ASPEN PUBLISHERS

CORPORATION

January 17, 2012 Section 2 Vol. LXXXIII No. 2

Delaware's Next Step: Developments in the Step-Transaction Doctrine © [¶2.1]

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The Delaware courts have long embraced the maxim that "equity regards substance rather than form."[1] One embodiment of this rule is the step-transaction doctrine, which allows a court to treat a multi-step transaction as a single transaction. But the step-transaction doctrine has historically played little part in Delaware law. While it has made a few limited appearances, only recently has the doctrine emerged as a tool for interpreting Delaware contracts.

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The most recent use of the step-transaction doctrine appeared in the Court of Chancery's November 2011 opinion in *Coughlan v. NXP*, which applied the doctrine to interpret an earn-out provision in a merger agreement governed by Delaware law.[2] Noting that "it is the very nature of equity to look beyond form to the substance of an arrangement,"[3] *Coughlan* suggests that the step-transaction doctrine—as a method of contract interpretation—may become a more common feature in Delaware law.

In this article, we discuss the genesis of the step-transaction doctrine and its first appearance in Delaware. Then we examine the *Coughlan* opinion and what it may mean for practitioners.

A Brief History of the Step-Transaction Doctrine

Formally, the step-transaction doctrine is an analytical tool—originally conceived in tax jurisprudence—allowing a court to treat the "'steps' in a series of formally

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separate but related transactions . . . as a single transaction, if all the steps are substantially linked.''[4] As traditionally stated, the doctrine includes three separate tests, any of which can trigger the doctrine's application: the binding commitment test, the interdependence test, and the end result test.[5] The binding commitment test, which is the narrowest, collapses a multi-step transaction ''only if, at the time the first step is entered into, there was a binding commitment to undertake the later steps.''[6] The interdependence test is somewhat broader and focuses on whether the steps in a transaction are so interdependent that ''the legal relations created by one transaction would have been fruitless without a completion of the series.''[7] The broadest and most far-reaching test is the end result test, which applies where a court determines that ''a series of separate transactions were prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate result.''[8]

The step-transaction doctrine's original purpose was to prevent taxpayers from side-stepping taxation by using multiple non-taxable transactions to achieve the same result as a single taxable transaction.[9] One of the earliest step-transaction cases, decided by the U.S. Supreme Court in 1935, involved taxpayer Evelyn F. Gregory, who owned all of the stock of United Mortgage Corporation, which itself held 1,000 shares of Monitor Securities Corporation.[10] To transfer the Monitor shares to herself and avoid paying taxes on a dividend from United Mortgage, Gregory effected a ''reorganization'' under which no gain would have been recognized. This reorganization involved three steps, each separated by three days: (1) Gregory created a third entity, Averill Corporation; (2) she transferred the 1,000 Monitor shares to Averill; and (3) she dissolved the newly created Averill, distributed its assets (the 1,000 Monitor shares) to herself, and immediately sold the Monitor shares.[11] The Court found that, although every element of the reorganization statute was technically satisfied, ''the whole undertaking . . . was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else.''[12] As a result, the Supreme Court agreed with the court below and affirmed that Gregory's transaction did not qualify as a ''reorganization'' under the meaning of the statute.[13]

During the ensuing decades, the step-transaction doctrine was adopted by a number of courts outside of the tax context—although not always explicitly cited, and sometimes with varying application.[14] For example, in *Sharon Steel*, an influential opinion from the Second Circuit, the Court aggregated a series of three asset sales of UV Industries, Inc., labeling the different transactions as a single act of ''liquidation.''[15] On January 19, 1979, UV announced that it intended to liquidate all of its assets, pending shareholder approval. In a series of three transactions that closed during 1979, UV successfully sold all of its assets.[16] In the last transaction, which closed approximately eight months after the first sale transaction and two months after the second, Sharon Steel purchased all of UV's remaining assets, including its liabilities and outstanding debts.[17] Nevertheless, in construing the terms under certain indentures, the Court rejected Sharon Steel's argument that it had purchased ''all'' of UV's assets.[18] Instead conflating the three transactions as part of ''an overall scheme to liquidate,'' the Court held that Sharon Steel had participated in no more than 51% of the plan to liquidate—far short of the required ''all or substantially all'' of UV's assets.[19]

