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Form or Substance? The Past, Present, and Future of the Doctrine of Independent Legal Significance

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The "bedrock" doctrine of independent legal significance provides that, if a transaction is effected in compliance with the requirements of one section of the Delaware General Corporation Law ("DGCL"), Delaware courts will not invalidate the transaction for failing to comply with the requirements of another section of the DGCL—even if the substance of the transaction is such that it could have been structured under the other section. Two recent decisions of the Delaware courts have caused commentators to question the doctrine's status. This Article looks to the foundation of the doctrine and the Delaware courts' use of equitable review (and the substance-over-form doctrine) to clarify when the doctrine of independent legal significance does and does not apply and when it may be relied on with confidence by corporate practitioners. The doctrine as applied by the courts is narrower than sometimes assumed by corporate practitioners, and the Delaware courts may use their equitable powers to look through a transaction's form to its substance even if the doctrine does apply.

The doctrine of independent legal significance ("ILS") is one of the "bedrock"[1] doctrines of Delaware corporate law. The Delaware Supreme Court has defined ILS as providing that "action taken under one section of that law is legally independent, and its validity is not dependent upon, nor to be tested by the requirements of other unrelated sections under which the same final result might be attained by different means."[2] That is, 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.[3] For example, a stock split may be effected in two different ways. A corporation may either (1) amend its certificate of

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1. Warner Commc'ns Inc. v. Chris-Craft Indus., Inc., 583 A.2d 962, 970 (Del. Ch.) (referring to the Delaware courts' "bedrock doctrine of independent legal significance"), *aff'd*, 567 A.2d 419 (Del. 1989) (unpublished table decision).

2. Orzeck v. Englehart, 195 A.2d 375, 378 (Del. 1963).

3. *See* Winston v. Mandor, 710 A.2d 835, 841 (Del. Ch. 1997), *appeal dismissed*, 713 A.2d 932 (Del. 1998) (unpublished table decision); *see also Orzeck*, 195 A.2d at 377 ("The mere fact that the result of actions taken under one section may be the same as the result of action taken under another section does not require that the legality of the result must be tested by the requirements of the second section.").

incorporation under section 242 of the DGCL to subdivide the outstanding shares into a greater number of shares or (2) issue the new stock as a dividend under section 170. The stock split would require a stockholder vote if effected as an amendment, but not if effected as a dividend declared by the board.[4] If a corporation effects the stock split by declaring a stock dividend under section 170, under ILS the courts would not require the stockholder vote that would have been required if the stock split had been effected as a subdivision of the outstanding shares under section 242.

ILS provides a benefit to Delaware corporations and their counsel by allowing certainty. If corporate lawyers structure a transaction in a certain way, in a way compliant with one section of the DGCL, they can have comfort that the courts will not invalidate the transaction for its failure to comply with a different section.[5] As the Court of Chancery noted in *Speiser v. Baker*:

> As a general matter, those who must shape their conduct to conform to the dictates of statutory law should be able to satisfy such requirements by satisfying the literal demands of the law rather than being required to guess about the nature and extent of some broader or different restriction at the risk of an *ex post facto* determination of error. The utility of a literal approach to statutory construction is particularly apparent in the interpretation of the requirements of our corporation law—where both the statute itself and most transactions governed by it are carefully planned and result from a thoughtful and highly rational process.
>
> Thus, Delaware courts, when called upon to construe the technical and carefully drafted provisions of our statutory corporation law, do so with a sensitivity to the importance of the predictability of that law. That sensitivity causes our law, in that setting, to reflect an enhanced respect for the literal statutory language.[6]

Thus, ILS allows Delaware corporations and their counsel to plan transactions secure in the advance knowledge of the legal requirements for, and legal consequences of, those transactions.

