



## The Coronavirus and M&A Transactions: MAE Clauses

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By: Andrew P. McDonough, John B. Hill

If a buyer claims they terminated a contract for an MAE, the court will first look to the specific language of the MAE clause. If the MAE clause carves out pandemics or epidemics from the definition of MAE, then the impact of COVID-19 clearly will not allow a buyer to terminate an agreement on the basis of the MAE. As an example, the February 20<sup>th</sup> Agreement and Plan of Merger between Morgan Stanley and E\*Trade Financial Corp. specifically carves out “epidemic, pandemic or disease outbreak (including the COVID-19 virus)” from events that could result in an MAE.<sup>1</sup> Additionally, an impact that is this widespread across companies and industries will often be caught by a carve-out for changes in general market conditions. If there is no carve-out and it is a generic MAE clause, courts will then look to see if the buyer has shown the requisite substantial threat to the earnings potential of the target in a durationally significant manner.

Current projections of the impact of COVID-19 vary widely by country, industry and severity. As such, models to date have a variety of outcomes with the consensus suggesting potential impacts lasting through 2020. Therefore, while target companies may be adversely affected, the impact of COVID-19 to date will likely not trigger a generic MAE clause because it will be difficult to demonstrate that the impact will cause a long-term effect on financial performance, falling short of the heavy burden placed on buyers by the courts. However, the inquiry into whether an MAE has occurred is always fact-specific, and as more information about the impacts of COVID-19 are discovered, buyers will have to continually evaluate whether the impact will have a significant, long-term effect on the target company.

<sup>1</sup> See Grace Maral Burnett, Denis Demblowski & Diane Holt, *ANALYSIS: Morgan Stanley, E\*Trade Merger Excludes Coronavirus*, *Bloomberg Law* (Feb. 28, 2020, 4:25PM), (also describing epidemic and pandemic-specific MAE carve-out language used in transactions between Celgene Corp. and Bristol-Myers Squibb Co., and Aetna Inc. and CVS Health Corp.).

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