The Step-Transaction Doctrine Appears in Delaware

The first use of the step-transaction doctrine in Delaware—although under New York law—was in the context of a corporate spin-off and merger analyzed in the Court of Chancery's two *Noddings* opinions.[20] SFX Broadcasting, pursuant to a merger agreement, spun off SFX Entertainment and merged with a subsidiary of Hicks, Muse, Tate & Furst (later changing its name to Capstar Communications).[21] Noddings Investment Group owned warrants to purchase shares of SFX Broadcasting, and the warrant agreements contained an adjustment provision triggered by a ''recapitalization, capital reorganization, or other change of outstanding shares of Common Stock.''[22] Noddings claimed that it was entitled to both the spun-off shares of SFX Entertainment and the cash merger consideration, arguing that the spin-off and the merger together triggered the adjustment provision.[23] Applying the step-transaction doctrine, the Court held that the ''two transactions, the Spin-Off and the Merger, should be combined into one for purposes of determining the rights of the Plaintiffs in the shares of [SXF] Entertainment stock distributed to shareholders.''[24] The Court concluded ''as a matter of law'' that the two transactions were ''part and parcel of the same transaction'' and that the plaintiffs were entitled to adjustment (and thus the spun-off shares of SFX Entertainment).[25]

The *Noddings* Court provided additional detail when it denied Capstar's motion for reargument.[26] Capstar argued that the doctrine of independent legal significance[27] should have applied—instead of the step-transaction doctrine—but the Court rejected this argument for two reasons: (1) New York, not Delaware, law applied and (2) ''the law at issue in this matter was related to contractual interpretation, not corporate law, further distancing this case from the protection of [the doctrine of independent legal significance].''[28] Capstar had also cited no cases holding ''that this Court *cannot* apply the step transaction doctrine outside [the tax] realm or that of fraudulent conveyance.''[29]

After the *Noddings* opinions, the Delaware courts did not use the step-transaction doctrine for eight years. The doctrine then made a brief appearance in the Delaware Supreme Court's opinion in *Gatz v. Ponsoldt*, which relied in part on the step-transaction doctrine to extend the reach of case law allowing certain claims to be brought as either direct or derivative claims.[30] The Court looked through the formalities of a set of separate transactions and recharacterized them as one transaction that gave rise to a direct claim.[31]

The doctrine's next appearance was the Court of Chancery's 2007 *Twin Bridges* opinion, which applied it to determine the validity of a two-step transaction that altered a limited partnership's governance structure by amending the partnership agreement and merging the partnership into another limited partnership.[32] The original partnership agreement had barred certain amendments (including an amendment transferring control of the partnership's business to the limited partners) without a unanimous vote of the limited partners.[33] The defendants argued that this two-step transaction violated the original agreement by effecting a transfer of control without a unanimous vote of the limited partners. Seeing ''no reason as a matter of law or equity why the step transaction principle should not be applied here,'' the Court conflated the two-step amendment and merger under the

step-transaction doctrine.[34] The Court held nonetheless that the original agreement did not bar the amendment and subsequent merger, even if considered as a single transaction.[35] As in *Noddings*, the Court in *Twin Bridges* defended its use of the doctrine (a first under Delaware contract law): ''the holding in [*Noddings*] is based on contract law, and Plaintiffs have not identified any distinction that would render it inapplicable to this case.''[36]

In its September 2011 opinion in *Bank of New York Mellon Trust*, the Delaware Supreme Court also addressed the step-transaction doctrine, but under New York law.[37] The Court of Chancery had applied the three step-transaction tests to interpret the terms of an indenture and had held that the split-off of the Capital and Starz business groups, following three other major distributions of assets since 2004, did not constitute a transfer of ''substantially all'' of the assets of Liberty Media Corporation.[38] The Delaware Supreme Court affirmed the decision based on the Court of Chancery's factual findings and application of *Sharon Steel*, concluding that it was unnecessary to decide whether the step-transaction doctrine would be adopted as New York law in a similar analysis.[39]