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4. *Compare* DEL. CODE ANN. tit. 8, § 170(a) (2001), *with id.* § 242(b). For another example, ILS traditionally arose in response to a claim that a transaction should be treated as a *de facto* merger. Company A would (1) sell its assets to Company B in exchange for shares of B stock and (2) liquidate itself, distributing the B shares to the stockholders of A upon dissolution. The end result of this two-step transaction (A stockholders owning B shares; B stockholders owning A assets) is the same as would have been obtained under section 251 of the DGCL, though Company A did not comply with the requirements of section 251. In response to the claim by an A stockholder that Company A has effected a *de facto* merger—and therefore that Company A's stockholders deserve appraisal rights—the Delaware courts would apply the doctrine of ILS and uphold the transaction as structured. *See, e.g.*, Hariton v. Arco Elecs., Inc., 188 A.2d 123 (Del. 1963). The Delaware Supreme Court has held that a reorganization

> accomplished through § 271 [of the DGCL] and a mandatory plan of dissolution and distribution is legal. . . . because the sale-of-assets statute [section 271] and the merger statute [section 251] are independent of each other. They are, so to speak, of equal dignity, and the framers of a reorganization plan may resort to either type of corporate mechanics to achieve the desired end.

Id. at 125.

5. *See* 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 9.4, at 9-9 (3d ed. 2007) ("The doctrine [of ILS] has become a keystone of Delaware corporate law and is continually relied upon by practitioners to assure that transactions can be structured under one section of the General Corporation Law without having to comply with other sections which could lead to the same result.").

6. Speiser v. Baker, 525 A.2d 1001, 1008 (Del. Ch.), *appeal refused*, 525 A.2d 582 (Del. 1987) (unpublished table decision); *see also* Uni-Marts, Inc. v. Stein, C.A. Nos. 14713 & 14893, 1996 WL

I. Disturbance in the Doctrine? The CVS/Caremark Case

Because of the heavy reliance placed on ILS in transactional planning involving Delaware corporations, the Court of Chancery's recent holding in *LAMPERS v. Crawford*[7] took many corporate lawyers by surprise. The *LAMPERS* court held that a special cash dividend to be paid by Caremark Rx to its stockholders before the closing of its merger with CVS Corporation was to 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 in which there would have been no appraisal rights.[8] The court disregarded that the dividend payment was being paid by Caremark prior to the closing of the merger under section 170 of the DGCL and was not being paid by CVS pursuant to the conversion provisions of the merger agreement. Since the dividend was being paid under section 170, it was different from the merger consideration being paid under section 251 of the DGCL in a number of ways, including that unlike merger consideration payable under section 251 it was subject to the availability of lawful funds and that stockholders who dissented from the merger and exercised appraisal rights were entitled to receive the dividend even though they would not receive the consideration paid under the conversion provisions of the merger agreement. The court brushed aside what it viewed as technicalities, holding that the dividend was "simply cash consideration dressed up in a none-too-convincing disguise."[9] Thus, the Chancellor enjoined the merger vote until notice of appraisal rights was given in accordance with the applicable provisions of the DGCL (and until other corrective disclosure was made).[10]

Perhaps because the Delaware courts have a long history of interpreting the appraisal statute literally and of rejecting attempts to award appraisal rights on equitable grounds,[11] and because of the potentially dire consequences of corporate planners' being wrong on an important issue such as the availability of appraisal

466961, at *9 (Del. Ch. Aug. 12, 1996) ("Formality in the analysis of intellectual problems has been largely out of fashion for much of this century, and Delaware corporation law has sometimes been criticized for its reliance on formality. But the entire field of corporation law has largely to do with formality. Corporations come into existence and are accorded their characteristics, including most importantly limited liability, because of formal acts. Formality has significant utility for business planners and investors. While the essential fiduciary analysis component of corporation law is not formal but substantive, the utility offered by formality in the analysis of our statutes has been a central feature of Delaware corporation law.").

7. La. Mun. Police Employees' Ret. Sys. v. Crawford, 918 A.2d 1172 (Del. Ch.), *review refused sub nom.* Express Scripts, Inc. v. Crawford, No. 113, 2007, 2007 WL 707550 (Del. Mar. 9, 2007) (unpublished table decision) [hereinafter "*LAMPERS*"].

8. *Id*. at 1191–92.

9. *Id*.

10. *Id*. at 1192.

