EXAMINING DATA POINTS IN MINORITY BUY-OUTS:
A PRACTITIONERS' REPORT

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ABSTRACT

The authors reviewed controlling stockholder/minority buyout transactions announced between January 1, 2006 and December 31, 2010, in which the controlling stockholder held more than 40% of the target company at the commencement of the transaction, the value paid for the minority stake was in excess of $50 million, and the transaction was successfully completed. This data shows that the Delaware Court of Chancery's efforts to make progress toward a more efficient and coherent approach to judicial review of minority buyout transactions are having de minimis, if any, impact, and that market forces, rather than existing case law, are the participants' primary drivers when deciding how to structure these types of transactions and how to respond to related litigation.

TABLE OF CONTENTS

I. INTRODUCTION ...........................................................................................................940
II. BACKGROUND ............................................................................................................940
   A. A Bifurcated Approach to Controlling Stockholder Buyout Transactions .................941
   B. Establishing a Unified Standard ..............................................................................946
   C. The Goals of the Delaware Courts in Pursuing the Unified Standard ......................948
   D. Difficulty of Achieving the Court of Chancery's Desired Outcomes—Data Points from Four Years of Controlling Stockholder Buyout Transactions ................................................949
III. The Failure of Pure Resources and the Dim Prospects of CNX ..............................950

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I. Introduction

Determination of the appropriate approach to review controlling stockholder/minority buyout transactions—i.e., where a controlling stockholder acquires the "minority" shares that it does not already own—requires resolution of the tension between deference to business judgment and protection against self-dealing and coercion.\(^1\) Delaware courts, along with legal practitioners and academics have been fascinated with this tension in the context of minority buyouts, and the debate continues without resolution.\(^2\) This Article critiques the progress of the effort to resolve this tension against a compilation of real-world data points collected from actual controlling stockholder buyout transactions. This data shows that the Delaware Court of Chancery's efforts to make progress toward a more efficient and coherent approach to judicial review of minority buyout transactions are having de minimis, if any, impact, and that market forces, rather than existing case law, are the participants' primary drivers when deciding how to structure these types of transactions and how to respond to related litigation.

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\(^1\)See, e.g., In re Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 606 (Del. Ch. 2005) (discussing and expanding upon the established judicial framework regarding the balance between deference to business judgment and protection against self-dealing).

\(^2\)See Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1117 (Del. 1994) (holding that deference should be paid to business judgment in a minority buyout when there is approval by either an independent committee or a majority of the minority of shareholders). But see Cox, 879 A.2d at 606 (expanding the doctrine to require the approval of both a committee and the majority of the minority of shareholders). See generally Guhan Subramanian, Fixing Freezeouts, 115 Yale L.J. 2 (2005) (discussing the conflict between business judgment deference and concerns of coercion).
II. BACKGROUND

A. A Bifurcated Approach to Controlling Stockholder Buyout Transactions

Delaware courts have sought to create a framework for analyzing controlling stockholder buyout transactions that balances traditional deference for business judgment with the need to discourage self-dealing by the controlling stockholder. The courts' efforts have given rise to two different analytical frameworks: (1) the heightened "entire fairness" review of transactions pursuant to negotiated merger agreements; and (2) deferential business judgment review where the controlling stockholder pursues the buyout of the unaffiliated or "minority" shares through a unilateral tender offer (i.e., outside the context of a negotiated agreement with the target's board). As discussed below, these two standards have converged somewhat over the last ten years.

The justification for the two different approaches arose from the courts' perception that the process of negotiating a merger agreement threatened unaffiliated stockholders' interests in a way that pursuing a unilateral tender offer did not. The negotiated merger agreement evoked a scene of opaque backroom deliberations, in which a controlling stockholder—an "800 pound gorilla" with "informational advantages and ... voting clout"—could promise reward or threaten retributive action against the target board with whom it was negotiating. In such a situation, the courts perceived "extraordinary potential for ... exploitation" by the controlling stockholder, in the form of a strong temptation for both the controlling stockholder and the target board to prioritize the controlling stockholder's interests ahead of those of the unaffiliated stockholders.

3 See, e.g., Kahn, 638 A.2d at 1115-17.
4 Id. at 1115-16.
5 See, e.g., Cox Commc'ns, 879 A.2d at 617.
6 Id. (discussing the advantages that a controlling stockholder has in negotiating a sale price with minority shareholders).
7 See In re Pure Res., Inc., S'holders Litig., 808 A.2d 421, 441 (Del. Ch. 2002) ("[I]t is important to remember that the overriding concern of Lynch is the controlling shareholders'] ... ability to take retributive action in the wake of rejection by an independent board, a special committee, or the minority. That ability is so influential that the usual cleansing devices that obviate fairness review of interested transactions cannot be trusted.").
8 Cox Commc'ns, 879 A.2d at 617.
9 See id.
Accordingly, when a stockholder challenges the terms of a negotiated merger, the Delaware Supreme Court requires that the target board demonstrate entire fairness—i.e., both fair process and fair price—to prevail.\(^{10}\) In Kahn v. Lynch, the case in which the Delaware Supreme Court established that the "entire fairness" doctrine would apply to all negotiated merger agreements involving a target company with a controlling stockholder, the Court identified two actions that the parties to a merger could take to preemptively demonstrate the deal's integrity: (1) secure approval of the transaction by an independent committee of the target's directors, or (2) condition the deal on approval by a majority of the minority stockholders (a "majority of the minority" condition).\(^{11}\) The benefit to the parties of taking these actions, however, is limited.\(^{12}\) Even when the parties adopt one or both of these safeguards, the result is to shift the burden to the challenging stockholder-plaintiff to provide evidence of either unfair price or unfair process.\(^{13}\) There is no possibility of dismissing the matter on the pleadings, and entire fairness scrutiny still applies.\(^{14}\)

In contrast to the backroom backdrop of negotiated mergers, the Delaware courts have placed unilateral tender offers in the context of transactional freedom.\(^{15}\) In a unilateral tender offer, the controlling stockholder makes the offer directly to the unaffiliated stockholder, who then commences his or her "evaluation of the merits of the offer," and voluntarily

\(^{10}\)Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1115 (Del. 1994) ("The concept of fairness has two basic aspects: fair dealing and fair price" (quoting Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983))).

\(^{11}\)Id. at 1117 (indicating that the presence of either of these conditions shifts the burden of proof to the minority stockholder (citing Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937-38 (Del. 1985))).

\(^{12}\)See id. (noting that even when these procedural safeguards are put into place, entire fairness remains the standard of review with the only difference being the shift of the burden of proof between the parties).

