

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

August 9, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-2115**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**KOHLER COMPANY,**

**PETITIONER-RESPONDENT,**

**V.**

**SOGEN INTERNATIONAL FUND, INC., HELEN WINTER,  
CATHARINE BEMIS STAYER, BARBARA H. LOVELAND,  
JOHN H. STRAUSS, RITA R. STRAUSS, MARIE H. KOHLER,  
JOHN M. KOHLER TRUST F/B/O MARIE H. KOHLER,  
JULILLY W. KOHLER, JOHN M. KOHLER TRUST  
F/B/O JULILLY W. KOHLER, GILLIAN B. KOHLER,  
ROBERT E. KOHLER, JR., VICTORIA G. KOHLER,  
CATHLIN DEBORAH KOHLER, BRIGGS & STRATTON  
CORPORATION, ISBELLE MILLER AND GEORGE M. CHESTER,  
TRUSTEES OF GEORGE CHESTER RESIDUARY TRUST,  
SMITH BARNEY INCORPORATED, VERNE R. READ,  
TRUSTEE OF MARIAN C. READ RESIDUARY TRUST,  
JAMES F. AND MERCEDES C. HEYRMAN  
REVOCABLE TRUST, MARSHALL & ILSLEY TRUST,  
WILLARD AND EUNICE KOHLHAGEN, DEXTER DEFNET,  
BONNIE KOHL, LAURIE ANDRUSCAVAGE, PATRICK M. WILSON,  
ABN-AMRO, INC., A FOREIGN CORPORATION,  
ASSOCIATED BANK GREEN BAY, N.A., AS TRUSTEE FOR  
JANET A. DESPIRITO, ASSOCIATED BANK GREEN BAY,  
N.A., AS TRUSTEE FOR KRUEGER INTERNATIONAL,**

INC., SALARIED EMPLOYEES' RETIREMENT PLAN,  
ASSOCIATED BANK GREEN BAY, N.A., AS TRUSTEE FOR  
JOHN ROSE, SR., ASSOCIATED BANK GREEN BAY, N.A.  
AND ALLAN ROSS AS TRUSTEES FOR THE THOMAS R. NELSON  
TRUST, FREDERICK E. BAER, BANK AMERICA  
NT & SA, D/B/A SEAFIRST BANK, AS TRUSTEE FOR  
THE ROSEBUD TRUST, THOMAS J. BENO, M.D. AS  
TRUSTEE FOR THOMAS J. BENO M.D. REVOCABLE  
TRUST, GERALD L. BUCKLEY, CATHERINE ANN CALAWAY,  
SUSAN A. HOOK CZARNOCKI AND SARA E. CARTLEDGE,  
JOSEPHINE P. DELORENZO AS TRUSTEE FOR  
JOSEPHINE P. DELORENZO TRUST UAD, JOHN A. DENIS,  
PAUL D. DIBLEY, DDS, S.C. AS TRUSTEE OF  
PROFIT SHARING PLAN & TRUST, MICHAEL D. DONOVAN  
AS TRUSTEE OF MICHAEL D. DONOVAN REV. LIVING  
TRUST, QUINN M. DONOVAN, MILTON DUESCHER,  
EUGENE W. DWYER AND EILEEN M. DWYER, GEORGE M.  
AND MARGARET E. EVANS, PAUL W. FAIRCHILD, JR.,  
CLARA MAE FELTS, ORLIN F. FELTS, CAROLYN L. FEY,  
SARA FORTUNE, RICHARD O. AND PATRICIA P. FRIDAY,  
MARY E. GEHR AND ROBERT J. GEHR AS  
CO-TRUSTEES OF THE MARY E. GEHR REVOCABLE  
LIVING TRUST, MARY E. GEHR AND ROBERT J. GEHR  
AS CO-TRUSTEES OF THE ROBERT J. GEHR REVOCABLE  
LIVING TRUST, MARVIN GERLIKOVSKI, DONALD J. HEINZEN,  
SCOTT D. HENDRICKSON, DR. HAROLD J. HOOPS, JR.,  
MRS. FRANCES HOOPS, SUSAN K. JAMES,  
PAUL R. JOHNSON, CLARENCE M. AND JUELAIN KRAHN,  
JAMES F. KRESS, LAURIE A. LAMBERG,  
BONNIE R. LAIRD, BENJAMIN W. LAIRD AND  
WILLIAM D. LAIRD, DR. FREDERICK JOSEPH LAMONT,  
CHRISTOPHER LARSON, M.D., AND RANDINE LARSON,  
HERBERT C. LIEBMANN, JR. AND MARIE V. LIEBMANN  
AS TRUSTEES FOR HERBERT C. AND MARIE V. LIEBMANN  
REVOCABLE TRUST, LEONARD C. LIEBMANN  
AS TRUSTEE OF LEONARD C. LIEBMANN REVOCABLE  
TRUST, RUTH LIEBMANN AS TRUSTEE FOR RUTH LIEBMANN  
REVOCABLE TRUST, JOHN J. MACKIN, JR.,  
EDWARD N. MARTIN, MARGARET ELLEN MARTIN,  
MARY ELLEN MARTIN AS TRUSTEE FOR MARGARET MARTIN  
TRUST, MARY ELLEN NEUFELD MARTIN,  
PATRICK ALBERT MARTIN AND MARY ELLEN NEUFLED MARTIN,  
C/O FIDUCIARY TRUST COMPANY AS TRUSTEES FOR

