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Fresh off bombshell Xerox ruling, N.Y. judge issues another shareholder-friendly decision

Alison Frankel

(Reuters) - Onetime corporate defense lawyer Barry Ostrager, now a New York State Supreme Court Justice in Manhattan, seems to be waging a one-man campaign for shareholders' rights. Last month, as you probably remember, Justice Ostrager issued a preliminary injunction halting a vote on Xerox's proposed \$6 billion merger with Fujifilm, setting off a chain of events in which, as of Sunday, Xerox called off the Fuji deal and agreed to revamp its management and board to appease activist investors Carl Icahn and Darwin Deason.

Last week, the onetime Simpson Thacher & Bartlett partner followed up his Xerox blockbuster with a decision allowing minority shareholders to proceed with breach of duty claims against controlling shareholder Steel Partners LP for SPLP's 2017 acquisition of Handy & Harman. SPLP, a global holding company, owned 70 percent of the stock of Handy & Harman, a maker of niche industrial products, so it was unquestionably a controlling shareholder when it proposed acquiring the other 30 percent of Handy & Harman in early 2017. Under Delaware precedent in 2013's [Kahn v. M&F Worldwide Corp \(88 A.3d 635\)](#), controlling shareholders are entitled to deference under the business judgment standard of review if they satisfy two conditions before buying out minority shareholders: They must appoint a special committee of independent directors to negotiate and approve the deal on behalf of the minority owners; and they must obtain the fully informed consent of at least half of those shareholders.

SPLP and Handy & Harman purported to have met both of the MFW conditions. SPLP's \$128 million acquisition of 30 percent of H&H was negotiated and approved by a special committee, which assured its independence by hiring its own lawyers and **financial** advisors to negotiate a buyout price with the controlling shareholder, SPLP founder and CEO Warren Lichtenstein. After the full board approved the deal, SPLP launched a tender offer. The merger took effect in October 2017.

But shareholders' lawyers from Gardy & Notis, Rigrodsky & Long and Wolf Popper said SPLP hadn't really met the MFW conditions for review under the business judgment standard. The head of the three-director special committee, Robert Frankfurt, turned out to have been Lichtenstein's college roommate. After college, Frankfurt and Lichtenstein shared an apartment and worked together for five years at SPLP's predecessor. Plaintiffs' lawyers said the merger process was tainted by their undisclosed friendship and work history, which cast doubt on the independence of the special committee and the sufficiency of the information provided to H&H's minority shareholders.

Justice Ostrager agreed, ruling that SPLP was not entitled to review under the deferential business judgment standard but under the more exacting entire fairness standard, in which defendants bear the burden of showing the deal was fair to minority shareholders. Under that standard, the judge said, shareholders could move forward with their claim against SPLP. (He dismissed the claim against special committee chair Frankfurt, finding he was exculpated for actions as a board member under Handy & Harman's articles of incorporation.)

"The facts alleged by plaintiffs sufficiently call into question the independence of the special committee based on Frankfurt's long-standing personal relationship with Warren G. Lichtenstein, the founder, chair and CEO of SPLP, as well as their prior business relationship," the judge wrote. "Any conflict on the part of Frankfurt, 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."

Justice Ostrager cautioned minority shareholders that they still have "a heavy burden to establish any actionable wrongdoing." But at least they can try.

Shareholders' lawyer Carl Stine of Wolf Popper said in an email statement that the plaintiffs are gratified Justice Ostrager "recognized the obvious potential conflict of interest when the company's board appointed Warren Lichtenstein's college roommate to chair the board's special committee, when that committee's main task was negotiating with Lichtenstein."

I emailed SPLP counsel Thomas Fleming of Olshan Frome Wolosky and Frankfurt lawyer Howard Kaplan of Kaplan Rice but didn't hear back.