\(^{13}\)Id.

\(^{14}\)See Kahn, 638 A.2d at 1117; see also In re Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 605 (Del. Ch. 2005) ("Because that standard (as heretofore understood by practitioners and courts) makes it impossible for a controlling stockholder ever to structure a transaction in a manner that will enable it to obtain dismissal of a complaint challenging the transaction, each Lynch case has settlement value, not necessarily because of its merits but because it cannot be dismissed.").

\(^{15}\)See, e.g., In re Siliconix Inc., S'holders Litig., 2001 WL 716787, at *6 (Del. Ch. June 19, 2001), reprinted in 27 DEL. J. CORP. L. 1011, 1020 (2002) (stating that, in regard to unilateral tender offers, "shareholders of Delaware corporations are free to accept or reject the tender based on their own evaluation of their best interests").
accepts or rejects it based on that stockholder's "individual investment objectives."\textsuperscript{16} In such a context, the courts have explained that it is not their role to substitute its judgment for that of the stockholder in determining whether the price is "fair."\textsuperscript{17} Instead, the courts' role is to ensure that a stockholder is able to make the choice free from "improper coercion" or "disclosure violations."\textsuperscript{18}

Embracing this reduced role, the courts apply the business judgment rule if a stockholder files suit to challenge the terms of a unilateral tender offer, and place the burden of proof on the plaintiff-stockholder to provide evidence that "material information about the offer has been withheld or misrepresented or that the offer is coercive in some significant way."\textsuperscript{19} Only upon an adequate showing of evidence by the plaintiff will the courts subject the deal to the entire fairness standard or question the business judgment rule presumption.\textsuperscript{20} Absent such a showing, dismissal on the pleadings is available to defendants.\textsuperscript{21}

From time to time over the last decade, the Delaware Court of Chancery has questioned whether Delaware's bifurcated approach to these two types of controlling stockholder buyout transactions is justified.\textsuperscript{22} After all, from the point of view of the basic structural outcome of the transactions, the negotiated merger and the unilateral tender offer are no different.\textsuperscript{23} The

\textsuperscript{16}Id., reprinted in 27 DEL. J. CORP. L. 1011, 1021 (quoting Eisenberg v. Chicago Milwaukee Corp., 537 A.2d 1051, 1056 (Del. Ch. 1987)) (internal quotation marks omitted).

\textsuperscript{17}Id., reprinted in 27 DEL. J. CORP. L. 1011, 1021 (holding that "unless coercion or disclosure violations can be shown" pertaining to unilateral offers, a court need not evaluate whether the transaction was entirely fair) (citation omitted).

\textsuperscript{18}Id., reprinted in 27 DEL. J. CORP. L. 1011, 1020.


\textsuperscript{20}See id., reprinted in 27 DEL. J. CORP. L. 1011, 1021 (citation omitted).

\textsuperscript{21}See, e.g., id. at *17, reprinted in 27 DEL. J. CORP. L. 1011, 1037-38. Note, however, that the Court of Chancery's definition of what constitutes 'improper coercion' has significantly expanded over the past ten years. In re CNX Gas Corp., Sholders Litig., 4 A.3d 397, 406-14 (Del. Ch. 2010) (discussing the progression of coercion in Delaware precedent over the last decade).

\textsuperscript{22}In re Pure Res., Inc., Sholders Litig., 808 A.2d 421, 435 (Del. Ch. 2002) ("These strands appear to treat economically similar transactions as categorically different simply because the method by which the controlling shareholder proceeds varies . . . . This disparity creates a possible incoherence in our law.").

\textsuperscript{23}Id.
transactions are "economically similar" but are treated as "categorically different simply because the method by which the controlling stockholder proceeds varies."\(^{24}\)

More significantly, the Court of Chancery has challenged the underlying assumptions regarding the relative necessity of stockholder protection in each of the two transaction structures,\(^{25}\) identifying the stockholder in a tender offer context not as the free market participant described in earlier cases,\(^{26}\) but rather one of many "disaggregated stockholders" who must "decide whether to tender quickly, pressured by the risk of being squeezed out in a short-form merger at a different price later or being left as part of a much smaller public minority."\(^{27}\) The stockholder contemplating whether to participate in a tender offer may well be placed under at least the same pressure to accept the terms of the "800-pound gorilla" as the target board contemplating whether to adopt a negotiated merger agreement.\(^{28}\) If this is true, the Court of Chancery has reasoned, then the minority stockholders deciding whether to participate in a tender offer required more protection than the Delaware courts had been providing.\(^{29}\)

As the Court of Chancery considered whether Delaware courts were providing too little protection to unaffiliated stockholders in the unilateral tender offer context, it also began to express concern that the \textit{Kahn v. Lynch} "entire fairness" framework provided too much "protection" to stockholders in the negotiated merger context.\(^{30}\) The court noted, in \textit{dicta}, that the

\(^{24}\textit{Id.}\)

\(^{25}\textit{Id. at 435, 438-39.}\)

\(^{26}\textit{See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956-57 (Del. Ch. 1985) ("It is consistent with the principle that 'the minority stockholder shall receive the substantial equivalent in value of what he had before.' This concept of fairness, while stated in the merger context, is also relevant in the area of tender offer law.") (citations omitted).}\)

\(^{27}\textit{Pure Res., 808 A.2d at 435.}\)

\(^{28}\textit{See id. at 436.}\)

\(^{29}\textit{Id. at 441-42 ("The problem is that nothing about the tender offer method of corporate acquisition makes the 800-pound gorilla's retributive capabilities less daunting to minority stockholders. Indeed, many commentators would argue that the tender offer form is more coercive than the merger vote."."\})}\)

\(^{30}\textit{Compare id. at 441 ("In this regard, it is important to remember that the overriding concern of \textit{Lynch} is the controlling shareholders have the ability to take retributive action in the wake of rejection by an independent board, a special committee, or the minority shareholders. The ability is so influential that the usual cleansing devices that obviate fairness review of interested transactions cannot be trusted."). with \textit{In re Cox Comms'}, Inc. S'holders Litig., 879 A.2d 604, 619-22 (Del. Ch. 2005) ("The incentive system that \textit{Lynch} created for plaintiffs' lawyers is its most
negotiated merger participants' inability to seek dismissal on the pleadings, once a merger agreement was challenged and subjected to "entire fairness" review, generated a troubling pattern of free-riding plaintiffs' litigation;\textsuperscript{31} litigation that predictably followed the announcement of each transaction, but that did not actually serve the interests of the unaffiliated stockholders.\textsuperscript{32}

