
May 9, 2016

New York Court of Appeals Adopts Delaware's Roadmap for Business Judgment Review in Controlling Stockholder Transactions

In the recent decision of *In the Matter of Kenneth Cole Productions, Inc. S'holder Litig.*, the New York Court of Appeals adopted for New York corporations Delaware's standard of review for controlling stockholder going-private transactions as articulated by the Delaware Supreme Court in *Kahn v. M&F Worldwide Corp.* ("MFW"). Under *MFW*, the business judgment standard of review will apply to controlling stockholder buyouts if: (i) the controlling stockholder conditions 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 of Appeals distinguished prior cases that had held otherwise because they, among other things, did not involve a going-private merger (as opposed to a two-step merger), an independent special committee or a majority-of-the-minority vote requirement. Absent these protective conditions, however, entire fairness review would continue to apply to controlling stockholder transactions.

In the case at hand, the Court of Appeals affirmed the lower courts' application of the *MFW* standard to Mr. Kenneth Cole's buy-out of his namesake company. Because the transaction met all of the *MFW* conditions, the transaction was subject to the business judgment standard of review. Absent sufficient allegations of fraud or bad faith, the lower courts dismissed the claims of breach of fiduciary duty by Mr. Cole and the other directors, which dismissal has been affirmed by the Court of Appeals.

As *MFW* did for Delaware corporations, the *Kenneth Cole* decision similarly provides a clear, and more predictable, path for controlling stockholder transactions involving New York corporations.

For our prior memo on the *MFW* decision, click [here](#).

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Ariel J. Deckelbaum
Partner
New York Office
212-373-3546
[Email](#)



Ross A. Fieldston
Partner
New York Office
212-373-3075
[Email](#)



Justin G. Hamill
Partner
New York Office
212-373-3189
[Email](#)



Jeffrey D. Marell
Partner
New York Office
212-373-3105
[Email](#)

Counsel Frances Mi contributed to this alert.

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