

## Structuring M&A Transactions in the Current Market: Deal Points, Financing, MAC Clauses, Reps and Warranties

WEDNESDAY, APRIL 7, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Jack Bowling, Partner, **Stinson**, Kansas City, MO

David A. Edgar, Partner, **K&L Gates**, Pittsburgh, PA

Frank M. Pellegrino, Member, **Bass Berry & Sims**, Nashville, TN

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

## *Tips for Optimal Quality*

FOR LIVE EVENT ONLY

---

### Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail [sound@straffordpub.com](mailto:sound@straffordpub.com) immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press \*0 for assistance.

### Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

## *Continuing Education Credits*

FOR LIVE EVENT ONLY

---

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

# STRUCTURING M&A TRANSACTIONS IN THE WAKE OF COVID-19

---

DEAL POINTS, FINANCING CONCERNS, MAC CLAUSES,  
REPS AND WARRANTIES

Jack Bowling  
David A. Edgar  
Frank M. Pellegrino

April 7, 2021

STINSON

K&L GATES

BASS BERRY SIMS  
CENTERED TO DELIVER.

## AGENDA

- Deal Disruption in the Wake of COVID-19
  - Renegotiated and Abandoned Deals
  - Litigation – MAE and Ordinary Course
- Due Diligence
- Drafting Considerations
- Financing Matters

# DEAL DISRUPTION IN THE WAKE OF COVID-19: RENEGOTIATED AND ABANDONED DEALS

Renegotiated Deals	
Tiffany & Co. and LVMH	<ul style="list-style-type: none"> <li>➤ reduced purchase price by \$400m</li> </ul>
Simon Property Group Inc. and Taubman Centers Inc.	<ul style="list-style-type: none"> <li>➤ reduced purchase price by \$600m</li> <li>➤ required buyer to not pay a dividend on its common stock prior to March 1, 2021, and only then subject to limitations.</li> </ul>
Devon Energy and BKV Barnett	<ul style="list-style-type: none"> <li>➤ reduced purchase price by \$200m</li> <li>➤ added an earnout of up to \$260m (tied to achievement of certain commodity price thresholds)</li> <li>➤ required buyer to provide additional escrow funds to secure the purchase price</li> <li>➤ extended outside date by ~5.5 months.</li> </ul>
RTI Surgical Holdings and Ardi Bidco Ltd.	<ul style="list-style-type: none"> <li>➤ reduced purchase price by \$40m</li> <li>➤ eliminated \$10m rollover</li> <li>➤ extended the outside date by ~1.5 months</li> </ul>
Abandoned Deals	
➤ Xerox and HP Inc.	\$34 billion
➤ Woodward Inc. and Hexcel Corp.	\$13.7 billion

# DELAWARE LAW: MATERIAL ADVERSE EFFECT

8

- A MAE clause is “best read as a backstop protecting an acquirer from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally-significant manner.”<sup>1</sup>
- The Court will default to reviewing a MAE from a seller-friendly perspective. Buyers thus bear the “heavy” burden of proving that a MAE has occurred.<sup>2</sup>
  - In the absence of evidence to the contrary, a court will presume that a buyer is purchasing the seller as part of a long-term strategy, so short-term or small-scale seller issues will not be treated as a MAE.<sup>3</sup>
- Four categories of risks allocated by a typical MAE clause:
  - **Systematic risks** – beyond the control of the parties, generally impacting the industry. Systematic risks go to the acquirer.
  - **Indicator risks** – signals that a MAE may have occurred through a stock price drop, credit rating downgrade, or failure to meet financial projections. Indicator risks go to the acquirer.
  - **Agreement risks** – arising from the announcement of the merger, cost of getting from signing to closing, or employee flight. Agreement risks go to the acquirer.
  - **Business risks** – risks over which the seller usually has significant control. Business risks go to the seller.

<sup>1</sup> *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 68 (Del. Ch. 2001).

<sup>2</sup> *Hexion Specialty Chems., Inc. v. Hunstman Corp.*, 965 A.2d 715, 739 (Del. Ch. 2008).

<sup>3</sup> *Id.* at 738.

## DELAWARE LAW: MATERIAL ADVERSE EFFECT (CONT'D)

9

- Common factors for finding a MAE
  - Occurrence of unknown events.
  - Events that substantially threaten the overall earnings potential of the target.
    - EBITDA is the preferred measure for a decline because it is independent of capital structure.<sup>4</sup>
    - While not controlling, a 40% EBITDA decline is likely to demonstrate a MAE.<sup>5</sup>
  - Earnings impact is durationally-significant.
    - Measured in years, not months.<sup>6</sup>
    - A short-term “hiccup” is unlikely to show a MAE.<sup>7</sup>
  - The potential MAE has disproportionately affected the target.
    - A disproportionate affect does not necessarily show a MAE.<sup>8</sup>

<sup>4</sup> *Hexion Specialty Chems., Inc. v. Hunstman Corp.*, 965 A.2d 715, 740 (Del. Ch. 2008).

<sup>5</sup> *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at \*53 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018).

<sup>6</sup> *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 68 (Del. Ch. 2001).

<sup>7</sup> *Akorn*, 2018 WL 4719347, at \*68.

<sup>8</sup> *Hexion*, 965 A.2d at 737.

- *In re IBP, Inc. Shareholders Litig.*<sup>9</sup>
  - Tyson argued that IBP suffered a MAE because of (a) IBP's decline in performance (Q1 2001 earnings of \$0.19/share compared to projected FY 2001 earnings of \$1.93/share) and (b) an impairment charge against an IBP subsidiary each constituted a MAE.
  - The Court held that IBP had a history of swings in annual EBITDA, and that Tyson was aware of the charge against IBP's subsidiary.
- *Hexion Specialty Chems. Inc. v. Huntsman Corp.*<sup>10</sup>
  - Hexion argued that each of the following constituted a MAE: (a) Huntsman's poor Q1 2008 results and (b) concerns that Huntsman may be insolvent.
  - The Court held there was no MAE because the Q1 2008 results were not materially different from previous Q1s.
  - In addition, the projected EBITDA deltas were not material (7% below 2007 EBITDA and 3% below 2006 EBITDA).

<sup>9</sup> 789 A.2d 1 (Del Ch. 2001).

<sup>10</sup> 965 A.2d 715, 738 (Del. Ch. 2008).