As identified by then-Vice Chancellor Strine in \textit{Cox Communications}, and still accurate today,\textsuperscript{33} it has become inevitable that plaintiff-stockholders react to the announcement of a controlling stockholder's proposal to negotiate a merger agreement at a specified price by filing suit purportedly on behalf of the general class of unaffiliated stockholders.\textsuperscript{34} The target board then appoints a special committee and dual negotiations commence—one set of negotiations between the special committee and the controlling stockholder that is real and hard fought, and a parallel set of phantom negotiations that involve the plaintiff-stockholders.\textsuperscript{35} Eventually, the special committee and controlling stockholder reach and announce a deal (on improved terms from those originally proposed) and, in the spirit of settling the plaintiffs' litigation, volunteer to recognize some contribution of plaintiffs in securing the improved terms (generally formalized in a Memorandum of Understanding).\textsuperscript{36} The plaintiffs readily agree to settle the case (subject to perfunctory confirmatory discovery) and plaintiffs' counsel petitions for fees to remunerate them for their "work" and the improved terms they "earned" for the stockholders.\textsuperscript{37} Plaintiffs' counsel receive their

problematic feature, however, and the consequence that motivates the objectors' contentions here. . . . Unlike any other transaction one can imagine—even a Revlon deal—it was impossible after \textit{Lynch} to structure a merger with a controlling stockholder in a way that permitted the defendants to obtain a dismissal of the case on the pleadings.").

\textsuperscript{31}Cox Comm'ns, 879 A.2d at 619-20.

\textsuperscript{32}Id. at 620.

\textsuperscript{33}\textit{See In re Revlon, Inc. S'holders Litig.}, 990 A.2d 940, 945 (Del. Ch. 2010) (describing the now familiar scenario then-Vice Chancellor Strine outlined as the "opening steps in the Cox Communications Kabuki dance").

\textsuperscript{34}Cox Comm'ns, 879 A.2d at 620 ("Instead of suing once a controller actually signs up a merger agreement with a special committee of independent directors, plaintiffs sue as soon as there is a public announcement of the controller's intention to propose a merger.").

\textsuperscript{35}Id. at 620-21 (coining the conversations between the special committee and the controlling stockholder as "first track" negotiations and the discussions with plaintiffs' counsel as "second track" negotiations).

\textsuperscript{36}Id. at 621.

\textsuperscript{37}Id. at 621-22 (noting that although counsel is "pragmatic" in their petitions for fees, plaintiffs' counsel claim to have had a hand in the price increase, even though the price would have increased regardless of any effort on the plaintiff-counsels' part); \textit{see also} Elliot J. Weiss & Lawrence J. White, \textit{File Early, Then Free Ride: How Delaware Law (Mis)shapes Shareholder
fees (on occasion reduced by the Court), and the merger moves forward, with the controlling stockholder/acquiror absorbing the cost of these fees as the price of settlement.\textsuperscript{38}

Then-Vice Chancellor Strine highlighted in \textit{Cox Communications} the absence of a single instance in which plaintiffs rejected the terms negotiated by the special committee as inadequately beneficial for the unaffiliated stockholders: "[I]n every instance, the plaintiffs' lawyers have concluded that the price obtained by the special committee was sufficiently attractive, that the acceptance of a settlement at that price was warranted."\textsuperscript{39} The key takeaway from Cox is that if plaintiffs' counsel adds no value to what the special committee already achieves once the special committee's process concludes, then the special committee process is sufficient to protect the unaffiliated stockholders, and application of "entire fairness," in depriving defendants of a way to demonstrate this and secure dismissal on the pleadings, serves solely to line the pockets of plaintiffs' lawyers and clog up the docket.\textsuperscript{40}

\textbf{B. Establishing a Unified Standard}

Over the last decade, the Delaware Court of Chancery has attempted to address the problems with the bifurcated legal framework.\textsuperscript{41} First, in the 2002 \textit{Pure Resources} decision, the Court of Chancery established a heightened standard for a tender offer to qualify as "non-coercive" and not

\textit{Class Actions}, 57 VAND. L. REV. 1797, 1829-30 (2004) (asserting that such suits generate significant revenue for firms while posing minimal risk).

\textsuperscript{38}\textit{Cox Commcn's}, 879 A.2d at 622-23.

\textsuperscript{39}Id. at 622 (citing Weiss & White, \textit{supra} note 37, at 1820 & n. 84, 1833-34).

\textsuperscript{40}See id. at 622, 640-42 ("The size of the supposed benefit is largely a product of the size of the transaction itself. . . . I have absolutely no reason to believe that the plaintiffs are responsible for more than a very small amount of the difference between the original offer and the negotiated price. There is nothing in the record that shows that the plaintiffs had any novel legal arguments up their sleeve. . . . The plaintiffs' negotiations with the Family prove nothing more than that the defendants knew that there was a value, per \textit{Lynch}, in resolving the suit, and that they needed to negotiate to accomplish that. At most, the plaintiffs were a stand-by monitor of a Special Committee negotiation process that could have gone wrong, but apparently never did.").

\textsuperscript{41}See, e.g., \textit{In re Pure Res., Inc., S'holders Litig.}, 808 A.2d 421, 452 (Del. Ch. 2002) (bolstering scrutiny levels in minority buyout transactions so as to address parties' materially misleading information and "the possibility that structural coercion will taint the tendering process"); \textit{see also} Reis v. Hazelet Strip-Casting Corp., 2011 WL 4346913, at *17 (Del. Ch. Feb. 1, 2011) (holding that bifurcation is counterproductive where "where the fair price analysis and remedial determination coincide").
materially misleading. Specifically, then-Vice Chancellor Strine held that a controlling stockholder pursuing a unilateral tender offer would have to: (1) condition the offer on a non-waivable majority of the minority condition; (2) ensure that the transaction was accompanied by a special committee process in which independent directors of the target board had "adequate time" and "free rein" to react to the tender offer; (3) not make retributive threats; (4) agree to a short-form merger at the tender price promptly after the tender accomplished a 90% ownership threshold; and (5) adequately and accurately disclose information related to the offer. Only if these conditions were satisfied would a defendant-controlling stockholder be able to utilize the business judgment rule presumption and obtain dismissal on the pleadings.