11. *See, e.g.*, Ala. By-Prods. Corp. v. Neal, 588 A.2d 255, 258 n.1 (Del. 1991) ("This Court has consistently held that there is no basis for expanding the limited remedy which is provided for in the Delaware appraisal statute by the invocation of equitable principles. The invocation of equitable principles to override established precepts of Delaware corporate law must be exercised with caution and restraint. Otherwise, the stability of Delaware law is imperiled. . . . Since claims of unfair dealing cannot be litigated in a statutory appraisal proceeding, an act of unfair dealing cannot be the equitable basis for independently attributing value to stock in such an action." (citations omitted)); *see also* Coyne v. Schenley Indus., Inc., 155 A.2d 238, 239 (Del. 1959) (holding that a beneficial owner was ot entitled to pursue appraisal following a short-form merger); Salt Dome Oil Corp. v. Schenck, 41

rights in a merger,[12] some commentators questioned the future of ILS when the *LAMPERS* opinion first issued. "'Independent legal significance' is not so certain in Delaware, at least not in the Court of Chancery," said some.[13] Others stated that the decision was "a surprise to many practitioners and seems contrary to the well-settled Delaware corporate law doctrine of independent legal significance."[14] On the other hand, one commentator suggested that the doctrine was not really implicated in *LAMPERS* because the doctrine "only matters when two characterizations of a transaction are mutually exclusive," and nothing in section 262 *forbids* a dividend from being treated as merger consideration.[15]

This Article discusses whether *LAMPERS* is an anomaly or a signal of ILS's demise, and whether *LAMPERS* was really an ILS case at all. We first describe the evolution of ILS and its application in the Delaware courts. Then, we examine recent cases for insight into the courts' current thinking about the scope of ILS, including the reference by the Delaware Supreme Court to the step-transaction doctrine in *Gatz v. Ponsoldt*,[16] decided less than a month after *LAMPERS*. Finally, we discuss the future of ILS in light of *LAMPERS* and conclude that practitioners may have assumed that the doctrine is broader than in fact it is viewed by the Delaware courts.

II. The History of ILS

A. Havender and Its Progeny

The reasoning behind ILS first appeared in *Federal United Corp. v. Havender*.[17] *Havender* involved the merger of Federal United with a wholly owned subsidiary whereby the accrued dividends on Federal United's preferred stock were to be cancelled.[18] An earlier court had held that accrued dividends could not be

A.2d 583, 589 (Del. 1945) (holding that a beneficial owner was not entitled to pursue appraisal under the predecessor to the current appraisal statute). *But cf. In re* Maxxam Group, Inc. Stockholders Litig., C.A. No. 8636, 1987 WL 10016, at *9 (Del. Ch. Apr. 16, 1987) ("Putting to one side the effect on the probability of success of such a claim of the role of an apparently disinterested negotiating committee, it seems clear that if structuring an interested merger [to avoid giving appraisal rights] would be found to be a breach of duty, the likely remedy (on the theory that flexible equitable remedies should be fashioned to address the specific wrong found) would be some sort of quasi-appraisal remedy as distinct from a right to rescission or rescissory damages.").

12. Failure to give proper notice of appraisal rights in a merger has been held reason to declare the merger void. *See* Jackson v. Turnbull, C.A. No. 13042, 1994 WL 174668, at *6 (Del. Ch. Feb. 8, 1994), *aff'd*, 653 A.2d 306 (Del. 1994) (unpublished table decision).

13. Edward D. Herlihy et al., Wachtell, Lipton, Rosen & Katz, *In re Caremark*—The Takeover Chronicles 4 (Mar. 23, 2007) (capitalization altered), http://blogs.law.harvard.edu/corpgov/files/2007/03/20070325%20WLRK%20Caremark%20Memorandum.pdf; *see also id*. ("It remains to be seen whether this ruling will be extended to other transactions involving different underlying facts.").

14. Potter Anderson & Corroon LLP, *Delaware Court of Chancery Delays Vote on CVS/Caremark Merger* (Feb. 2007), http://www.potteranderson.com/news-publications-0-194.html; *see also Appraising Caremark*, Corp. Control Alert, Apr. 2007, at 10, 10 ("Other lawyers believe the doctrine of independent legal significance should have led to the opposite result.").

15. Posting of Gordon Smith to Conglomerate, http://www.theconglomerate.org/2007/03/independent_leg.html (Mar. 6, 2007) ("Independent Legal Significance").

16. 925 A.2d 1265 (Del. 2007).

