

## Litigator of the Week: Tariq Mundiya of Willkie Farr & Gallagher

By Scott Flaherty

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It may seem an unlikely place to find a Northern England-raised, University of Cambridge graduate: arguing for Brooklyn-born fashion designer Kenneth Cole in a contentious commercial dispute.

Nevertheless, that's where Tariq Mundiya of Willkie Farr & Gallagher has found himself over the past four years—defending Cole in New York state court over a 2012 transaction in which the fashion mogul bought out minority shareholders and took his company, Kenneth Cole Productions Inc., private.

“It's not something that, 30 years ago, I could have imagined doing,” said Mundiya.

On May 5, Mundiya secured a win for Cole in the New York Court of Appeals, which issued a ruling that makes it harder for shareholders to challenge the fairness of certain going-private transactions. And the standard adopted in New York flows directly from an earlier case in Delaware state court, *Kahn v. M&F Worldwide*, where Mundiya also played a key role on the winning side.

Mundiya's involvement in the Kenneth Cole case, he said, grew out of Cole's close connection to Willkie. The shoe and clothing designer is the son-in-law of former New York Gov. Mario Cuomo, who was affiliated with Willkie for nearly 20 years before he died in January 2015.

When Cole wanted to take his company private in 2012, he came to his father-in-law's firm.

“We did the transactional work,” Mundiya said. “Then, within days of a potential deal being announced, we had a number of lawsuits filed.”



**Tariq Mundiya of Willkie Farr & Gallagher**

Those suits, which were eventually consolidated, challenged the fairness of the transaction on the grounds that Cole had an outsized interest in the deal. Kenneth Cole Productions had created a special, independent committee of four directors who

were expected to negotiate with Cole. A majority of the company's minority shareholders also had to sign off.

After months of negotiations, the special committee and more than 99 percent of the minority shareholders approved a buyout in which Cole would pay \$15.25 per share—roughly a 17 percent premium over the stock price when Cole first announced his plan to take the company private. Still, other shareholders were unhappy and contested the deal in court.

The two conditions of the transaction—approval from the special committee and minority shareholders—took center stage in the litigation. Representing Cole, Mundiya maintained that building in those upfront conditions made the take-private deal similar to a third party acquiring the company after arms-length negotiations.

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Accordingly, Mundiya argued, the court should review the challenge to the transaction under the "business judgment" standard, which gives deference to decisions made by corporate officers or directors as long as they're unbiased and made in good faith. The plaintiffs, represented by Lee Rudy of Kessler Topaz Meltzer & Check and others, argued for the court to use the more exacting and fact-intensive "entire fairness" test.

The Kenneth Cole case then wound its way through New York's courts, with Mundiya's side consistently coming out on top. A trial court applied the business

judgment standard and dismissed the case in September 2013, and, in 2014, an intermediate appeals court affirmed.

Meanwhile, an unrelated case moving forward in Delaware raised virtually identical issues. As it happened, Mundiya also played a key role in that case, which predated the Kenneth Cole litigation by about a year. He represented the special committee of directors tasked with reviewing a take-private transaction in which billionaire Ronald Perelman's company MacAndrews & Forbes Holdings Inc. bought out its affiliate M&F Worldwide Corp. The MFW deal had a similar structure to the Kenneth Cole transaction, requiring approval from the special committee and a majority of the company's minority shareholders.

Ultimately, in March 2014, the Delaware Supreme Court sided with Mundiya and lawyers at Skadden, Arps, Slate, Meagher & Flom who represented MacAndrews & Forbes. In a key ruling for Delaware corporations, the court applied the business judgment rule, holding that the upfront conditions of minority shareholder and special committee approval acted as safeguards to ensure the deal's fairness.

The New York court reached the same conclusion on May 5 in the Kenneth Cole case. Mundiya told the *Litigation Daily* he wouldn't be surprised to see the standard spread elsewhere, now that two of the country's most influential jurisdictions in commercial litigation have weighed in.

The Delaware and New York courts, he said, strike a balance that gives minority shareholders protections up front, but also shields controlling shareholders from legal claims that they exerted too much influence over a deal.

"I think courts will look long and hard before they disagree," said Mundiya. Minority shareholders "get protected at the front end. ... If you get those protections, then it only stands to reason that [the controlling shareholders] should get the benefit of that on the back end in litigation."

**WILLKIE FARR & GALLAGHER<sub>LLP</sub>**