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L'État de New York adopte le cadre établi par le Delaware relativement aux fusions visant une fermeture du capital faisant intervenir des actionnaires de contrôle

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In *In the Matter of Kenneth Cole Productions, Inc. Shareholder Litigation* the New York Court of Appeals adopted the business judgment standard of review established by the Delaware Supreme Court in *Kahn v. M&F Worldwide Corp.* (*MFW*) for going-private mergers involving a controlling stockholder. Under *MFW*, so long as certain minority stockholder protections are in place from the time the transaction is proposed, challenges to going-private mergers are reviewed under the deferential business judgment rule instead of the more onerous entire fairness standard. The *Kenneth Cole Productions* decision provides a clear blueprint for controlling stockholders of New York corporations on how to engage in going-private mergers without risking the more onerous entire fairness standard of review.

Background

The *Kenneth Cole Productions* decision stems from Mr. Kenneth Cole's 2012 acquisition of all of the shares of Class A common stock of Kenneth Cole Productions, Inc. (KCP) that were not previously owned by Mr. Cole. Prior to the acquisition, through KCP's dual-class share structure comprising a class of high vote Class B common stock (all of which were held by Mr. Cole) and a class of low vote Class A common stock (of which Mr. Cole held approximately 46%), Mr. Cole held shares representing approximately 70% of the equity and 90% of the voting power in KCP. The remaining shares of Class A common stock were publicly held by minority stockholders and traded on the New York Stock Exchange. Mr. Cole's offer to purchase the remaining shares of Class A common stock was conditioned from the outset on approval by a special committee of the board and by a majority of the minority stockholders. Mr. Cole stated that he would not approve any other type of merger as a stockholder and that his relationship with KCP would not be adversely affected if the special committee did not recommend approval or the stockholders voted against the proposed transaction.

The board established a special committee to consider the proposal and negotiate the potential merger. The special committee retained legal counsel and a financial adviser, and proceeded to negotiate the terms of the going-private merger with Mr. Cole. After months of negotiations with the special committee, Mr. Cole increased his initial offer of $15.00 per share to $15.25 per share. The special committee recommended the transaction to the minority shareholders, and 99.8% of the minority stockholders voted in favour of the going-private merger.

A number of minority stockholders quickly commenced litigation after Mr. Cole made his offer to purchase the remaining shares of Class A common stock. The plaintiffs alleged, among other things, that the directors lacked independence and had breached their fiduciary duties. The New York Supreme Court and the Appellate Division dismissed the stockholders' claims, and the Court of Appeals granted review of the case.

The New York Court of Appeals Decision

The primary issue before the New York Court of Appeals was to determine which standard should be applied when "reviewing a going-private merger that is subject from the outset to approval by both a special committee of independent directors and a majority of the minority stockholders." The plaintiff argued that the transaction should be subject to the entire fairness review, which places the burden on the directors to show that they engaged in a fair process and obtained a fair price. Conversely, Mr. Cole contended that the transaction should be subject to the business judgment rule. Under the business judgment rule, courts show deference to decisions made by corporate officers and directors and, in the absence of fraud or bad faith, will not subject such decisions to judicial inquiry.

In a 1984 decision (*Alpert v. 28 Williams St.* (*Alpert*)), the Court of Appeals applied the entire fairness standard of review in the context of a two-step freeze-out merger. However, the Court found that the facts in *Kenneth Cole Productions* were easily distinguishable from *Alpert* because the Court of Appeals specifically limited its decision in *Alpert* to a two-step freeze-out structure (whereas *Kenneth Cole Productions* involved a going-private merger) and there was no independent committee of the board or majority of the minority stockholder vote in *Alpert*. Therefore, the Court did not feel constrained by its previous ruling in *Alpert*.

In *Kenneth Cole Productions*, the Court of Appeals adopted a "middle ground" whereby the business judgment rule applies so long as the six stockholder-protective conditions established by the Delaware Supreme Court in *MFW* are met, specifically (1) the controller conditions the procession of the transaction on the approval of both a special committee of the board and a majority of the minority stockholders;(2) the special committee is independent; (3) the special committee is empowered to freely select its own advisers and to definitively reject the transaction; (4) the special committee meets its duty of care in negotiating a fair price; (5) the vote of the minority stockholders is informed; and (6) there is no coercion of the minority stockholders. If any of the preceding conditions are not met, the entire fairness standard of review will apply. The Court of Appeals reasoned that "[o]verall the *MFW* standard properly considers the rights of minority shareholders...and balances them against the interests of directors and controlling shareholders in avoiding frivolous litigation and protecting independently-made business decisions from unwarranted judicial inference."

The Court of Appeals then determined that the plaintiff had not sufficiently and specifically alleged that any of the six *MFW* conditions had not been met and therefore applied the business judgment rule in upholding the dismissal of the plaintiff's complaint.

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