash flow projections provided by third-party analysts from the time of the alleged material event or circumstance.⁹³ Many companies have probably suffered an MAE due to COVID-19, as government lockdowns led to an estimated decline in 2020 GDP of about 6.3%.⁹⁴

Once the occurrence of an MAE is determined, the parties will then assess whether the circumstance was carved out of their agreement.⁹⁵ This determination will lead to contentious litigation pertaining to the proximate cause of the MAE, as parties can argue that the adverse effect arose from different sources, such as COVID-19 itself, the government's response to the pandemic, or actions taken by the seller.⁹⁶ While M&A agreements that explicitly carve out "pandemics" will be enforced,⁹⁷ there is uncertainty for deals that lack such language.

⁹¹ *MAE Clauses and COVID-19*, *supra* note 20, at 27.

⁹² *Id.* This point is especially important considering "Delaware courts will enforce agreements between sophisticated parties in accordance with their terms." *Id.*

⁹³ *Id.* But see Robert T. Miller, *A New Theory of Material Adverse Effects*, 76 *BUS. LAW.* 749, 815 (2021) (arguing that an MAE is best measured by "a discounted cash flow analysis" rather than "changes in projected cash flows.>").

⁹⁴ *MAE Clauses and COVID-19*, *supra* note 20, at 28. Alternatively, some have questioned the reliability of long-term forecasts. Jennejohn, Nyarko & Talley, *supra* note 50, at 8. This point is particularly relevant to finding an MAE, as courts require "the target's unanticipated hardship [to] be durationally significant, and not merely a hiccup in revenues or earnings over a quarter or two." *Id.* Accordingly, to be durationally significant, an MAE "must affect not just the current period or the next succeeding one, but many periods into the future." *MAE Clauses and COVID-19*, *supra* note 20, at 13–14.

⁹⁵ *MAE Clauses and COVID-19*, *supra* note 20, at 28.

⁹⁶ *Id.*

⁹⁷ *Id.* As previously noted, SARS and the Avian influenza virus primarily impacted MAE exceptions for changes in political condition and international calamities. See *MAC SURVEY* (2007), *supra* note 74, at 7. As of 2019, only 15% of M&A agreements addressed international calamities, but 78% of such agreements included MAE exceptions for changes in political condition. See *MAC SURVEY* (2019), *supra* note 66, at 10.

If an MAE provision includes general terms, such as “natural disasters” and “*force majeure* events,”⁹⁸ Delaware courts are likely to interpret this language to include pandemics.⁹⁹ However, if an M&A agreement does not address pandemics—either explicitly or generally—“Delaware courts are extremely unlikely to read pandemics into [the contract].”¹⁰⁰ If MAE exceptions include changes in law,¹⁰¹ sellers can argue reduced revenues stem from government shutdowns.¹⁰² However, certain actions—such as layoffs, salary reductions, and debt defaults—result from company decisions rather than government orders.¹⁰³ Additionally, the enforcement of disproportionality exclusions will heavily rely on the facts of each case, as government lockdowns may impact companies within the same industry equally or create varying impacts due to different jurisdictional requirements.¹⁰⁴

Another recent study by Professors Matthew Jennejohn, Julian Nyarko, and Eric Talley included a survey of M&A transactions from 2003 to 2020 to review MAE exceptions related to *force majeure* events.¹⁰⁵ This study revealed a spike in general *force majeure* language and explicit carve-outs for pandemics following the 2009 H1N1 crisis, the 2012 MERS crisis, and the 2015 MERS crisis.¹⁰⁶ By 2019, the authors determined that 23% of M&A agreements included specific MAE exceptions for pandemics.¹⁰⁷ Significantly, the impact of these exceptions has been neutralized, as disproportionality exclusions “overwhelmingly” supplement pandemic clauses.¹⁰⁸ Notably, when pandemics are addressed by explicit language, they are an

⁹⁸ See *MAE Clauses and COVID-19*, *supra* note 20, at 28. As of 2019, 77% of M&A agreements included carve-outs for acts of God, which would encompass natural disasters and *force majeure* events. See MAC SURVEY (2019), *supra* note 66, at 10. This number rose to 82% for M&A agreements valued at one billion dollars or more. *Id.*

⁹⁹ See *MAE Clauses and COVID-19*, *supra* note 20, at 28.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* As of 2019, 89% of M&A agreements included MAE exceptions related to changes in laws or regulations. See MAC SURVEY (2019), *supra* note 66, at 11. Such exceptions are important, as definitions of “[l]aw” have “expansive” meanings within M&A agreements. See *MAE Clauses and COVID-19*, *supra* note 20, at 28.

¹⁰² See *MAE Clauses and COVID-19*, *supra* note 20, at 28.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 28–29.

¹⁰⁵ See Jennejohn, Nyarko & Talley, *supra* note 50, at 1.

¹⁰⁶ *Id.* at 5.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1.

enumerated example of a general *force majeure* event 57% of the time.¹⁰⁹ In the other 43% of the time, pandemics are a stand-alone MAE without reference to any general language.¹¹⁰ These conflicting findings dispel the argument that general *force majeure* clauses can *never* capture pandemics, but it also creates doubt that pandemics can *always* be read into such language.¹¹¹ This interpretation issue can make or break cases, especially since courts have “long resisted the temptation to rescue a regretful party once foundational risk allocation decisions seem locked in.”¹¹²

Based on these considerations, the following qualitative and quantitative review of M&A agreements during 2019 and 2020 was performed to assess the impact of COVID-19 on contract provisions.

II. ANALYSIS

A. MAE Exceptions for Pandemics Prior to COVID-19

To track COVID-19's impact on MAE clauses, this Note selected a sample of thirty publicly disclosed M&A agreements from November 2019.¹¹³ As expected, none of these thirty agreements included explicit provisions related to COVID-19,¹¹⁴

¹⁰⁹ *Id.* at 7.

¹¹⁰ *Id.*

¹¹¹ *Id.* See also Robert T. Miller, *Pandemic Risk and the Interpretation of Exceptions in MAE Clauses*, 46 J. Corp. L. 681, 714 (2021) (“[M]ost transactional lawyers would not see a difference between such phrases as ‘hurricanes, tornados, tsunamis, and other natural disasters’ and ‘natural disasters, including hurricanes, tornados, and tsunamis.’”).

¹¹² Jennejohn, Nyarko & Talley, *supra* note 50, at 8. The Delaware Court of Chancery has set a high bar for terminating M&A agreements, as acquirers “ought to have to make a strong showing to invoke a [MAE clause].” *Id.* Notably, Delaware had never held that an MAE has occurred until *Akorn v. Fresenius*. See *Akorn, Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, 2018 WL 4719347, at *101 (Del. Ch. Oct. 1, 2018). While some speculated that this ruling would lead to future findings of MAEs, *Akorn* had unique circumstances—including false regulatory compliance representations and an incurable financial downfall. *Id.* Aside from litigation, parties can renegotiate a lower purchase price or alternatively use a reverse termination fee (“RTF”), which would enable the buyer to cancel the deal in exchange for liquidated damages. See Jennejohn, Nyarko & Talley, *supra* note 50, at 9–10. From 2003 to 2020, over 40% of M&A agreements that had both general and specific carveouts included RTFs. *Id.*

¹¹³ See Appendix A: MAE Exceptions for Pandemics Prior to COVID-19 [hereinafter Appendix A].

¹¹⁴ *Id.*

as the virus did not start until late December 2019.¹¹⁵ Of the thirty contracts this Note examined, only eight agreements (26.67%) included MAE exceptions for general terms that could be associated with COVID-19, including: pandemic, epidemic, plague, health crisis, outbreak of illness, and public health event.¹¹⁶ Interestingly, none of the thirty contracts included MAE exceptions with other general terms associated with COVID-19, such as: virus, contagion, disease, quarantine, or sickness.¹¹⁷ As previously noted, there is uncertainty on whether general *force majeure* language would encompass COVID-19.¹¹⁸ Notably, of the thirty agreements analyzed, only six contracts (20%) included MAE exceptions for *force majeure* events.¹¹⁹ Therefore, twenty-four of the thirty contracts (80%) did not include *force majeure* language that could potentially be interpreted to incorporate COVID-19.¹²⁰ While similar interpretation issues could exist for other general MAE events, it was noted that of the thirty contracts examined, ten agreements (33.33%) included carve-outs for acts of God.¹²¹ Additionally, of the thirty contracts analyzed, twenty-three of the agreements (76.67%) included MAE exceptions for disasters.¹²² Of these twenty-three contracts, all encompassed natural disasters, while only four included man-made disasters.¹²³

As stated before, MAE exceptions for changes in political conditions increase following the outbreak of viruses.¹²⁴ In the thirty contracts studied, twenty-four agreements (80%) included such exceptions.¹²⁵ As previously analyzed, government mandates related to COVID-19 may trigger MAE exceptions for changes in law.¹²⁶ Of the thirty contracts examined, twenty-

¹¹⁵ On December 31, 2019, the Wuhan government confirmed that health officials were treating dozens of cases of a pneumonia-like illness, which was later identified as COVID-19. See Sui-Lee Wee and Vivian Wang, *China Grapples with Mystery Pneumonia-Like Illness*, N.Y. TIMES (Jan. 6, 2020), <https://www.nytimes.com/2020/01/06/world/asia/china-SARS-pneumonialike.html>.

¹¹⁶ See Appendix A, *supra* note 113.