MARY ELLEN NEUFLED MARTIN TRUST A, PATRICK ALBERT MARTIN AND MARY ELLEN NEUFELD MARTIN, C/O FIDUCIARY TRUST COMPANY AS TRUSTEES FOR MARY ELLEN NEUFLED MARTIN TRUST B, PATRICK ALBERT MARTIN AND JOHN C. BROGAN AS TRUSTEE FOR MARY ELLEN NEUFELD MARTIN 1997 SUPPLEMENTAL TRUST, PATRICK ALBERT MARTIN, CHRISTINE E. MAYER, MARILYN KANE MILLER, HERBERT J. MUELLER, E. FREDERICK MURPHY, ELBRIDGE N. MURPHY, JOHN G. MURPHY, JANET C. MUTH, FRANKLIN MUTUAL ADVISORS, INC., AS TRUSTEES FOR MUTUAL DISCOVERY FUND, MV PARTNERS, FREDERICK W. NEVEU AND MERCEDES M. NEVEU AS TRUSTEES FOR THE FREDERICK W. NEVEU AND MERCEDES M. NEVEU REVOCABLE TRUST, NORBERT & COMPANY, C/O THE PREMONSTRATENSIAN FATHERS, WAYNE R. PETERSON, JAMES W. PIETTE, SUZANNE M. PIETTE, DAVID PUTZ, MYRON AND ROBERT RABINOVITZ, MICHAEL C. AND JESSICA M. RAYMAKER AS TRUSTEE FOR MICHAEL C. AND JESSICA M. RAYMAKER TRUST/RAYMAKER LIVING TRUST, RICHARD W. ROSS AND RUTH E. ROSS, BRUCE H. RUOFF, GEORGE SARKIS, RONALD A. AND JANET M. SCHAUER, ROBERT T. SCHMIDT, M.D., AS TRUSTEE FOR ROBERT T. SCHMIDT, M.D., AND JANE S. SCHMIDT REVOCABLE TRUST OF 1990, BANK ONE TRUST COMPANY AS TRUSTEE FOR VERNA C. SHARPE REVOCABLE TRUST, GENE H. SPECHT AND CAROL ANN SPECHT, NORWEST BANK WI, NATIONAL ASSOCIATION INVESTMENTS AND TRUST AS TRUSTEE FOR WALTER J. KOEPSSELL, JR., FAMILY TRUST, ALICE B. STAYER, DUDLEY J. GODFREY, JR., AS ONE OF THE TRUSTEES FOR RALPH C. STAYER LIFE INSURANCE TRUST, RALPH F. STAYER, JANE F. STOEHR, FRANCES STOLL, MARJORIE C. STOLZ, MARGARET STOVIC, RALPH STOVIC, MARGERY H. UHLEIN, C/O THE GLENORA COMPANY AS TRUSTEE FOR THE MARGERY H. UHLEIN REVOCABLE TRUST, BARBARA VAN ABEL AS TRUSTEE OF STOLL FAMILY TRUST, MERLIN A. AND DELORES A. VANDERHEIDEN, GEORGE AND AUNE A. VIRT, STEVEN A. VIRT, MICHAEL L. WAGNER, WILLIAM M. WESLEY, JEAN A. WIELGUS, LLOYD A. WIELGUS, FREDERICK C. WIETING, JR., AND KATHLEEN A. WIETING, ROSA WIZA, JOHN AND MARY E. MARTIN ZELLERBACH AS

