

March 14, 2014

**Delaware Supreme Court Endorses Availability of Business Judgment Review in Controlling Stockholder Mergers**

The Delaware Supreme Court today affirmed that a going-private transaction may be reviewed under the deferential business judgment rule when it is conditioned on the approval of both a well-functioning special committee and a majority of the minority stockholders. [Kahn v. M&F Worldwide Corp., No. 334, 2013 \(Del. Mar. 14, 2014\).](#)

As described in our [previous memo](#), the case arose out of a stockholder challenge to a merger in which MacAndrews & Forbes acquired the 57% of M&F Worldwide it did not already own. Then-Chancellor Strine granted summary judgment in favor of the defendants, finding that the record established the transaction was approved by both an independent special committee that functioned effectively and had the power to say no and the fully-informed vote of a majority of the unaffiliated stockholders, thus entitling them to business judgment review.

In today's unanimous opinion, the Supreme Court agreed. The Court held that a controller may obtain business judgment review of a going-private merger, and avoid more onerous "entire fairness" scrutiny, if "(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." The Court explained that in these circumstances, the merger "acquires the shareholder-protective characteristics of third-party, arm's-length mergers, which are reviewed under the business judgment standard." The Court emphasized that one requirement for avoiding a trial is a determination that "a fair price was achieved by an empowered, independent committee that acted with care." The Court also stated that "[i]f a plaintiff that can plead a reasonably conceivable set of facts showing that any or all of [the] enumerated conditions did not exist, that complaint would state a claim for relief that would entitle the plaintiff to proceed and conduct discovery."

The Court also stressed that the proper use of *either* special committee *or* majority-of-the-minority approval alone "would continue to receive burden-shifting within the entire fairness standard of review framework." The opinion did not, however, shed light on whether tender offers by controllers followed by short-form mergers would be subject to fiduciary review as part of a "unified standard," a stance that has been endorsed in several Court of Chancery decisions.

In examining the independence of the special committee, the Court also noted that a plaintiff seeking to rebut the presumption of independence must show that the director is "beholden" to the controlling party "or so under the [controller's] influence that [the director's] discretion would be sterilized," and that "bare allegations that directors are friendly with, travel in the same social circles as, or have past business relationships with the proponent of a transaction" are not enough.

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