¹¹⁷ *Id.*

¹¹⁸ See Jennejohn, Nyarko & Talley, *supra* note 50, at 7.

¹¹⁹ See Appendix A, *supra* note 113.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See MAC SURVEY (2006), *supra* note 77, at 5; MAC SURVEY (2007), *supra* note 74, at 7–8.

¹²⁵ See Appendix A, *supra* note 113.

¹²⁶ See *MAE Clauses and COVID-19*, *supra* note 20, at 28.

seven agreements (90%) included such exceptions.¹²⁷ Furthermore, twenty-nine of the thirty contracts (96.67%) included MAE exceptions for economic changes, which is important given the financial implications of COVID-19.¹²⁸ Of these twenty-nine contracts, twenty-eight agreements included offset language that shifts risk back to the seller, conditioned upon the seller being disproportionately affected.¹²⁹

Based on these findings, buyers who entered M&A agreements prior to the outbreak of COVID-19 can seek recourse through MAE clauses. Importantly, nearly 73.33% of the studied MAE clauses did not explicitly exclude pandemics.¹³⁰ Moreover, 80% of examined MAE clauses did not exclude *force majeure* events,¹³¹ which could be interpreted to include COVID-19.¹³² Therefore, the impact of COVID-19 may trigger MAE clauses in the majority of M&A agreements entered prior to the pandemic. However, sellers may also argue the effects of the virus have been precluded under other common exceptions, such as changes in political conditions and laws.¹³³ Additionally, sellers can argue that the financial implications of COVID-19 are precluded by MAE exceptions related to changes in economic conditions, but the majority of M&A agreements limit this exemption through disproportionate offset language.¹³⁴

B. *MAE Exceptions for COVID-19 During the Rise of the Pandemic*

To document the evolution of contracts during the rise of COVID-19,¹³⁵ this Note examined a sample of thirty M&A

¹²⁷ See Appendix A, *supra* note 113.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Jennejohn, Nyarko & Talley, *supra* note 50, at 7.

¹³³ See *MAE Clauses and COVID-19*, *supra* note 20, at 28.

¹³⁴ See Appendix A, *supra* note 113.

¹³⁵ As of February 1, 2020, the WHO confirmed 11,953 cases of COVID-19 globally. *Novel Coronavirus (2019-nCoV) Situation Report-12*, WORLD HEALTH ORG. (Feb. 1, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200201-sitrep-12-ncov.pdf?sfvrsn=273c5d35_2. By May 31, 2020, the WHO confirmed 5,934,936 cases of COVID-19 globally. See *Coronavirus disease (COVID-19) Situation Report – 132*, WORLD HEALTH ORG. (May 31, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200531-covid-19-sitrep-132.pdf?sfvrsn=d9c2eae2_2 [<https://perma.cc/DL8P-TWZH>].

agreements between February 2020 and May 2020.¹³⁶ Notably, of these thirty contracts, seven agreements (23.33%) included COVID-19 as an MAE exception.¹³⁷ Of the remaining twenty-three contracts that did not explicitly address COVID-19, eight agreements included general terms associated with the virus, including pandemic and epidemic.¹³⁸ Interestingly, none of the thirty analyzed contracts included other general terms associated with COVID-19, such as: outbreak, quarantine, contagion, disease, illness, sickness, virus, plague, or health crisis.¹³⁹ Accordingly, 50% of M&A agreements between February 2020 and May 2020 explicitly carved out the effects of COVID-19, pandemics, and epidemics.¹⁴⁰ Comparatively, only 26.67% of contracts as of November 2019 addressed pandemics.¹⁴¹ Importantly, one of the thirty contracts analyzed between February 2020 and May 2020 included a definition related to COVID-19.¹⁴² Adicet's merger with resTORbio in April 2020 defined "COVID-19 Measures" as "require[ments] to comply with any quarantine, 'shelter in place,' 'stay at home,' workforce reduction, social distancing, shut down, closure, sequester or any other Law, Order, directive, guidelines or recommendations by any Governmental Authority in connection with or in response to COVID-19."¹⁴³

Another development was the inclusion of COVID-19 in miscellaneous clauses, such as covenants related to the operation of the business,¹⁴⁴ the conduct of the business,¹⁴⁵ employee matters,¹⁴⁶ and access to information.¹⁴⁷ Furthermore, the

¹³⁶ See Appendix B: MAE Exceptions for COVID-19 During the Rise of the Pandemic [hereinafter Appendix B].

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See Appendix A, *supra* note 113.

¹⁴² See Appendix B, *supra* note 136.

¹⁴³ See Agreement and Plan of Merger, resTORbio, Inc. and Project Oasis Merger Sub, Inc.-Adicet Bio, Inc., Apr. 28, 2020, at 64, <https://www.sec.gov/Archives/edgar/data/1720580/000119312520200676/d92144d8k.htm>.

¹⁴⁴ *Id.*

¹⁴⁵ See Agreement and Plan of Merger, Communications Systems, Inc. and Resilience Technology Corporation-Ecessa Corporation and Albert A. Woodward, May 8, 2020, at 38, https://www.sec.gov/Archives/edgar/data/22701/000089710120000393/csi200829_ex2-1.htm.

¹⁴⁶ See Agreement and Plan of Merger, KLX Energy Services Holdings, Inc., Krypton Intermediate, LLC, and Krypton Merger Sub, Inc.-Quintana Energy Services, Inc., May 3, 2020, at 64, <https://www.sec.gov/Archives/edgar/data/1738827/000110465920055884>

selected contracts included COVID-19 within representations and warranties related to the absence of certain developments,¹⁴⁸ employees,¹⁴⁹ and employee benefit plans.¹⁵⁰ Uniquely, Accelmed Partners' acquisition agreement with TearLab in May 2020 included a termination fee provision that explicitly addressed COVID-19.¹⁵¹ Under the clause, the buyer may terminate the agreement and pay liquidated damages of \$500,000 if it "reasonably determines in good faith that the transactions contemplated . . . have become impracticable . . . as a result of the effect of the COVID-19 pandemic on the [seller] and its business."¹⁵²

As previously noted, fifteen of the thirty contracts (50%) examined between February and May 2020 included MAE exceptions that explicitly carved out COVID-19, pandemics, and epidemics.¹⁵³ To assess this fifty-fifty split, five differentiating factors were reviewed, including: (1) timing, (2) deal values, (3) business sectors, (4) law firms, and (5) termination fees.¹⁵⁴ First, the timing of deals proved to be highly dispositive of whether MAE exceptions addressed COVID-19. Of five M&A agreements reviewed in February 2020, none of the contracts (0%) included MAE exceptions for pandemics.¹⁵⁵ However, five out of eleven contracts (45.45%) examined in March 2020 and three out of seven contracts (42.86%) reviewed in April 2020 included pandemic-related language.¹⁵⁶ These notable increases continued

/tm2016623d3_ex2-1.htm.

¹⁴⁷ See Agreement and Plan of Merger, Portola Pharmaceuticals, Inc.-Alexion Pharmaceuticals, Inc. and Odyssey Merger Sub Inc., May 5, 2020, at 76, https://www.sec.gov/Archives/edgar/data/899866/000110465920058178/tm2018594d5_ex2-1.htm.

¹⁴⁸ See Agreement and Plan of Merger, Ten-X Holding Company, Inc.-CoStar Realty Information, Inc., Crescendo Sub, Inc., and Thomas H. Lee Equity Fund VII, LP, May 13, 2020, at 22–23, <https://www.sec.gov/Archives/edgar/data/1057352/000105735220000080/mergeragreement-projec.htm>.

¹⁴⁹ *Id.* at 33.

¹⁵⁰ *Id.* at 34–37.

¹⁵¹ See Agreement and Plan of Merger, Accelmed Partners II L.P. and Accelmed Merger Sub, Inc.-TearLab Corporation, May 11, 2020, at 52–53, <https://www.sec.gov/Archives/edgar/data/1299139/000149315220008168/ex2-1.htm>.

¹⁵² *Id.* Liquidated damages are defined as "[c]ash compensation, agreed to by signed, written contract for breach of contract, payable to the aggrieved party." *Black's Law Dictionary: What is Liquidated Damages?*, LAW DICTIONARY, <https://thelawdictionary.org/liquidated-damages/> (last visited Sept. 19, 2021).

¹⁵³ See Appendix B, *supra* note 136.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

with the rise of COVID-19, as seven out of seven (100%) contracts examined in May 2020 included MAE exceptions that addressed pandemics.¹⁵⁷

Second, the value of deals provided conflicting information on whether larger acquisitions, as compared to smaller deals, priced in the risks of COVID-19. Of the thirty contracts examined, twenty-four had readily ascertainable values, producing an average consideration amount of \$893.2 million.¹⁵⁸ Based on the reviewed purchase prices, contracts with MAE exceptions for pandemics had an average value of \$594.8 million, while contracts without such exceptions had an average value of \$1.2 billion.¹⁵⁹ Accordingly, larger deals were less likely to include MAE exceptions for known risks, which is inconsistent with the historical findings of Nixon Peabody's MAC surveys.¹⁶⁰ This result is primarily driven by a reduced sample size and the influence of timing. For example, Intuit's \$7.1 billion acquisition of Credit Karma was the largest deal observed in this sample.¹⁶¹ Since the underlying M&A agreement was effective in February 2020, the contract did not include MAE exceptions for COVID-19, which skewed the computed average value.¹⁶²

Conversely, every deal observed in May 2020 had MAE exceptions for pandemics, but only two out of the six contracts with readily ascertainable values had purchase prices above \$100 million.¹⁶³ During the rise of COVID-19 in May 2020, deal value was not particularly dispositive, as Alexion Pharmaceuticals' \$1.4 billion acquisition of Portola Pharmaceuticals included MAE exceptions for the pandemic, but so did Communication Systems' smaller \$4 million acquisition of Ecessa Corporation.¹⁶⁴ This lack of a pattern is explained by relativity. Since all sampled deals were obtained through public disclosures, these M&A agreements were inherently material to the contracting parties.¹⁶⁵ Since the contracts were significant to the respective parties, pandemic-related risks were amply negotiated.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See generally MAC SURVEY (2019), *supra* note 66.

