

CLIENT MEMORANDUM

Business Judgment Rule, Not Entire Fairness, Applies to Going-Private Transactions Approved By a Special Committee and a Majority-of-the-Minority Vote

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Yesterday, Chancellor Strine of the Delaware Chancery Court held that the deferential business judgment rule — rather than a potentially fact-intensive “entire fairness” standard — should apply to a going-private merger conditioned upfront by the controlling stockholder on approval by *both* a properly empowered, independent committee and an informed, uncoerced majority-of-the-minority vote. The decision, *In re MFW Shareholders Litigation*, No. 6566-CS (Del. Ch. May 29, 2013) ([link here](#)), is an important one and provides valuable guidance to corporate lawyers structuring going-private transactions involving controlling stockholders. Willkie Farr & Gallagher LLP represented the independent Special Committee, both in the underlying transaction and in the litigation in the Delaware Chancery Court.¹

The litigation was initiated by purported shareholders of M&F Worldwide Corp. (“MFW”) in connection with a 2011 going-private transaction in which MacAndrews & Forbes Holdings Inc., owner of 43% of MFW at the time, sought to acquire ownership of the remaining 57% of MFW. The transaction was expressly conditioned upon the approval of an independent special committee and a vote of a majority-of-the-minority stockholders. The Special Committee selected its own financial and legal advisors,² met eight times, and after extensive work and negotiation, secured a bid of \$25 per

¹ Skadden, Arps, Slate, Meagher & Flom represented Defendant MacAndrews & Forbes Holdings Inc. in the litigation.

² Willkie partners Jeffrey Hochman and Michael Schwartz represented the Special Committee on the underlying transaction.

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share — \$1 greater than MacAndrews & Forbes' initial offer. Three months later, 65% of the stockholders unaffiliated with MacAndrews & Forbes voted in favor of the transaction. Despite the work of the Special Committee and the approval of the minority shareholders, plaintiffs sought damages after the deal had closed, alleging that the merger was unfair and that the MFW Board and the Special Committee members had breached their fiduciary duties. Defendants moved for summary judgment on the basis that the two procedural protections upon which the deal was expressly conditioned — (1) approval by an independent and well-functioning Special Committee and (2) a vote of a majority-of-the-minority stockholders — required the court to evaluate the merger under the more deferential business judgment rule rather than the more exacting and fact intensive “entire fairness” standard. The Chancery Court adopted the defendants' argument that the business judgment rule should apply to the transaction, reasoning that “the rule of equitable common law that best protects minority investors is one that encourages controlling stockholders to accord the minority this potent combination of procedural protections.” In other words, where both an independent special committee *and* a fully informed majority-of-the-minority stockholders approve a going-private transaction, the court will defer to their business judgment and will not evaluate the substantive fairness of the merger.

The court carefully reviewed whether the actions of the MFW Special Committee and the stockholders “qualified as a cleansing device” as a matter of law. It concluded that each procedure did. In doing so, the court found that plaintiffs' conclusory assertions regarding the Special Committee members' business and social ties with MacAndrews & Forbes fell far short of meeting the standard required to demonstrate that they were “beholden' to the controlling party.” Indeed, the court determined that there were no issues of fact about whether the purported conflicts were material to each Special Committee member whose independence was challenged. After its careful review of the record, the court also concluded that the Special Committee had functioned properly and clearly had discharged its duty of care. The court noted that the Special Committee's power to engage financial and legal advisors (which it exercised) and its authority to negotiate the merger and reject the transaction were significant in reaching that conclusion.

Clients having questions about the case should contact Tariq Mundiya (212-728-8565) or Todd G. Cosenza (212 -728-8677), both of whom appeared for the Special Committee in the Delaware Chancery Court litigation, or the Willkie attorney with whom they regularly work.

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