The Court of Chancery progressed more slowly with respect to scaling back plaintiff-stockholder advantages in the negotiated merger context. In a footnote to the Pure Resources decision, then-Vice Chancellor Strine suggested the possibility of a "slight easing" of the Lynch standard to create a business judgment rule safe harbor for deals structured as negotiated mergers. Three years later, in Cox Communications, then-Vice Chancellor Strine explicitly proposed that the courts develop a "unified... standard" for the treatment of negotiated mergers and tender offers that would provide both transactions with the same safe harbor from "entire fairness." Five years later, in the 2010 context of a stockholder challenge to the tender offer by CONSOL for the publicly held shares of CONSOL's subsidiary, CNX Gas, Vice Chancellor Laster responded to former Vice Chancellor Strine's call and adopted a unified standard for a safe harbor from "entire fairness" for both tender offers and negotiated mergers.

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42 Pure Res., 808 A.2d at 445-46.
43 Id. at 445.
44 Id. at 445-46 (stating that once these requirements have been met, "the law should be chary about imposing the full fiduciary requirement of entire fairness upon the statutory tender offer process").
45 See id. at 444 & n.43.
46 Pure Res., 808 A.2d at 444 n.43.
47 879 A.2d 604 (Del. Ch. 2005).
48 Id. at 607.
49 In re CNX Gas Corp., S'holders Litig., 4 A.3d 397, 405-07, 413-14 (Del. Ch. 2010) ("The tension created by the different fiduciary standards has been discussed at length by Vice Chancellor Strine and generated reams of scholarly and practitioner commentary. I will set forth my own views in more abbreviated fashion." (citing, inter alia, Leo E. Strine, Jr., The Inescapably Empirical Foundation of the Common Law of Corporations, 27 DEL. J. CORP. L. 499, 507-14 (2002))).
In **CNX Gas**, the Court of Chancery held that business judgment review would be available in all controlling stockholder buyout transactions, regardless of form, that were both (1) negotiated and recommended by a special committee with the full authority of the Board (including authority to negotiate, consider alternatives, and adopt a stockholder rights plan), and (2) approved by a majority of the minority stockholders in satisfaction of an unwaivable condition to this effect.50

**C. The Goals of the Delaware Courts in Pursuing the Unified Standard**

The Delaware Court of Chancery's adoption of a unified standard in **CNX Gas** reflects two clear goals.51 The first goal is to protect unaffiliated stockholders by encouraging parties to a transaction to use both an empowered special committee and a majority of the minority condition.52 The Court of Chancery describes these stockholder safeguards as serving complementary functions.53 Then-Vice Chancellor Strine explained in Cox that the special committee is better suited than "disaggregated stockholders" to negotiate and bargain with the controlling stockholder to get the best terms for minority stockholders, while a majority of the minority condition allows stockholders to play an "integrity-enforcing" role of ensuring that the special committee has effectively bargained on the minority stockholders' behalf.54

The second goal of the unified standard is to reduce frivolous litigation, identified in Cox as the "most problematic feature" of Lynch.55 By creating an opportunity for dismissal on the pleadings in negotiated merger transactions as well as unilateral tender offers, the Court of Chancery explained, the unified standard would improve the "integrity of the representative litigation process... as those cases that would be filed would involve plaintiffs and plaintiffs' lawyers who knew that they could only succeed by filing and actually prosecuting meritorious claims, and not by

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50Id. at 412-13.
51Id. at 413 (stating that if the unified standard of establishing a special committee and using the majority of the minority standard from Cox, the business judgment rule would allow "viabl[e]... challenge to a controlling stockholder merger in which both protective devices are used [and] can... be assessed prior to trial," thereby reducing pointless litigation).
52Id. at 412-13.
53*In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 619 (Del. Ch. 2005).
54Id.
55Id. at 619-20.
free riding on a special committee's work.\textsuperscript{56} Moreover, adopting the special committee and majority of the minority conditions would promote a system of internal policing of the transaction, limiting the requirement of court involvement in the first instance.\textsuperscript{57}

D. Difficulty of Achieving the Court of Chancery's Desired Outcomes—Data Points from Four Years of Controlling Stockholder Buyout Transactions

The goals of the Court of Chancery are straightforward, and its method of achieving them is arguably more coherent than the bifurcated approach that, until the Delaware Supreme Court rules otherwise, remains law. However, our research and experience suggest that the Court of Chancery will have a difficult time convincing controlling stockholders and target boards that opting in to the unified standard's safe harbor is in their best interests.\textsuperscript{58} In fact, given the costs and uncertainties associated with the requirements of the safe harbor, we predict that many controlling stockholders and target boards will choose to proceed outside of it, and live with the burdens of confronting "entire fairness" challenges.

Recently, we reviewed controlling stockholder buyout transactions announced between January 1, 2006 and December 31, 2010, in which the controlling stockholder held more than 40% of the target company at the commencement of the transaction, the value paid for the minority stake was in excess of $50 million, and the transaction was successfully completed.\textsuperscript{59} Of the approximately forty-five transactions that met these parameters, we narrowed the deals examined to twenty-seven, excluding situational outliers, foreign or non-corporate targets, and a few transactions in which full information was not publicly available. Among the variables we examined were how the deal was structured, whether it included a majority of the minority condition and/or a special committee, whether stockholder litigation was filed, and, as applicable, the amount of plaintiffs' counsel fees and expenses related to settlement. The summary chart of our findings is laid out at the end of this Article in an extended chart format.\textsuperscript{60} While the limited sample size and inherently complex nature of the transaction processes

\textsuperscript{56}Id. at 607.
\textsuperscript{57}See Cox Comm'ns, 879 A.2d at 607.
\textsuperscript{58}See infra app. A.
\textsuperscript{59}See generally infra app. A.
\textsuperscript{60}See infra app. A.
preclude any claims as to scientific significance, the review did reveal some interesting and instructive findings.

III. THE FAILURE OF PURE RESOURCES AND THE DIM PROSPECTS OF CNX

Few controlling stockholders bother to take advantage of the protection of the Pure Resources safe harbor from entire fairness review. Of the twenty-seven deals we reviewed, only eight were structured as unilateral tender offers. The remaining nineteen involved signed merger agreements, providing for either a one-step or two-step (tender offer followed by short-form merger) structure, and therefore triggered automatic application of "entire fairness" and loss of the ability to prevail on the pleadings. At its most basic level, this means that 70% of the controlling stockholders in our review felt that the benefits of the Pure Resources safe harbor from "entire fairness" review were not worth the costs of pursuing it.