¹⁶¹ See Appendix B, *supra* note 136.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ SEC, SEC 873 (02-21), Form 8-K 8 (2021), <https://www.sec.gov/files/form8-k.pdf> [<https://perma.cc/J87X-V9AS>].

Third, the business sector of contracting parties influenced whether underlying agreements included MAE exceptions for COVID-19. For example, of the thirty contracts sampled, nine related to acquisitions within the healthcare sector, and seven pertained to the financial services industry.¹⁶⁶ Of the nine healthcare deals examined, eight (88.89%) included MAE exceptions for COVID-19.¹⁶⁷ Meanwhile, of the seven financial services deals reviewed, only two (28.57%) included pandemic-related language.¹⁶⁸ This difference is explained by the varying impact of COVID-19, which is highly prevalent within the healthcare sector as compared to other industries.¹⁶⁹ Of the thirty contracts reviewed, there were additional sectors represented by multiple deals, such as technology, consumer defensive, and energy.¹⁷⁰ These industries had an even split regarding whether the underlying deals included MAE exceptions for pandemics.¹⁷¹ Additionally, the communication services sector was represented by three deals, of which two included MAE exceptions that addressed the risks of COVID-19.¹⁷²

Fourth, the law firms involved with M&A agreements did not expressly indicate whether a deal would include MAE exceptions for COVID-19. For example, Morgan, Lewis & Bockius LLP was the most represented firm, appearing in four of the sampled contracts.¹⁷³ Of these four deals, only two (50%) of the underlying contracts addressed the pandemic.¹⁷⁴ This fifty-fifty split also occurred for Luse Gorman, PC and Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC.¹⁷⁵ Notably, Cravath, Swaine & Moore LLP, Latham & Watkins LLP, and Dorsey & Whitney LLP appeared in two deals each—none of which included MAE exceptions for COVID-19.¹⁷⁶ Conversely, Cooley

¹⁶⁶ See Appendix B, *supra* note 136.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Hospitals and Healthcare Systems Face Unprecedented Financial Pressures Due to COVID-19*, AM. HOSP. ASS'N (May 2020), <https://www.aha.org/guidesreports/2020-05-05-hospitals-and-health-systems-face-unprecedented-financial-pressures-due> [<https://perma.cc/K8SN-YK2X>].

¹⁷⁰ See Appendix B, *supra* note 136.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

LLP represented two deals, both of which carved out pandemic-related risks, while Skadden, Arps, Slate, Meagher & Flom LLP appeared in three deals, two (66.67%) of which addressed COVID-19.¹⁷⁷ Similarly, Wilson Sonsini Goodrich & Rosati, PC represented three deals, two (66.67%) of which included pandemic-related language.¹⁷⁸

Based on these findings, the prominence of firms involved did not indicate whether or not pandemic-related language was included. For example, Cravath, Swaine & Moore LLP is the top-ranked firm according to Vault's well-known rankings,¹⁷⁹ yet none of the firm's deals included pandemic-related language.¹⁸⁰ Meanwhile, Cooley LLP is the twenty-fourth ranked firm,¹⁸¹ yet all of the deals negotiated by the firm addressed COVID-19.¹⁸² Similarly, Wilson Sonsini Goodrich & Rosati, PC is the thirty-eighth ranked firm,¹⁸³ yet 66.67% of the firm's deals included pandemic-related carve-outs.¹⁸⁴ Notably, Luse Gorman PC is unranked,¹⁸⁵ but 50% of the firm's deals included MAE exceptions for COVID-19.¹⁸⁶

Lastly, the presence of a termination fee did not particularly influence the inclusion of MAE exceptions for pandemics. For example, of the thirty contracts sampled, only eighteen (60%) included termination fees.¹⁸⁷ Of these eighteen agreements, nine (50%) appeared in contracts with MAE exceptions for COVID-19, and nine (50%) were included in deals with no such language.¹⁸⁸ Notably, contracts with MAE carve-outs for pandemics had an average termination fee of \$26.3 million, while contracts without such exceptions had an average termination fee of \$30 million.¹⁸⁹ This difference is consistent with the finding that sampled contracts with greater deal values did not include MAE

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See 2022 Vault Law 100, VAULT, <https://www.vault.com/best-companies-to-work-for/law/top-100-law-firms-rankings> [<https://perma.cc/5PDH-EW97>] (last visited Aug. 5, 2021).

¹⁸⁰ See Appendix B, *supra* note 136.

¹⁸¹ See 2022 Vault Law 100, *supra* note 179.

¹⁸² See Appendix B, *supra* note 136.

¹⁸³ See 2022 Vault Law 100, *supra* note 179.

¹⁸⁴ See Appendix B, *supra* note 136.

¹⁸⁵ See 2022 Vault Law 100, *supra* note 179.

¹⁸⁶ See Appendix B, *supra* note 136.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

exceptions for COVID-19.¹⁹⁰ Termination fees are typically included to compensate buyers for agreements that are canceled.¹⁹¹ Given the significant financial implications of ceasing M&A agreements, parties are influenced to close deals, especially those with greater termination fees.¹⁹² Interestingly, one of the sampled contracts included a reverse termination fee of \$60 million,¹⁹³ which would provide financial compensation to the seller if the buyer were to walkway from the deal.¹⁹⁴ Remarkably, this contract with a reverse termination fee did not include an MAE exception for pandemics.¹⁹⁵

C. MAE Exceptions for COVID-19 Resulting From the Pandemic

Lastly, thirty M&A agreements were selected from August 2020 to capture the full effect of COVID-19 on MAE clauses.¹⁹⁶ Based on this selection, twenty-six of the thirty examined agreements (86.67%) included MAE exceptions for COVID-19.¹⁹⁷ A common formulation of this exclusion was “any epidemic, pandemic, or disease outbreak (including COVID-19).”¹⁹⁸ Comparatively, only 50% of agreements examined between February 2020 and May 2020 included MAE exceptions for COVID-19 or pandemics and epidemics in general.¹⁹⁹ Furthermore, only 26.67% of contracts from November 2019 included MAE exceptions for pandemics.²⁰⁰ This drastic increase to 86.67% for contracts entered in August 2020 reflects that MAE exceptions are reserved for the unknown, as sellers shift known risks to purchasers to increase the likelihood of M&A agreements going through.²⁰¹ Interestingly, of the four contracts that did not

¹⁹⁰ *Id.*

¹⁹¹ Frank C. Butler & Peter Sauska, *Mergers and Acquisitions: Termination Fees and Acquisition Deal Completion*, 26 J. MANAGERIAL ISSUES 44, 44 (2014).

¹⁹² *Id.* at 48.

¹⁹³ See Appendix B, *supra* note 136.

¹⁹⁴ See Jennejohn, Nyarko & Talley, *supra* note 50, at 9–10.

¹⁹⁵ See Appendix B, *supra* note 136.

¹⁹⁶ See Appendix C: MAE Exceptions for COVID-19 Resulting From the Pandemic [hereinafter Appendix C].

¹⁹⁷ *Id.*

¹⁹⁸ See Agreement and Plan of Merger, Cancer Genetics, Inc. and CGI Acquisition, Inc.-StemoniX, Inc., Aug. 21, 2020, at A-2, A-4, <https://www.sec.gov/Archives/edgar/data/1349929/000149315220016574/ex2-1.htm> [hereinafter Cancer Genetics Plan of Merger].

¹⁹⁹ See Appendix B, *supra* note 136.

²⁰⁰ See Appendix A, *supra* note 113.

²⁰¹ See Appendix C, *supra* note 196.

explicitly address COVID-19 in August 2020,²⁰² one contract included no related exceptions,²⁰³ another contract included exceptions for changes in law,²⁰⁴ the third contract had carve-outs for changes in political conditions and laws plus natural disasters,²⁰⁵ and the fourth contract contained exceptions for political and economic changes along with natural disasters.²⁰⁶

Additionally, there was an increase of contracts that included definitions related to COVID-19 from 3.33% between February and May 2020 to nearly 56.67% as of August 2020.²⁰⁷ Interestingly, there were a variety of definitions. For example, Software Acquisition Group's agreement with CuriosityStream defined "COVID-19" as "SARS-CoV-2 or COVID-19, and any evolutions or mutations thereof or related or associate epidemics, pandemic or disease outbreaks."²⁰⁸ Meanwhile, Enterprise Financial Services' agreement with Seacoast Commerce Banc defined "COVID-19" as "SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2), coronavirus disease or COVID-19."²⁰⁹ As another example, DiamondPeak's agreement with Lordstown Motors defined "COVID-19" as "the outbreak of the novel

²⁰² *Id.*

²⁰³ See generally Agreement and Plan of Merger, U.S. Gold Corp., Gold King Acquisition Corp.-Northern Panther Resources Corporation and Richard Silas, Aug. 10, 2020, <https://www.sec.gov/Archives/edgar/data/27093/000149315220015434/ex10-1.htm>.