➤ *Akorn, Inc. v. Fresenius Kabi AG*<sup>11</sup>

- Akorn's full-year adjusted EBITDA suffered a year-over-year decline of 51% and suffered significant declines in revenue, operating income, and earnings per share over five quarters.
- Akorn faced increasing and unexpected competition, losing a key contract.
- Post-signing, Fresenius discovered that Akorn may have falsified product data to the FDA, with the Court finding that Akorn misled the FDA about these data integrity issues.

➤ *Channel Medsystems, Inc. v. Boston Scientific Corporation*<sup>12</sup>

- After entering into a merger agreement with Boston Scientific, Channel discovered that its VP of quality defrauded the company and falsified data in FDA submissions.
- Channel undertook remediation efforts that satisfied the FDA, which eventually approved Channel's flagship device.
- The Court held that the VP's fraud would not reasonably be expected to have a long-term impact on Channel's business.

<sup>11</sup> 2018 WL 4719347 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018).

<sup>12</sup> 2019 WL 6896462 (Del. Ch. Dec. 18, 2019).

# DELAWARE LAW: ORDINARY COURSE COVENANTS

12

- Ordinary course provisions “help ensure that the business the buyer is paying for is essentially the same as the one it decided to buy at signing.”<sup>13</sup>
- The acquirer must prove a breach of an ordinary course covenant.<sup>14</sup>
- What is ordinary course of business?
  - “Consistent with past practices”.
  - The business of a generic company in the same industry.<sup>15</sup>
- “Commercially reasonable efforts” qualifier?
  - Seller “to take all reasonable steps to maintain [the company’s] operations in the ordinary course of business.”<sup>16</sup>
- “In all material respects” qualifier?
  - A “substantial likelihood that the . . . fact [of breach] would have been viewed” by a reasonable buyer “as having altered the ‘total mix’ of information.”<sup>17</sup>

---

<sup>13</sup> *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at \*83 (Del. Ch. Oct. 1, 2018), *aff’d*, 198 A.3d 724 (Del. 2018).

<sup>14</sup> *Id.* at \*82.

<sup>15</sup> *Id.* at \*86.

<sup>16</sup> *Id.* at \*88.

<sup>17</sup> *Id.* at \*86.

## DELAWARE LAW: ORDINARY COURSE COVENANTS (CONT'D)

13

- Can sellers act in response to extra-ordinary events that cause a disruption to the ordinary operations of the company?
- *Cooper Tire & Rubber Company v. Apollo (Mauritius) Holdings Pvt. Ltd.*<sup>19</sup>
  - After Apollo agreed to acquire Cooper Tire, workers at Cooper Tire's Chinese subsidiary were instigated to go on strike, halted Cooper Tire's Chinese tire production, and denied Cooper Tire and Apollo access to the Chinese facility.
  - To break the unlawful seizure of the subsidiary, Cooper Tire suspended payments to the Chinese subsidiary's suppliers.
  - The Court held that Cooper Tire's response, while perhaps a reasonable reaction to the extra-ordinary seizure of its Chinese subsidiary, evidenced a conscious desire to cause its subsidiary to operate outside the ordinary course of business.
  - The Court also held that, even without Cooper Tire's response, the events at the Chinese subsidiary would have constituted a failure by Cooper Tire to cause the subsidiary to conduct business in the ordinary course.

<sup>18</sup> 2014 WL 5654305, at \*17 (Del. Ch. Oct. 25, 2013).

<sup>19</sup> 2014 WL 5654305 (Del. Ch. Oct. 25, 2013).

# DELAWARE LAW: ORDINARY COURSE COVENANTS (CONT'D)

14

## ➤ *Akorn, Inc. v. Fresenius Kabi AG*<sup>20</sup>

- After entering into a merger agreement with Fresenius, Akorn failed to:
  - Maintain its audit function.
  - Maintain its data integrity system so it could prove to the FDA the data underlying the company's regulatory filings was accurate.
  - Avoid submitting fabricated data to the FDA.
  - Conduct a responsible and credible investigation in response to whistleblower letters.

---

<sup>20</sup> 2018 WL 4719347 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018).

# MATERIAL ADVERSE EFFECT VS. ORDINARY COURSE

15

- Allocation of Risk?
  - **Material Adverse Effect** – Seller retains only business risks.
  - **Ordinary Course** – Systematic risks, agreement risks, or indicator risks to the extent that these risks would cause the seller to cease operating in the ordinary course?
- Materiality threshold?
  - **Material Adverse Effect** – Significant declines that are durationally significant.
  - **Ordinary Course** – A “substantial likelihood that the... fact of breach would have been viewed by the reasonable investor as having significantly altered the total mix of information.”
    - Seller cuts salaries or staff?
    - A temporary hiccup in business operations?
- Disproportionate effect?

# MAES, ORDINARY COURSE, AND COVID-19: NEW LITIGATION

16

- In 2020 during the early part of the pandemic, a deluge of complaints were filed in the Delaware Court of Chancery related to COVID-19 busted deals.
- Acquirers have asserted both (i) failures to operate in the ordinary course or (ii) a MAE, or at least the possibility of a MAE. Acquirers also asserted failure of closing conditions, such as the failure to obtain debt financing.
- As time has passed since that initial period, those acquirers' remedies have become more limited as buyers' debt-financing commitments have expired and time has made specific performance increasingly difficult to implement.
- The parties to many of the initial suits have resolved their differences — by either terminating the transaction at issue or amending the purchase agreement to provide for a lower price.
- Thus far, *AB Stable VIII LLC, v. Maps Hotels & Resorts One LLC* is the only COVID-19 related decision rendered in Delaware on either MAE or ordinary course covenants.

## MAES, ORDINARY COURSE, AND COVID-19: (CONT.) 17

*AB Stable VIII LLC, v. Maps Hotels & Resorts One LLC*<sup>21</sup>

➤ **No MAE Found.**

- Although the MAE definition lacked an exception for effects arising from a “pandemic” or “epidemic,” the court found that the impact of COVID-19 on the target’s business fell within the “natural disasters or calamities” MAE clause exception and thus did not constitute an MAE.