***Coughlan*: Return of the Step-Transaction Doctrine**

Because *Noddings* and *Bank of New York* were decided under New York law (and *Gatz* was not interpreting a contract), the November 2011 opinion in *Coughlan* represents only the second application, after *Twin Bridges*, of the step-transaction doctrine to a Delaware contract. But *Coughlan* goes beyond *Twin Bridges* and suggests the potential for the doctrine's more prominent role in Delaware law.

Coughlan involved the interpretation of two earn-out provisions in a merger agreement governed by Delaware law.[40] Under the merger agreement, NXP acquired GloNav, Inc. for cash.[41] In addition to the cash payment, NXP was required to make certain contingent payments to the former GloNav stockholders ''upon the achievement of certain revenue and product development targets.''[42] Section 2.4(h) of the merger agreement also provided that, ''in the event of certain transactions resulting in a particular change in control of NXP or the GloNav business, any remaining Contingent Payments would be accelerated or, in some cases, the obligations associated with the Contingent Payments would be assumed by the acquirer.''[43]

Shortly after the merger closed, NXP executed a joint venture agreement with STMicroelectronics, creating ST-NXP Wireless (to which NXP contributed the GloNav operations).[44] Before the closing of the joint venture transaction, NXP created two wholly owned subsidiaries and contributed the GloNav business to one; at closing, NXP transferred all of the shares of its two subsidiaries to ST-NXP Wireless in exchange for shares in the joint venture and roughly $1.5 billion in cash.[45]

The principal dispute in *Coughlan* was whether the contribution of GloNav to the joint venture triggered the acceleration of the earn-out payments due to the former GloNav stockholders. Defendant NXP argued that neither of the two transactions—(1) contributing the GloNav business to its wholly owned subsidiary or (2) transferring the shares of its wholly owned subsidiary to ST-NXP Wireless—qualified as a triggering event.[46] Plaintiff Coughlan (stockholder representative for the former GloNav stockholders) argued in response that, under the step-transaction doctrine, ''the transaction viewed together clearly resulted in a transfer of

GloNav's assets from NXP to the ST Joint Venture."[47]

The Court agreed with the plaintiff and "conclude[d] that the two transactions that resulted in the Joint Venture's ownership of GloNav's assets were part and parcel of the same transaction."[48] The Court applied the step-transaction doctrine and found that all three tests had been satisfied.[49]

As in other cases, the *Coughlan* Court rejected the defendant's call to limit the step-transaction doctrine. Conceding that the doctrine originated in tax cases, the Court stated that "the doctrine has also been applied in bankruptcy court to determine fraudulent conveyances, and this Court has extended the doctrine to partnership agreements, warrant agreements, and recapitalization transactions."[50] Further, the Court noted, the defendant had not "cited any cases suggesting that [the governing principle of the step-transaction doctrine—that transactional formalities will not blind the court to what truly occurred—]should not carry over to contractual arrangements outside of those already addressed by this Court and others."[51]

Ultimately, the Court's application of the doctrine appeared to rest in a respect for the parties' intent under the merger agreement: "The purpose of the step transaction doctrine is to ensure the fulfillment of parties' expectations notwithstanding the technical formalities with which a transaction is accomplished."[52] Indeed, *Coughlan* held that "a court should refrain from applying the step transaction doctrine to interpret a contract if doing so would contravene the parties' intent."[53] Under that analysis, the Court found "nothing in the Merger Agreement's drafting history that suggests that the acceleration was not meant to occur upon a series of interdependent transactions that, when analyzed substantively rather than hyper-technically, clearly fits within the transactions enumerated in §2.4(h)."[54] Allowing NXP to "circumvent the protections of §2.4(h) simply by using a subsidiary to transfer the assets of GloNav to the Joint Venture would render those protections meaningless."[55] The Court refused to "entertain an interpretation of a contract that renders terms meaningless or illusory" and therefore applied the step-transaction doctrine.[56]

