

Delaware Supreme Court confirms effect of majority vote of informed, disinterested stockholders

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In *In re KKR Financial Holdings LLC Shareholder Litigation* the Delaware Chancery Court found that a management entity with operational control of a target, but holding only 1% of its stock and without control of the board of directors, was not a controlling stockholder. The court further held that because there was no controlling stockholder, a fully informed vote of the disinterested stockholders approving the transaction would subject the transaction to business judgement review, rather than the more demanding standard of entire fairness review.

On October 2 2015 the Delaware Supreme Court upheld the chancery court's decision.⁽¹⁾ In his opinion for the court, Chief Justice Strine focused on the principle that a fully informed majority vote by disinterested stockholders will lead to business judgement review of a transaction, even if a company is required to hold a stockholder vote by statute rather than holding a vote voluntarily.

The court clarified its previous decisions on this point. While the plaintiffs argued that the Supreme Court's 2009 decision in *Gantler v Stephens* distinguished between voluntary votes of the disinterested stockholders (which would lead to business judgement review) and statutorily required votes (which could lead to entire fairness review), the court explained that the true significance of *Gantler* was the materially misleading disclosure to stockholders in that case and not whether the stockholder vote was required by statute. The court cited an extensive list of Delaware Supreme and Chancery Court precedents for the principle that as long as there is no controller, a majority of fully informed, disinterested stockholders "can easily protect themselves at the ballot box by simply voting no" and do not need the protection of entire fairness review in post-deal litigation. This decision confirms a bright-line rule and should be welcome news to companies that wish to structure transactions to avoid litigation challenges.

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Endnotes

(1) *Corwin v KKR Financial Holdings LLC*, 629, 2014 (Del October 2 2015).

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