

No Exit Tax: The Delaware Supreme Court Holds Conversion from Delaware Is Subject to Business Judgment Review

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Last week, in *Maffei v. Palkon*, the Delaware Supreme Court held that the decision to change the corporate domicile of a Delaware corporation with a controlling stockholder to Nevada is subject to the business judgment rule, making stockholder challenges to such conversions unlikely to succeed if done on a “clear day” when defendants face no claimed or threatened liability or other material risks that the conversion will relieve.¹

Reversing the Court of Chancery after accepting a rare interlocutory appeal, the Court clarified that a transaction in which a controller receives a non-ratable benefit will trigger “entire fairness” review, Delaware’s most intensive standard of scrutiny, only if the benefit is “material.” The Court further held that, where no specific post-conversion transaction was contemplated, “the hypothetical and contingent impact of Nevada law on unspecified corporate actions that may or may not occur in the future is too speculative to constitute a material, non-ratable benefit triggering entire fairness review.”² Imbued with policy-based reasoning, the decision suggests a reluctance by the Delaware Supreme Court to engage in a cost-benefit analysis of Delaware corporations’ conversion to competing jurisdictions. *Palkon* also provides important guidance as to what kinds of transactions involving controllers more generally should be subject to judicial intervention.

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¹ *Maffei v. Palkon*, 2025 WL 384054, at *1 (Del. Feb. 4, 2025).

² *Id.* at *26.



Background and Procedural Posture:

As discussed in our [prior alert memo](#), the stockholders of TripAdvisor, Inc. (“[TripAdvisor](#)”) challenged a proposed conversion by TripAdvisor and its parent company (“[Holdings](#)”) into Nevada corporations on the grounds that Gregory B. Maffei, the undisputed beneficial owner of the majority of voting power in both entities, as well as their directors, approved the conversion to limit future liability for fiduciary misconduct. While the Court of Chancery declined to enjoin the conversion, the Court held that (1) it was “reasonably conceivable” for purposes of a motion to dismiss that Nevada law offers greater protection to corporate fiduciaries and (2) that additional protections constitute a non-ratable benefit that requires the controlling stockholder to demonstrate the conversion was entirely fair.³

After the Court of Chancery issued its decision on February 20, 2024, defendants sought interlocutory review by the Delaware Supreme Court. The Delaware Supreme Court took the unusual step of granting interlocutory review after the Court of Chancery declined to certify the appeal. The high court’s intervention is also noteworthy given that the stockholder plaintiffs-appellees moved to dismiss the case voluntarily on mootness grounds. The case was moot, plaintiffs-appellees argued, because, following the conversion, Holdings had merged with and into TripAdvisor, leaving TripAdvisor with a simplified capital structure and no controlling stockholder.⁴ On appeal, the Delaware Supreme Court held that the case was not moot in light of TripAdvisor’s capital restructuring, noting that plaintiffs-appellees still maintained claims against the directors and that the issues on appeal will have “significant impact in future cases.”⁵

³ *Palkon v. Maffei*, 311 A.3d 255, 276–77 (Del. Ch. 2024).

⁴ *Palkon*, 2025 WL 384054, at *14. See Press Release, Liberty TripAdvisor Holdings, TripAdvisor and Liberty TripAdvisor Announce Planned Merger (Dec. 19, 2024), <https://www.libertytripadvisorholdings.com/news/press-releases/detail/100/tripadvisor-and-liberty-tripadvisor-announce-planned-merger>.

Holding and Reasoning:

- The Delaware Supreme Court held that the business judgment rule is the applicable standard of review to a conversion of a controlled Delaware corporation into a Nevada corporation “in the absence of any allegations” that, as a result of the conversion, “any particular litigation claims [against the fiduciaries] will be impaired or that any particular transaction”—presumably, one that would give rise to liability under Delaware law, but not under Nevada law—“will be consummated post-conversion.”⁶
- The application of the business judgment rule is appropriate in this context, the Court reasoned, because Delaware courts “should be cautious about second-guessing the judgments of the directors as to how best evaluate and weigh the various competing considerations as such factors might apply to a specific corporation.”⁷ Nodding towards an amicus brief filed by the state of Nevada, the Court also stressed that its decision “furthers the goals of comity by our declining to engage in a cost-benefit analysis of the Delaware and Nevada corporate governance regimes.”⁸
- The application of the business judgment rule means that stockholder challenges to future conversion decisions by controllers are unlikely to succeed, and will be dismissed at the motion to dismiss stage, unless plaintiffs can satisfy the heavy burden that the conversion “cannot be attributed to any rational business purpose.”⁹ While this standard is not difficult for fiduciaries to meet, it is a good reminder to boards considering leaving Delaware to carefully consider and articulate the reasons for doing so.

⁵ *Id.* at *14.

⁶ *Id.* at *21.

⁷ *Id.* at *30.

⁸ *Id.* at *28.

⁹ *In re Match Grp., Inc. Deriv. Litig.*, 315 A.3d 446, 462 (Del. 2024).

