



SB 21's § 144 and Controlling Stockholders: Back to the Future?

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Delaware's SB 21 has been in place for several months. By most accounts, no part of the sky has fallen. SB 21's correction of the Supreme Court's *Match* decision—by restoring what many considered the Delaware tradition of business judgment rule respect for controlling stockholder transactions approved by either informed independent directors or unaffiliated stockholders, via the eloquent creation of safe harbors in amended DGCL § 144—has caused no discernible havoc.

But just when one might have thought it was safe to go outside again, a thoughtful and thought-provoking piece of academic scholarship has seriously questioned whether the text of the statutory amendment is true to its promise. In “What Newly Amended DGCL § 144 Says (and Does Not Say) about Controlling Stockholder Transactions” published here, Professors Marcel Kahan and Edward Rock mount an impressive argument that the new statute actually “does not reflect either its proponents’ dreams nor its opponents’ nightmares.” The claim advanced is that the “actual language” of the new § 144 “Safe Harbor Provision” does not inter *Match* but “instead draws a distinction between statutory controllers and common law controllers and leaves Delaware’s law on the latter untouched.” *Match* lives?

Wow.

The professors’ claim is jaw-dropping. It would surely reverberate around Rodney Square, and beyond. The thesis is that the new § 144 safe harbors are available only for the “statutory controllers” as defined by the new § 144(e)(2) definition of a “controlling stockholder,” viz., a person (with affiliates or associates) who (a) owns or controls a majority of the voting power for director elections (or for directors having majority voting power); (b) has that same power by contract or otherwise; or (c) has “the power functionally equivalent” to that by virtue of ownership or control “of at least one-third in voting power” and has “power to exercise managerial authority over the business and affairs of the corporation.” And yet there remains in place and untouched, argue the

professors, the entire category of “common law controllers” to be identified by the pre-SB 21 case-specific “facts and circumstances” standard that in days gone by yielded the conclusions that Elon Musk controlled Tesla (on some things) with 21.9% voting power while Larry Ellison did not control Oracle with 28.8% voting power (now around 40%).

SB 21, under this view, did not remake the waterfront of controlling stockholder ontology. Rather, it created two parallel (bizarro?) universes of controlling stockholders, and therefore of “controlling stockholder transactions,” with very different legal treatment. “Statutory controllers” can access the safe harbors of §§ 144(b) and (c), under which disinterested director approval or disinterested stockholder approval suffices to bar equitable or monetary relief against any director, officer or the controlling stockholder on fiduciary duty grounds — unless the transaction is a going private transaction (aka a freeze-out), in which case both such approvals are necessary to reach the promised land of the business judgment rule. “Common law controllers” are shut out, and left to the omnipresent spectre of ad-hoc “control” definitions and—spoiler alert!—application of the entire fairness standard of review for any transaction with a perceived (or real) non-pro-rata controller benefit unless, the professors write, “the *MFW* conditions, as interpreted in cases like [*Match*], are satisfied.” That is, the full *MFW* suite of disinterested director *and* stockholder (majority-of-the-minority) approval, together with the controllers’ ab initio commitment to stand down absent those approvals, etc. In short, *MFW* Creep lives for “common law controllers” but not for “statutory controllers”! Full stop.

Double wow.

And who knew? The professors make no claim that anyone anywhere intended to create the dual-class controller transaction regime they posit. Nor do they make any claim that the dichotomy they argue for is wise or sensible policy. There is no claim that anyone would have thought that such a bi-polar regime makes any sense.

Indeed, even the obvious ramifications of the professors’ position seem fraught, if not astonishing. Consider:

- Most strikingly, the professors’ position would have a less-than-one-third “common law controller” treated more harshly than a one-third-plus “statutory controller” that as defined in § 144(e)(2). No rationale is suggested, or apparent, for that. Nor is stock taken of the seemingly odd incentives created by making the one-third line a gateway to safety. (Presumably—but who knows?—not even a Northern academic would suggest that a § 144(e)(2) “statutory controller” who could also identify, or at least qualify, as a “common law controller” would likewise be denied entry into the § 144 safe harbors.)

