

March 14, 2014

Delaware Supreme Court Affirms Roadmap to Avoid Entire Fairness in a Going-Private Transaction

In *Kahn v. M&F Worldwide Corp.*, the Delaware Supreme Court has provided a clear path for controlling stockholders of Delaware corporations to structure going-private transactions to avoid the entire fairness standard of review.¹ The requirements to avoid entire fairness, and revert to the business judgment standard of review, are as follows (i) the controller must condition the transaction from the outset on the approval of both a special committee and a majority of the minority stockholders; (ii) the special committee must be independent, empowered to freely select its own advisors and to say no definitively and meet its duty of care in negotiating a fair price; and (iii) the vote of the minority must be informed and uncoerced. It is critical that the conditions related to approval by the special committee and a

“[W]here the controller irrevocably and publicly disables itself from using its control to dictate the outcome of the negotiations and the shareholder vote, the controlled merger then acquires the shareholder-protective characteristics of third-party, arm’s length mergers, which are reviewed under the business judgment standard.”

majority of the minority stockholders be established by the controller at the outset of its efforts to take the corporation private.²

This decision is important because it provides controllers who engage in a fair process a more predictable path to take controlled companies private. While the going-private process must still be carefully managed and the decision will not prevent lawsuits challenging such transactions, it is now possible to end the litigations at an earlier stage.

BACKGROUND FACTS:

The transaction at issue in *M&F Worldwide* involved the going-private merger of M&F Worldwide (“MFW”) with its controlling stockholder, MacAndrews & Forbes Holdings, Inc., which owned approximately 43% of the company’s common stock. In June 2011, MacAndrews’ made a public

offer to the MFW board to take the company private. Critically, the offer conditioned the merger on negotiation with and approval by a special committee of independent directors and also the nonwaivable condition that the merger be approved by a majority of the non-MacAndrews stockholders. The offer also noted that MacAndrews was not interested in selling its stake to a third party.

In response to the MacAndrews offer, the MFW board formed a special committee of independent directors who then hired independent legal and financial advisors. In forming the committee, the board clearly provided that the committee had the power to negotiate the transaction and, if it did not find the transaction advisable, to decline to transact with MacAndrews. The Court of Chancery found that the special committee performed its work with due care and the assistance of its advisors and was informed as to the important financial and legal considerations.

When the merger was presented to the stockholders for their approval, the proxy statement accurately and fully disclosed the transaction and the negotiations between the special committee and MacAndrews. In addition, the Court of Chancery found that the stockholders were not coerced into voting in favor of the transaction. In similar cases, courts have occasionally expressed concern that if the transaction is rejected, the controlling stockholder will exact retribution on the other stockholders. The Court of Chancery held that such a concern was misplaced when the controller has publicly indicated that the merger will be conditioned on the approval of a special committee and a majority of the minority.

The Delaware Supreme Court adopted the factual findings of the Court of Chancery and rejected the plaintiff's attempts to cast into doubt the independence of the committee members and their due care in managing the process.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Lewis R. Clayton
212-373-3215
lclayton@paulweiss.com

Ariel J. Deckelbaum
212-373-3546
ajdeckelbaum@paulweiss.com

Justin G. Hamill
212-373-3189
jhamill@paulweiss.com

Stephen P. Lamb
302-655-4411
slamb@paulweiss.com

Jeffrey D. Marell
212-373-3105
jmarell@paulweiss.com

Robert B. Schumer
212-373-3097
rschumer@paulweiss.com

Steven J. Williams
212-373-3257
swilliams@paulweiss.com

Frances F. Mi
212-373-3185
fmi@paulweiss.com

Joseph Christensen contributed to this memorandum.

¹ Paul, Weiss served as counsel to M&F Worldwide in this matter.

² We previously summarized the facts of *M&F Worldwide* in connection with then-Chancellor Strine's trial court opinion [here](#). The Delaware Supreme Court rendered its decision on the same set of factual findings as the Chancellor.