²⁰⁴ See Agreement and Plan of Merger, Mullen Technologies, Inc. and Mullen Acquisition, Inc.-Net Element, Inc., Aug. 4, 2020, at 41-42, https://www.sec.gov/Archives/edgar/data/1499961/000143774920016598/ex_197234.htm.

²⁰⁵ See Agreement and Plan of Merger, KBR Wyle Services, LLC and Astrid Merger Sub, LLC-Centauri Platform Holdings, LLC and Centauri ACP Holdings, LLC, Aug. 17, 2020, at Article XI, <https://www.sec.gov/Archives/edgar/data/1357615/000135761520000167/exhibit2-1.htm> [hereinafter KBR Wyle Services Plan of Merger].

²⁰⁶ See Agreement and Plan of Merger, Megalith Financial Acquisition Corp., MFAC Merger Sub, Inc.-Customers Bank and BankMobile Technologies, Inc., Aug. 6, 2020, at 71, https://sec.report/Document/0001213900-20-020527/ea125088ex2-1_megalith.htm.

²⁰⁷ See Appendix B, *supra* note 136; Appendix C, *supra* note 196.

²⁰⁸ See Agreement and Plan of Merger, Software Acquisition Group, Inc.-CS Merger Sub, Inc., CuriosityStream, Inc. and Hendricks Factual Media LLC, Aug. 10, 2020, at A-4, https://www.sec.gov/Archives/edgar/data/1776909/000121390020021306/ea125257ex2-1_software.htm [hereinafter Software Acquisition Group Plan of Merger].

²⁰⁹ See Agreement and Plan of Merger, Enterprise Financial Services Corp. and Enterprise Bank & Trust-Seacoast Commerce Banc Holdings and Seacoast Commerce Bank, Aug. 20, 2020, at 85, <https://sec.report/Document/1025835/000102583520000083/exhibit21agreementandp.htm> [hereinafter Enterprise Financial Services Plan of Merger].

coronavirus and the associated ongoing public health considerations.”²¹⁰ Alternatively, The Peck Company’s agreement with Sunworks included “Contagion Event,” which was defined as “any contagious disease, epidemic or pandemic (including the COVID-19 pandemic).”²¹¹

The August 2020 contracts also included definitions for events associated with COVID-19.²¹² For example, Johnson & Johnson’s agreement with Momenta Pharmaceuticals defined “COVID-19 Measures” as:

[A]ny quarantine, ‘shelter in place,’ ‘stay at home,’ workforce reduction, social distancing, shut down, closure, sequester, safety or similar Law, directive or guidelines promulgated by any Governmental Authority, including the Centers for Disease Control and Prevention and the World Health Organization, in each case, in connection with or in response to COVID-19, including the Coronavirus Aid, Relief and Economic Security Act . . . and the Families First Coronavirus Response Act[.]²¹³

Another new definition was “COVID-19 Law,” which Take-Two Interactive’s agreement with PlayDots defined as “the CARES Act, the Families First Coronavirus Response Act of 2020 or any other Law intended to address the consequences of COVID-19.”²¹⁴ Meanwhile, KBR Wyle Services’ agreement with Centauri altered the explanation of “Business Day” by defining the term as “any day of the year on which national banking institutions in the State of New York are open to the public for conducting business and are not required or authorized by Law to close or are otherwise not required to be closed due to the COVID-19 outbreak.”²¹⁵ Uniquely, Gores Metropoulos’ agreement with

²¹⁰ See Agreement and Plan of Merger, DiamondPeak Holdings Corp. and DPL Merger Sub Corp.-Lordstown Motors Corp., Aug. 1, 2020, at A-3, https://www.sec.gov/Archives/edgar/data/1759546/000121390020019762/ea124863ex2-1_diamondpeak.htm [hereinafter DiamondPeak Holdings Plan of Merger].

²¹¹ See Agreement and Plan of Merger, The Peck Company Holdings, Inc. and Peck Mercury, Inc.-Sunworks, Inc., Aug. 10, 2020, at 86, https://www.sec.gov/Archives/edgar/data/1634447/000114036120023036/nt10015267x4_424b3.htm.

²¹² See Agreement and Plan of Merger, Johnson & Johnson and Vigor Sub, Inc.-Momenta Pharmaceuticals, Inc., Aug. 19, 2020, at 6, <https://www.sec.gov/Archives/edgar/data/200406/000119312520237578/d35685dex99a1a.htm>.

²¹³ *Id.*

²¹⁴ See Agreement and Plan of Merger, Take-Two Interactive Software, Inc., Dash MC, LLC and Dash MS II, LLC-PlayDots, Inc. and Shareholder Representative Services LLC, Aug. 17, 2020, at 83, <https://www.sec.gov/Archives/edgar/data/946581/000119312520223616/d82273dex21.htm>.

²¹⁵ See KBR Wyle Services Plan of Merger, *supra* note 205, at Article XI.

Luminar included the term “COVID-19 Quarantine Period,” which meant “the period during which the state or local Governmental Authority restricted nonessential work at such location.”²¹⁶ Moreover, Sanofi’s agreement with Principia Biopharma included the new term “COVID-19 Response,” which was defined as “any workforce reduction, social distancing measure, office closure or safety measure adopted in response to any Legal Requirement, directive, guideline or recommendation promulgated by any Governmental Body, including the Centers for Disease Control and Prevention . . . related to the COVID-19 pandemic.”²¹⁷

Liberty Broadband’s agreement with GCI Liberty included a host of unique definitions related to COVID-19.²¹⁸ For example, the contract included the term “Government Shutdown,” which was defined as:

[T]he shutdown or suspension, including, for the avoidance of doubt, any tolling of review periods, of any government services provided by any of the SEC, the United States Federal Trade Commission, the United States Department of Justice, the FCC, the RCA or any other State Commission and/or NASDAQ, including, for the avoidance of doubt, as a result of the COVID-19 pandemic or any other pandemic or epidemic.²¹⁹

The agreement also conditioned the terms “Ordinary Course” and “Ordinary Course Consistent with Past Practice,” which are both “subject . . . to such commercially reasonable actions as are reasonably necessary given changing economics and other conditions, circumstances or events relating to or arising from the COVID-19 pandemic.”²²⁰

²¹⁶ See Agreement and Plan of Merger, Gores Metropoulos, Inc., Dawn Merger Sub, Inc. and Dawn Merger Sub II, LLC-Luminar Technologies, Inc., Aug. 24, 2020, at 9, <https://www.sec.gov/Archives/edgar/data/1758057/000119312520227516/d63113dex21.htm> [hereinafter Gores Metropoulos Plan of Merger].

²¹⁷ See Agreement and Plan of Merger, Sanofi and Kortex Acquisition Corp.-Principia Biopharma, Inc., Aug. 16, 2020, at A-4, <https://www.sec.gov/Archives/edgar/data/1510487/000119312520221651/d25143dex21.htm> [hereinafter Sanofi Plan of Merger].

²¹⁸ See generally Agreement and Plan of Merger, Liberty Broadband Corporation, Grizzly Merger Sub 2, Inc. and Grizzly Merger Sub 1, LLC-GCI Liberty, Inc., Aug. 6, 2020 [hereinafter Liberty Broadband Corporation Plan of Merger], <https://www.sec.gov/Archives/edgar/data/808461/000104746920005364/a2242592zdefm14a.htm#la>.

²¹⁹ *Id.* at 18.

²²⁰ *Id.* at 22.

Another development observed in the August 2020 contracts was the increasing use of miscellaneous clauses related to COVID-19, including covenants, representations, and warranties.²²¹ As of August 2020, nineteen of the thirty agreements examined (63.33%) included such provisions.²²² In comparison, only 20% of the contracts analyzed between February and May 2020 included covenants, representations, and warranties for COVID-19.²²³ Covenants identified in the August 2020 contracts pertained to: the operation of the business,²²⁴ the interim operation of the business,²²⁵ access to information,²²⁶ retention of books and records,²²⁷ employees,²²⁸ the conduct of the business,²²⁹ and employee benefits.²³⁰ Meanwhile, representations and warranties related to COVID-19 included: absences of change,²³¹ material contracts,²³² compliance with laws and permits,²³³ labor matters,²³⁴ company benefit plans,²³⁵ taxes,²³⁶ financial statements,²³⁷ material customers,²³⁸ key suppliers,²³⁹ employee matters,²⁴⁰ benefit plans,²⁴¹ real property assets,²⁴² leased real property,²⁴³ and undisclosed liabilities.²⁴⁴

²²¹ See Appendix C, *supra* note 196.

²²² *Id.*

²²³ See Appendix B, *supra* note 136.

²²⁴ See Cancer Genetics Plan of Merger, *supra* note 198, at 60–61.

²²⁵ See DiamondPeak Holdings Plan of Merger, *supra* note 210, at 36.

²²⁶ See Enterprise Financial Services Plan of Merger, *supra* note 209, at 63.

²²⁷ See DiamondPeak Holdings Plan of Merger, *supra* note 210, at 47.

²²⁸ See Enterprise Financial Services Plan of Merger, *supra* note 209, at 53–54.

²²⁹ See Gores Metropoulos Plan of Merger, *supra* note 216, at 71.