17. Fed. United Corp. v. Havender, 11 A.2d 331 (Del. 1940) [hereinafter "*Havender II*"].

18. *Id*. at 331.

cancelled through an amendment to a corporation's certificate of incorporation because the rights to the dividends were already vested.[19] Federal United had attempted to achieve the same result by structuring a merger in which the accrued dividends on the preferred stock would be eliminated.

The Court of Chancery invalidated the merger because "the so-called merger which the facts disclose here, is at best a mere technical thing."[20] The court found that this was not a typical merger that "occurs when two corporations having a distinct body of stockholders desire to throw their assets and liabilities into a common pool."[21] As a side effect of a typical merger, the two bodies of stockholders have to apportion the ownership of the unified corporation, which may involve "a reclassification of the shares and a revamping of the capital structure of the surviving company."[22] Federal United was merging with its wholly owned subsidiary, merely eliminating an intermediary, so there was no need for an equitable adjustment of ownership. Reclassifying and readjusting the capital structure "so as to be able to rid itself of the troublesome problem of its obligation to discharge the dividends" was not legally possible by charter amendment.[23] Allowing cancellation through merger would, in the words of the Court of Chancery, "giv[e] color of legality to what, under the cases hereinbefore cited, it was not permitted to do by way of an amendment of its certificate of incorporation."[24] Federal United's motive was to eliminate the accrued dividends as one would have done by amendment to the certificate of incorporation pursuant to section 26 had it been legally possible. Because the company's motive was not to join two bodies of stockholders in a merger contemplated by section 59, the Court of Chancery construed the transaction as it would have under section 26, ordering Federal United to pay the accrued dividends before the merger could take full effect.[25]

The Delaware Supreme Court reversed the Court of Chancery, upholding the merger and the cancellation of accrued dividends.[26] The supreme court reasoned that, in granting the general power of any two corporations to merge, the legislature had not prohibited mergers between a parent and its wholly owned subsidiary, so, as a matter of statutory construction, such a merger was legally possible pursuant to the merger statute then in effect.[27] "The shareholder has notice that the corporation whose shares he has acquired may be merged with another corporation if the required majority of the shareholders agree."[28] Since the merger statutes

19. Keller v. Wilson & Co., Inc., 190 A. 115, 124 (Del. 1936).
20. Havender v. Fed. United Corp., 2 A.2d 143, 146 (Del. Ch. 1938) [hereinafter "*Havender I*"].
21. *Id*.
22. *Id*. But "[c]apital readjustments and stock reclassifications are not ends which it is the function of mergers to accomplish." *Id*.
23. *Id*. at 147.
24. *Id*. (referring to *Keller*, 190 A. 115, cited *supra* note 19, and the other case regarding the vested-rights doctrine).
25. *Id*.
26. *Havender II*, *supra* note 17, 11 A.2d at 342–43.
27. *Id*. at 337.
28. *Id*. at 338.

contemplate capital restructurings of the type that eliminated the plaintiffs' accrued dividends, the "average intelligent mind must be held to know" that, in the event of a merger, "the various rights of shareholders, including the right to dividends on preference stock accrued but unpaid, may, and perhaps must, be the subject of reconcilement and adjustment."[29] Although the end results of cancellation through amendment and cancellation through merger were the same, "[t]here is a clear distinction between the situations recognized by the General Law and the modes of procedure applicable to each of them."[30] ILS was born in *Havender* when the court held that, although cancellation of the dividends through amendment would have been unlawful, the corporation could validly reach the same result through compliance with the requirements of the merger statute.[31]

The first case in which the phrase "independent legal significance" was used as an expression of the ILS doctrine[32] was *Langfelder v. Universal Laboratories, Inc.*, in which the U.S. District Court for the District of Delaware cited *Havender* for the proposition that a corporation could cancel accrued dividends through a merger even though it could not do the same by means of an amendment to the certificate of incorporation.[33] "The rationale is that a merger is an act of *independent legal significance*, and when it meets the requirements of fairness and all other statutory requirements, the merger is valid and not subordinate or dependent upon any other section of the Delaware Corporation Law."[34]

In the years following *Langfelder*, the Delaware courts continued to develop the concepts behind ILS, but it would be 17 years before the phrase "independent legal significance" was used again. The first development was *Fidanque v. American Maracaibo Company*, decided in 1952, in which the Court of Chancery held that selling all the outstanding stock of Case Pomeroy for 36% of the stock of Maracaibo was not a merger or *de facto* merger even though the result closely resembled a merger.[35] If the transaction had been structured as a merger, it would have required

29. *Id*.