Implications for Practitioners

Coughlan's application of the step-transaction doctrine is noteworthy for a number of reasons. First, it should now be clear to practitioners that the Court of Chancery has accepted the doctrine as a valid tool for interpreting contracts. Several litigants have tried to resist the Court's use of the step-transaction doctrine, and they have been universally unsuccessful. *Coughlan* refused to accept the defendant's arguments that the step-transaction doctrine should be "limited in application to tax treatment and fraudulent conveyances,"[57] and the Court of Chancery has made similar rulings in other cases.[58] Unless the Delaware Supreme Court sets forth a different rule, litigants are on notice that the Delaware courts can and will apply the step-transaction doctrine to interpret contracts under Delaware law.[59]

Coughlan also emphasizes the step-transaction doctrine's concern for effectuating the parties' intent. In this way, the step-transaction doctrine acts somewhat like the implied covenant of good faith and fair dealing that inheres in every Delaware contract.[60] The implied covenant "is 'best understood as a way of implying terms in the agreement,' whether employed to analyze unanticipated developments or to fill gaps in the contract's

provisions.''[61] Similarly, the step-transaction doctrine is intended to ''ensure the fulfillment of parties' expectations notwithstanding the technical formalities with which a transaction is accomplished.''[62]

But the two doctrines' similarities are limited. The step-transaction doctrine is fairly circumscribed, with three specific tests and a narrow effect (to construe a series of formally separate transactions instead as components of a single transaction), while the implied covenant has a broader reach. Further, the Delaware courts will only ''imply contract terms when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected.''[63] While the step-transaction doctrine is intended to effectuate the parties' intentions '''as expressed in, or reasonably inferred from, their agreement,'''[64] it does not require a showing of bad faith by one party.[65] Nevertheless, the potential overlap of these two doctrines may merit scrutiny in a particular case.[66]

A further question arising from *Coughlan* is the extent to which parties can avoid the step-transaction doctrine through drafting (whereas the implied covenant cannot be avoided through drafting). That is, the ''parties' intentions as expressed in, or reasonably inferred from, their agreement must be controlling in the construction of a contract.''[67] And *Coughlan* specifically noted that ''a court should refrain from applying the step transaction doctrine to interpret a contract if doing so would contravene the parties' intent.''[68] On the other hand, *Coughlan* declined to give weight to the defendant's argument that the parties had specifically negotiated and eliminated a phrase that would have expressly prevented the two-step workaround under challenge.[69] Practitioners should expressly include contrary language in the contract itself if they wish to avoid future application of the step-transaction doctrine.

Some of the above questions may be addressed by further development of the step-transaction doctrine in the Delaware courts. And despite these unanswered questions, it seems likely that, after *Coughlan*, the step-transaction doctrine will receive more attention and this further development will occur.

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1. *Monroe Park v. Metro. Life Ins. Co.*, 457 A.2d 734, 737 (Del. 1983); *see also, e.g.*, *Henderson v. Plymouth Oil Co*., 141 A. 197, 220 (Del. 1928) (''A court of equity will disregard mere form and consider the substance of a matter . . . .'').

2. *Coughlan v. NXP B.V.*, 2011 WL 5299491, at *10 (Del. Ch. Nov. 4, 2011).

3. *Id.* at *9.

4. *Noddings Inv. Grp. v. Capstar Commc'ns, Inc.,* 1999 WL 182568, at *6 (Del. Ch. Mar. 24, 1999), *aff'd*, 741 A.2d 16 (Del. 1999) (TABLE); *Gregory v. Helvering*, 293 U.S. 465, 469–70 (1935); *Associated Wholesale Grocers, Inc. v. United States*, 927 F.2d 1517, 1522 (10th Cir. 1991) (noting that ''the step transaction principle derives from the classic tax case *Gregory v. Helvering*'' and has been used at least three times by the U.S. Supreme Court).