— *Palkon* also permits Delaware courts to side-step difficult questions about how a court would measure the impairment of the litigation rights purportedly lost by investors in the conversion for purposes of constructing an eventual remedy. With respect to the suggestion by the Vice Chancellor that the value of the lost litigation rights could be measured by analyzing the impact of the conversion on the corporation’s stock price, the Delaware Supreme Court noted that any such exercise would be “highly uncertain and speculative given the difficulty of isolating the effect of the differing statutory schemes alone.”¹⁰ Even if litigation rights are a core part of the “corporate governance bundle,” the Court noted, they are still “only one stick.”¹¹

Clarifying the Test for Conflicted Controller Transactions:

— *Palkon* clarifies the test used by Delaware courts for identifying transactions involving a controlling stockholder that trigger entire fairness scrutiny. For entire fairness to apply, it does not suffice for plaintiffs to maintain that the controller “received a unique benefit by extracting something uniquely valuable to the controller.”¹² Such benefit must also be “material,” particularly where the “principal focus has been on the alleged non-ratable benefits potentially flowing to the controller.”¹³ With respect to the claims on appeal, the Court noted that the any benefits flowing to fiduciaries from the conversion as a result of the reduction of potential liability under Nevada law for future litigation claims were too

speculative to constitute a legally cognizable conflict.¹⁴

— *Palkon* thus harmonizes the Delaware Supreme Court’s legal standards for determining which transactions should count as a disabling controller conflict. In articulating the legal standard, the decision affirms *Sinclair Oil Corp. v. Levien*, in which the Court held that a controller transaction will be subject to entire fairness review only if plaintiffs can establish that a non-ratable benefit obtained by the controller was also to “the detriment of” stockholders.¹⁵ While *Palkon* indicates that plaintiffs need not plead that stockholders suffered a harm to trigger entire fairness scrutiny, the Delaware Supreme Court has made clear the underlying purpose of the test is to identify those transactions in which a “a controller who stands to earn different consideration or some unique benefit will flex his control to secure that self-interested deal to the detriment of minority stockholders.”¹⁶

— The decision has potential implications for how Delaware courts approach so-called liquidity conflict claims. *Palkon* cites to a 2012 Court of Chancery decision, *In re Synthes, Inc. S’holder Litig.*, in which then-Chancellor Leo Strine set a high bar for claims alleging that a controlling stockholder obtained a non-ratable benefit by supporting a sale of the corporation to a third party in order to obtain liquidity.¹⁷ That the high court went out of its way to cite *Synthes* is notable, for subsequent Court of Chancery decisions have downplayed its core teaching.¹⁸ Given this

¹⁰ *Palkon*, 2025 WL 384054, at *30 n.265.

¹¹ *Id.* at *28.

¹² *Id.* at *19.

¹³ *Id.* at *20.

¹⁴ *Id.* at *26.

¹⁵ 280 A.2d 717, 720 (Del. 1971).

¹⁶ *Palkon*, 2025 WL 384054, at *18 (citing *Larkin v. Shah*, 2016 WL 4485447, at *9 (Del. Ch. Aug. 25, 2016)).

¹⁷ 50 A.3d 1022, 1036 (Del. Ch. 2012) (“It may be that there are very narrow circumstances in which a controlling stockholder’s immediate need for liquidity could constitute a disabling conflict of interest irrespective of pro rata

treatment. Those circumstances would have to involve a crisis, fire sale where the controller, in order to satisfy an exigent need (such as a margin call or default in a larger investment) agreed to a sale of the corporation without any effort to make logical buyers aware of the chance to sell, give them a chance to do due diligence, and to raise the financing necessary to make a bid that would reflect the genuine fair market value of the corporation.”).

¹⁸ See *In re Mindbody, Inc.*, 2020 WL 5870084, at *17 (Del. Ch. Oct. 2, 2020) (describing the language in *Synthes* as “hyperbolic”); *Firefighters’ Pension Sys. of City of Kansas City, Missouri Tr. v. Presidio, Inc.*, 251 A.3d 212, 256 (Del.

background, the references to *Synthes* can be read as reinforcing the idea that, where stockholders receive pro rata treatment, Courts should approach liquidity conflict claims with skepticism.

- While the analysis set out in the decision is carefully constructed as an exercise in clarifying and harmonizing established common law tests, it is at the same time a clear statement of Delaware’s policy at a moment of public debate surrounding decisions on whether to incorporate or remain domiciled in the state. The Supreme Court states in the opinion’s conclusion that “Delaware policy has long recognized the values of flexibility and private ordering. Allowing directors flexibility in determining an entity’s state of incorporation is consistent with this Delaware policy.”¹⁹ For corporate decisionmakers worried about risk of liability under Delaware law and a restraints around their ability to redomicile elsewhere in the future, the opinion points to an open door—an easier way to exit the state in this case, but perhaps more importantly, a welcoming symbol for future entrants and current Delaware companies.

Key Take-Aways for Boards Considering a Conversion:

- A board of directors considering a conversion from Delaware should consider whether it is doing so on a “clear day,” meaning there are no actual or threatened claims against the fiduciaries or planned transaction that would likely give rise to liability in Delaware (but not in the jurisdiction to which the company plans to convert). If so, then the board’s decision should be protected by the business judgment rule, and any shareholder lawsuit is likely to be dismissed.
- Boards should also carefully weigh and document the costs and benefits of the potential conversion in addition to those related to differing litigation standards. In *Palkon*, the Court approvingly noted that the boards of TripAdvisor and Holdings

considered a number of “costs and benefits” of the proposed conversion from Delaware to Nevada, including the “respective court systems,” “the predictability of the courts with respect to corporate matters”, the “judges’ expertise in handling such disputes”, the “development and body of judicial decisions” and “the familiarity of market participants with the corporate governance regime.”²⁰

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Ch. 2021) (noting that the “extreme language in *Synthes* should not be read as establishing a general rule”).

¹⁹ *Palkon*, 2025 WL 384054, at *64.

²⁰ *Id.* at *29.