○ **BUT Breach of Ordinary Course Covenant Found.**

- Underlying Provision: “*The business of the Company and its Subsidiaries shall be conducted only in the ordinary course of business consistent with past practice in all material respects.*”

○ **Key Findings for Court’s Ordinary Course Decision:**

- Relevant time period for “ordinary course” was since entry into the purchase agreement
- Required standard was the way in which the company **normally** operates. It is **not** ordinary course for a company operating during a pandemic.
- Covenant was unconditional. It was not qualified by an efforts obligation.

○ **Relevant Factual Background for Breach of Covenant:**

- Seller closed 2 of 15 hotels. Operations at hotels that remained open were radically different from normal and routine operation of business (eliminated food and beverage service other than in-room dining).
- All capital expenditures were placed on hold.
- Marketing expenses decreased year-over-year by 33.1%, 76.4% and 69% in March, April, and May 2020.

<sup>21</sup> 2020 WL 7024929 (Del. Ch. November 30, 2020)

## MAES, ORDINARY COURSE, AND COVID-19: (CONT.) 18

### *AB Stable VIII LLC, v. Maps Hotels & Resorts One LLC*

- *AB Stable VIII* underscores the importance of **including specific language** in MAE provisions and ordinary course covenants to address business responses by targets during COVID-19 and other unanticipated external conditions.
- Moving forward, one can expect broken deal filings premised on pandemic-related issues to continue this year. Yet, despite the dramatic initial drop in deal activity and ongoing human challenges, deal making returned in full force by the end of 2020. Assuming recent progress in national efforts to combat the pandemic continues, the volume of these pandemic filings may diminish as the most dramatic impacts on the economy and businesses begins to subside.
- Nonetheless, an increase in broken deal litigation in Delaware generally may be on the horizon as *AB Stable VIII* exemplifies the Court of Chancery breaking away from its historic trend of refusing to allow buyers out of deals through litigation.

- **Prepare for expanded timeframes and/or virtual diligence challenges**
  - Sellers should factor in additional time for gathering materials to build out a VDR and respond to diligence inquiries, remote working, reduced staff, and/or keeping deal teams or those “under the tent” to only necessary individuals. Sellers may be unable to obtain original documents or may need additional time to implement sufficient protocols to gather diligence materials virtually.
  - As the ability to complete diligence continues to be delayed, buyers are considering requests for a due diligence condition “out” – that the buyer’s obligation to close is conditioned on the completion of diligence and satisfactory results of the same.
  
- **Review logistics of site visits and management meetings**
  - Buyers should consider the feasibility of conducting site visits or meetings with management remotely.
  - Plan for the pieces where virtual or remote access is not possible, such as environmental assessments and surveys.

## DUE DILIGENCE: PROCESS (CONT'D)

20

- **Expect additional questions and increased scrutiny from buyers and insurers**
  - Due to ongoing uncertainty about forecasting, demand, supply chains, costs, business relationships, and strategies (to name a few), buyers should seek more detailed responses and analysis regarding such matters.
  - If using RWI, sellers should expect detailed COVID-19 questions from underwriters. These detailed questions may ask for data points not previously gathered or normally tracked, which, in addition to the volume of questions, may result in additional delays in diligence completion.
- **Prepare for a heightened “bring-down” of diligence**
  - Buyers and insurers will want to review changes that have occurred to the normal course of business.
  - As shutdown orders or guidelines evolve, and restrictions are placed and/or lifted on businesses, buyers will likely seek a “refreshment” of financial forecasts and underlying assumptions accordingly. This also applies to additional issues which may arise that warrant further review of previously completed diligence-items.

# DUE DILIGENCE: SAMPLE REQUESTS

21

## ➤ COVID-19 Business Impacts

- Describe changes to (or impacts on) the normal course of business since March 1, 2020.
- Describe any supply chain interruptions or material third-party concerns regarding the ability of parties to perform under material contracts since March 1, 2020.
- Describe any other material developments or impacts in the Company or the business related to COVID-19 of which [buyer/insurer] should be aware.

## ➤ COVID-19 Business Responses

- Describe mitigation steps the Company is taking to manage impact on business, customers, employees, and the market generally in light of COVID-19 .
- Describe any disruptions caused by COVID-19 on the Company's human resources, specifically senior management, key employees, or personnel. Indicate whether the Company has implemented any layoffs, furloughs, wage reductions, reduction in hours or workdays (or any other compensation or work scheduling changes) in light of COVID-19.
- Describe the ways in which the Company's functions can be undertaken remotely, and how IT systems are responding (i.e., capacity, security, productivity, etc.).

## ➤ Future Outlook

- Describe expected impact to the business as a whole (both short and long-term), financial condition, and changes to the Company's overall business strategy with respect to COVID-19.
- Discuss whether any of the Company's insurance policies may cover losses related to COVID-19 (e.g., business interruption insurance coverage), and if so, whether the Company has made any claims with respect thereto.

## DRAFTING CONSIDERATIONS

- Valuation; Purchase Price Adjustments
- Representations and Warranties
- Pre-closing Operating Covenants / Ordinary Course
- Closing Conditions
- Outside Dates; Notice; Filings; and Other Matters

## ➤ Valuation

- Practical challenges exist for purposes of preparing projections that have the normal range of confidence.
  - Fluid nature of the pandemic and various federal and state responses make forecasting difficult, creating issues for both buyers and sellers.
- Form of Consideration
  - As is often the case when there are valuation gaps between buyers and sellers, buyers may want to consider shifting a portion of the purchase price into an earnout to reduce the risk of valuation swings – taking into account the inherent challenges of earnout disputes, scope of control, and obligation to maximize later payments.

# VALUATION; PURCHASE PRICE ADJUSTMENTS (CONT'D)

24

## ➤ Purchase Price Adjustments

- What does “normalized” working capital mean now (i.e., including or excluding effects of COVID-19)?
  - Historical or trailing periods could result in a misalignment between current environment and “normal” historical information (e.g., as a result of significant decreases in A/R or increases in deferred payments so as to manage cash/liquidity)
  - Evaluate the underlying assumptions and methodologies in setting the NWC target and adjustment procedures - is it an apples-to-apples comparison?
  - Historical A/R and A/P may be significantly impacted
- Buyers should consider timing issues - i.e., is more lead time needed to review seller's estimated NWC calculations prior to closing and should the post-closing period in which buyer is to prepare NWC calculations be extended?

