



In re MFW Decision Upheld by Delaware Supreme Court

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Following the Kahn v. M&F Worldwide case, the business judgment standard of review will apply if and only if the controlling stockholder agrees at the outset to proceed with the merger only if it receives the approval of:

(1) an attentive special committee comprised of directors who are independent of the controlling stockholder, fully empowered to decline the transaction and retain its own financial and legal advisors, and satisfies its duty of care in negotiating fair price, and

(2) a majority of the unaffiliated stockholders, who are uncoerced in their vote and fully informed.

While this affirmation by Delaware's highest court of the MFW decision is an important clarification of the process that can be used in mergers involving a controlling stockholder to get business judgment review, it also highlights challenges of building a record that each of the conditions were met prior to consummation.

In addition, both the controlling stockholder and the target company have a vested interest in ensuring that they have experienced, sophisticated M&A counsel, as the requirement that these conditions should be met from the outset is not necessarily intuitive. Parties should include the conditions in the bid letter or in the initial response.

Here, the Delaware Supreme Court summarizes its new standard as follows: "in controller buyouts, the business judgment standard of review will be applied if and only 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
- (vi) there is no coercion of the minority.”

Interestingly, the court indicated in a footnote that under this new standard the Verified Consolidated Class Action Complaint would have survived a motion to dismiss because of allegations that called into question the adequacy of the negotiations by the Special Committee regarding price.

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