

1

Articles + Publications | April 4, 2024

Delaware Supreme Court Confirms Dual MFW Protections Are Needed Outside of the Freeze-Out Merger Context for Application of Business Judgment Rule

WRITTEN BY

Taylor B. Bartholomew | Christopher B. Chuff | Matthew M. Greenberg | Joanna J. Cline

In *In re Match Group, Inc. Derivative Litigation*, the Delaware Supreme Court held that the dual procedural protections announced in the seminal case of *Kahn v. M & F Worldwide Corp.* (*MFW*) are required in order to shift the presumptive standard of review from entire fairness to the business judgment rule in transactions involving a controlling stockholder that stands on both sides of the transaction and receives a nonratable benefit, regardless of whether the transaction involves a freeze-out merger. That case, which was decided in the context of a freeze-out merger, famously required that to change the standard of review from entire fairness to the business judgment rule, the controlling stockholder must subject the transaction at the outset to *both* the approval of a special committee consisting of independent and disinterested directors and the approval of a majority of the minority stockholders. One of these procedural protections was insufficient.

In *Match*, the Delaware Supreme Court had the occasion to decide whether controlling stockholder transactions outside of the freeze-out merger context require only *one* of those protections, but not both. The court's decision confirms that both protections must be employed in not only freeze-out transactions, but also in transactions where a controller stands on both sides of a transaction and receives a nonratable benefit.

Takeaways

The primary takeaways from the court's decision are as follows:

- Both Sides of a Transaction, Nonratable Benefit. When a controlling stockholder stands on both sides of a transaction *and* receives a nonratable benefit, entire fairness review applies unless *both* prongs of *MFW* are satisfied.
- **Special Committee Independence**. One of the requirements of *MFW* is that the special committee is disinterested and independent. The court in *Match* found that for *MFW* to be satisfied, it is not enough that a *majority* of the members of the special committee are independent from the controlling stockholder. Rather, every member of the special committee must be independent from the controller.
- Section 144 of the DGCL Does Not Impact the Standard of Review. Finally, the court's decision contains ancillary commentary on Section 144 of the Delaware General Corporation Law (DGCL). That section, which

provides for a safe harbor for self-dealing transactions by directors, has occasionally been cited to operate to shift the standard of review in conflict transactions if its requirements are met, but the court confirmed in a footnote that the statute deals with "incurable voidness" and that the section "is not concerned with equitable review."

RELATED INDUSTRIES + PRACTICES

- Business Litigation
- Capital Markets
- Corporate
- Delaware Court of Chancery Litigation
- Emerging Companies + Venture Capital
- Life Sciences Transactions
- Private Equity
- Securities Litigation