

Delaware Supreme Court Establishes New Standard of Review for Controlling Stockholder Going-Private Mergers

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In a landmark decision issued this morning, the Delaware Supreme Court held for the first time in *Kahn v. M&F Worldwide Corp.* that the deferential business judgment standard of review should apply to a merger between a controlling stockholder and its subsidiary, where the merger is conditioned from the outset on both the approval of an independent, adequately empowered special committee and the uncoerced, informed vote of a majority of the minority stockholders.

The Court rejected the plaintiffs' argument that entire fairness ("the highest standard of review in corporate law") was the exclusive standard of review for controller mergers and also dispelled the view that the best a defendant could do, regardless of the protections used, was obtain a burden shift at trial. The Court explained that the entire fairness standard applied in the controller merger context as a substitute for the dual statutory protections of disinterested board and stockholder approval, because both protections are potentially undermined by the influence of the controller.

Unlike prior transactions reviewed under entire fairness, the simultaneous deployment of both procedural protections by the controlling stockholder, MacAndrews & Forbes, created a "countervailing, offsetting influence of equal — if not greater — force," which replicated the characteristics of third-party, arm's-length mergers. The Court emphasized that the dual procedural protection merger structure optimally protects the minority stockholders in controller buyouts, and the application of the business judgment rule will encourage the use of these protections.

From a planning standpoint, the decision provides a roadmap for structuring mergers involving controlling stockholders that can reduce costly and time-consuming stockholder litigation that follows the announcement of nearly every merger.

Skadden, Arps represented MacAndrews & Forbes in the transaction, and Skadden litigation partner Thomas Allingham argued the case before the Court on behalf of MacAndrews & Forbes. For a copy of the opinion, click [here](#).

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