The decision not to pursue the Pure Resources safe harbor involves multiple considerations, but the most meaningful is the distastefulness of the majority of the minority closing condition, a mandatory and unwaivable element of the Pure Resources safe harbor, but optional in the "entire fairness"/negotiated merger agreement context when combined with a special committee. Even for corporations with fairly large market caps, there exist real risks that hedge funds and arbitrageurs will engage in open market purchases of equity sufficient to prevent the satisfaction of a majority of the minority condition. The execution risks that arise from subjecting a transaction's success to the whims of "minority" stockholders are often equally unattractive to both controlling stockholders and the special committee; the former concerned about the risk that they may have to pay ransom in the form of increased offer prices to satisfy the demands of minority stockholders, and the latter wary about the stigma of stockholder

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61See infra app. A.
62See infra app. A (listing the eight unilateral tender offers as Consol/CNX; CoreLogic/First Advantage Corp.; Hearst Corp./Hearst-Argyle Television Inc.; Cox Enter./Cox Radio; Lafarge/Lafarge N. Am.; Offeror/William Lyon Homes; Koninklijke KPN NV/iBasis; and Investor Grp./Erie Family Life Ins. Co.).
63See infra app. A.
64See infra app. A.
66Id. at 7.
rejection of an offer recommended by them after good faith negotiations with the controlling stockholder or, less egotistically, genuinely concerned that the public stockholders will reject an offer that really is in their best interests.67

These baseline concerns about the risks inherent with an unwaivable majority of the minority condition were supplemented by the Court of Chancery's decision in the CNX decision, which injected doctrinal uncertainty into calculations regarding how and when the condition would be deemed satisfied.68 Specifically, in CNX, the court questioned the inclusion of T. Rowe Price, the largest minority stockholder of CNX Gas (the target company) and the holder of roughly equivalent equity shares of both CONSOL (the controlling stockholder) and CNX Gas, as part of the "minority" stockholders required to approve the transaction.69 Observing T. Rowe Price's holdings and the fact that it had pre-negotiated merger terms with CONSOL in exchange for its promise to tender, the Court of Chancery determined that T. Rowe Price had "materially different incentives" from the other "minority" holders of CNX stock, and, therefore, their tender should not be counted for the purposes of determining whether the majority of the minority condition was satisfied.70 The Court of Chancery rejected the defendants' protest that delving into a particular stockholder's incentives, in a world where "[s]ophisticated institutional investors . . . often have diverse holdings that could include shares of both parent and subsidiary[,] . . . have complex hedging arrangements, [and] possess holdings in competitor corporations," was "unworkable as well as unwarranted."71 Unwarranted or not, by increasing the uncertainty regarding satisfaction of the majority of the minority condition, the CNX court created an additional burden for those who might otherwise have attempted to require it.72

67See id.

68In re CNX Gas Corp., S'holders Litig., 4 A.3d 397, 416 (Del. Ch. 2010) ("[T]he plaintiffs have raised sufficient questions about the role of T. Rowe Price to undercut the effectiveness of the majority-of-the-minority tender condition.").

69Id.

70Id. (noting that although T. Rowe Price's inclusion into the majority of the minority vote called the effectiveness of the condition into question, the court was not required to definitively decide the effectiveness of the condition because the standard used was the unified Cox standard).

71Id. at 416-17 (quoting Defendant CONSOL's Answering Brief) (internal quotation marks omitted).

72See Delaware Court of Chancery Revisits Standard for Going Private Transactions with Controlling Stockholders, CLEARY GOTTLIEB STEIN & HAMILTON at 3-4 (June 2, 2010), http://www.cgsh.com/delaware_court_of_chancery_revisits_standard_for_going_private_transaction
CNX also complicated the landscape for merger parties considering whether to seek protection of a Pure Resources safe harbor by heightening the standards required to satisfy the second prong of the safe harbor: the special committee process. In CNX, the Court of Chancery determined that a special committee must be accorded the right not only to recommend against and refuse to adopt any proposed transaction, but also the extraordinary right to adopt a stockholder rights plan that would, if implemented, block completely any buyout transaction that the special committee did not adopt or recommend. The right to adopt a stockholder rights plan creates a particularly significant risk for the controlling stockholder: If the controlling stockholder runs into a dead-end in its negotiations with the special committee, and the special committee adopts a rights plan, the controlling stockholder will be prevented from presenting its case directly to the other stockholders by way of a unilateral tender offer. If implemented, the rights plan would preclude even a unilateral tender offer that would have had a reasonable chance of satisfying entire fairness. Indeed, such a tender offer under the (pre-CN) Pure Resources paradigm would have qualified for deferential, business judgment rule treatment.

In sum, to the extent that our research of past transactions reflects an already-existing skepticism of the net benefit of the Pure Resources safe harbor, the heightened standards of the CNX safe harbor may well further encourage a controlling stockholder to take its chances with "entire fairness." Accordingly, we predict that the Court of Chancery will not see

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s_with_controlling_stockholders/ (listing, inter alia, that one of the factors of uncertainty created by the decision was how one determines the composition of the minority with a level of confidence when engaging in a transaction).

73 Id. at 3.

74 CNX, 4 A.3d at 415 ("A subsidiary board, acting directly or through a special committee, can deploy a rights plan legitimatly against a controller's tender offer, just as against a third-party tender offer, to provide the subsidiary with time to respond, negotiate, and develop alternatives.").

75 Id. at 414-15 ("The shadow of pill adoption alone may be sufficient to prompt a controller to give a special committee more time to negotiate or to evaluate how to proceed.").

76 Id.

77 Id. at 418, 420 ("Were I evaluating the Tender Offer under the Pure Resources standard, I would incline toward (i) enjoining the transaction preliminarily until CONSOL modified the Tender Offer to exclude the Mid-Cap Growth Fund shares from the majority-of-the-minority calculation and (ii) requiring disclosure of the change followed by sufficient time for CNX Gas stockholders to consider its implications and respond. But because I am evaluating the Tender Offer under the Cox Communications unified standard, I do not need to rule definitively on the effectiveness of the majority-of-the-minority condition.").

78 CLEARY GOTTlieb STEIN & HAMILTON, supra note 72, at 4.
any meaningful movement among merger parties toward embracing the business judgment rule safe harbor outlined in CNX.

