

Delaware Supreme Court Holds Business Judgment Governs Decision to Reincorporate Outside of Delaware For Purpose of Reducing Litigation Exposure In the Absence of Existing or Threatened Litigation

Article By:

John P. Stigi III

Alejandro E. Moreno

Tori D. Kutzner

In [*Maffei v. Palkon*](#), No. 125, 2024, 2025 Del. LEXIS 51 (Del. Feb. 4, 2025) (Valihura, J.), the [Delaware Supreme Court](#) held that a corporation's decision to reincorporate in another state purportedly to reduce exposure to potential future litigation risk is subject to the deferential business judgment rule, as long as the decision is not alleged to have been made to avoid any existing or threatened litigation or in contemplation of a specific transaction. Reversing the decision of the [Delaware Court of Chancery](#) [see blog article [here](#)], the Supreme Court concluded that reduced exposure to potential liabilities that a controlling stockholder may face in the future is not a material, non-ratable benefit triggering the exacting entire fairness standard of review.

In *Maffei*, minority stockholders in TripAdvisor, Inc. and its controlling stockholder Liberty TripAdvisor Holdings, Inc. (collectively, the "Companies") challenged the Companies' decision to convert from Delaware corporations to Nevada corporations. In deciding to reincorporate in Nevada, the Companies cited what they believed were greater protections against liability for directors and officers under Nevada law. The boards of both Companies approved the conversions without implementing any procedural protections in favor of the minority stockholders. The controlling stockholder of the Companies exercised his control to approve the Companies' reincorporation in Nevada.

Plaintiffs contended that the conversions were self-interested transactions that were not entirely fair to minority stockholders, arguing that the conversions accorded the controlling stockholder and other insiders a "non-ratable benefit" by allegedly reducing their exposure to future liability to the company and non-controlling stockholders. Defendants moved to dismiss for failure to state a claim and argued that the decision to reincorporate in Nevada should instead be governed by the more deferential business judgment rule. The Court of Chancery agreed with plaintiffs, holding that the entire fairness standard of review applied and denied the motion to dismiss.

The Delaware Supreme Court granted interlocutory review to consider which standard of review — entire fairness or the business judgment rule — applies to the conversion decisions. Defendants argued the business judgment rule applies because there was no pending or contemplated lawsuit and, therefore, they are not receiving a material, non-ratable benefit. They further argued that subjecting the conversions to entire fairness review raises comity concerns by requiring the court to quantify the extent of the harm, if any, that moving from Delaware to Nevada imposes on minority stockholders. Plaintiffs, in contrast, reiterated their prior argument that the entire fairness standard of review applies because the conversions conferred a non-ratable benefit on the controlling stockholder and other corporate insiders. The State of Nevada itself filed an amicus brief generally supporting defendants' arguments and arguing that applying the entire fairness standard would risk creating an "exit tax" regime for corporations leaving Delaware.

The Delaware Supreme Court agreed with defendants holding that the conversions did not provide non-ratable benefits sufficient to trigger entire fairness review. The Court began its analysis by considering what constitutes a "non-ratable benefit," which, if conferred on a controlling stockholder in a transaction with the controlled corporation, triggers entire fairness review under Delaware law. The Court confirmed that a non-ratable benefit must be "material" to avoid the business judgment rule. The Court then held that temporality, or whether the corporate decision is tied to obtaining a specific benefit to avoid an existing problem, is a key factor in determining the materiality of a potential non-ratable benefit. In reaching this conclusion, the Court cited Delaware cases illustrating the importance of temporality. For example, the Court cited cases in the advancement context holding that entire fairness review does not apply to director decisions adopting provisions regarding the advancement of litigation expenses when those provisions are adopted without regard to any particular litigation or expenses. The Court also pointed to Delaware cases distinguishing between the adoption of provisions limiting directors' liability for future conduct with actions to extinguish directors' existing potential liability for past conduct. Finally, the Court cited Delaware's ripeness and standing jurisprudence, which it concluded show that Delaware courts routinely apply temporal distinctions and require more than mere speculation about future litigation for a party to litigate a claim. With this background in mind, the Court held that that distinguishing between transactions that might limit potential future liability and transactions extinguishing existing potential liability is a workable solution in deciding whether a transaction confers a material, non-ratable benefit.

The Court then held that in this case, plaintiffs failed to allege facts showing the controlling stockholder and other corporate insiders received a material, non-ratable benefit sufficient to warrant entire fairness review. It emphasized the absence of any allegations that the conversion decisions were made "to avoid any existing or threatened litigation or that they were made in contemplation of any particular transaction." Thus, the Court found that the business judgment rule applied.

Concerns regarding comity and Delaware policy also supported its holding. While Delaware serves as the domicile for many U.S. corporations and other business entities, other states, including Nevada, are eager to compete by promoting their own corporate governance regimes. Where stockholder litigation rights as just "one stick in the corporate governance bundle," the Court observed that its holding furthers the goals of comity by declining to engage in "a cost-benefit analysis" of one state's corporate governance regime over another's, something it noted courts are "ill-equipped to quantify." Additionally, the Court concluded that not to second guessing directors' decisions to redomesticate aligns with Delaware policy, which has "long recognized the values of flexibility and private ordering." The Delaware Supreme Court's decision in *Maffei* reflects the evolving juridical and academic discussion regarding the competition between states as forums for corporate domicile and the effect that corporate domicile decisions can have on the outcome of

governance disputes [see, e.g., Harvard Law School Forum on Corporate Governance blog articles [here](#) and [here](#)]. By applying the business judgment rule to director decisions to reincorporate in another jurisdiction where such decisions are not motivated by existing operational issues, the Delaware Supreme Court leans into this competition by enhancing management's flexibility.

Copyright © 2025, Sheppard Mullin Richter & Hampton LLP.

National Law Review, Volume XV, Number 44

Source URL: <https://natlawreview.com/article/delaware-supreme-court-holds-business-judgment-governs-decision-reincorporate>