30. *Id*. at 342 ("To say that the right to such dividends may not be destroyed by charter amendment . . . is not to say that the right may not be compounded under the merger provisions of the law which warn the shareholder that his right is defeasible . . . .").

31. *Id*. at 342–43.

32. In another federal case in the District of Delaware, *MacCrone v. American Capital Corp.*, the court used the phrase "independent legal significance" three years before *Langfelder*, but it meant something different from ILS as defined in this Article. *See* 51 F. Supp. 462, 470 (D. Del. 1943). Under the ILS doctrine, statutes are independent from the requirements of other statutes, whereas the act in *MacCrone* was independent of the motives that initiated the act. "May it be said that if a jural act is lawful, i.e., if the merger is lawful, no one can claim that the motive which generated it rests on bad faith." *Id*. at 470 n.10 (citing Gans v. Del. Terminal Corp., 2 A.2d 154 (Del. Ch. 1938)). Interestingly, *MacCrone* was authored by Judge Paul Leahy, the author of *Langfelder*.

33. Langfelder v. Universal Labs., Inc., 68 F. Supp. 209, 211 & n.5 (D. Del. 1946) (citing Fed. United Corp. v. Havender, 11 A.2d 331, 343 (Del. 1940)).

34. *Id*. at 211 (emphasis added); *see also* Hottenstein v. York Ice Mach. Corp., 136 F.2d 944 (3d Cir. 1943) (holding that a *Havender*-type merger was allowed by Delaware law even when the subsidiary was created for the primary purpose of effecting the merger).

35. 92 A.2d 311, 315–16 (Del. Ch. 1952). The *Fidanque* court remarked that in determining

> [w]hether a particular transaction is in reality a merger . . . all the elements of the transaction must be considered. There is no magic in the words applied to the transaction. Calling it a

a two-thirds vote of the holders of the outstanding stock and would have triggered appraisal rights for the dissenting stockholders.[36] As structured, the transaction neither required a stockholder vote nor afforded dissenting stockholders appraisal rights. Maracaibo allowed its stockholders to vote on the transaction, but only 57% of the holders of the outstanding stock gave their approval.[37] The sale complied with the statute regarding issuances of stock for stock and therefore was not obligated to meet the merger statute's requirements.[38] The court upheld the transaction where the corporation complied with the requirements for one statutory regime even though the corporation reached the same result as would have been reached through another statutory regime (with which the corporation did not comply).

In the same year as *Fidanque*, the Delaware Supreme Court also distinguished sales of assets from mergers in *Sterling v. Mayflower Hotel Corp*. There plaintiffs had argued that a "merger is essentially a sale of assets."[39] If the court had applied the sale-of-assets statute, the plaintiffs would have been entitled to the higher liquidation value of their stock, as opposed to its lower going-concern value.[40] A merger is "something quite distinct" from a sale of assets, the court stated, "and the distinction is not merely one of form, as the plaintiffs say, but one of substance. A merger ordinarily contemplates the continuance of the enterprise," while a sale of assets "ordinarily contemplates the liquidation of the enterprise."[41] In a nod to the independent significance of the two statutory provisions, the court stated that, although there was "overlap" between the statutes, "[t]hey are, in general, distinct and designed for different ends."[42]

Seven years later, in *Heilbrunn v. Sun Chemical Corp.*, the Delaware Supreme Court again considered an argument that a sale of assets should be treated as a merger.[43] The *Heilbrunn* transaction consisted of Sun buying all the assets of Ansbacher in exchange for stock in Sun.[44] After the purchase, Ansbacher was to dissolve and distribute its assets (the Sun stock) to its stockholders.[45] Since the transaction was structured as a sale of assets, as opposed to a statutory merger, the Sun stockholders were not entitled to appraisal rights. Relying on *Sterling* and using its "overlap" language, the court rejected plaintiffs' attempt to argue that the sale of assets should be treated as if it had been a merger, even though the selling corporation was to be dissolved after the sale and its assets distributed as if the companies had statutorily merged.[46]

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merger does not necessarily make it so and giving it another name does not prevent it from being a merger.

Id.

