

M&A TCO/SPG: Michigan Court Likely to Apply Similar Standards as Delaware; Longer Case Timeline Possible

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Takeaways

- Last week, Simon Property Group filed a complaint with a Michigan court seeking to terminate its agreement to acquire Taubman Centers. According to practitioners with experience litigating such matters, substantially the same standards are used by courts in Michigan as well as in Delaware, the state where such cases are typically brought.
- The business court in Oakland County, Michigan, where the case will be litigated, was established in 2013 through legislation enacted by the Michigan legislature the previous year. With only seven years in operation, the business court lacks the extensive case law that is available in the Delaware Chancery Court.
- The Michigan business court's limited operational history may result in a slightly longer time frame for the case, the practitioners said.

While merger disputes are most commonly litigated in the Delaware Chancery Court, Simon Property Group and Taubman Centers will most likely see similar treatment of their case in Michigan, albeit with a potentially longer timeline, according to practitioners with experience litigating such matters.

Peter G. Roth, partner and M&A lead at the Detroit-based law firm Varnum Law, said that Simon's choice to litigate in Michigan is driven by the merger contract, wherein the parties agreed to litigate any merger-related dispute in Michigan. "I don't think they chose that option because it would be an easier venue to litigate or offered some other unique advantage," Roth told Reorg.

Additionally, any litigation action is likely to meet with delays considering the logistical difficulties facing the courts amid the ongoing coronavirus crisis. "[While] the timing of the litigation process in Michigan is similar to that in Delaware and the courts of most other states, the impact of the Covid-19 pandemic may slow down the process as some courts may have a backlog," noted Roth.

On Thursday, June 11, Simon filed a [complaint](#) with the business court under the Circuit Court for the Sixth Judicial Circuit, Oakland County, Mich., claiming that the company should be allowed to terminate its acquisition of Taubman. Simon cites a "disproportionate" impact of the Covid-19 pandemic on Taubman compared with the target company's peers, as well as Taubman's violation of its ordinary course covenants.

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However, practitioners agreed that the Delaware and Michigan courts use substantially the same standards when establishing material adverse effects, or MAE. "Michigan courts are unlikely to diverge substantially from Delaware. The court will likely interpret the contract in a similar manner and adopt similar legal standards established in Delaware," said Roth.

According to Robert J. Malonek, partner specializing in commercial litigation at Latham & Watkins, the case will involve "not just showing that the pandemic has had a significant impact on the target, but also showing that the impact is and is expected to be durationally significant. It can't just be a blip on the company's financial results."

Malonek noted that the Taubman/Simon case "certainly will help define market practice in these

agreements going forward.” He added that the case “shows what acquirers and financing sources are considering in light of the pandemic, which is whether other operational covenants – like those related to the target running its business in the ordinary course and taking mitigating actions in response to the pandemic – are triggered.”

As Reorg [analyzed](#) previously, a comparison of Taubman’s recent monthly rent collection metrics to that of a broader category of REITs, including shopping center REITs, may aid Simon in proving to the court that Taubman has suffered disproportionately. Practitioners noted, however, that this dynamic would need to exist for a substantial period in order to persuade a court.

In addition to the MAE argument, Simon is also looking to rely on Taubman’s alleged violations of the ordinary course covenants to get out of the deal. Simon argues that Taubman failed to take appropriate business measures in response to the pandemic. Such measures could have included furloughing employees, reducing operating expenses, and suspending cash payments and retainer fees for independent board directors.

However, according to Dan Gold, partner and chair of the securities and shareholder litigation practice group at Haynes and Boone, buyers have asserted the opposite position regarding these types of business measures taken in response to the pandemic. Earlier this year, for example, an affiliate of Sycamore Partners argued that it had validly terminated its purchase of a majority interest in Victoria’s Secret from owner L Brands. Sycamore [claimed](#) that L Brands violated the covenant to conduct the business in the ordinary course by furloughing its employees and reducing by 20% the base compensation of all employees above the level of senior vice president, among other operational cuts.

Potentially Longer Legal Timeline in Michigan Than Delaware

Malioneck noted the Delaware Chancery Court is “quite sophisticated on these kinds of business disputes, making it an efficient and often fast forum for litigation.” In contrast, the Michigan business court’s limited operational history may result in a slightly longer timeframe for litigation, other practitioners said.

According to F.L. Gorman, co-leader of the real estate developers industry team at the law firm Harris Beach LLC, if the language in the parties’ merger contract is not “tight and super clear and is ambiguous,” the less-developed body of case law in Michigan suggests that a prolonged period of fact-finding may be necessary. This likelihood may result in a settlement and renegotiated agreement between the parties, he said.

“In this case, it may be best for Simon to have a prolonged litigation, so that they can work out an economic solution,” Gorman said. “In most cases, the ultimate resolution is a negotiated solution.” One recent and prominent case where the parties reached settlement came in April 2017. After Abbott Laboratories filed a lawsuit seeking to back out of its Alere acquisition, the parties eventually [agreed](#) to a significantly lower deal price to ultimately complete the transaction.

Gold, the practitioner with Haynes and Boone, noted that even the more experienced Delaware Chancery Court has anticipated needing time for these disputes to be ready for trial. “What the Delaware court has said in a number of cases is that even under the best of circumstances, these cases are too complex to be ready for trial in a few weeks,” Gold said. “They’re very fact-intensive and dependent on what’s going on with the target company’s business and the industry – these are not easy claims to prove.”

When reached by Reorg, counsel for Simon declined to provide comment beyond the company’s [official statement](#), which claims that Taubman has “failed to take steps to mitigate the impact of the pandemic as others in the industry have, including by not making essential cuts in operating expenses and capital expenditures.”

In [response](#) to Simon’s complaint, Taubman stated last week that the termination is “invalid and without merit” and that Taubman will “vigorously contest” both the termination and any legal action on Simon’s part.

Reorg's previous coverage of this transaction can be found [HERE](#).

--Matt Tracy and Shrey Verma

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