# REPRESENTATIONS AND WARRANTIES

Buyer Considerations	
<b>Absence of Certain Changes</b>	Require seller to confirm it has not participated in COVID-19 targeted programs (e.g., loan programs under the CARES Act) or sought benefits or relief thereunder or under any other COVID-19 related laws or orders or, alternatively, require seller to provide details of same
<b>Accounts Receivable</b>	<ul style="list-style-type: none"><li>➤ Include representations regarding implications on A/R and collectability thereof</li><li>➤ Require seller to guarantee collectability of A/R outside of the normal range</li></ul>
<b>Inventory</b>	<ul style="list-style-type: none"><li>➤ Given supply chain disruptions and nationwide shutdowns, include representations regarding supply chain (e.g., shutdowns (possibly by region); furloughed employees; delayed shipments) and inventory aging/obsolescence</li><li>➤ Consider the desirability of a physical inventory</li></ul>

# REPRESENTATIONS AND WARRANTIES (CONT'D)

Buyer Considerations	
Compliance with Laws	<ul style="list-style-type: none"><li>➤ Include representations regarding compliance with government orders limiting the extent of the seller's business operations, forcing business closure, or limiting import/export activities</li><li>➤ Consider whether compliance with other "policies" or "guidelines" issued by entities such as the Centers for Disease Control and Prevention or World Health Organization (i.e., outside the normal scope of "Laws") should be an additional construct layered into the compliance representations as stand-alone reps</li></ul>
Financial Statements	<ul style="list-style-type: none"><li>➤ Be mindful of date for unaudited financials or other interim or quarterly statements or A/R updates</li><li>➤ Consider the need for more detailed and periodic updates on the target's operational results - perhaps in the form used internally for reporting and planning purposes</li></ul>

# REPRESENTATIONS AND WARRANTIES (CONT'D)

Buyer Considerations	
<b>HR / Safety</b>	<p>Consider representations with respect to:</p> <ul style="list-style-type: none"><li>➤ Location of seller's employees (to determine high risk or containment areas)</li><li>➤ Seller's emergency preparedness plans (to determine whether seller has such plans in place and if they are sufficiently prepared to respond to COVID-19 events if not yet implemented or lifted)</li><li>➤ Mass quarantines (including government-imposed or self-imposed quarantines), school closures and other disruptions in the availability of a target's workforce, which labor shortages may adversely affect a target's business</li></ul>
<b>Information Technology</b>	<ul style="list-style-type: none"><li>➤ Given the expansion of remote working, buyers should be conducting diligence on the seller's security policies for employees working from home and obtaining representations that no security breaches have occurred</li><li>➤ If seller has not yet had to implement remote working, buyer will want to diligence and obtain representations regarding the sufficiency of seller's IT capabilities to ensure productivity and provide network access to employees working from home or remotely<ul style="list-style-type: none"><li>○ Network capacity, robustness, security, etc.</li><li>○ Employee access to requisite equipment, etc.</li></ul></li></ul>

# REPRESENTATIONS AND WARRANTIES (CONT'D)

Buyer Considerations	
<b>Insurance</b>	<ul style="list-style-type: none"><li>➤ Confirm whether the seller has any potential insurance coverage COVID-19 related losses.</li><li>➤ Confirm that no claims have been denied due to COVID-19/pandemics.</li></ul>
<b>Material Contracts</b>	<ul style="list-style-type: none"><li>➤ Require seller to list contracts with potentially applicable force majeure provisions.</li><li>➤ Include specific representations regarding seller's (and to the knowledge of seller, the counterparty's) ability to perform specific contracts in light of COVID-19, pandemics, etc.</li></ul>
<b>Top Customers and Suppliers</b>	<p>Representations as to whether customers and/or suppliers:</p> <ul style="list-style-type: none"><li>➤ have reduced quantity levels below normal or a particular amount (whether by \$ or %);</li><li>➤ breached or terminated key contracts;</li><li>➤ are subject to government orders restricting operations related to COVID-19 or other health and safety matters; or</li><li>➤ are solvent / have filed for bankruptcy.</li></ul>

# REPRESENTATIONS AND WARRANTIES (CONT'D)

Seller Considerations	
<b>Generally</b>	<ul style="list-style-type: none"><li>➤ Consider need for pandemic/shutdown related exceptions across the range of representations that buyers will be focused on</li><li>➤ Be over inclusive on disclosures related to COVID-19 events to mitigate breach claims</li><li>➤ Include knowledge qualifiers on representations related to the impact of COVID-19 on third parties with whom seller conducts business (i.e., customers, suppliers, distributors, etc.)</li></ul>
<b>Absence of Certain Changes</b>	<ul style="list-style-type: none"><li>➤ Sellers will want to make sure they include exceptions from (or at the very least provide comprehensive disclosures to) the Absence of Changes rep and Interim Operations Covenants so they can take into account the impact of COVID-19 since the date of the last financials and also to provide for flexibility to run the business between signing and closing, including to address:<ul style="list-style-type: none"><li>○ reductions in force;</li><li>○ facility shutdowns;</li><li>○ draws on credit facilities;</li><li>○ taking advantage of tax extensions; and</li><li>○ write-offs.</li></ul></li></ul>
<b>Buyer's Solvency</b>	<ul style="list-style-type: none"><li>➤ Consider whether representations regarding buyer's solvency / ability to pay are warranted</li></ul>

# PRE-CLOSING OPERATING COVENANTS AND ORDINARY COURSE

30

- As buyers attempt to rely on breaches of ordinary course covenants to get out of deals, negotiation of pre-closing operating covenants to address actions taken in response to, or in connection with, COVID-19 is critical for sellers.
  
- Sellers will want to limit their obligation to operate in the “historical” ordinary course, but how much latitude should a buyer give seller to take actions in response to COVID-19 or to participate in COVID-19 related programs?
  - Most of the deals entered into in March 2020 did not directly address COVID-19 in the pre-closing ops covenants (though some relied on the compliance with law exception).
  - Not until mid to late March/April 2020 did deals directly address COVID-19 in the pre-closing ops covenants.

