Mark Solomon Talks Whether Companies Will Invoke Material Adverse Effect Provisions in Wake of Coronavirus

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Clients involved in deals who are concerned about the impact of the coronavirus on their transactions may look to terminate a deal before closing. One way of doing so is by invoking material adverse effect (MAE) clauses, which are part of merger agreements and offer clients the opportunity to get out of a deal that they have agreed to. Dallas Corporate partner Mark Solomon spoke to *Law360* about whether companies will invoke MAE clauses during the coronavirus pandemic, and the challenges associated with doing so.

"If your company is affected just like everyone else in the industry, it's going to be hard to trigger the MAE," Mark explained.

In recent years, the use of MAE clauses, or, similarly, material adverse change (MAC) clauses, has increased. Before advising clients on whether to invoke a MAE or MAC clause, attorneys should understand how those clauses are viewed by the courts. Additionally, the specific nature and wording of a transaction can determine whether a client will be successful in terminating a deal. A short-term negative impact on a company's financial performance would not be enough to invoke a MAE, so companies need to determine if the coronavirus has had a disproportionate, long-term impact on their business. MAE and MAC clauses also often include exceptions, such as for "acts of God," natural disasters, economic slumps or terrorism.

The term "disproportionate" is also important for invoking a MAE provision. If a company is not the only business in its industry being hit by the coronavirus, then it will have difficulty claiming the right to apply a MAE provision to get out of a deal.

While the coronavirus pandemic is now being included in deals being agreed to today, the party on the other side of the deal might not necessarily accept the provision as written.

Read, "Why Material Adverse Effect Clauses Aren't Escape Hatches," in its entirety.

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