5. *Penrod v. Comm'r*, 88 T.C. 1415, 1428–29 (T.C. 1987).

6. *Noddings*, 1999 WL 182568, at *6; *see also Bank of N.Y. Mellon Trust Co. v. Liberty Media Corp.*, 29 A.3d 225, 240 (Del. 2011) (noting that the binding commitment test is the ''most restrictive'' of the three tests).

7. *Noddings*, 1999 WL 182568, at *6; *Penrod*, 88 T.C. at 1430.

8. *Noddings*, 1999 WL 182568, at *6; *Penrod*, 88 T.C. at 1428–29 (noting that the end result test is the most ''far reaching'' of the three tests).

9. *Cf. Minn. Tea Co. v. Helvering*, 302 U.S. 609, 613 (1938) (''A given result at the end of a straight path is not made a different result because reached by following a devious path.'').

10. *Gregory v. Helvering*, 293 U.S. 465, 467 (1935).

11. *Id.*

12. *Id.* at 470.

13. *Id.* (''To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.'').

14. *See, e.g., Int'l Specialty Prods., Inc. v. Dexter Corp.*, 2000 WL 35453111, at *7 (D. Conn. July 27, 2000) (applying a variation of the step-transaction doctrine and finding that, ''if each of the steps has independent economic significance, is not a sham and was undertaken for a valid business purpose, the steps will not be collapsed under the step transaction doctrine'').

15. *Sharon Steel Corp. v. Chase Manhattan Bank N.A.*, 691 F.2d 1039, 1049–52 (2d Cir. 1982).

16. *Id.* at 1045–46.

17. *Id.* at 1045–48.

18. *Id.* at 1049.

19. *Id.* at 1051–52.

20. *Noddings Inv. Grp., Inc. v. Capstar Commc'ns, Inc.*, 1999 WL 182568, at *1 (Del. Ch. Mar. 24, 1999) (*Noddings I*), *aff'd,* 741 A.2d 16 (Del. 1999) (TABLE); *Noddings Inv. Grp., Inc. v. Capstar Commc'ns, Inc.*, 1999 WL 350494, at *1 (Del. Ch. Apr. 16, 1999) (*Noddings II*).

21. *Noddings I*, 1999 WL 182568, at *1.

22. *Id.* at *2.

23. *Id.* at *1.

24. *Id.* at *7.

25. *Id.*

26. *Noddings II*, 1999 WL 350494, at *1.

27. *See* C. Stephen Bigler & Blake Rohrbacher, *Form or Substance? The Past, Present, and Future of the Doctrine of Independent Legal Significance*, 63 BUS. LAW. 1, 1 (2007) (describing the doctrine of independent legal significance as follows: ''so long as a transaction is effected in compliance with the requirements of one section of the Delaware General Corporation Law ('DGCL'), Delaware courts will not invalidate it for failing to comply with the requirements of a different section of the DGCL—even if the substance of the transaction is such that it could have been structured under the other section'').

28. *Noddings II*, 1999 WL 350494, at *1.

29. *Id.*

30. *Gatz v. Ponsoldt*, 925 A.2d 1265, 1280 (Del. 2007).

31. *Id.* at 1280–81.

32. *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *9–10 (Del. Ch. Sept. 14, 2007).

One of the authors has argued elsewhere that the 2007 *Crawford* opinion applied the step-transaction doctrine without expressly referencing it. *See* Bigler & Rohrbacher, *supra* note 27, at 17–18; *La. Mun. Police Empls.' Ret. Sys. v. Crawford*, 918 A.2d 1172 (Del. Ch. 2007). In that case, the Court of Chancery held that a special cash dividend to be paid by Caremark Rx to its stockholders before the closing of its merger with CVS Corporation should be treated as if it were part of the merger consideration being paid by CVS to Caremark stockholders in the merger, thus giving Caremark stockholders appraisal rights in what was otherwise a stock-for-stock merger not giving rise to appraisal rights. *Crawford*, 918 A.2d at 1190. While not expressly applying the step-transaction doctrine, the Court considered whether the two independent transactions—the special dividend and merger—should be considered so interdependent that they were in reality one transaction. Similar to the *Noddings* opinion (which was also decided by then-Chancellor Chandler), the Court found public statements important in suggesting that the defendants viewed the transactions as one single transaction. In other words, the facts ''belie[d] the claim that the special dividend has legal significance independent of the merger.'' *Id.* at 1191.