**TRUSTEES FOR ZELLERBACH LIVING TRUST, DATED  
2/14/91, SEPARATE JWZ, JOHN AND MARY E. MARTING  
ZELLERBACH AS TRUSTEES FOR ZELLERBACH LIVING  
TRUST, DATED 2/14/91, SEPARATE MEMZ, DAVID K. DUNN,  
M.D., EDWARD F. BIEDRON, THELMA HARWITZ  
AND WM. H. SCHIELD, JR., AS TRUSTEES,**

**RESPONDENTS-(IN T. CT.),**

**TED PETRIE AND JANE PETRIE,**

**RESPONDENTS-APPELLANTS.**

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APPEAL from an order of the circuit court for Sheboygan County:  
L. EDWARD STENGEL, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Ted and Jane Petrie appeal from an order granting Kohler Company a declaratory judgment. The circuit court concluded that the Petries waived their right to be a party to the proceeding to appraise the fair value of Kohler shares held by minority shareholders because they did not timely dissent from a proposed merger involving Kohler. Because we conclude that the Petries, through their nominee, received timely and appropriate notice of their dissenters' rights but did not timely exercise those rights, we affirm.

¶2 The Petries were the beneficial owners of one share of Kohler stock. At the time Kohler gave notice of an April 24, 1998 special meeting of shareholders (the April 4 notice) at which shareholders would vote on a merger which would require Kohler's minority shareholders to tender their shares at a price determined by Kohler, Kohler's records identified CEDE & Company, the

Petries' nominee, as the recordholder of the Petries' share of Kohler stock. Included with the April 4 notice were copies of the Wisconsin dissenters' rights statutes and proxy materials (hereinafter the "proxy statement"). The proxy statement advised shareholders that those wishing to assert dissenters' rights had to deliver a written objection before the merger vote was taken.<sup>1</sup>

¶3 On May 8 (the adjourned date for the meeting of the shareholders), Kohler's shareholders approved the merger. On May 15, the Petries became aware of the merger, gave written notice of their objection and demanded payment for the fair value of their share of stock.

¶4 In July 1998, Kohler filed a petition under WIS. STAT. § 180.1330 (1997-98)<sup>2</sup> to determine the fair value of the dissenters' shares of Kohler common stock. Kohler contended that the fair value of each share immediately before the merger was \$55,400, and Kohler paid that amount to those dissenters/respondents who had made payment demands. *See* WIS. STAT. § 180.1325. Kohler's petition asked the court to determine that it had paid the fair value of the common shares to the respondents and to exonerate Kohler from liability to the respondents. Kohler named as respondents those shareholders who had dissented from the merger within the meaning of WIS. STAT. § 180.1301(3) and exercised dissenters' rights

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<sup>1</sup> Shareholders who dissent from certain corporate actions may obtain payment of the fair value of their shares. *See* WIS. STAT. § 180.1302 (1997-98). In order to assert dissenters' rights, a dissenting shareholder must deliver a written notice under WIS. STAT. § 180.0141 that the shareholder intends to demand payment for his or her shares if the proposed corporate action goes forward. *See* WIS. STAT. § 180.1321(1)(a). A shareholder or beneficial shareholder, *see* WIS. STAT. § 180.1301(1), who fails to comply with § 180.1321(1) is not entitled to payment for the shares under WIS. STAT. §§ 180.1301 to 180.1331. *See* § 180.1321(2).