²³⁰ See Agreement and Plan of Merger, Majesco-Magic Intermediate, LLC and Magic Merger Sub, Inc., Aug. 8, 2020, at 51–52, https://sec.report/Document/0001213900-20-020985/ea125239ex2-1_majesco.htm [<https://perma.cc/DQV5-L9SC>].

²³¹ See Agreement and Plan of Merger, Jernigan Capital, Inc. and Jernigan Capital Operating Company, LLC-NexPoint RE Merger, Inc. and NexPoint RE Merger OP, LLC, Aug. 3, 2020, at 30–31, <https://www.sec.gov/Archives/edgar/data/1622353/000155837020008950/jcap-20200803xex2d1.htm>.

²³² See DiamondPeak Holdings Plan of Merger, *supra* note 210, at 16–19.

²³³ See KBR Wyle Services Plan of Merger, *supra* note 205, at Article III.

²³⁴ See Enterprise Financial Services Plan of Merger, *supra* note 209, at 23–24.

²³⁵ See Gores Metropoulos Plan of Merger, *supra* note 216, at 47–49.

²³⁶ *Id.* at 51–53.

²³⁷ See KBR Wyle Services Plan of Merger, *supra* note 205, at Article III.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See Sanofi Plan of Merger, *supra* note 217, at 28–30.

²⁴¹ *Id.*

²⁴² See Agreement and Plan of Merger, Roper Technologies, Inc. and Project V Merger Sub Inc.-Project Viking Holdings, Inc., Aug. 12, 2020, at 22–23,

The August 2020 agreements also included general provisions related to COVID-19, including interpretation and consent to jurisdiction.²⁴⁵ Notably, the consent to jurisdiction representation stated that each party agrees to personal jurisdiction within the Delaware Court of Chancery unless the court “declines to accept or does not have jurisdiction over a particular matter or is unable to timely hear an Action as a result of COVID-19 or any COVID-19 Measure.”²⁴⁶

D. Practice Points on Drafting MAE Clauses in the Wake of COVID-19

Due to the widespread implications of COVID-19, practitioners should be ready to heavily negotiate their clients’ MAE clauses. First, sellers should demand a specific MAE exception for COVID-19, plus general language for “other pandemics, epidemics, diseases and health emergencies.”²⁴⁷ As a result, sellers will increase the probability of their agreements going through. Conversely, buyers should seek to avoid explicit MAE exceptions for COVID-19, along with general carve-outs that can be interpreted to capture the effects of the pandemic, such as *force majeure* events, changes in laws, changes in political conditions, and international calamities.²⁴⁸ At a minimum, buyers should demand scaled-back MAE exceptions related to COVID-19.²⁴⁹ By doing so, buyers will have a greater ability to cancel deals when an MAE does occur. In connection with MAE exceptions, both parties should negotiate the definition of key phrases, such as: COVID-19, COVID-19 Measures, COVID-19 Law, Contagion Event, Government Shutdown, COVID-19 Quarantine Period, and COVID-19 Response.²⁵⁰ While defining such phrases, the parties, especially sellers, should follow the example outlined in Liberty Broadband’s agreement with GCI Liberty, which uses the crafty phrase of “for the avoidance of doubt” when defining Government

<https://www.sec.gov/Archives/edgar/data/882835/000119312520218831/d82103dex21.htm> [hereinafter Roper Technologies Plan of Merger].

²⁴³ *Id.*

²⁴⁴ See Software Acquisition Group Plan of Merger, *supra* note 208, at 15.

²⁴⁵ See Roper Technologies Plan of Merger, *supra* note 242, at 70–71, 74–75.

²⁴⁶ *Id.* at 74.

²⁴⁷ See Bartels & Qadir, *supra* note 31.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ See *supra* notes 208–220 and accompanying text.

Shutdown.²⁵¹ This clever drafting technique better emphasizes the intentions of the negotiating parties by reducing ambiguity.

To further reduce uncertainty, contracting parties should consider negotiating a quantified threshold that would constitute an MAE.²⁵² The parties will have greater clarity on when adverse effects give rise to a material event by agreeing on a specific dollar amount.²⁵³ When negotiating a quantified threshold, sellers should seek to increase this dollar amount to minimize the finding of an MAE. Conversely, buyers should negotiate a lower dollar amount, which will increase their ability to exercise termination rights under an MAE clause. In connection with this dollar amount, parties should identify quantifiable metrics that are specific to the seller or the macro-economy.²⁵⁴ For example, a quantified threshold could be related to the seller's earnings before interest, taxes, depreciation, and amortization ("EBITDA") or can relate to the pricing of a market index.²⁵⁵ Moreover, parties should define the time period associated with these quantified measures, as courts focus on the durational significance of adverse effects to determine if a material event has occurred.²⁵⁶ Accordingly, sellers should seek to expand the amount of time required to find an MAE, while buyers should negotiate a limited time period to enhance their ability to exercise termination rights. When negotiating what constitutes an MAE, the seller should seek to limit the definition to only the seller and its subsidiaries and avoid the inclusion of future prospects and financial performance.²⁵⁷

While sellers should demand MAE exceptions for pandemics, buyers should seek to limit the effect of such exceptions by attaching language for disproportionate adverse effects, which will shift risk back to the seller.²⁵⁸ This effort may be resisted, as some sellers have successfully carved out the effect of COVID-19 from disproportionate adverse effect provisions.²⁵⁹ At a

²⁵¹ See Liberty Broadband Corporation Plan of Merger, *supra* note 218, at 18.

²⁵² See Bartels & Qadir, *supra* note 31.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ See Roper Technologies Plan of Merger, *supra* note 242, at 4; see also Agreement and Plan of Merger, Siemens Healthineers Holding I GMBH, Falcon Sub

minimum, sellers should narrow disproportionate impact exceptions to avoid taking on all pandemic-related risks.²⁶⁰ Sellers can achieve this goal by expressly stating that only incremental disproportionate impacts on the seller can be considered in evaluating an MAE and identifying appropriate comparison groups, such as similarly sized companies within the target's industry, market, or geographical location.²⁶¹

Both parties should also consider negotiating an RTF, which will enable buyers to walk away from negotiated M&A deals in exchange for liquidated damages.²⁶² Given the uncertainties of the pandemic and the inherent nature of litigation, both parties may desire a clean break option. RTFs allow the buyer to avoid a less appealing prospect while permitting sellers to recoup some financial benefit, along with the ability to attract a new acquisition partner. Finally, parties may want to consider the impact of COVID-19 on other clauses, such as covenants, warranties, and representations. As noted, parties have increasingly adjusted such provisions for the effects of the pandemic, including those related to: operations of the business, access to information, retention of books and records, employee benefits, material contracts, compliance with laws and permits, labor matters, taxes, financial statements, material customers, key suppliers, assets, and undisclosed liabilities.²⁶³

CONCLUSION

The impact of COVID-19 has infiltrated nearly every facet of society. Aside from health woes, the pandemic has produced significant economic implications for contracting parties. As historically observed, buyers and sellers utilize MAE exceptions to shift known risks following catastrophic events, such as terrorist attacks, wars, natural disasters, and international calamities.²⁶⁴ This process of risk allocation hinges on the desire of sellers to ensure negotiated transactions will go through and the necessity for buyers to have safety valves to squash soured

Inc. and Siemens Medical Solutions USA, Inc.-Varian Medical Systems, Inc., Aug. 2, 2020, at 7 [hereinafter *Siemens Healthineers Plan of Merger*].

²⁶⁰ See Bartels & Qadir, *supra* note 31.

²⁶¹ *Id.*

²⁶² See Jennejohn, Nyarko & Talley, *supra* note 50, at 9–10.

²⁶³ See *supra* notes 224–244.

²⁶⁴ See MAC SURVEY (2003), *supra* note 67, at 2; MAC SURVEY (2007), *supra* note 74, at 7–8.

deals. Based on a sample of M&A agreements between November 2019 and August 2020,²⁶⁵ there were significant developments in contract clauses due to COVID-19. In real-time, parties evolved their agreements to shift the risks associated with the virus. These changes most significantly occurred between February 2020 and May 2020 during the rise of COVID-19.²⁶⁶ Within this time period, it was determined that deal values, termination fees, and the specific law firms utilized did not have a dispositive impact on whether MAE exceptions for pandemics were included.²⁶⁷ However, it was noted that during this time period, the majority of M&A agreements in the healthcare sector included pandemic-related carve-outs, while the majority of deals within the financial services industry did not.²⁶⁸ Nonetheless, by August 2020, the risks of COVID-19 were priced into the majority of all M&A agreements.²⁶⁹

Significantly, parties updated MAE exceptions to address pandemics, along with reducing the effectiveness of offset language by carving out COVID-19 from disproportionate adverse effect provisions.²⁷⁰ Additionally, parties defined a variety of new terms, such as: COVID-19, COVID-19 Measures, COVID-19 Law, Contagion Event, Government Shutdown, COVID-19 Quarantine Period, and COVID-19 Response.²⁷¹ Moreover, parties explicitly included the effects of the pandemic in numerous covenants, representations, and warranties, including those related to: the operation of the business, compliance with laws and permits, material contracts, material customers, key suppliers, access to information, retention of books and records, labor matters, employee benefits, taxes, financial statements, assets, and undisclosed liabilities.²⁷² These changes have been widespread, as the majority of M&A agreements now address the virus either through MAE exceptions or covenants, representations, and warranties.²⁷³

²⁶⁵ See generally Appendix A, *supra* note 113; Appendix B, *supra* note 136; Appendix C, *supra* note 196.