33. *Twin Bridges*, 2007 WL 2744609, at *3.

34. *Id.* at *10 (''Indeed, partnership agreements in Delaware are treated exactly as they are treated in tax law, as contracts between the parties.'').

35. *Id.* at *16.

36. *Id.* at *10 (''As the Delaware Supreme Court emphasized in *Gatz*, 'transactional creativity [] should not affect how the law views the substance of what truly occurred.'' (alteration in original)).

37. *Bank of N.Y. Mellon Trust Co. v. Liberty Media Corp.*, 29 A.3d 225, 239–40 (Del. 2011).

38. *Liberty Media Corp. v. Bank of N.Y. Mellon Trust Co.*, 2011 WL 1632333, at *10–17 (Del. Ch. Apr. 29, 2011), *aff'd*, 29 A.3d 225.

39. *Bank of N.Y.*, 29 A.3d at 244.

40. *Coughlan v. NXP B.V.*, 2011 WL 5299491 (Del. Ch. Nov. 4, 2011).

41. *Id.* at *1.

42. *Id.*

43. *Id.*

44. *Id.* at *3.

45. *Id.* Less than a year later, NXP sold its interest in the joint venture. *Id.* at *4.

46. *Id.* at *6–7.

47. *Id.* at *7.

48. *Id.*

49. *Id.* at *7–8.

50. *Id.* at *9 (footnotes omitted).

51. *Id.*

52. *Id.* at *7; *see also id.* at *9 (''[T]he controlling principle in applying the step transaction doctrine (or any such doctrine) in the construction of a contract is the effectuation of 'the parties' intentions as expressed in, or reasonably inferred from, their agreement.'").

53. *Id.* at *8.

54. *Id.*

55. *Id. But cf. In re Sunstates Corp. S'holder Litig.*, 788 A.2d 530, 535 (Del. Ch. 2001) (interpreting provisions in a certificate of incorporation: ''I am unable to accept plaintiffs' related argument that the duty of good faith and fair dealing precluded Sunstates from doing indirectly through its subsidiaries that which it was prevented from doing directly itself.'').

56. *Coughlan*, 2011 WL 5299491, at *9 (''The Defendant has not identified any distinctions from prior case law that convincingly suggest that the step transaction doctrine should not be applied here, nor has the Defendant pointed to any evidence in the record that suggests that the parties' intent was to draft an illusory protection for GloNav's former stockholders. Additionally, none of the principles upon which the step transaction doctrine originated dictate against applying the doctrine in other areas of contract law.'').

57. *Id.*

58. *Noddings I*, 1999 WL 182568, at *7 (''Defendants have not provided me with reasons in the form of case law or otherwise for why it would be improper to determine as a matter of law that these two transactions . . . should be combined into one . . . .''); *Noddings II*, 1999 WL 350494, at *1 (noting that the defendant had cited no cases holding ''that this Court *cannot* apply the step transaction doctrine outside [the tax] realm or that of fraudulent conveyance''); *Twin Bridges*, 2007 WL 2744609, at *10 (''I see no reason as a matter of law or equity why the step transaction principle should not be applied here.'').

