

## CLIENT MEMORANDUM

# Delaware Supreme Court Holds that the Business Judgment Standard of Review, Not Entire Fairness, Applies to Going-Private Transactions Involving Controlling Shareholders

March 17, 2014

## AUTHORS

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In a case of first impression, on March 14, 2014, the Delaware Supreme Court in *Kahn v. M&F Worldwide*, C.A. No. 65661 (Del. Sup. Ct.), held that the business judgment rule — rather than the fact-intensive “entire fairness” standard — applied to certain going-private mergers involving controlling shareholders. Delaware law has long held that the entire fairness standard applies to such transactions, but that standard means that litigation involving such transactions cannot be resolved at an early stage of legal proceedings. This landmark ruling makes it more likely that going private deals involving controlling shareholders — if they have the correct procedural protections — will be reviewed and resolved earlier than at a full trial. The ruling provides a roadmap to corporate lawyers structuring going-private transactions involving controlling stockholders. The deferential business judgment standard of review will apply to such a transaction if it is approved by (1) an independent and well functioning special committee (with its own advisors) that has the power to say no to the proposed transaction, and (2) a majority of the minority stockholders in a fully informed non-coerced vote. Willkie litigation partners Tariq Mundiya (who argued the case in the Delaware Supreme Court) and Todd G. Cosenza represented the independent Special Committee in the Delaware litigation.<sup>1</sup> Corporate partners Jeffrey Hochman and Michael Schwartz counseled the Special Committee throughout the underlying transaction.

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<sup>1</sup> Morris, Nichols, Arshat & Tunnell LLP also represented the Special Committee in the Delaware litigation.

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### **Background**

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, met eight times, and after extensive work and negotiation, secured a bid of \$25 per share — \$1 per share greater than MacAndrews & Forbes’s 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 closed, alleging that the merger was unfair and that the MFW Board and the Special Committee members had breached their fiduciary duties. The Delaware Chancery Court granted summary judgment to the defendants finding that the business judgment rule would apply to judicial review of the transaction because it was approved by an independent special committee **and** a fully informed vote of a majority-of-the-minority stockholders. Plaintiffs appealed.

### **Delaware Supreme Court Ruling**

The Delaware Supreme Court affirmed the lower court’s ruling. The Supreme Court found that the dual protections of an independent and well functioning special committee, and a well-informed vote of a majority of the minority stockholders, provided adequate safeguards to minority stockholders in a going private transaction. According to the Court, those procedural safeguards resulted in the going private transaction “acquir[ing] the shareholder-protective characteristics of third-party, arm’s length mergers.”

After carefully reviewing the record relating to the independence, mandate and process of the Special Committee, the Court concluded that the Special Committee members had successfully “established a record of independent committee effectiveness and process.” The Court agreed with the Chancery Court’s findings that the Special Committee had functioned properly and discharged its duty of care by engaging financial and legal advisors and exercising its authority to negotiate the merger. The Court focused on the fact that the Special Committee had the power to say “no” and, ultimately, had negotiated a fair price. The Court also agreed with the Chancery Court’s conclusion that the majority of the non-controlled shareholders’ vote “was fully informed and not coerced.” As a result, the Court affirmed the dismissal of the shareholder claims because “it cannot be credibly argued (let alone concluded) that no rational person would find the Merger favorable to MFW’s minority stockholders.”

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Clients having questions about the case, or structuring transactions in light of the MFW opinion, should contact Tariq Mundiya (212-728-8565, [tmundiya@willkie.com](mailto:tmundiya@willkie.com)), Todd G. Cosenza (212-728-8677, [tcosenza@willkie.com](mailto:tcosenza@willkie.com)) Jeffrey Hochman (212-728-8592, [jhochman@willkie.com](mailto:jhochman@willkie.com)), Michael Schwartz (212-728-8267, [mschwartz@willkie.com](mailto:mschwartz@willkie.com)) or the Willkie attorney with whom they regularly work.

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