

New York Court of Appeals: Court Adopts Standard of Review for Going-Private Mergers

On May 5, 2016, the New York Court of Appeals ruled on the standard of review applicable to a going-private merger in *Matter of Kenneth Cole Prods, Inc. Shareholder Derivative Litig.* In particular, the Court considered whether to apply the business judgment rule or the entire fairness standard.

In a unanimous decision, the Court concluded that so long as certain shareholder-protective conditions exist, the business judgment rule applies. Specifically, the Court adopted the following standard articulated by the Delaware Supreme Court:

“[I]n controller buyouts, the business judgment standard of review will be applied if and only if: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority”

(quoting *Kahn v M & F Worldwide Corp.*, 88 A3d 635, 645 [Del 2014]). However, the Court explained, “if the evidence demonstrates that any of the protections were not in place, then the business judgment rule is inapplicable and the entire fairness standard applies.”

The Court determined that this approach “properly considers the rights of minority shareholders – to obtain judicial review of transactions involving interested parties, and to proceed to trial where there is adequate proof that those interests may have affected the transaction – and balances them against the interests of directors and controlling shareholders in avoiding frivolous litigation and protecting independently-made business decisions from unwarranted judicial interference.” Applying the newly-adopted standard to the instant case, the Court concluded that the complaint was properly dismissed and affirmed the Appellate Division order.

To learn more, contact [Steven M. Cunningham, Jr.](#) at 315.218.8192 or scunningham@bsk.com.



Commitment • Service • Value • Our Bond



Bond, Schoeneck & King PLLC (Bond, we, or us), has prepared this communication to present only general information. This is not intended as legal advice, nor should you consider it as such. You should not act, or decline to act, based upon the contents. While we try to make sure that the information is complete and accurate, laws can change quickly. You should always formally engage a lawyer of your choosing before taking actions which have legal consequences.

For information about our firm, practice areas and attorneys, visit our website, www.bsk.com. • Attorney Advertising • © 2016 Bond, Schoeneck & King, PLLC

CONNECT WITH US ON LINKEDIN: SEARCH FOR BOND, SCHOENECK & KING, PLLC

FOLLOW US ON TWITTER: SEARCH FOR BONDLAWFIRM