- The professors' position would require the simultaneous development of two doctrinal worlds to police controlling stockholder transactions. Applying the full *MFW* suite to "common law controllers" would be difficult enough especially outside of freeze-outs for which it was intended (e.g., how does the ab initio requirement work for controller employment or services agreements, or for after-the-fact perceptions of non-ratable benefits conferred on the controller?). But to require the courts to do that, while the self-same transaction gives rise to no claim at all if the controller has crossed the one-third line, seems a bit much.
- Positing a controlling stockholder category outside of the § 144(e)(2) definition would carry forward the pre-SB 21 world of ad hoc, and at times seemingly idiosyncratic, line drawing. It would lock in the inherent unpredictability of that endeavor, and expend judicial and litigation resources without any claim (much less demonstration) of any empirical benefit for any corporate constituency. Aside from the fact that there is no claim that such was intended, it is kind of boggling to think that, after everything that everyone went through to get to SB 21, it was in large part in vain. Any bright-line test like one-third may be arbitrary. But it is at least clear, and roughly aligned with common sense. The question begged is obvious: is it reasonably conceivable that Delaware went through the post-*Match* "annus horribilis" of SB 21^[1] and yet ended up with a kind of two-faced controlling stockholder transaction doctrine that left in place much of what was thought to have been repaired??
- Nor is there a need to resurrect a category of "common law controllers" in order to catch a bad stockholder lurking below one-third voting power. A board's agreement to a transaction with that non-controlling stockholder remains a fiduciary decision subject to judicial review where appropriate, and the bad non-controlling stockholder remains subject to suit and relief as an aider/abettor of a fiduciary breach by one or more directors under the careful preservation of that claim in SB 21's § 144(d)(6)(c).
- The professors' position seemingly would resuscitate the common law "transaction-specific" controller category that was prominently featured in cases like *Tornetta v. Musk*. Whatever its provenance, that expansion of controller doctrine is incompatible with the putative rationale for *MFW* Creep—namely, the theory of a brooding omnipresent controller "inherent coercion" that rests on the supposition that director and/or stockholder independence is illusory in the face of an actual real controller (not a "transaction-specific" one) with the power to oust disobedient directors and/or punish stockholders who decline to bend the knee. ^[2]

If any of these confounding points are sound, it should take a compelling "actual language" argument to support interpreting SB 21's § 144 as birthing the two-headed categories of controlling stockholders, and corresponding split personality of judicial review, espoused by the

professors. As Carl Sagan long ago ruled, “extraordinary claims require extraordinary evidence.” The “actual language” argument advanced seems not up to the task.

The linchpin of the professors’ argument is the observation that the § 144(e)(2) definition of “controlling stockholder” is prefaced with the introductory phrase: “For purposes of this section ...” Yes it is. As are all the definitions of § 144(e). And since the safe harbors of §§ 144(b) and (c) are in “this section,” and the § 144(e)(2) definition is “incorporated” into the definition of “controlling stockholder transaction” in § 144(e)(3)—meaning that the (defined) term “controlling stockholder” appears in § 144(e)(3) and in the safe harbors of §§ 144(b) and (c)—the argument is that the safe harbors are open only to controlling stockholders who fall within the § 144(e)(2) criteria. Punchline: old-school pre-SB 21 controlling stockholder transactions that are outside of the §§ 144(b) and (c) safe harbors for “controlling stockholder transactions” are not entitled to enter the safe harbors.

Well and good, in part. As the professors write, “[a] ‘safe harbor’ provides legal certainty when its conditions are met—but nothing more.” Fair enough. But nothing in SB 21’s new § 144 suggests that its reach is so limited that it has left in place a whole world of other types (“common law”) of “controlling stockholders” whose transactions remain governed by what the professors call “the *MFW* conditions as interpreted in cases like *Match Group*.” Perhaps if there was nothing else, a statutory definition that X is a “controlling stockholder” could be taken to leave courts free to determine that stockholders less than X are also controlling stockholders. A stretch, but maybe. That would be a rather constricted way to read the statutory definition of X; typically, if a statute says X is the definition of something, one would more readily think that less than X is not X. There must be some canon of statutory construction that could be invoked.

