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Commercial division update: Surviving dismissal in minority shareholder buy-out litigation

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Ten years ago, the New York Court of Appeals adopted Delaware's framework for reviewing a controlling shareholder's buyout of the minority in going-private transactions. *Matter of Kenneth Cole Prods., Inc., S'holder Litig.*, 27 N.Y.3d 268 (2016).

Under *Kenneth Cole*, a controlling shareholder is entitled to business judgment deference only if it conditions the transaction on approval by an independent special committee and by a majority of the minority shareholders, and both protections actually work. Otherwise, entire fairness governs.

The Commercial Division's recent decisions applying *Kenneth Cole* provide consistent guidance for practitioners. Defendants who build and rely on a clean process generally can win dismissal. Plaintiffs who plead a concrete defect in that process—not just an unsatisfactory price or an alleged biased board—generally get to proceed to entire fairness discovery.

The *MFW* framework

New York courts have long deferred to the good faith decisions of disinterested directors, while reserving the right to examine "the disinterested independence of the members of [the] committee and... the appropriateness and sufficiency of the investigative procedures chosen and pursued by the committee." *Auerbach v. Bennett*, 47 N.Y.2d 619, 623-24 (1979); see Bus. Corp. Law §717(a).

Where an inherent conflict taints a transaction, the interested parties must prove its entire fairness with a showing of "fair process and fair price." *Matter of Kenneth Cole*, 27 N.Y.3d 268, 275 (2016) (citing *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 569-70 (1984)).

The Court of Appeals' test in *Kenneth Cole* replaced its earlier *Auerbach* case-by-case inquiry with a detailed checklist. Adopting the Delaware approach set forth in *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) (*MFW*), the court held that the business judgment rule applies to such transactions "if and only if" (i) the controller conditions the transaction on approval of both a special committee and a majority of the minority; (ii) the committee is independent; (iii) the committee is allowed to select its own advisors and say no definitively; (iv) the committee meets its duty of care in negotiating a fair price; (v) the minority vote is informed; and (vi) the minority is not coerced.

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A minority shareholder's complaint can survive dismissal if zit pleads "a reasonably conceivable set of facts" showing that at least one condition was not satisfied.

The court struck that balance deliberately, preserving minority shareholders' right "to obtain judicial review of transactions involving interested parties" while protecting directors' interest "in avoiding frivolous litigation and protecting independently-made business decisions from unwarranted judicial intervention."

This framework presents a high bar for defendants advancing a business judgment rule defense, who must satisfy all six conditions. But it also provides a route to dismissal at the pleading stage if all conditions were satisfied. As the Delaware Supreme Court later observed, "[*MFW*] cleared the way for defendants in controlling stockholder transactions to gain pleading-stage dismissal of complaints." *In re Match Grp., Inc. Deriv. Litig*., 315 A.3d 446 (Del. 2024).

Delaware Courts have since refined *MFW* in two respects, both of which the Commercial Division has adopted. First, *Flood v. Synutra Int'l, Inc*., 195 A.3d 754 (Del. 2018), held that a plaintiff cannot plead a breach of the committee's duty of care merely by attacking price. Second, *Flood* and *Olenik v. Lodzinski*, 208 A.3d 704 (Del. 2019), clarified—but did not abandon—the requirement that the controller impose both protections ab initio.

The protections must be in place before substantive economic negotiations begin, but not necessarily before every such contact. In *Olenik*, the court refused dismissal because the parties had already negotiated the price before the conditions were imposed.

Justice O. Peter Sherwood of the New York County Commercial Division adopted *Flood's* price holding in *In re Cadus Corp. S'holder Litig*., 2020 N.Y. Slip Op. 30547(U) (N.Y. Co. Feb. 25, 2020), explaining that *MFW*'s conditions "ha[ve] been narrowly tailored" and that "merely questioning the sufficiency of the sales price is not enough to plead a violation of a duty of care."

Justice Andrew Borrok of the New York County Commercial Division also relied on *Flood* and *Olenik* to enforce the timing requirement in *Macomb*, discussed below. No New York appellate court has squarely decided whether *Kenneth Cole* incorporates these refinements, but the First Department affirmed *Cadus* without disturbing its holding.

Social connections not enough

A favorite target for the plaintiff minority shareholder is the composition of the special committee itself—if the directors negotiating for the minority were not independent, the business judgment rule falls away no matter how the rest of the process unfolded.

In nearly every decision since *Kenneth Cole*, plaintiffs have used that as a basis to attack the transaction, combing committee members' histories for friendships, shared board seats, and old business dealings with the controlling shareholder.

The Commercial Division consistently has been unmoved. From Baltic Trading in 2016 through *Cadus* to *Avangrid* last year, the courts have required plaintiffs to show, not merely that a director knows the controlling shareholder, but that the relationship was material enough to compromise the director's judgment.