# PRE-CLOSING OPERATING COVENANTS AND ORDINARY COURSE

31

Buyers and sellers can address the issue of how much latitude a seller should have to respond to COVID-19 events in a number of ways:

- Including exceptions to the ordinary course pre-closing operating covenant that provide sellers with significant latitude, subject to certain limitations.
- Specifically defining “Ordinary Course of Business” to address permitted and prohibited actions
- Drafting narrowly tailored exceptions
- Including exceptions for compliance with laws

## PRE-CLOSING OPERATING COVENANTS AND ORDINARY COURSE (CONT'D)

32

Exceptions to the ordinary course pre-closing operating covenants:

- Sellers have sought to give themselves the ability to take actions in response to COVID-19, including the ability to:
  - suspend operations and furlough employees;
  - participate in CARES Act programs; and
  - comply with quarantine, “shelter in place,” “stay at home,” social distancing or other governmental rules, directives, guidelines or recommendations in response to COVID-19.
- Buyers are adding additional protective provisions to limit the actions sellers can take in response to COVID-19 – for example, by:
  - applying a reasonableness or good faith standard on seller’s actions; or
  - requiring consent for certain actions and only notice for other actions (e.g., buyers requiring consent for non-emergency actions and notice only for emergency actions)

# PRE-CLOSING OPERATING COVENANTS AND ORDINARY COURSE (CONT'D)

33

## Examples:

***In the following two examples, sellers have the ability to take actions in response to or in connection with COVID-19 events without buyer's consent, but buyers have limited seller's right to take such actions by including reasonableness standards.***

Between the Effective Date and the earlier of the termination of this Agreement pursuant to Section 9.1 or the Closing Date, unless Buyer otherwise agrees in writing, the Company will, and Seller will cause the Company to, (1) **conduct the Business only in the ordinary course of business** .....; **provided, however,** notwithstanding any other provision of this Agreement, the Company ***will be permitted, without the prior consent of Buyer, to take or refrain from taking all actions, whether or not in the ordinary course of business, that the Company reasonably believes necessary or appropriate in response to the COVID-19 virus, including cancelling or postponing events at the Building, suspending some or all operations of or related to the Business, and otherwise complying with orders of any Governmental Authority. In furtherance of and without limiting the previous sentence, except (i) as required by applicable Law, ... (v) to the extent the Company reasonably believes necessary or appropriate in response to any epidemic, pandemic or disease outbreak (including the COVID-19 virus)*** or

(vi) as Buyer may otherwise approve in writing (which approval will not be unreasonably withheld, conditioned or delayed), between the Effective Date and the earlier of the termination of this Agreement pursuant to Section 9.1 or the Closing Date, the Company will not, and Seller will cause the Company not to, do, directly or indirectly, any of the following: [...]

*Source: Membership Interest Purchase Agreement — Capss LLC, Polpat LLC, MSG National Properties, LLC, MSG Forum, LLC (March 24, 2020)*

# PRE-CLOSING OPERATING COVENANTS AND ORDINARY COURSE (CONT'D)

34

## Examples (cont'd):

**Conduct of the Business.** From and after the date of this Agreement and prior to the earlier of the Closing or the termination of this Agreement pursuant to Article X (Termination, Amendment and Waiver), **except ... (III) as required by applicable Law** or policy or guidance from a Governmental Authority, (IV) **for any action (including cessation of activities) taken by the Seller or any Subsidiary Transferor that the Seller or such Subsidiary Transferor reasonably believes is required (provided that any such non-emergent actions shall require the prior written consent of the Buyer, which shall provide written response to the Seller within two (2) Business Days and shall not to unreasonably withhold, delay or condition such consent, and any emergent actions shall be notified by the Seller to the Buyer within two (2) Business Days), or that is recommended by a Governmental Authority, in order to protect the health, safety and welfare of the officers and employees of the Business and all other individuals having business dealings with the Business in connection with the coronavirus outbreak and related public health situation,** or (V) with the prior written consent of the Buyer, such consent not to be unreasonably withheld, delayed or conditioned, the Seller shall, and shall cause each of its Subsidiary Transferors to, ..... *Source: Business Transfer Agreement — Magnachip Semiconductor S.A., Magnachip Semiconductor, Ltd., Magnus Semiconductor, LLC (March 31, 2020)*

# PRE-CLOSING OPERATING COVENANTS AND ORDINARY COURSE (CONT'D)

35

## Specifically defining “Ordinary Course of Business”

- Sellers may also want to define what “Ordinary Course” means and include in such definition actions taken in response to COVID-19 as “deemed” ordinary course actions.
- Buyers will again want to set some limitations on any such definition by:
  - specifically excluding certain actions that might be taken in response to COVID-19;
  - including a reasonableness or good faith standard; or
  - requiring that pre-signing COVID-19 actions be disclosed before signing and that buyer receive notice of any such post-signing actions.
- Buyers may also want to define Ordinary Course to expressly identify seller actions that buyer does not want to be deemed as ordinary course.

# PRE-CLOSING OPERATING COVENANTS AND ORDINARY COURSE (CONT'D)

36

## Examples:

***The following definition can be modified to be buyer favorable (i.e., to exclude certain seller actions) or seller favorable (i.e., to include certain seller actions) as noted below:***

“**Ordinary Course of Business**” means actions that are (i) recurring in nature, consistent with the [Seller]’s past practices and taken in the ordinary course of normal day to day operations of the Business during the [●] months prior to the Agreement Date, (ii) do not require approval by the stockholders of any corporation or the members, partners or other equity owners of any other business entity, including any limited liability company, partnership etc., (iii) taken in accordance with sound and prudent business practices but which do not result from, arise out of, relate to, and were not caused by, any breach of contract, breach of warranty, tort, infringement, or violation of Law;

- **Buyers will want to add the following at the end of this definition:** provided, however, that such actions identified in clauses (i) – (iii) do not include [terminating any [specified contracts/leases]] or [drawing down a revolver or credit facility in an amount of more than \$[●]].
- **Sellers will want to add the following at the end of this definition:** “or (iv) any actions taken to comply with Laws related to COVID-19 or that the Company [reasonably believes] necessary [or appropriate] in response to the [COVID-19 virus], including [ ].”

