



In re Kenneth Cole: Business Judgment Review of Controlling Stockholder Mergers

Posted by William Savitt, Wachtell, Lipton, Rosen & Katz, on Saturday, May 7, 2016

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[On May 5, 2016,] the New York Court of Appeals held that business judgment review is available in the context of going-private mergers of controlled companies. [In re Kenneth Cole Prods., Inc. S'holder Litig., No. 54 \(N.Y. May 5, 2016\)](#). The decision adopts the same standards set forth by the Delaware Supreme Court in its [MFW opinion](#) and affirms dismissal of a stockholder suit.

The case concerned a merger transaction between Kenneth Cole Productions, Inc. and its controlling stockholder, Kenneth Cole. In February 2012, Cole informed the board of directors that he wished to take the company private. The board appointed a special committee of independent directors. Cole thereafter made an offer conditioned on the approval of both that independent committee and the vote of the majority of the minority stockholders. Following months of negotiation, the special committee approved the merger and some 99% of the minority stockholders voted in favor of it. Multiple stockholder class action lawsuits challenging the transaction were nevertheless filed. The trial court dismissed these actions, reasoning that the complaints failed to impugn the independence of the special committee, and the appellate division affirmed. On appeal to New York's highest court, plaintiffs argued that all controlled company go-private mergers should be subject to "entire fairness" review.

The Court of Appeals unanimously disagreed and affirmed dismissal. In so doing, the Court expressly adopted the Delaware *MFW* standard, which applies business judgment review to controller buyouts when "(i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority." Stressing the "general principle that courts should strive to avoid interfering with the internal management of business corporations," Judge Stein's opinion for the Court of Appeals also made clear that this standard applies at the pleadings stage and cannot be avoided through conclusory or artful allegations.

The *Kenneth Cole* decision brings standards for controlling stockholder mergers in New York in line with those of Delaware and provides transaction planners with a path for controlled New York corporations to obtain business judgment review, and early litigation relief, in going-private mergers.