In re Baltic Trading Ltd. S'holder Litig., Index No. 651241/2015 (N.Y. Co. Aug. 29, 2016), set the tone. Plaintiffs challenging Genco Shipping's buyout of its Marshall Islands subsidiary relied on a seven-year-old business deal between a committee member and Genco's chairman and on another members' prior Genco board service.

The First Department, affirming dismissal of the complaint by Justice Jeffrey Oing, called these "mere allegation[s] of friendliness and past business relationship" that failed without "nonconclusory allegations of materiality." *In re Baltic Trading S'holders Litig*., 160 A.D.3d 599, 601 (1st Dep't 2018).

Cadus tested how far that principle extends. Plaintiffs challenging Carl Icahn's buyout of *Cadus* pointed to a committee member's 50-year friendship with Icahn and seats on several Icahn-controlled boards, and to committee counsel's prior representation of Icahn.

Justice Sherwood held that none of these ties rebutted the presumption of independence and that, even if one member was conflicted, "one 'interested' director does not taint the entire process." The First Department affirmed because plaintiffs never alleged that the conflicted member "controlled and dominated the committee or failed to disclose his interests to it." *In re Cadus Corp. S'holder Litig.*, 189 A.D.3d 437, 438 (1st Dep't 2020).

Matter of Avangrid, Inc. S'holder Litig., 2025 N.Y. Slip Op. 35005(U) (N.Y. Co. Dec. 22, 2025), shows that line has held for a decade. By the time *Avangrid's* minority challenged Iberdrola's buyout, plaintiffs had narrowed their attack—counsel conceded at oral argument that they were not alleging the special committee lacked power to say no, or that the committee breached its duty of care—and instead focused on lack of independence.

Justice Andrew Borrok found that continued board service after the merger did not compromise independence, and the First Department refused to infer lack of independence from a retired director's reliance on board fees, which would require holding "that all retired board members lack independence." *Matter of Avangrid, Inc. S'holder Litig.*, 250 A.D.3d 650, 652 (1st Dep't 2026).

Surviving dismissal

In *In re Handy & Harman Ltd. S'holder Litig.*, 2018 N.Y. Slip Op. 30894(U) (N.Y. Co. May 9, 2018), Justice Barry Ostrager of the New York Commercial Division denied Steel Partners' motion to dismiss a challenge to its buyout of its 70%-owned subsidiary. The chair of the special committee had been college roommates with Steel Partners' founder and his business partner for five years in a predecessor company.

That relationship alone set the case apart from *Cadus*, but the chair's role in the transaction was critical. As chair and lead negotiator, he also allegedly led the selection of advisors, including a financial advisor that had previously worked for Steel Partners.

The court therefore held that "[a]ny conflict on the part of [the chair], the Chair of the Special Committee and lead negotiator of the Merger, calls into question the independence of the entire Committee and the fairness of their process." *Handy & Harman* and *Cadus* appear consistent—one conflicted member does not taint a committee unless that member controls it, and a conflicted chair who runs the negotiation and picks the advisors does so.

Macomb Cnty. Retiree Health Care Fund v. MSC Indus. Direct Co., 2025 N.Y. Slip Op. 51839(U) (N.Y. Co. Nov. 14, 2025), is the clearest example of a process that failed despite perhaps looking compliant on paper. Defendant MSC's controlling family converted its high-vote Class B shares into Class A shares at a 22.5% premium, although MSC's charter provided for one-for-one conversion.

Despite the use of a special committee, outside advisors, a fairness opinion, and a majority-of-the-minority condition, Justice Borrok found that the complaint adequately alleged the failure of five of the six conditions.

The controlling shareholder allegedly approached a board ally privately before any committee existed, so the protections were not in place before substantive negotiations began. The committee chair allegedly had a 25-year relationship with the family, had previously been found to lack independence in a stock-option backdating case, and relied on board fees as his sole income.

Counsel was chosen before the committee was formed and never vetted for conflicts, and the financial advisor's $2 million fee depended on a premium transaction. The committee opened at a 12.5% premium the charter did not require, and the proxy never disclosed the one-for-one provision.

The court questioned whether the committee was "free from the controller's influence" such that members' "personal, financial, or professional ties could not compromise their judgment," and whether it had "genuine authority to select its own advisors and reject the controller's proposal." *Macomb* makes clear that the satisfaction of the conditions are not simply boxes to check; courts will look behind them to analyze what actually occurred.

Conclusion

Kenneth Cole and its progeny have made the motion to dismiss the decisive event in litigation over going-private transactions. Transaction counsel advising a company should impose the required protections before the first substantive conversation about price, keep conflicted directors out of the room and away from advisor selection, vet advisors for conflicts, and disclose every term that bears on value. And litigators on both sides should treat the motion to dismiss as the stage where these cases can be won and lost.

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