# PRE-CLOSING OPERATING COVENANTS AND ORDINARY COURSE (CONT'D)

37

Examples (cont'd):

***Similar to the earlier example regarding exceptions to the ordinary course covenants, here, seller has drafted a definition of Ordinary Course of Business so that it takes into account the changes the company makes in connection with COVID-19 events, and buyer has limited seller's right to make such changes by including a reasonableness standard.***

***“Ordinary Course of Business” shall mean, unless otherwise specified, any action taken by the Company which is consistent with the past usual customs and practices of the Company **subject to such changes made by the Company that are in compliance with Applicable Law as are commercially reasonable in light of the then current operating conditions and developments with respect to the Company as a result of the COVID-19 outbreak, its impact on economic conditions and actions taken by Governmental Authorities in response thereto, provided that: (i) with respect to any such changes from the Accounts Date until the date hereof, such changes have been disclosed to the Purchaser prior to the date hereof; or (ii) with respect to any such material changes from and after the date hereof until the Completion, the Seller shall provide a prior written notice to the Purchaser with respect to such changes, and consult with the Purchaser in good faith in connection therewith.***** Source: Share Purchase Agreement — Prudential International Insurance Holdings, Ltd. and KB Financial Group Inc. (April 10, 2020)

# PRE-CLOSING OPERATING COVENANTS AND ORDINARY COURSE (CONT'D)

38

- Sellers should consider whether the standard “compliance with Law” exception to the ordinary course covenant is sufficient to absolve seller from seeking buyer’s consent.
  - Is “guidance” issued by state and federal authorities or organizations such as the CDC or W.H.O. picked up by the definition of Law or should that be a separate exception?
- Buyers should be cognizant of possible unintended consequences of layering COVID-19 specific matters into the definition of “Laws”.
  - If there is a “compliance with Laws” exception to the ordinary course operating covenant and “Laws” includes “orders” (or possibly even mere “guidance” of the CDC) then any action seller takes in response to such orders or guidance is picked up by the exception and seller need not obtain buyer’s consent to comply with such orders or guidance. Conversely, buyer will want to ensure that the representations seller makes regarding compliance with Laws includes compliance with other guidance/policies.

# PRE-CLOSING OPERATING COVENANTS AND ORDINARY COURSE (CONT'D)

39

- Depending on the nature of the seller's business, the broad exceptions noted above may not be necessary and buyers should consider requiring approval/consent rights if needed in the event operational changes are required after signing to address C19-related business impacts or material or extraordinary steps such as:
  - a material workforce reduction;
  - a material decrease in production volume; or
  - modifying or terminating material contracts.
- Consider whether any of the negative operating covenants should have exceptions related to COVID-19.
  - e.g., exigent circumstances of COVID-19 might trigger the need for additional working capital/liquidity for which seller may not want (or have time) to seek consent of buyer.
- Consider whether seller should have the specific ability to avail itself of relief programs (if eligible) without the consent of buyer.
  - e.g., permit participation in CARES Act stimulus program as an exception to the "shall not incur indebtedness covenant".
- Buyer should consider need for a covenant requiring seller to provide weekly or monthly interim financial updates, particularly while any shutdown continues.

## CLOSING CONDITIONS

**While references to the pandemic are finding their way into MAE provisions (either as an exception or specifically included) the case law places limits on that construct as a means to address COVID-19 issues and as a result buyers and sellers may want to identify specific metrics that might be impacted by COVID-19**

- Buyers are considering closing conditions tied to the occurrence of certain financial metrics (e.g., no more than a X% decrease in revenue, changes in EBITDA, stay-at-home/shelter-in-place orders being lifted; business open; at least X% of the workforce has returned.)
  - In other words, instead of arguing whether an X% decrease is a MAE, insert a closing condition tied to the absence of such a decrease.

➤ Examples:

There shall not have occurred any Event [with respect to any product, customer or supplier of the Acquired Companies] that would result, or be could reasonably be likely to result, in the EBITDA of the Company in the 12 month period following such event being reduced by [●]% or more in comparison to the prior 12 month period

There shall not have occurred any change, event, occurrence or effect that has resulted in, or would reasonably be expected to result in, individually or in the aggregate, at least, (a) a recurring (for at least two consecutive financial years) negative effect on the EBITDA in each of XXX and XXX financial years or the XXX and XXX financial years in excess of \$[●] in each case, or (b) a one-time negative effect on the EBITDA in excess of \$[●] in any of the XXX, XXX or XXX financial years; such amounts above, however, each adjusted upwards by adding the product of (i) in case of (a) above \$[●] and (ii) in case of (b) above \$[●], multiplied in each case by the percentage points by which the [applicable market index] - measured over the period starting at XXX, 2020 until the date five (5) Business Days prior to the date of the Independent Expert opinion has decreased (such amounts, the “Financial Threshold”). *Derived from a construct included in the Business Combination Agreement for Thermo Fisher Scientific Inc. and Qiagen N.V. (March 3, 2020) but with modifications to illustrate a closing condition tied to specific metrics.*

# CLOSING CONDITIONS (CONT'D)

41

- Sellers have considered closing conditions to preclude buyer's ability to consider COVID-19 effects in determining if a MAE exists if certain minimum conditions are met (and assuming other conditions are satisfied).
  - In other words, by clarifying that if certain key metrics are satisfied, then buyer cannot claim that the pandemic has resulted in a MAE.

➤ Example:

Minimum Conditions: [If the following conditions are satisfied as of the Closing, then Buyer shall be prohibited from taking the effects of COVID-19 into account in determining the occurrence or existence of a MAE]: (A) the average daily census for the most recent calendar week (i.e., Sunday – Saturday) ending prior to the Closing of the hospice business of both the Buyer and its subsidiaries (determined on a consolidated basis), on the one hand, and the Acquired Companies (determined on a consolidated basis), on the other hand, remains at 85% or higher of the average daily census of such Person's hospice business for the ninety (90)-day period ending March 31, 2020 (which average daily census for the ninety (90)-day period ending March 31, 2020 for each of the Buyer and for the Acquired Companies is listed on Confidential Exhibit A-1); and (B) none of the Fiscal Intermediaries has suspended or ceased the processing of claims or payment to any of the Acquired Companies, the Buyer, or any other direct or indirect subsidiaries of Amedisys, Inc. or the Buyer, including those engaged in home health operations. *Source: Securities Purchase Agreement – Amedisys Hospice, L.L.C. and Golden Gate Ancillary LLC (April 23, 2020)*