²⁶⁶ See Appendix B, *supra* note 136.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See Appendix C, *supra* note 196.

²⁷⁰ See Roper Technologies Plan of Merger, *supra* note 242, at 4; Siemens Healthineers Plan of Merger, *supra* note 259, at 7.

²⁷¹ See *supra* notes 208–220 and accompanying text.

²⁷² See *supra* notes 224–244 and accompanying text.

²⁷³ See Appendix C, *supra* note 196.

Practitioners who deal with M&A agreements have likely encountered these significant contractual developments. As COVID-19 persists, attorneys and parties must be prepared to allocate pandemic-related risks through various contract provisions, including MAE exceptions and definitions for key phrases. Importantly, practitioners should incorporate clever language, such as “for the avoidance of doubt,” to better emphasize the intentions of the contracting parties by reducing ambiguity.²⁷⁴ Moreover, parties may negotiate an RTF to return freedom to regretful buyers and provide some financial benefit for sellers who will have further opportunities to find a suitor.²⁷⁵ Overall, this analysis has documented the evolution of contracting in the wake of a catastrophic event. Most importantly, we have seen that parties flock to the negotiating table to allocate risks upon their respective realizations. This historical trend supports the argument that MAE clauses are truly reserved for the unknown.

²⁷⁴ See Liberty Broadband Corporation Plan of Merger, *supra* note 218, at 18.

²⁷⁵ See Jennejohn, Nyarko & Talley, *supra* note 50, at 9–10.

Appendix A: MAE Exceptions for Pandemics Prior to COVID-19

#	Parties	Date	COVID-19	Pandemic Language	Force Majeure Events	Acts of God	Natural Disasters	Man-Made Disasters	Political Conditions	Laws	Economic Conditions	Economic: Disproportionate
1	FITBIT, INC GOOGLE LLC and MAGNOLIOPHYTA INC	11/01/19	X	X	X	X	✓	X	✓	✓	✓	✓
2	GORES HOLDINGS III, INC EAP MERGER SUB, INC EAP MERGER SUB II, LLC SHAY HOLDING CORPORATION and PLATINUM EQUITY ADVISORS, LLC	11/01/19	X	✓	X	X	✓	✓	✓	✓	✓	✓
3	FIRST HORIZON NATIONAL CORPORATION and IBERIABANK CORPORATION	11/03/19	X	X	X	X	X	X	✓	✓	✓	✓
4	AIRCASTLE LIMITED MM AIR LIMITED and MM AIR MERGER SUB LIMITED	11/05/19	X	✓	✓	X	✓	X	✓	✓	✓	✓
5	TAYLOR MORRISON HOME CORPORATION TOWER MERGER SUB, INC and WILLIAM LYON HOMES	11/05/19	X	✓	✓	X	✓	X	✓	✓	✓	✓
6	NV5 GLOBAL, INC NV5 MERGER SUB CORP GEOSPATIAL HOLDINGS INC and Arlington Capital Partners III, LP	11/06/19	X	X	✓	X	✓	X	✓	✓	✓	✓
7	DIGI INTERNATIONAL INC NAMATH MERGER SUB, INC OPENGEAR, INC and SHAREHOLDER REPRESENTATIVE SERVICES LLC	11/07/19	X	X	X	✓	✓	✓	✓	✓	✓	✓
8	MICT, INC MICT MERGER SUBSIDIARY INC and GFH INTERMEDIATE HOLDINGS LTD	11/07/19	X	X	X	✓	✓	X	✓	X	✓	✓

9	CARBONITE, INC OPEN TEXT CORPORATION and CORAL MERGER SUB INC	11/10/19	X	✓	X	X	✓	X	✓	✓	✓	✓
10	INPHI CORPORATION EINSTEIN ACQUISITION SUB, INC ESILICON CORPORATION and FORTIS ADVISORS LLC	11/10/19	X	X	✓	X	✓	X	✓	✓	✓	✓
11	MENLO THERAPEUTICS INC GIANTS MERGER SUBSIDIARY LTD AND FOAMIX PHARMACEUTICALS LTD	11/10/19	X	X	X	X	✓	X	X	✓	✓	✓
12	ANHEUSER-BUSCH COMPANIES, LLC BARREL SUBSIDIARY, INC and CRAFT BREW ALLIANCE, INC	11/11/19	X	✓	X	✓	✓	X	✓	✓	✓	✓
13	LADENBURG THALMANN FINANCIAL SERVICES INC ADVISOR GROUP HOLDINGS, INC and HARVEST MERGER SUB, INC	11/11/19	X	X	X	X	✓	X	✓	✓	✓	✓
14	YAGEO CORPORATION SKY MERGER SUB INC and KEMET CORPORATION	11/11/19	X	X	X	✓	✓	X	✓	✓	✓	✓
15	CERTAINTED GYPSUM AND CEILINGS USA, INC CUPERTINO MERGER SUB, INC CONTINENTAL BUILDING PRODUCTS, INC and COMPAGNIE DE SAINT-GOBAIN S.A.	11/12/19	X	X	X	✓	✓	X	✓	✓	✓	✓
16	NEXTGEN HEALTHCARE, INC RENEGADE MERGER SUB, INC MEDFUSION, INC PROJECT RENEGADE LLC and GREENLIGHT HEALTH DATA SOLUTIONS, INC	11/12/19	X	X	X	X	X	X	X	X	✓	X
17	TECH DATA CORPORATION TIGER MIDCO, LLC and TIGER MERGER SUB CO	11/12/19	X	X	X	✓	X	X	✓	✓	✓	✓

18	CHASERG TECHNOLOGY ACQUISITION CORP CS MERGER SUB 1 INC CS MERGER SUB 2 LLC GRID DYNAMICS INTERNATIONAL, INC and AUTOMATED SYSTEMS HOLDINGS LIMITED	11/13/19	X	✓	X	X	✓	X	✓	✓	✓	✓
19	ALKERMES, INC THINKER MERGER SUB, INC ALKERMES PLC RODIN THERAPEUTICS, INC AND SHAREHOLDER REPRESENTATIVE SERVICES LLC	11/14/19	X	X	✓	X	✓	X	✓	✓	✓	✓
20	RIBBON COMMUNICATIONS INC RIBBON COMMUNICATIONS ISRAEL LTD ECLIPSE COMMUNICATIONS LTD ECI TELECOM GROUP LTD and ECI HOLDING (HUNGARY) KORLÁTOLT FELELŐSSÉGŰ TÁRSASÁG	11/14/19	X	X	X	✓	✓	X	✓	✓	✓	✓
21	UNITED BANKSHARES, INC AND CAROLINA FINANCIAL CORPORATION	11/17/19	X	X	X	X	✓	✓	✓	✓	✓	✓
22	BANK FIRST CORPORATION and TOMAH BANCSHARES, INC	11/19/19	X	X	X	X	X	X	✓	✓	✓	✓
23	SEACOAST BANKING CORPORATION OF FLORIDA SEACOAST NATIONAL BANK AND FIRST BANK OF THE PALM BEACHES	11/19/19	X	X	X	X	X	X	X	✓	✓	✓
24	SEASPAN CORPORATION ATLAS CORP and SEASPAN HOLDCO V LTD	11/20/19	X	X	X	X	X	X	X	X	X	X
25	MEDICINE MAN TECHNOLOGIES, INC PBS MERGER SUB, LLC MESA ORGANICS LTD JAMES PARCO AND PAMELA PARCO	11/23/19	X	X	X	✓	✓	✓	✓	✓	✓	✓

26	THE MEDICINES COMPANY NOVARTIS AG and MEDUSA MERGER CORPORATION	11/23/19	X	✓	X	✓	✓	X	✓	✓	✓	✓
27	THE CHARLES SCHWAB CORPORATION AMERICANO ACQUISITION CORP and TD AMERITRADE HOLDING CORPORATION	11/24/19	X	X	X	X	X	X	X	✓	✓	✓
28	TIFFANY & CO LVMH MOËT HENNESSY-LOUIS VUITTON SE BREAKFAST HOLDINGS ACQUISITION CORP and BREAKFAST ACQUISITION CORP	11/24/19	X	X	X	X	✓	X	✓	✓	✓	✓
29	STANDEX INTERNATIONAL CORPORATION SHOCKWAVE ACQUISITION CORPORATION and TOROTEL, INC	11/26/19	X	X	✓	X	✓	X	X	✓	✓	✓
30	RUILI INTERNATIONAL INC RUILI INTERNATIONAL MERGER SUB INC and SORL AUTO PARTS, INC	11/29/19	X	✓	X	✓	✓	X	✓	✓	✓	✓
Contracts With Provision			0	8	6	10	23	4	24	27	29	28
Total Contracts			30	30	30	30	30	30	30	30	30	30
Percentage of Total Contracts With Provision			0.00%	26.67%	20.00%	33.33%	76.67%	13.33%	80.00%	90.00%	96.67%	93.33%

