

Closing the Private Equity Fund Triggers Entire Fairness Under Delaware Law

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On June 3, the Delaware Court of Chancery held in *Manti Holdings, LLC v. The Carlyle Group Inc.* that it was reasonably conceivable that The Carlyle Group, Inc., together with its affiliates (Carlyle), constituted a controlling stockholder of Authentix Acquisition Company, Inc. (Authentix) and extracted a unique benefit as a controlling stockholder in connection with the sale of Authentix to Blue Water Energy because of Carlyle's alleged urgency to exit its investment in Authentix and close the associated fund.

When assessing whether corporate fiduciaries have satisfied their fiduciary duties, the court will apply one of several standards of review depending upon the nature and underlying facts of the challenged transaction. While the well-known business judgment rule applies by default, a plaintiff can rebut the business judgment rule by showing that either (1) at least half of the directors sitting on the board of the target were either interested or not independent or (2) a controlling stockholder stood on both sides of the transaction or extracted a unique benefit in the transaction not shared with the other stockholders. In this case, plaintiff stockholders honed in on the unique benefit prong of the test.

Historically, Delaware courts have not easily accepted theories that a controlling stockholder received a unique benefit by virtue of satisfying a unique liquidity need in a transaction (and has even stated that such a liquidity need would need to rise to the level of a "fire sale"), but the court's decision in *Manti* represents a trending departure from that reluctance. The court's ruling provides another reason for private equity firms to consider structuring their investments using limited liability companies rather than corporations and waiving all fiduciary duties owed to the minority.

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