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Litigator of the Week: Weil's Jonathan Polkes Carves Out a Win for Carlyle in Delaware

'The case directly presents some of the most pressing issues regarding material adverse effect clauses and the pandemic,' said Polkes, the global co-chair of Weil's litigation practice.

By Jenna Greene
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Our Litigator of the Week is Weil, Gotshal & Manges global litigation co-chair Jonathan Polkes, who notched a seminal win in Delaware Chancery Court that breaks new ground on material adverse effect (MAE) clauses and the pandemic.

Polkes was lead counsel for investment firm The Carlyle Group. Along with co-investor GIC, Carlyle was poised to make a $1 billion acquisition—a 20% stake in AmEx Global Business Travel from a Certares-led group of sellers (a/k/a Juweel).

And then came COVID-19. Travel suddenly became a distinctly unappealing investment—but could Carlyle abandon the deal?

On May 14, Vice Chancellor Joseph Slights heard telephonic oral arguments on Juweel's motion to expedite a trial to determine whether Carlyle and GIC needed to close on the deal, and whether the language of the contract permitted an MAE based on the pandemic. Ruling from the bench, Slights held that it was not feasible to try such a "dauntingly complex" case so quickly, and that Juweel waited too long to sue.

The result? The deal isn't happening–a big win for Carlyle.

Polkes discussed the case with Lit Daily.

Lit Daily: Who is your client and what was at stake?

Jonathan Polkes: Our client is Carlyle Group. The case directly presents some of the most pressing issues regarding material adverse effect ("MAE") clauses and the pandemic. It involves marquee names (besides Carlyle)—the target, American Express Global Business Travel ("AmEx GBT"), is 50% owned by American Express, and is a leading corporate travel service. It raises critical issues related to MAE provisions, such as the significance of the presence (or absence) of a pandemic carve-out. It also involves other important questions, such as the duration of the financial impact of the pandemic, the consequences of sellers trying to modify a deal under duress of the pandemic, and what constitutes ordinary course of business under these dramatic circumstances.

Jonathan D. Polkes, Global Litigation Co-Chair of Weil, Gotshal & Manges

Give us a little background on the underlying transaction. What was your client buying?

This was a complex recapitalization transaction, not an acquisition. Carlyle, GIC (the Singapore sovereign wealth fund) and a group of other investors had agreed to invest a major sum in AmEx GBT, by purchasing shares from a group of current shareholders. Juweel Investors Ltd., a subsidiary of New York-based Certares, served as Sellers Representative.

The deal involved the purchase of shares, and a refinancing by AmEx GBT, along with prescribed cash distributions to current and future shareholders, and a specified level of debt upon closing. Deal counsel were all from top-tier law firms.

What (if anything) did the contract say about pandemics and material adverse events? Was COVID-19 flagged as a potential problem?

The carve-outs to the MAE did not reference adverse change caused by the pandemic. Pandemic carve-outs have become standard fare in recent years, and are routinely used in a large number of SPAs, often alongside more generic carve-outs such as for general economic conditions, social and political unrest, etc. Practitioners negotiate and obtain the pandemic carve-out or they don't, and risk is allocated accordingly and priced into the deal.

This case poses the question (among others) of whether the seller can shoehorn the consequences of the pandemic into a generic carve-out when it failed to negotiate for or obtain a pandemic carve-out. This will have a major impact on existing deals and deals going forward.

When and how did you become involved in the case?

Carlyle retained Weil prior to plaintiff filing the lawsuit.

Who were the key members of your team and what contributions did they make?

My partner Caroline Zalka has to get special mention. She is the key member of the team and we would not be here without her. I can't say enough about her talent or indispensable contribution. She was involved in every step of the litigation, including participating in drafting the complaint and the opposition to motion to expedite, which factored heavily in the court's decision.

We also worked with GIC's excellent counsel from Quinn Emanuel Urquhart & Sullivan LLP and Morris, Nichols, Arsht & Tunnell LLP, including Kenneth Nachbar from Morris Nichols.

What happened on April 8? And how did Juweel respond?

On April 8, Carlyle told Juweel that it believed there had been an MAE and that Juweel could not satisfy conditions precedent to close. This followed promptly after AmEx GBT provided for the first time its 2020 financial projections updated for the impact of the pandemic—which were alarming. Carlyle also, however, invited Juweel to explain its position or to provide additional information if it wished.

Juweel suggested that Carlyle was "secretly drafting lengthy court papers" while engaging in negotiations. What was your response?

As we said at the hearing, all the players here were exceedingly sophisticated investors, represented by able counsel. From the outset, Carlyle was purposefully transparent with regard to its views of the MAE (as well as other failures by Juweel to satisfy conditions precedent, including the financing provisions and the ordinary course provisions). Juweel could then take any action or position it thought appropriate. As the court stated, nothing stopped Juweel from commencing a lawsuit promptly and continuing to negotiate.