Appendix B: MAE Exceptions for COVID-19 During the Rise of the Pandemic

Differentiating Factors

#	Parties	Date	COVID-19	Pandemic Language	Definition of COVID-19	Miscellaneous COVID-19 Clauses	Readily Ascertainable Value*	Sector	Buyer's Firm	Seller's Firm	Termination Fee
1	HEARTLAND FINANCIAL USA, INC AND AIM BANCSHARES, INC	02/11/20	X	X	X	X	\$280.4 Million	Financial Services	Dorsey & Whitney LLP	Fenimore, Kay, Harrison & Ford, LLP	\$11,000,000
2	INTUIT INC HALO MERGER SUB I, INC HALO MERGER SUB II, LLC CREDIT KARMA, INC AND SHAREHOLDER REPRESENTATIVE SERVICES LLC	02/24/20	X	X	X	X	\$7.1 Billion	Technology	Latham & Watkins LLP	Skadden, Arps, Slate, Meagher & Flom LLP Wilson Sonsini Goodrich & Rosati	\$265,000,000
3	NATIONAL STORAGE AFFILIATES TRUST NSA HOLDING COMPANY I, LLC SECURCARE SELF STORAGE, INC ARLEN NORDHAGEN DAVID CRAMER JUSTIN HLIBICHUK and ARLEN NORDHAGEN	02/24/20	X	X	X	X	\$10.3 Million	Real Estate	Clifford Chance US LLP	Sherman & Howard L.L.C.	N/A
4	EQUITRANS MIDSTREAM CORPORATION EQM LP CORPORATION LS MERGER SUB, LLC EQGP SERVICES, LLC and EQM MIDSTREAM PARTNERS, LP	02/26/20	X	X	X	X	\$1.8 Billion	Energy	Latham & Watkins LLP	Richards, Layton & Finger, P.A.	\$36,500,000
5	GAIN CAPITAL HOLDINGS, INC INTL FCSTONE INC and GOLF MERGER SUB I INC	02/26/20	X	X	X	X	\$328.0 Million	Financial Services	DLA Piper LLP (US)	Davis Polk & Wardwell LLP	\$9,000,000
6	FORTY SEVEN, INC GILEAD SCIENCES, INC and TORO MERGER SUB, INC	03/01/20	X	✓	X	X	\$4.7 Billion	Healthcare	Skadden, Arps, Slate, Meagher & Flom LLP	Cooley LLP	\$160,000,000
7	THE MEET GROUP, INC EHARMONY HOLDING, INC HOLLY MERGER SUB, INC AND NCG – NUCOM GROUP SE	03/05/20	X	X	X	X	N/A	Interactive Dating Solutions	Milbank LLP	Morgan, Lewis & Bockius LLP	\$18,631,945
8	US FOODS, INC CNC MERGER SUB, INC SMART STORES HOLDINGS CORP and SMART & FINAL HOLDINGS, INC	03/05/20	X	X	X	X	\$970.0 Million	Consumer Defensive	Cravath, Swaine & Moore LLP	Morgan, Lewis & Bockius LLP	-\$60,000,000

9	FARMERS AND MERCHANTS BANCSHARES, INC ANTHEM ACQUISITION CORP and CARROLL BANCORP, INC	03/06/20	X	X	X	X	\$25.0	Million	Financial Services	Gordon Feinblatt LLC	Luse Gorman PC	\$1,000,000
10	MARUCCI SPORTS, LLC WHEELHOUSE HOLDINGS INC WHEELHOUSE HOLDINGS MERGER SUB LLC and WHEELHOUSE 2020 LLC	03/06/20	X	✓	X	X	\$200.0	Million	Healthcare	Paul Hastings LLP	Ropes & Gray LLP	N/A
11	UNITED COMMUNITY BANKS, INC and THREE SHORES BANCORPORATION, INC	03/09/20	X	X	X	X	\$180.0	Million	Financial Services	Nelson Mullins Riley & Scarborough LLP	Smith Mackinnon, PA	\$8,500,000
12	PROVIDENT FINANCIAL SERVICES, INC AND SB ONE BANCORP	03/11/20	X	✓	X	X	\$180.8	Million	Financial Services	Luse Gorman, PC	Hogan Lovells US LLP	\$9,000,000
13	CINCINNATI BELL INC RED FIBER PARENT LLC and RF MERGER SUB INC	03/13/20	X	X	X	X	\$2.9	Billion	Communication Services	White & Case LLP	Cravath, Swaine & Moore LLP	\$7,500,000
14	ASSERTIO THERAPEUTICS, INC ALLIGATOR ZEBRA HOLDINGS, INC ZEBRA MERGER SUB, INC ALLIGATOR MERGER SUB, INC and ZYLA LIFE SCIENCES	03/16/20	✓	N/A	X	X	N/A		Healthcare	Gibson, Dunn & Crutcher LLP	Dechert LLP	\$3,400,000
15	FACEBANK GROUP, INC FUBOTV ACQUISITION CORP and FUBOTV INC	03/19/20	X	✓	X	X	\$576.0	Million	Communication Services	Loeb & Loeb LLP	Wilson Sonsini Goodrich & Rosati Professional Corporation	N/A
16	LUX AMBER, CORP WORLDWIDE SPECIALTY CHEMICALS INC AND WSC NEWCO, INC	03/23/20	X	X	X	X	N/A		Chemicals	Scheef & Stone, LLP	Scheef & Stone, LLP	N/A
17	TURNING POINT BRANDS, INC STANDARD MERGER SUB, LLC and STANDARD DIVERSIFIED INC	04/07/20	✓	N/A	X	X	\$236.0	Million	Consumer Defensive	Lathrop GPM LLP	Morgan, Lewis & Bockius LLP	\$3,000,000
18	ASTA FINANCE ACQUISITION INC ASTA FINANCE ACQUISITION SUB INC and ASTA FUNDING, INC	04/08/20	X	✓	X	X	\$34.8	Million	Financial Services	Bayard, P.A. Moomjian, Waite & Coleman, LLP	Pepper Hamilton LLP Tannenbaum Helpern Syracuse & Hirschtritt LLP	\$500,000
19	BIO-MATRIX SCIENTIFIC GROUP, INC RIVULET FILMS, INC and RIVULET FILMS LLC	04/08/20	X	X	X	X	N/A		Entertainment	Gallagher & Kennedy, P.A.	Gallagher & Kennedy, P.A.	N/A

20	MICT, INC MICT MERGER SUBSIDIARY INC GFH INTERMEDIATE HOLDINGS LTD and GLOBAL FINTECH HOLDINGS LTD	04/15/20	X	X	X	X	\$25.0	Million	Financial Services	Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.	Ellenoff Grossman & Schole LLP	N/A
21	GRATITUDE HEALTH, INC FRESH MARKET MERGER SUB, INC AND HOME BISTRO, INC	04/20/20	X	X	X	X	N/A		Consumer Cyclical	Gracin & Marlow, LLP	Faegre, Drinker, Biddle & Reath LLP	N/A
22	RESTORBIO, INC PROJECT OASIS MERGER SUB, INC and ADICET BIO, INC	04/28/20	X	✓	✓	✓	\$87.0	Million	Healthcare	Goodwin Procter LLP	Morrison & Foerster LLP	\$6,100,000
23	INNOVATE BIOPHARMACEUTICALS, INC NAIA MERGER SUB, INC SECOND NAIA MERGER SUB, LLC NAIA RARE DISEASES, INC and NAIA LIMITED	04/30/20	X	X	X	X	\$85.4	Million	Healthcare	Wyrick Robbins Yates & Ponton LLP	Dorsey & Whitney LLP	N/A
24	KLX ENERGY SERVICES HOLDINGS, INC KRYPTON INTERMEDIATE, LLC KRYPTON MERGER SUB, INC and QUINTANA ENERGY SERVICES INC	05/03/20	✓	N/A	X	✓	N/A		Energy	Freshfields Bruckhaus Deringer US LLP	Skadden, Arps, Slate, Meagher & Flom LLP	\$3,000,000
25	PORTOLA PHARMACEUTICALS, INC ALEXION PHARMACEUTICALS, INC and ODYSSEY MERGER SUB INC	05/05/20	X	✓	X	✓	\$1.4	Billion	Healthcare	Paul, Weiss, Rifkind, Wharton & Garrison LLP	Cooley LLP	\$51,500,000
26	PTC THERAPEUTICS, INC HYDRO MERGER SUB, INC CENSA PHARMACEUTICALS INC and SHAREHOLDER REPRESENTATIVE SERVICES LLC	05/05/20	✓	N/A	X	X	\$80.0	Million	Healthcare	Morgan, Lewis & Bockius LLP	Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.	N/A
27	COMMUNICATIONS SYSTEMS, INC RESILIENT CORP ECESSA CORPORATION and ALBERT A. WOODWARD	05/08/20	✓	N/A	X	✓	\$4.0	Million	Technology	Ballard Spahr LLP	Fredrikson & Byron, P.A.	N/A
28	ACCELMED PARTNERS II LP ACCELMED MERGER SUB, INC and TEARLAB CORPORATION	05/11/20	✓	N/A	X	✓	\$25.0	Million	Healthcare	McDermott Will & Emery LLP	Wilson Sonsini Goodrich & Rosati P.C.	\$500,000
29	TEN-X HOLDING COMPANY, INC COSTAR REALTY INFORMATION, INC CRESCENDO SUB, INC and Thomas H. Lee Equity Fund VII, LP	05/13/20	✓	N/A	X	✓	\$190.0	Million	Healthcare	Weil, Gotshal & Manges LLP	Kirkland & Ellis LLP	N/A

30	COMSOVEREIGN HOLDING CORP CHC MERGER SUB 7, INC VNC ACQUISITION, LLC VIRTUAL NETWORK COMMUNICATIONS INC and MOHAN TAMMISETTI	05/21/20	X	✓	X	X	\$19.0	Million	Communication Services	Pryor Cashman LLP	Orrick, Herrington & Sutcliffe LLP	N/A
	Contracts With Provision		7	8	1	6	24					18
	Total Contracts		30	23	30	30	30					30
	Percentage of Total Contracts With Provision		23.33%	34.78%	3.33%	20.00%	80.00%					60.00%

*Please note values were obtained from underlying contracts, SEC disclosures (Form 10-K, Form 10-Q, and Form 8-K), press releases, and news articles. Since some deals had fluctuating purchase prices or did not require disclosure upon finalization, not all transaction values were readily ascertainable.

