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Delaware Court of Chancery Provides Roadmap to Avoid Entire Fairness Review for Mergers with Controlling Stockholders

In an important and thoughtful decision that will influence the structure of future going-private transactions by controlling stockholders, Chancellor Strine of the Delaware Court of Chancery applied the business judgment rule—instead of the more onerous entire fairness review—to a going-private merger by a controlling stockholder because the merger was structured to adequately protect minority stockholders. The decision is likely to be appealed, but if affirmed by the Delaware Supreme Court on appeal, the case should provide certainty in an area of the law that has been a source of debate and uncertainty for two decades. The decision, *In re MFW Shareholders Litigation*, provides a detailed roadmap to obtaining the more favorable business judgment rule review and reducing the considerable litigation costs and risks associated with entire fairness review.

The court in *MFW* held that if the transaction is (1) negotiated by a fully-empowered special committee of directors who are independent of the controlling stockholder and (2) conditioned on the approval of a majority of the minority stockholders, then entire fairness review will not apply. The court noted the following key elements of the process:

- The special committee was:
 - contemplated from the beginning of the process;
 - composed of directors who are independent of the controlling stockholder;
 - empowered to negotiate and to say “no” to any transaction;
 - empowered to retain its own independent financial and legal advisors; and
 - properly attentive to the process.
- The vote by the majority of the minority stockholders was:
 - contemplated from the beginning of the process as a non-waivable condition;
 - free of any disclosure violations; and
 - uncoerced.

The transaction at issue in *MFW* involved the going-private merger of M&F Worldwide (“MFW”)¹ with its controlling stockholder, MacAndrews & Forbes Holdings, Inc., which owned approximately 43% of the

¹ Paul, Weiss served as counsel to M&F Worldwide in this matter.

company's common stock. In June 2011, MacAndrews' made a public offer to the MFW board to take the company private. Critically, the offer conditioned the merger on negotiation with and approval by a special committee of independent directors and also the non-waivable condition that the merger be approved by a majority of the non-MacAndrews stockholders. The offer also noted that MacAndrews was not interested in selling its stake to a third party.

In response to the MacAndrews offer, the MFW board formed a special committee of independent directors who then hired independent legal and financial advisors. In forming the committee, the board clearly provided that the committee had the power to negotiate the transaction and, if it did not find the transaction advisable, to decline to transact with MacAndrews. The court found that the special committee performed its work with due care and the assistance of its advisors and was informed as to the important financial and legal considerations.

When the merger was presented to the stockholders for their approval, the proxy statement accurately and fully disclosed the transaction and the negotiations between the special committee and MacAndrews. In addition, the court found that the stockholders were not coerced into voting in favor of the transaction. In similar cases, courts have occasionally expressed concern that if the transaction is rejected, the controlling stockholder will exact retribution on the other stockholders. The court held that such a concern was misplaced when the controller has publicly indicated that the merger will be conditioned on the approval of a special committee and a majority of the minority.

The decision is remarkable because the case law had until now provided no clear path to structure a merger with a controlling stockholder to avoid entire fairness review if litigated. In light of this uncertainty, controlling stockholders have not had a clear incentive to structure transactions to require both independent special committee approval and approval by a majority of the minority stockholders.

If affirmed, this decision will pave the way for transactions that are structured both to protect minority stockholders and provide a predictable transactional path for controlling stockholders. For a copy of the opinion, please click [here](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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