

April 5, 2024

Delaware Supreme Court Confirms *MFW* Framework For Shifting the Standard of Review from Entire Fairness to Business Judgment in All Conflicted Controller Transactions

On April 4, 2024, the Delaware Supreme Court [issued its much anticipated decision](#) in *In re Match Group, Inc. Derivative Litigation*, --- A.3d --- (Del. Apr. 4, 2024), concerning the requirements to obtain deferential business judgment review in controlling stockholder transactions, outside of the freeze out merger context, that otherwise are presumptively subject to entire fairness review.

Under Delaware law, transactions where a controlling stockholder stands on both sides of a transaction and receives a non-ratable benefit as compared to other stockholders are presumptively subject to review under Delaware’s entire fairness standard of review. Entire fairness is Delaware’s most exacting standard of judicial review for corporate transactions and generally requires the defendants to prove that the challenged transaction was entirely fair to the corporation—*i.e.*, that it was the product of a fair process and resulted in a fair price. On the other hand, “[i]f the business judgment standard of review applies, a court will not second guess the decisions of disinterested and independent directors” and “will only interfere if the board’s decision lacks any rationally conceivable basis, thereby resulting in waste or a lack of good faith.” *Match*, slip op. at 21 (citations omitted).

In *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) (“*MFW*”), the Delaware Supreme Court held that, in the context of a freeze out merger transaction (*i.e.*, where a controller buys-out the minority stockholders), such transactions can be subject to business judgment review, rather than entire fairness review, where, from the outset of the transaction process, the transaction is, among other things, conditioned on approval of both (i) a fully-empowered, disinterested, and independent special committee, and (ii) a fully-informed and uncoerced vote of a majority of the minority stockholders. Since *MFW* was decided, several Delaware Court of Chancery decisions have expanded *MFW*’s reach to controlling stockholder transactions beyond the freeze out merger context, while commentators have criticized such expansion as not warranted because the *MFW* framework was intended to address the specific problem of a controller bypassing the board and making a tender offer directly to stockholders in the freeze out context. Thus, the question before the Delaware Supreme Court in *Match*—a question that was raised by the Delaware Supreme Court in a May 2023 Order directing the parties to submit supplemental briefing and argument on the issue “in the interests of justice to provide clarity to boards and their advisors who look to Delaware law to manage their business affairs” and “to provide certainty to the Court of Chancery, which has continued to address *MFW* outside the context of controlling stockholder freeze out transactions in a manner that has evaded appellate review”—was: “for a controlling stockholder transaction that does not involve a freeze out merger . . . does the entire fairness standard of review change to business judgment if a defendant shows either approval by an independent special committee or approval by an uncoerced, fully informed, unaffiliated stockholder vote.”

The Delaware Supreme Court answered that question in the negative, holding that the *MFW* framework—*i.e.*, “approval by a well-functioning independent committee and the affirmative vote of the fully informed uncoerced minority stockholders”—must be implemented in all types of transactions where the controlling stockholder stands on both sides and receives a non-ratable benefit in order to shift the standard of review to business judgment. Where only one of the twin *MFW* protections is properly implemented, entire fairness remains the applicable standard of review, but defendants can shift the burden of proof at trial to the plaintiff challenging the transaction to show that the transaction was not entirely fair. The Delaware Supreme Court also held that, for purposes of *MFW*, the committee must be comprised entirely of disinterested and independent directors. In *Match*, because one director on the three-director committee that approved the transaction at issue was found, at the pleading stage, to not be independent of the controlling stockholder, the Court determined that the committee failed to satisfy *MFW* and remanded the case to the Delaware Court of Chancery for further proceedings.

The *Match* decision provides important guidance from the Delaware Supreme Court regarding the path to business judgment review for transaction planners considering any transaction involving a controlling stockholder that stands on both sides of the transaction and receives a non-ratable benefit. It also highlights the importance of carefully implementing the *MFW* framework in order to achieve the benefits of the business judgment rule and secure a pleading stage dismissal of any stockholder claims challenging the controlling stockholder transaction.

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