But there is something else. SB 21 itself provides that its definition of “controlling stockholder” in § 144(e)(2) is exclusive. SB 21’s § 144(d)(4): “No person shall be deemed a controlling stockholder unless such person satisfies the criteria in paragraph (e)(2) of this section.” That provision is not limited. It is not limited to “for purposes of this section,” or in any other way.

Mic drop.

If anything more is needed, the legislative synopsis accompanying SB 21 is unequivocal on the point:

Section 144 is intended to provide a comprehensive liability exculpation scheme with respect to the fiduciary duties owed by stockholders and with respect to when the safe harbors in § 144(b) and (c) apply. Section 144 does not provide for the elimination of liability or safe harbors for stockholders who are not controlling stockholders or part of a control group because those stockholders do not owe fiduciary duties to the corporation or other stockholders.

So § 144 is presented as a “comprehensive liability exculpation scheme” for stockholders that owe fiduciary duties, and the reason that there are no safe harbors provided for stockholders who are not “controlling stockholders” is simple: those stockholders “do not owe fiduciary duties.” Only “controlling stockholders” do. There is no escape. Even the best plaintiff-lawyer cannot plead, or argue, around that.

Somewhat surprisingly, the professors also claim support for their dichotomy in the language of new § 144(d)(4), which at first (if not every) blush seems to make the statute’s new definition of “controlling stockholder” the one and only road to controller status: “No person shall be deemed a controlling stockholder unless such person satisfies the criteria in paragraph (e)(2) of this section.” The “general” (unlimited) statement of § 144(d)(4) would seem to command that the § 144(e)(2) definition of “controlling stockholder” is the exclusive test of controlling stockholder. No one can be “deemed” a “controlling stockholder” unless the § 144(e)(2) criteria are satisfied. But the professors point out that § 144(d)(4) itself uses the term “controlling stockholder” which (as emphasized) is “for purposes of this section”—as if § 144(d)(4) can be read as a tautology that only repeats what the § 144(e)(2) definition says. Presumably canons of statutory construction lean into the idea that all the words of a statute mean something and are not just useless double talk, i.e., surplusage. How else could a provision provide for the exclusivity of the “controlling stockholder” definition in § 144(e)(2) without using the words “controlling stockholder”? In all events, it doesn’t require a canon to see that it is a bit fancy to render illusory the § 144(d)(4) “general” statement of exclusivity (no one is a controlling stockholder unless the § 144(e)(2) criteria are satisfied) on the ground that the exclusivity directive uses the very words that are the exclusive definition. A definition, after all, is a definition. It is not just an example.

The professors do not engage with the legislative synopsis’ command of exclusivity—heralding new § 144 as “a comprehensive liability exculpation scheme”—as their point is entirely an “actual language” of the statute point. But safe harbors are only needed if there is a storm; § 144(d)(4) makes clear that there is no storm except for stockholders who fall within the definition of a “controlling stockholder” under § 144(e)(2). The legislative synopsis makes that conclusion, already apparent from the statute’s actual language, inescapable. The safe harbors are only for defined “controlling stockholders” because “stockholders who are not controlling stockholders . . . do not owe fiduciary duties to the corporation or other stockholders.”

For once, Homers nodded. But this is not just an example of academics-being-academics. Like SB 21 itself, the professors’ piece forces one to confront anew the vexing subject of how fiduciary duty doctrine should best address the unavoidable conflicts of interests that inhere in controlled companies. SB 21 represents one way. There probably is a law of unintended consequences. Still, even those who consider SB 21 sub-optimal, or worse, should not wish it to

be read as creating two controlling stockholder categories that, admittedly, no one intended. That is just too weird.

Any opinions expressed are not those of any entity or the author.

1. *In re Match Group, Inc., St. Lit.*, Cons. C.A. No. 2020-0505-MTZ (Sept. 17, 2025) (Settlement Hearing and Rulings of the Court), at 43.[\(go back\)](#)
2. *And see* E. Pollman & L. Will, *The Lost History of Transaction-Specific Control*, 50:4 J. Corp. L. 1096 (2025).[\(go back\)](#)