IV. SAFE HARBORS FROM "ENTIRE FAIRNESS" HAVE NOT DETERRED LITIGATION CHALLENGES, RESULTED IN DISMISSALS OF CHALLENGES, NOR RESULTED IN MEANINGFUL SAVINGS IN PAYOUTS TO PLAINTIFFS' COUNSEL

Regardless of whether a minority buyout transaction is a tender offer carefully structured to take advantage of the Pure Resources safe harbor from "entire fairness," or a negotiated merger agreement that will likely be subject to "entire fairness," our research shows that the transaction will be challenged by purported class action lawsuits initiated by the plaintiffs' bar. In twenty-four of the twenty-seven transactions we reviewed, stockholder litigation was filed—a rate of 89%. Litigation was filed in all eight unilateral tender offer transactions—i.e., tender offers where there was no merger agreement adopted by the target board and where the Pure Resources safe harbor, therefore, should have been available. Indeed, seven of these eight tender offers included both a special committee recommendation and a majority of the minority condition, which should have made them prime candidates to earn a dismissal on the pleadings. Nevertheless, not a single one of these litigation challenges to tender offers was dismissed on the pleadings. Of the eight unilateral tender offer litigations, six ended in settlement; in one, litigation was not pursued, and in another, litigation was ongoing at the time of our review. If the objective of Pure Resources was to discourage litigation or give rise to opportunities for dismissal when a unilateral tender

79 See infra app. A; see also Klingsberg, supra note 65, at 2 (stating that one of the constant variables "[o]n the heels of almost every announcement of a minority buyout proposal of significant value is an announcement of the filing of class action lawsuits alleging that (1) the target board is at risk of imminently adopting the controlling stockholder's proposal and thereby breaching its fiduciary duties and (2) the controlling stockholder is improperly coercing the target board and target's public stockholders into accepting the buyout proposal").

80 See infra app. A.

81 See infra app. A.

82 One unilateral offer had a majority of the minority condition, but no special committee. The reason cited was the absence of independent Board Members. See infra app. A, Erie Life Ins.


84 See infra app. A.
offer by a controlling stockholder takes heed of the safeguards outlined in the opinion,\textsuperscript{85} then the opinion has been a failure.\textsuperscript{86}

Of the nineteen transactions we reviewed that fell within the "entire fairness" territory of negotiated merger transactions, all nineteen utilized a special committee and sixteen spurred stockholder litigation.\textsuperscript{87} Nine of these litigations ended in settlement, five of which involved deals with a majority of the minority condition.\textsuperscript{88} Four of the litigations were voluntarily withdrawn, only one of which involved a deal including a majority of the minority condition.\textsuperscript{89} Finally, two of the negotiated merger litigations were ongoing at the time of our review, and one (heard in Connecticut) was dismissed.\textsuperscript{90} Of the three transactions in which no litigation was filed, all were merger agreement transactions and none included a majority of the minority condition. This data points toward the conclusion that inclusion of a majority of the minority condition on top of a special committee process does not, in practice, earn the transaction any additional protection against suits being filed, or any greater likelihood of dismissal.

One may suspect that, given the backdrop of the \textit{Pure Resources} safe harbor from "entire fairness," and therefore the availability of a victory on a motion to dismiss, the cost of settling with plaintiffs' counsel in a unilateral tender offer context, at least where the tender offer includes procedural protections, would be meaningfully less than the cost of settling in the context of a merger agreement where "entire fairness" protects plaintiffs from being knocked out of court on the pleadings.\textsuperscript{91} But, contrary to expectations, our review did not support that conclusion.\textsuperscript{92} In fact, among the five unilateral tender offer transactions that included both majority of the minority and special committee protections, and for which litigation settled, average plaintiffs' attorneys' fees and expenses paid by the defendants were 0.72% of total deal value.\textsuperscript{93} In negotiated merger transactions, by contrast, the average fees and expenses were 0.24% of total deal value.\textsuperscript{94} In other words, those controlling stockholders and target boards that fashioned their

\textsuperscript{85} \textit{In re} Cox Commc'n, Inc. S'holders Litig., 879 A.2d 604, 607, 619-20 (Del. Ch. 2005).
\textsuperscript{86} See generally infra app. A.
\textsuperscript{87} See infra app. A.
\textsuperscript{88} See infra app. A.
\textsuperscript{89} See infra app. A.
\textsuperscript{90} See infra app. A.
\textsuperscript{91} See infra app. A.
\textsuperscript{92} See generally infra app. A.
\textsuperscript{93} See infra app. A.
\textsuperscript{94} See infra app. A.
transactions in accordance with the *Pure Resources* safe harbor were burdened with greater average settlement costs than their counterparts that had chosen to endure "entire fairness" scrutiny.

Our data did suggest a small savings in settlement costs associated with adopting a majority of the minority condition in the "entire fairness" context.\(^5\) Among the nine transactions with negotiated merger agreements that ended in settlement, the average plaintiffs' attorneys' fees and expenses were 0.18% of total deal value in the five transactions that included a majority of the minority condition and a special committee safeguard,\(^6\) and 0.30% of total deal value in the four transactions that did not include a majority of the minority condition to supplement the special committee process.\(^7\) Unfortunately, the potential savings of twelve basis points is insubstantial in most deals, particularly when weighed against the execution risks associated with taking on a majority of the minority condition.

**V. What's Next?**

The ultimate challenge for the Delaware courts in the context of minority buyouts is identifying a unified standard of review for these transactions that actually achieves the dual objectives of stockholder protection and a reduction of litigation when sufficient protections exist. We expect that dealmakers will not use either of the safe harbors designed by the Court of Chancery in *CNX* or *Pure Resources* as their preferred approach, but instead (and subject to the cooperation of the target's special committee) opt in the first instance to bear the risk of paying slightly higher settlement fees and pursue a negotiated merger agreement without any majority of the minority condition. The main driver of this conduct will be fear of hedge funds, proxy advisory firms, and other stockholder forces making satisfaction of the majority of the minority condition problematic. The fallback approach will be that of the *Pure Resources* unilateral tender offer with a majority of the minority condition, but not necessarily the recommendation of the special committee.\(^8\) Some controlling stockholders

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\(^5\) *See infra* app. A.

\(^6\) *See infra* app. A.

\(^7\) This statistic includes the *Lightsquared* transaction, in which a majority of the minority condition was negotiated as part of the settlement with plaintiff-shareholders. *See infra* app. A. Without the *Lightsquared* transaction, the average fees increase to 0.20%, indicating an even smaller cost savings associated with adoption of the majority of the minority condition.

\(^8\) *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 445 (Del. Ch. 2002) (stating that "our law should only consider an acquisition tender offer by a controlling stockholder non-coercive when
will agree to majority of the minority conditions in the context of negotiated merger agreements (indeed, there were nine among the twenty negotiated merger agreements that we reviewed).\(^9\) In these situations, the unified standard of \(CNX\), if followed more widely, may help them achieve cheaper settlements or obtain dismissals.