Walk us through what measures and unique approaches you had to take in order to brief and file your complaint, respond to plaintiff's motion to expedite, and prepare oral arguments on an expedited basis, all remotely.

I think the court's opinion was dead on in respect of explaining how challenging it is to engage in expedited litigation under the current circumstance. The challenges are as mental as they are logistical.

I love working with my teams, but in this instance it obviously was not possible to sit around a conference room and share ideas face to face, to exchange physical documents and discuss them as a group, or to do any of the other intangible things that contribute to teamwork. These kind of interactions are especially important in expedited, high visibility litigation, where having dinner together in the office, working late into the night as a group, are very much a part of the experience.

We tried consciously to compensate for this with Zoom meetings with the whole team several times a day—even with people not working directly on this motion to expedite. We tried to ensure that everyone knew what the others were doing. Sharing and drafting documents is always done electronically, but we had to be extra focused and conscious of drafts and controls.

One other note: oral arguments are done by phone, but always we are in the office and the team surrounds you. Doing the argument from home, and alone, was a strange experience, made a little better by the knowledge that everyone else on the phone—judge, opposing and co-counsel, members of the press, even the court reporter—was also at home alone.

Who was opposing counsel?

Juweel was very well represented by Dontzin Nagy & Fleissig LLP and Ashby & Geddes.

On May 14, Vice Chancellor Slights heard telephonic oral arguments on Juweel's motion to expedite a trial. What were your primary themes?

1) Courts in Delaware always weigh the costs and bur-

dens of expedition as a counterbalance to the threat of irreparable harm if expedition is not granted. Here, we thought there was no contest between the two concerns. The expedition that would have been required, given the high significance and complexity of the case, would have resulted in chaos.

This deal took seven months to negotiate, and had 36 signing entities. It will require many months of party discovery, third-party discovery, expert discovery, and briefing to do it justice. The idea of jamming this process into five weeks, and doing it fairly, was just not possible.

2) Carlyle told Juweel on April 8 about the MAE. Juweel waited nearly a full month to bring suit—apparently knowing all along that if it wanted specific performance, it had a financing cut-off of June 30. If it wanted expedition, it had an affirmative obligation to bring the matter to the court's attention promptly. Its failure to do so was—as the court found—hornbook laches.

These arguments are mutually reinforcing. They can't ask for a crazy expedited schedule and at the same time be largely responsible for creating the problem.

What advice do you have for other litigators facing a high-stakes argument via telephone?

Don't be afraid to walk around your empty room reciting your talking points out loud!

Vice Chancellor Slights issued an opinion from the bench. What to you were some of the most notable aspects of his holding?

The Vice Chancellor gave a very thoughtful opinion that directly addressed the issues that need to be confronted when weighing whether to expedite litigation during the pandemic. I think his decision will become the benchmark going forward for questions of expedition.

What's next? What recourse does Juweel have at this point?

They can pursue their case for monetary damages.

How will this case influence the fate of other pending mergers signed prior to the COVID-19 pandemic? And what does it add to material adverse effect jurisprudence in Delaware?

This case could be hugely significant in several ways:

1) Sophisticated practitioners and market participants have been using pandemic carve-outs for many years, and they are now a common carve-out available from an a la carte menu of carve-out options. People negotiate for pandemic carve-outs and get them or don't. Risk is allocated, and deals are priced accordingly.

Juweel argues that the presence or absence of a pandemic carve-out is meaningless and the adverse financial condition at AmEx GBT can be shoehorned into other, more generic carve-outs. This case could determine whether pandemic carve-outs have real meaning in terms of allocating risk or not. This could not be a better test, given that the travel business is one of the hardest hit industries during the pandemic. In the meantime, parties ignore pandemic carve-outs at their peril.

2) Durational significance is another key concept in MAE jurisprudence. The issue of how long the downturn in the travel business will last is squarely presented, and our complaint is chock-full of concrete evidence that the consensus view is travel will not return for three years or more, and even then, it may never be what it was pre-pandemic.

3) Just as important, this case will help focus the meaning of ordinary course provisions. There is remarkably little explanation and interpretation in Delaware of what these provisions mean. Is it OK if a company takes draconian cost-cutting measures because this is what companies do in the ordinary course during a crisis, or can the steps become so drastic that they cannot be considered operating in the ordinary course even given the nature of the crisis?

4) Also of equal importance, the company and seller took drastic action to alter the nature of the transaction into one that would help the company survive its financial crisis. This case will explore to what extent a seller can fundamentally change the deal in a crisis before crossing the line into a failure to satisfy a condition precedent.

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