# ADDITIONAL DRAFTING CONSIDERATIONS

<b>Outside Dates</b>	<ul style="list-style-type: none"><li>➤ May need adjustment or qualifier for an additional set number of days (or number of extensions) for COVID-19-related impacts such as:<ul style="list-style-type: none"><li>(i) delays in governmental or regulatory approvals, (ii) other consents or change of control approvals, (iii) financing approvals, or (iv) other heightened closing conditions specific to the industry or business.</li></ul></li><li>➤ Consider adding an automatic extension in the event of a continued shutdown of any governmental agencies that are required to approve the transaction.</li></ul>
<b>Notice and Counterparts</b>	<ul style="list-style-type: none"><li>➤ <i>Notice:</i> Confirm that the notice provision includes emails and time requirements for electronic delivery in light of remote work and office closures. Consider the appropriate notice time periods with respect to physical mailings in case of mail delays.</li><li>➤ <i>Electronic Signatures and Counterparts:</i> Confirm that the agreement allows for (i) the electronic signature of all documents (including ancillaries) and (ii) multiple counterparts for execution.</li></ul>

## ADDITIONAL DRAFTING CONSIDERATIONS (CONT'D)

43

<b>Outside Dates</b>	<ul style="list-style-type: none"><li>➤ Confirm filing availability of the applicable state or federal documents, such as Certificates of Merger or FIRPTA certificates.</li><li>➤ Even if filing is available, expect timing delays for filing and receiving evidence of such filings.</li></ul>
<b>Notice and Counterparts</b>	<ul style="list-style-type: none"><li>➤ Recognizing the challenge of defining what is a COVID-19-related consequence versus what are “regular” business challenges, consider express indemnification rights related to COVID-19 matters (e.g., employee liabilities related thereto, violations of state/federal orders related thereto), particularly if an RWI policy is contemplated and COVID-19-related matters are excluded from the policy.</li></ul>

# ADDITIONAL DRAFTING CONSIDERATIONS (CONT'D)

<b>Termination Rights</b>	<ul style="list-style-type: none"><li>➤ Consider express termination rights tied to COVID-19 events (e.g., if stay-at-home orders have not been lifted by X date).</li></ul>
<b>Antitrust Provisions and Related Matters</b>	<ul style="list-style-type: none"><li>➤ Review regulatory aspects (e.g., whether early termination is available; whether review periods are expected to be protracted). Consider whether parties can file on an expedited basis.</li><li>➤ If available, consider filing based on LOIs and MOUs.</li></ul>

# ACQUISITION DEBT FINANCING CONSIDERATIONS

45

- Pursuing acquisition debt financing
- Negotiating debt commitment letters
- Complying with debt financing related provisions in purchase agreements

STINSON

K&L GATES

BASS BERRY SIMS  
CENTERED TO DELIVER.

# PURSUING ACQUISITION DEBT FINANCING

46

- Sellers have typically required buyers to deliver fully executed debt commitment letters (“DCLs”) at signing with “funds certain” or “SunGard” protections. In sponsor-backed platform acquisitions, debt commitment letters are often coupled equity commitment letters.
- When these letters are taken together, the buyer can demonstrate to the satisfaction of the seller that the buyer has funds necessary to consummate the purchase price, assuming certain conditions have been met.
- In light of COVID-19, at the outset of any acquisition transaction, buyers should consider whether to pursue acquisition debt financing, taking into account, among other things:
  - Pricing
  - Leverage
  - Incremental debt, investment, and other flexibility
  - Financial covenants
  - Conditionality and flex terms.

## PURSUING ACQUISITION DEBT FINANCING (CONT'D)

47

- In this environment, some buyers have been unwilling to take any risk that their financing sources may decline to fund and are choosing instead to fund 100% of the acquisition consideration from a combination of available liquidity and equity financing.
  
- So, when does a buyer pursue committed debt financing with limited conditionality in this market?
  - Buyer does not have cash on hand or access to equity financing in an amount necessary to consummate the acquisition.
  - Buyer wishes to preserve cash on hand or access to other liquidity sources.
  - No financing condition in the purchase agreement.
  - No due diligence condition in the purchase agreement.

## PURSUING ACQUISITION DEBT FINANCING (CONT'D)

48

- Buyers may opt for “best efforts” debt financings if the purchase agreement allows for a buyer to decline to close on the basis of a financing condition, due diligence matter, or other basis.
- Unlike in committed financings, “best efforts” debt financings permit the financing sources to decline to fund on the basis of a number of events, including:
  - Legal, business or other due diligence
  - “Material Adverse Effect”, as typically defined in credit documentation (versus purchase agreements)
  - Inaccuracy of any of the representations and warranties in the credit documentation
- Ultimately, buyer may seek the certainty debt commitment letters bring to a transaction and decide to pursue third party debt financing.

## PURSuing ACQUISITION DEBT FINANCING (CONT'D)

- Since the outbreak of COVID-19, buyers have been pursuing club (often with so-called direct lenders) or similarly closely-held financing structures.
- If the buyer is an operating company, sellers should confirm with buyer whether the buyer will be:
  - incurring an incremental facility under, or refinancing of, its existing credit facility;
  - requesting a consent from its existing lenders to consummate the acquisition financing; and
  - pursuing a back-stop financing.
- Unless buyer is a shell, seller may have to accept some risk the financing sources to decline to fund on the basis of a decline in buyer's performance.

# PURSUING ACQUISITION DEBT FINANCING (CONT'D)

Seller Considerations	
<b>Financial Statements</b>	➤ The financing sources may require buyer to deliver financial statements relating to its own business.
<b>Material Adverse Effect</b>	➤ The financing sources may require a condition that no Material Adverse Effect has occurred on the buyer and its existing subsidiaries.
<b>Financial Covenant Testing</b>	➤ Consider whether representations regarding buyer's solvency / ability to pay are warranted
<b>Representations and Warranties</b>	<ul style="list-style-type: none"><li>➤ The existing credit documentation (especially in the case of revolver draws) may require accuracy with all representations and warranties in the existing credit documentation.</li><li>➤ Perfection of security interests granted by buyer and its existing subsidiaries may be required under the existing credit documentation</li></ul>
<b>Events of Default</b>	➤ The existing credit documentation may require the absence of any defaults or events of default (or the absence of a subset thereof).

# NEGOTIATING DEBT COMMITMENT LETTERS

51

- Buyers will heavily negotiate the terms of, and conditions to the availability of, the debt financing with their financing sources.
- Buyers will negotiate with its financing sources for as much “pass-through” conditionality as possible.
- Absent a significant rollover equity position or other special circumstance, sellers typically will only review the debt commitment letters for the limited purpose of ensuring the funds will be available at closing.