With respect to reducing litigation, the outlook is not good. Litigation has become an expected part of the controlling stockholder buyout context.\(^10\) The Court of Chancery has not yet convinced controlling stockholders, target boards, or plaintiffs' counsel that an attainable, dependable safe harbor-based dismissal on the pleadings is available.\(^11\) Almost seven years after Pure Resources, there is not a case that we are aware of that the Chancery Court has dismissed based on the safe harbor created by that case. Moreover, as the Delaware courts' requirements for meeting the safe harbor continue to shift, as evidenced by the decision in \(CNX\), the confidence of dealmakers that they will be able to take advantage of a safe harbor from "entire fairness" will continue to diminish, and plaintiffs' counsel will continue to be emboldened, regardless of whether meaningful safeguards are employed for the benefit of the unaffiliated stockholders.\(^12\)

At its best, the threat of litigation keeps dealmakers honest. At worst, it creates a nuisance cost of settlement that dealmakers calculate upfront, and subtracts from the consideration that a controlling stockholder is willing to offer to the unaffiliated stockholders. Our hope is that any unified standard adopted and refined by the Delaware courts will establish a business judgment rule safe harbor that is both clearly defined and realistically attainable. If the courts proceed without addressing the real barriers to companies of opting into its framework, past practice suggests that the courts' efforts will neither impact how transactions are structured nor reduce litigation, but at most, will tweak the calculus for the settlement of litigation.\(^13\)

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\(^9\) See infra app. A.
\(^10\) See infra app. A.
\(^11\) See infra app. A.
\(^12\) See infra app. A.
\(^13\) See infra app. A.
### Summary of Recent Minority Buyout Transactions

<table>
<thead>
<tr>
<th>Controlling SH/Target (Date)</th>
<th>Controlling SH Pre-Bid Equity Holdings</th>
<th>Structure</th>
<th>Majority of the Minority Condition</th>
<th>Completion of Negotiations with Special Committee: Before or After Initial Public Announcement of Deal</th>
<th>Plaintiffs' Litigation: Plaintiffs' Counsel Fees and Expenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Williams Partners LP/Williams Pipeline Partners LP (2010) Delaware $335.17</td>
<td>47.70%</td>
<td>Merger Agreement (one-step; all stock)</td>
<td>Yes, Waivable Voluntary</td>
<td>Before Public Announcement</td>
<td>Settlement Memorandum of Understanding: $810 Court Approved Settlement: $810 Plaintiffs' Counsel Fees = .24% of deal value</td>
</tr>
</tbody>
</table>

<sup>104</sup> All values include fees and expenses.

<sup>105</sup> All dollar values in millions.
### Summary of Recent Minority Buyout Transactions

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<th>Majority of the Minority Condition</th>
<th>Completion of Negotiations with Special Committee: Before or After Initial Public Announcement of Deal</th>
<th>Plaintiffs' Litigation: Plaintiffs' Counsel Fees and Expenses¹⁰⁴</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highland Capital Management LP/ American Homepatient Inc. (2010) Nevada $213.64</td>
<td>78.50% Merger Agreement (one-step; all cash)</td>
<td>No</td>
<td>Before Public Announcement</td>
<td>No Litigation</td>
</tr>
<tr>
<td>Consol Energy Inc/ CNX Gas Corp. (2010) Delaware $963.31</td>
<td>83.32% No Merger Agreement: Tender Offer + Short-form Merger</td>
<td>Yes, Non-waivable</td>
<td>After Public Announcement</td>
<td>Ongoing</td>
</tr>
<tr>
<td>Harbinger Capital Partners/ LightSquared Inc. (prev Skyterra Communications Inc.) (2009) Delaware $1052.7</td>
<td>46% Merger Agreement (one-step; all cash)</td>
<td>Yes, Non-waivable</td>
<td>Before Public Announcement</td>
<td>Stipulation of Settlement: $1.350 Court Approved Settlement: $1.350 Plaintiffs' Counsel Fees = .12% of deal value</td>
</tr>
</tbody>
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### Summary of Recent Minority Buyout Transactions

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<th>Controlling SH Pre-Bid Equity Holdings</th>
<th>Structure</th>
<th>Majority of the Minority Condition</th>
<th>Completion of Negotiations with Special Committee: Before or After Initial Public Announcement of Deal</th>
<th>Plaintiffs' Litigation: Plaintiffs' Counsel Fees and Expenses¹⁰⁴</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fairfax Financial Holdings Ltd/ Odyssey Re Holdings Corp. (2009) Delaware</td>
<td>$1040.85</td>
<td>72.60%</td>
<td>Merger Agreement (two-step; Tender Offer + Short-form Merger)</td>
<td>Yes, Non-waivable Voluntary</td>
<td>After Public Announcement Litigation dismissed</td>
</tr>
<tr>
<td>CoreLogic Inc. (prev First American Corp.)/ First Advantage Corp. (2009) Delaware</td>
<td>$59.64</td>
<td>74%</td>
<td>No Merger Agreement: Exchange Offer + Short-Form Merger</td>
<td>Yes, non-waivable plus waivable super-majority (90%) condition Voluntary</td>
<td>After Public Announcement Stipulation of Settlement: $925 Court Approved Settlement: $925 Plaintiffs' Counsel Fees = 1.55% of deal value</td>
</tr>
</tbody>
</table>
## Summary of Recent Minority Buyout Transactions