<sup>2</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

as required by WIS. STAT. §§ 180.1320 to 180.1328. The Petries were not named as respondents because they had not timely asserted their dissenters' rights.

¶5 In December 1999, the court granted the Petries' motion to intervene in the action to determine their rights, if any. Kohler moved for a declaratory judgment that the Petries had not satisfied the statutory requirements for asserting their rights as dissenters, were not entitled to payment under WIS. STAT. §§ 180.1301 to 180.1331, and could not be parties to a proceeding under § 180.1330 to appraise the fair value of Kohler shares.

¶6 The circuit court found that Kohler complied with the WIS. STAT. ch. 180 notice requirements relating to dissenters' rights. The court specifically found that the April 4 notice to CEDE complied with the statutory requirements. Although the Petries did not receive the notice and were not in a position to comply with the statutory requirements for asserting dissenters' rights, the court noted that the deficiency would be visited upon the Petries or their agent, CEDE, not upon Kohler. The Petries appeal.

¶7 The Petries do not contest that their nominee, CEDE, received the April 4 notice.<sup>3</sup> They also do not contest that CEDE appeared in Kohler's records as the owner of their share of stock. The circuit court found that the April 4 notice to CEDE complied with the applicable statutes. Therefore, it is undisputed that Kohler complied with the notice requirement for corporate actions to which shareholders may object. *See* WIS. STAT. § 180.1321(1).

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<sup>3</sup> The notice was effective when mailed. *See* WIS. STAT. § 180.0141(5)(b).

¶8 The Petries have offered no explanation for the failure of CEDE to alert them to the April 4 notice and the legal requirements emanating from it. The Petries' failure to assert their dissenters' rights in timely relation to the April 4 notice is the dispositive fact in this appeal. *Cf.* WIS. STAT. § 180.1323(3) (shareholder who does not demand payment by the date set in the dissenters' notice is not entitled to payment for the shares under WIS. STAT. §§ 180.1301 to 180.1331).

¶9 In *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1354-55 (Del. 1987), the court discussed the type of situation presented by this case:

The use of security depositories by brokerage firms now is a common practice. The decision in that regard, however, is a matter which is strictly between the broker and its clients .... In making that choice, the burden must be upon the stockholder to obtain the advantages of record ownership .... The legal and practical effects of having one's stock registered in street name cannot be visited upon the issuer. The attendant risks are those of the stockholder, and where appropriate, the broker .... If an owner of stock chooses to register his [or her] shares in the name of a nominee, he [or she] takes the risks attendant upon such an arrangement, including the risk that he [or she] may not receive notice of corporate proceedings, or be able to obtain a proxy from his [or her] nominee .... Here, the problem is one between the [shareholders] and their brokers. (Citations omitted.)

¶10 We agree with the Delaware court and apply the reasoning of *Enstar* to this appeal. Under *Enstar*, the failure of CEDE to bring the April 4 notice to the Petries' attention cannot be attributed to Kohler. We agree with Kohler and the circuit court that the April 4 notice to the Petries' nominee was notice to the Petries, regardless of the steps taken or not taken by CEDE to alert the Petries that their dissenters' rights were at stake. We conclude that the circuit court did not misuse its discretion in granting Kohler declaratory judgment. *See Wisconsin Educ.*

*Ass'n Council v. State Elections Bd.*, 156 Wis. 2d 151, 161, 456 N.W.2d 839 (1990).

¶11 Because we conclude that the April 4 notice to CEDE was sufficient under the applicable statutes, we do not address any arguments relating to events subsequent to the mailing of the April 4 notice.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.