# NEGOTIATING DEBT COMMITMENT LETTERS (CONT'D)

Buyer Considerations	
<b>Due Diligence</b>	<ul style="list-style-type: none"><li>➤ Eliminate due diligence condition relating to seller and its subsidiaries</li></ul>
<b>Material Adverse Effect</b>	<ul style="list-style-type: none"><li>➤ Match absence of a “Material Adverse Effect” condition in purchase agreement to corresponding condition in the debt commitment letter</li><li>➤ Financing sources in the United States have generally continued to honor revolving draws</li></ul>
<b>Financial Statements</b>	<ul style="list-style-type: none"><li>➤ Make seller covenant in the purchase agreement to deliver to buyer any financial statements required to be provided by buyer under DCL</li><li>➤ Require parties to acknowledge satisfaction of financial statements condition at signing or, at a minimum, receipt of financial statements delivered at or prior to signing</li></ul>

# NEGOTIATING DEBT COMMITMENT LETTERS (CONT'D)

Seller Considerations	
<b>Representations and Warranties</b>	<ul style="list-style-type: none"><li>➤ Consider which representations must be accurate as a condition to funding.<ul style="list-style-type: none"><li>○ Buyer will consider which representations are <i>made</i>.</li></ul></li><li>➤ The existence of a “Material Adverse Effect” may be both a condition itself and brought down as a representation, depending on how the purchase agreement is drafted.</li></ul>
<b>Perfection of Collateral</b>	<ul style="list-style-type: none"><li>➤ Avoid any risk that buyer will be unable to perfect in collateral due to a government shut down or business continuity issue.</li></ul>
<b>Financial Covenants and Equity Check</b>	<ul style="list-style-type: none"><li>➤ Resist any condition tied to leverage or EBITDA or otherwise ensure that any such conditions are accurately covered by an equity back-stop.</li><li>➤ Some market sources have speculated financing sources will require these.</li></ul>
<b>Solvency</b>	<ul style="list-style-type: none"><li>➤ Attach to DCL form of solvency certificate to be delivered at closing.</li></ul>

# NEGOTIATING DEBT COMMITMENT LETTERS (CONT'D)

Seller and Buyer Considerations	
<b>Amendments to Purchase Agreements</b>	<ul style="list-style-type: none"><li>➤ Review which amendments to purchase agreement trigger consent rights</li><li>➤ Ensure as few financing sources as possible have approval/consent rights</li></ul>
<b>Outside Date</b>	<ul style="list-style-type: none"><li>➤ Incorporate any automatic extensions negotiated in the purchase agreements into the DCLs</li></ul>
<b>Precedents</b>	<ul style="list-style-type: none"><li>➤ Specify precedent credit documentation (including with respect to any intercreditor agreements)</li><li>➤ Negotiate form of any earn-out subordination agreement, if required</li></ul>
<b>Approvals of Administrative Agent, Lead Arrangers and Initial Lenders</b>	<ul style="list-style-type: none"><li>➤ Negotiate for administrative agent to hold as many approval rights as possible and then for a majority of lead arrangers</li><li>➤ Avoid language requiring approval (or waiver) by all Initial Lenders</li></ul>

## NEGOTIATING DEBT COMMITMENT LETTERS (CONT'D)

55

- Post-COVID-19 debt commitment letters have generally continued to follow their pre-COVID-19 counterparts. Due consideration should be given, however, to the impact of COVID-19, and customary provisions must be reviewed in light of COVID-19.
- For example, shutdowns and limited staffing at federal, state, and local offices have made it difficult to predict when certain customary documents can be delivered, filed, or recorded.

# NEGOTIATING DEBT COMMITMENT LETTERS (CONT'D)

56

➤ Lien searches, charters, and good standing certificates:

Subject in all respects to the Certain Funds Provisions, the execution and delivery by the Borrowers of .... customary legal opinions, customary borrowing notices, **customary lien searches**, customary evidence of authorization, **customary officer's certificates, good standing certificates (to the extent applicable) in the jurisdiction of organization of each Borrower and each Guarantor** and a solvency certificate of the Borrower's chief financial officer or other officer with equivalent duties in substantially the form of Annex I hereto.

➤ Lien releases:

Substantially concurrently with, the establishment and borrowing under the Credit Facilities, all of the existing third party indebtedness for borrowed money of the Parent Borrower, Acquired Business and their respective subsidiaries.... shall have been refinanced and/or repaid in full and any **and all commitments, guarantees and liens** .... **shall have been terminated and/or released (or arrangements satisfactory to the Administrative Agent shall have been made for the termination of such liens).**

➤ Perfection:

Subject in all respects to the Certain Funds Provisions, all documents and instruments required to create and perfect the Administrative Agent's security interest in the Collateral (as defined in Exhibit B) **shall have been executed and delivered by the Borrower and the Guarantors, as applicable and, if applicable, be in proper form for filing.**

# DEBT FINANCING PROVISIONS IN PURCHASE AGREEMENTS

57

- Buyers should expect to be obligated to provide to seller:
  - notice to the sellers if any financing source indicates its unwillingness to fund.
    - Buyers should continue to communicate with the financing sources throughout the period between signing and closing.
    - Buyers must be cognizant that this includes any participant in the lending group.
  - copies of certain amendments, replacements, or other modifications to the DCLs, subject to certain exceptions.

## DEBT FINANCING PROVISIONS IN PURCHASE AGREEMENTS (CONT'D)

58

- Sellers will typically be obligated to cooperate with buyers' financing, including, without limitation, assisting with completing disclosure schedules and "know your customer" due diligence.
- Sellers should negotiate a period to cure any financing cooperation covenant in the purchase agreement, in the event a buyer declares a default.
- Financing sources continue to take a hard look at Xerox provisions. Expect financing sources to respond to any litigation risk by expressly referencing COVID-19, for example.

# CONTACT INFORMATION

Jack Bowling

[jack.bowling@stinson.com](mailto:jack.bowling@stinson.com)

David A. Edgar

[david.edgar@klgates.com](mailto:david.edgar@klgates.com)

Frank M. Pellegrino

[fpellegrino@bassberry.com](mailto:fpellegrino@bassberry.com)