<table>
<thead>
<tr>
<th>Controlling SH/Target (Date) Target's State of Incorporation</th>
<th>Transaction Value</th>
<th>Controlling SH Pre-Bid Equity Holdings</th>
<th>Structure</th>
<th>Majority of the Minority Condition</th>
<th>Completion of Negotiations with Special Committee: Before or After Initial Public Announcement of Deal</th>
<th>Plaintiffs' Litigation: Plaintiffs' Counsel Fees and Expenses¹⁰⁴</th>
</tr>
</thead>
<tbody>
<tr>
<td>PepsiCo Inc/NC/ PepsiAmericas Inc. (2009) Delaware</td>
<td>$3921.29</td>
<td>43.02%</td>
<td>Merger Agreement (one-step; combination cash/stock)</td>
<td>No.</td>
<td>After Public Announcement</td>
<td>Stipulation of Settlement: $7.75 Court Approved Settlement: $7.75 Plaintiffs' Counsel Fees = .2% of deal value</td>
</tr>
<tr>
<td>Hearst Corp/ Hearst-Argyle Television Inc. (2009) Delaware</td>
<td>$75.91</td>
<td>82%</td>
<td>No Merger Agreement: Tender Offer + Short-form Merger.</td>
<td>Yes, Non-waivable Voluntary.</td>
<td>After Public Announcement</td>
<td>Memorandum of Understanding: $3.75 Court Approved Settlement: $3.75 Plaintiffs' Counsel Fees = .49% of deal value</td>
</tr>
<tr>
<td>Cox Enterprises Inc./ Cox Radio Inc. (2009) Delaware</td>
<td>$84.67</td>
<td>78%</td>
<td>No Merger Agreement: Tender Offer + Short-form Merger</td>
<td>Yes, Non-waivable plus waivable super-majority (90%) condition Voluntary</td>
<td>After Public Announcement</td>
<td>Stipulation of Settlement: $5.725 Court Approved Settlement: $1.077 Plaintiffs' Counsel Fees = 1.3% of deal value</td>
</tr>
<tr>
<td>Controlling SH/ Target (Date)</td>
<td>Controlling SH Pre-Bid Equity Holdings</td>
<td>Structure</td>
<td>Majority of the Minority Condition</td>
<td>Completion of Negotiations with Special Committee: Before or After Initial Public Announcement of Deal</td>
<td>Plaintiffs' Litigation: Plaintiffs' Counsel Fees and Expenses$\textsuperscript{104}</td>
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</table>
| Roche/ Genentech (2008) Delaware $44,047 | 55.8% Merger Agreement (two-step; Tender Offer + Short-form Merger) | Yes, Non-waivable Voluntary | After Public Announcement | Stipulation of Settlement: $24,500  
Court Approved Settlement: $24,500  
Plaintiffs' Counsel Fees = .06% |
| Nationwide Corporation/ Nationwide Financial Services, Inc. (2008) Delaware $2,467.17 | 100% Class B Shares (representing 95% of the voting power.) Merger Agreement (one-step; all cash) | No | After Public Announcement | Stipulation of Settlement: $3,500  
Court Approved Settlement: $3,500  
Plaintiffs' Counsel Fees = .15% of deal value |
Court Approved Settlement: $1,250  
Plaintiffs' Counsel Fees = .03% of deal value |
### Summary of Recent Minority Buyout Transactions

<table>
<thead>
<tr>
<th>Controlling SH/ Target (Date)</th>
<th>Target's State of Incorp</th>
<th>Transaction Value</th>
<th>Controlling SH Pre-Bid Equity Holdings</th>
<th>Structure</th>
<th>Majority of the Minority Condition</th>
<th>Completion of Negotiations with Special Committee: Before or After Initial Public Announcement of Deal</th>
<th>Plaintiffs’ Litigation: Plaintiffs’ Counsel Fees and Expenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Renova Media Enterprises Ltd./ Moscow CableCom Corp. (2006) Delaware</td>
<td></td>
<td>$247.69</td>
<td>40% (plus right to acquire shares to reach 62.7% voting power through exercise of warrants)</td>
<td>Merger Agreement (one-step; all cash)</td>
<td>No (Shareholder approval not required/sought)</td>
<td>After Public Announcement</td>
<td>Litigation not pursued</td>
</tr>
<tr>
<td>Investor Group (MBO)/ Waste Industries USA, Inc. (2007) North Carolina</td>
<td></td>
<td>$262.72</td>
<td>51%</td>
<td>Merger Agreement (one-step; all cash)</td>
<td>No (Proxy statement disclosure that decided not to pursue in favor of higher share price)</td>
<td>After Public Announcement</td>
<td>Litigation not pursued</td>
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</tbody>
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### Summary of Recent Minority Buyout Transactions

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<tr>
<th>Company</th>
<th>Controlling SH/Target SH (Date)</th>
<th>Target's State of Incorp Transaction Value</th>
<th>Controlling SH Pre-Bid Equity Holdings</th>
<th>Structure</th>
<th>Majority of the Minority Condition</th>
<th>Completion of Negotiations with Special Committee: Before or After Initial Public Announcement of Deal</th>
<th>Plaintiffs' Litigation: Plaintiffs' Counsel Fees and Expenses[^1]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lafarge/ Lafarge North America (2006) Maryland</td>
<td>53%</td>
<td>No Merger Agreement: Tender Offer + Short-form Merger</td>
<td>Yes, Non-waivable plus waivable 90% condition Voluntary</td>
<td>After Public Announcement</td>
<td>Settlement Memorandum of Understanding: $12,090</td>
<td>Court Approved Settlement: $4,807</td>
<td>Plaintiffs' Counsel Fees = .16% of deal value</td>
</tr>
<tr>
<td>Offeror/ Target (Date)</td>
<td>Controlling SH/ Pre-Bid Equity Holdings</td>
<td>Majority of the Minority Condition</td>
<td>Completion of Negotiations with Special Committee: Before or After Initial Public Announcement of Deal</td>
<td>Plaintiffs' Litigation: Plaintiffs' Counsel Fees and Expenses*</td>
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<tr>
<td>Delaware $1,114.34</td>
<td>47.59%</td>
<td>Yes, non-waivable Voluntary</td>
<td>After Public Announcement</td>
<td>Settlement Memorandum of Understanding: $1.200</td>
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<tr>
<td>Koninklijke KPN NV/ Basis (2009) Delaware $93.32</td>
<td>56.33%</td>
<td>Yes, non-waivable plus [waivable] super-majority (90%) condition Voluntary</td>
<td>After Public Announcement</td>
<td>Litigation not pursued</td>
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<tr>
<td>Investment Group/ Dominion Homes, Inc. (2008) Ohio $206.94</td>
<td>46.10%</td>
<td>Merger Agreement (one-step; all cash)</td>
<td>No</td>
<td>After Public Announcement</td>
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<td>Controlling SH/Target (Date)</td>
<td>Controlling SH Pre-Bid Equity Holdings</td>
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<td>Toronto-Dominion Bank/TD BankNorth Inc (2006) Delaware $3103.94</td>
<td>57%</td>
<td>Merger Agreement (one-step; all-cash)</td>
<td>Yes</td>
<td>Before Public Announcement</td>
<td>Plaintiffs' Motion to the Court: $14.714 Court Approved Settlement: $14.714 Plaintiffs' Counsel Fees = .47% of deal value</td>
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<tr>
<td>Nielsen Media Research/Netratings Inc. (2006) Delaware $296.04</td>
<td>60.50%</td>
<td>Merger Agreement (one-step; all-cash)</td>
<td>No</td>
<td>After Public Announcement</td>
<td>Litigation not pursued</td>
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<tr>
<td>Investor Group/ Erie Family Life Insurance Company (2006)</td>
<td>75.10%</td>
<td>No Merger Agreement: Tender Offer + Short-form Voluntary</td>
<td>N/A</td>
<td>N/A</td>
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<tr>
<td>Pennsylvania $75.3</td>
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106 Value includes $.039 attorneys' fees to settle the claims of a claimant not in the class, and the award for expenses ($0.066) is stated to cover the fees and costs of the Settlement Administrator.