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Maryland Court Confirms Application of Business Judgment Rule
in All-Stock REIT Merger

A Maryland court last week confirmed that the business judgment rule applies to Maryland REITs and other Maryland companies in the context of stock-for-stock mergers, providing comfort to REIT boards that informed and well-advised directors will be granted substantial deference in entering into all-stock mergers. [*In re Nationwide Health Properties, Inc. S'holder Litig.*, M.D. 24-C-11-001476 \(May 31, 2011\)](#).

The Maryland corporate statute specifies that directors are not to be held to a higher duty or subjected to greater scrutiny for decisions relating to a change of control, but a 2009 case in Maryland's highest court extended common law fiduciary duties beyond the statute. The *NHP* plaintiffs argued that this created heightened, *Revlon*-like duties for directors of Maryland corporations even in stock transactions.

In the *NHP* case, the plaintiffs alleged that NHP's directors breached a common law duty to maximize the value received by NHP's shareholders by failing to conduct a full auction and by accepting a lower, but firm, offer over a higher but more speculative proposal. The Court squarely rejected this argument, holding that, under Maryland law, the decision by a board of directors to enter into a traditional stock-for-stock transaction with no sale of control is a managerial decision protected by the business judgment rule. The Maryland Court also dismissed as "wholly without merit" the plaintiffs' claim that inclusion of relatively standard deal protections in the merger agreement – a customary no-shop provision, information rights with regard to competing proposals, a matching right with respect to superior proposals and a reasonable termination fee – constituted a breach of the board's fiduciary duties.

By rejecting the application of *Revlon*-like duties in the context of an all-stock merger, the Maryland Court took the same approach as would apply under Delaware law, which has long held that a stock-for-stock merger between two public companies with no controlling stockholder does not constitute a change of control and thus will not trigger *Revlon* duties to auction the company.

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