Type	Average Value	Termination Fee	Average Termination Fee
Contracts with MAE Exceptions for Pandemics	\$594,820,099	9	\$26,333,333
Contracts without MAE Exceptions for Pandemics	\$1,245,826,000	9	\$33,014,661
Total	\$893,197,804	18	

Industry	Contracts with MAE Exceptions for Pandemics		Contracts without MAE Exceptions for Pandemics		Total	Yes (%)	No (%)
	Contracts with MAE Exceptions for Pandemics	Contracts without MAE Exceptions for Pandemics	Contracts with MAE Exceptions for Pandemics	Contracts without MAE Exceptions for Pandemics			
Chemicals	0	1	1	1	1	0.00%	100.00%
Communication Services	2	1	3	3	3	66.67%	33.33%
Consumer Cyclical	0	1	1	1	1	0.00%	100.00%
Consumer Defensive	1	1	2	2	2	50.00%	50.00%
Energy	1	1	2	2	2	50.00%	50.00%
Entertainment	0	1	1	1	1	0.00%	100.00%
Financial Services	2	5	7	7	7	28.57%	71.43%
Healthcare	8	1	9	9	9	88.89%	11.11%
Interactive Dating Solutions	0	1	1	1	1	0.00%	100.00%
Real Estate	0	1	1	1	1	0.00%	100.00%
Technology	1	1	2	2	2	50.00%	50.00%
Total	15	15	30	30	30		

Month	Contracts with MAE Exceptions for Pandemics		Contracts without MAE Exceptions for Pandemics		Total	Yes (%)	No (%)
	Contracts with MAE Exceptions for Pandemics	Contracts without MAE Exceptions for Pandemics	Contracts with MAE Exceptions for Pandemics	Contracts without MAE Exceptions for Pandemics			
February	0	5	5	5	5	0.00%	100.00%
March	5	6	11	11	11	45.45%	54.55%
April	3	4	7	7	7	42.86%	57.14%
May	7	0	7	7	7	100.00%	0.00%
Total	15	15	30	30	30		

Firms that Have Appeared in Multiple Deals	Contracts with MAE Exceptions for Pandemics	Contracts without MAE Exceptions for Pandemics	Total	Yes (%)	No (%)	2021 Vault Ranking
Cooley LLP	2	0	2	100.00%	0.00%	24
Cravath, Swaine & Moore LLP	0	2	2	0.00%	100.00%	1
Dorsey & Whitney LLP	0	2	2	0.00%	100.00%	N/A
Latham & Watkins LLP	0	2	2	0.00%	100.00%	5
Luse Gorman PC	1	1	2	50.00%	50.00%	N/A
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.	1	1	2	50.00%	50.00%	84
Morgan, Lewis & Bockius LLP	2	2	4	50.00%	50.00%	35
Skadden, Arps, Slate, Meagher & Flom LLP	2	1	3	66.67%	33.33%	3
Wilson Sonsini Goodrich & Rosati P.C.	2	1	3	66.67%	33.33%	38
Total	10	12	22			

Appendix C: MAE Exceptions for COVID-19 Resulting From the Pandemic

#	Parties	Date	COVID-19	Definition of COVID-19	Miscellaneous COVID-19 Clauses
1	DIAMONDPEAK HOLDINGS CORP DPL MERGER SUB CORP and LORDSTOWN MOTORS CORP	08/01/20	✓	✓	✓
2	SIEMENS HEALTHINEERS HOLDING I GMBH FALCON SUB INC VARIAN MEDICAL SYSTEMS, INC and SIEMENS MEDICAL SOLUTIONS USA, INC	08/02/20	✓	✓	✓
3	GTCR-ULTRA HOLDINGS, LLC GTCR-ULTRA HOLDINGS II, LLC FINTECH III MERGER SUB COR, FINTECH ACQUISITION CORP III FINTECH ACQUISITION CORP III PARENT CORP GTCR/ULTRA BLOCKER, INC and GTCR FUND XI/C LP	08/03/20	✓	✓	✓
4	JERNIGAN CAPITAL, INC JERNIGAN CAPITAL OPERATING COMPANY, LLC NEXPOINT RE MERGER, INC and NEXPOINT RE MERGER OP, LLC	08/03/20	✓	✓	✓
5	MULLEN TECHNOLOGIES, INC MULLEN ACQUISITION, INC and NET ELEMENT, INC	08/04/20	X	X	X
6	LIVONGO HEALTH, INC TELADOC HEALTH, INC and TEMPRANILLO MERGER SUB, INC	08/05/20	✓	X	X
7	LIBERTY BROADBAND CORPORATION GRIZZLY MERGER SUB 2, INC GRIZZLY MERGER SUB 1, LLC and GCI LIBERTY, INC	08/06/20	✓	✓	X
8	MEGALITH FINANCIAL ACQUISITION CORP MFAC MERGER SUB INC CUSTOMERS BANK AND BANKMOBILE TECHNOLOGIES, INC	08/06/20	X	X	X

	SIRIUS INTERNATIONAL INSURANCE GROUP, LTD				
9	THIRD POINT REINSURANCE LTD and YOGA MERGER SUB LIMITED	08/06/20	✓	✓	✓
10	TAT HOLDCO LLC TAT MERGER SUB LLC and TRANSATLANTIC PETROLEUM LTD	08/07/20	✓	X	X
11	MAJESCO, MAGIC INTERMEDIATE, LLC and MAGIC MERGER SUB, INC	08/08/20	✓	✓	✓
12	BARINGS BDC, INC MUSTANG ACQUISITION SUB, INC MVC CAPITAL, INC and BARINGS LLC	08/10/20	✓	X	X
13	LIGAND PHARMACEUTICALS INCORPORATED PELICAN ACQUISITION SUB, INC and PFENEX INC	08/10/20	✓	X	X
14	SOFTWARE ACQUISITION GROUP INC CS MERGER SUB, INC CURIOSITYSTREAM INC and HENDRICKS FACTUAL MEDIA LLC	08/10/20	✓	✓	✓
15	THE PECK COMPANY HOLDINGS, INC PECK MERCURY, INC and SUNWORKS, INC	08/10/20	✓	✓	✓
16	U.S. GOLD CORP GOLD KING ACQUISITION CORP NORTHERN PANTHER RESOURCES CORPORATION and RICHARD SILAS	08/10/20	X	X	X
17	CELLULAR BIOMEDICINE GROUP, INC CBMG HOLDINGS and CBMG MERGER SUB INC.	08/11/20	✓	X	✓
18	NTN BUZZTIME, INC BIT MERGER SUB, INC and BROOKLYN IMMUNOTHERAPEUTICS LLC	08/12/20	✓	X	X

19	ROPER TECHNOLOGIES, INC PROJECT V MERGER SUB INC and PROJECT VIKING HOLDINGS, INC	08/12/20	✓	✓	✓
20	SOUTHWESTERN ENERGY COMPANY and MONTAGE RESOURCES CORPORATION	08/12/20	✓	X	✓
21	SANOFI, KORTEX ACQUISITION CORP and PRINCIPIA BIOPHARMA INC	08/16/20	✓	✓	✓
22	KBR WYLE SERVICES, LLC ASTRID MERGER SUB, LLC CENTAURI PLATFORM HOLDINGS, LLC AND CENTAURI ACP HOLDINGS, LLC	08/17/20	X	✓	✓
23	TAKE-TWO INTERACTIVE SOFTWARE, INC DASH MS, LLC DASH MS II, LLC PLAYDOTS, INC and SHAREHOLDER REPRESENTATIVE SERVICES LLC	08/17/20	✓	✓	✓
24	YINKE HOLDINGS LTD YINKE MERGER CO. LTD AND YINTECH INVESTMENT HOLDINGS LIMITED	08/17/20	✓	X	X
25	JOHNSON & JOHNSON, VIGOR SUB, INC and MOMENTA PHARMACEUTICALS, INC	08/19/20	✓	✓	✓
26	ENTERPRISE FINANCIAL SERVICES CORP ENTERPRISE BANK & TRUST SEACOAST COMMERCE BANC HOLDINGS and SEACOAST COMMERCE BANK	08/20/20	✓	✓	✓
27	CANCER GENETICS, INC CGI ACQUISITION, INC and STEMONIX, INC	08/21/20	✓	✓	✓
28	PROTEOSTASIS THERAPEUTICS, INC PANGOLIN MERGER SUB, INC YUMANITY THERAPEUTICS, INC and YUMANITY HOLDINGS, LLC	08/22/20	✓	X	X

29	GORES METROPOULOS, INC DAWN MERGER SUB, INC DAWN MERGER SUB II, LLC and LUMINAR TECHNOLOGIES, INC	08/24/20	✓	✓	✓
30	BROADWAY FINANCIAL CORPORATION and CFBANC CORPORATION	08/25/20	✓	X	✓
	Contracts With Provision		26	17	19
	Total Contracts		30	30	30
	Percentage of Total Contracts With Provision		86.67%	56.67%	63.33%