59. Similarly, arguments that the step-transaction doctrine conflicts with the doctrine of independent legal significance are also unlikely to succeed. The Court of Chancery at least twice has rejected that argument, citing the distinction between corporate law (doctrine of independent legal significance) and contract law (step-transaction doctrine). *See, e.g.*, *Noddings II*, 1999 WL 350494, at *1 (stating that ''the law at issue in this matter was related to contractual interpretation, not corporate law, further distancing this case from the protection of [the doctrine of independent legal significance]''); *Twin Bridges*, 2007 WL 2744609, at *10 n.47 (''Plaintiffs cite *Warner Commc'ns, Inc. v. Chris-Craft Indus., Inc.* for the doctrine of independent legal significance, and argue that, under that doctrine, the Amendment and Merger should be treated as separate and independent events. This doctrine, however, is fundamentally rooted in corporation law.'' (citations omitted)). Nevertheless, it is conceivable that the step-transaction doctrine could be used in corporate law—for example, to collapse a series of transactions for purposes of determining whether ''all or substantially all'' of a company's assets had been sold and whether a stockholder vote was needed under 8 *Del. C.* §271. *Cf., e.g.*, *Bacine v. Scharffenberger*, 1984 WL 21128, at *1 (Del. Ch. Dec. 11, 1984) (noting that ''plaintiffs argue that the sale of the three subsidiaries, as initially proposed, constituted the first step of a plan to liquidate the corporation and that accordingly, being a part of a plan of liquidation, the sale must be submitted to the vote of the shareholders pursuant to 8 *Del. C.* §275,'' but not deciding the issue); *Int'l Specialty Prods.*, *Inc. v. Dexter Corp.*, 2000 WL 35453111, at *1 (D. Conn. July 27, 2000) (concluding under Connecticut law that, ''although Dexter developed the ultimate objective of selling off 'all or substantially all' its assets through a series of transactions, in the absence of any showing that the transactions were interrelated or interdependent such that one prearranged plan could be inferred, Dexter is not required to submit the first transaction in the series to a shareholder vote'').

60. *Cf. Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (noting that ''the implied covenant attaches to every contract'').

61. *Id.* at 441 (footnotes omitted); *see also Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 22–23 (Del. Ch.) (stating

that an implied duty ''arises only where it is clear from what the parties expressly agreed, that they would have proscribed the challenged conduct as a breach of the implied covenant of good faith had they thought to negotiate with respect to the matter''), *aff'd*, 609 A.2d 668 (Del. 1992) (TABLE).

62. *Coughlan*, 2011 WL 5299491, at *7.

63. *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010); *see also id.* at 1128 (stating that the implied covenant cannot be used to ''rebalanc[e] economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract'').

64. *Coughlan*, 2011 WL 5299491, at *9.

65. Further, the Court of Chancery can take into account the equities of the situation even without the step-transaction doctrine. *See, e.g.*, *id.* at *10 (''Even if the step transaction doctrine did not apply in this case, I would still consider the two transactions together as a matter of equity. It is well-established that 'equity regards substance rather than form.'''); *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) (stating that ''inequitable action does not become permissible simply because it is legally possible'').

66. *Cf. Twin Bridges*, 2007 WL 2744609, at *17 (''Assuming that the original parties did not foresee that the OPA could be amended by way of a merger approved by only two-thirds of the interests to provide for the addition of a former limited partner as a third general partner, I still find that no violation of the implied covenant of good faith and fair dealing occurred. The covenant only would be applicable if the integrated transaction was clearly against the intent of the parties as expressed in the OPA. For reasons previously stated, the integrated transaction did not violate the expressed intent of the original parties. Thus, the Amendment and Merger did not contravene the implied covenant.'').

67. *Id.* at *10.

68. *Coughlan*, 2011 WL 5299491, at *8.

69. *See id.* (rejecting the defendant's argument that the step-transaction doctrine would '''violate the intent of the parties,''' even though early drafts of the merger agreement proposed that acceleration would occur if NXP '''ceases to be (either directly, or indirectly through one or more wholly owned subsidiaries)' the owner of . . . substantially all of the assets of GloNav'' (omission in original)). The Court reasoned that the negotiating history did not suggest that ''acceleration was not meant to occur upon a series of interdependent transactions that, when analyzed substantively rather than hypertechnically, clearly fits within the [contract provisions].'' *Id.*