36. *Id*. at 315.
37. *Id*.
38. *Id*.
39. 93 A.2d 107, 112 (Del. 1952).
40. *Id*. at 111.
41. *Id*. at 112.
42. *Id*.
43. 150 A.2d 755 (Del. 1959).
44. *Id*. at 756.
45. *Id*.
46. *Id*. at 757 (citing *Sterling*, 93 A.2d at 112).

In *Hariton v. Arco Electronics, Inc.*, the Delaware Supreme Court referred to the legal concept underlying the holdings in *Fidanque, Sterling*, and *Heilbrunn* using the phrase "'independent legal significance.'"[47] The structure of the transaction in *Hariton* was the same as in *Heilbrunn*: a sale of A's assets for B stock followed by A's dissolution and the distribution of B stock to A's stockholders.[48] The difference was that, in *Hariton*, the plaintiffs were stockholders of the company whose assets were purchased, while in *Heilbrunn* the plaintiffs were stockholders of the purchasing company.[49] The question in *Hariton*, therefore, was whether stockholders of the selling corporation were entitled to the appraisal rights available in a merger when it was their company selling all of its assets and dissolving.[50] The court reached the same result as in *Heilbrunn*, upholding the transaction's structure as a sale of assets and rejecting a claim that the transaction should have been structured as a merger so as to grant appraisal rights.[51] The court held that the sale-of-assets method of reorganization was valid "because the sale-of-assets statute and the merger statute are independent of each other. They are, so to speak, of equal dignity, and the framers of a reorganization plan may resort to either type of corporate mechanics to achieve the desired end."[52] The court drew authority from *Havender* and the phrase "independent legal significance" from *Langfelder*.[53]

Hariton had settled the independence of the sale-of-assets statute as against the merger statute. The next development, *Orzeck v. Englehart*, clarified that this independence was a general feature of Delaware's corporate law not limited to sale-of-assets-versus-merger scenarios.[54] The court in *Orzeck* summarized the effect of the line of cases from *Havender* to *Hariton* as meaning that:

> [T]he general theory of the Delaware Corporation Law is that action taken under one section of that law is legally independent, and its validity is not dependent upon, nor to be tested by the requirements of other unrelated sections under which the same final result might be attained by different means.[55]

Once the doctrine reached this mature expression, the courts applied it with sufficient regularity that it became "a keystone of Delaware corporate law."[56]

B. Where ILS Has Been Applied

The Delaware courts have applied ILS in several contexts. The first, and most frequently discussed in the early cases, is in response to arguments that a transaction or series of transactions has resulted in a *de facto* merger and therefore the

47. 188 A.2d 123, 125 (Del. 1963) (citation omitted).
48. *Id.* at 124.
49. *Id.*
50. *Id.*
51. *Id.* at 125.
52. *Id.*
53. *Id.*
54. 195 A.2d 375 (Del. 1963) (holding that a corporation's purchase of the stock of another corporation was not a merger but was a valid purchase of stock under section 123 of the DGCL).
55. *Id.* at 378.
56. 1 Balotti & Finkelstein, *supra* note 5, § 9.4, at 9-9.

court ought to require the procedures applicable to a merger to be followed and allow stockholders to exercise any appraisal rights that would have been available in a merger.[57]

In *Hariton*, Arco first transferred its assets and liabilities to Loral for Loral stock. Then Arco dissolved and distributed the Loral stock to the Arco shareholders.[58] The plaintiffs, stockholders of Arco, sought appraisal rights under the merger statute, but appraisal rights were denied because the court held that no merger had taken place and that it was merely a sale of assets.[59] In *Orzeck*, the Bellanca Corporation purchased all the stock of seven corporations with stock, pitting the statute allowing corporations to purchase stock against the merger statute.[60] There plaintiffs again sought appraisal rights, and the court again refused to apply merger procedures where the transaction was not structured in compliance with the merger provisions of the DGCL.[61] The court also held in *Tri-Star* that a sale of assets for stock was not a merger in a transaction in which the assets and liabilities of the entertainment sector of Coca-Cola were transferred to Tri-Star in exchange for shares of Tri-Star.[62] Plaintiffs filed a direct suit, arguing that a merger had taken place and that they were directly harmed because the merger consideration was inadequate.[63] The court construed the transaction as a sale of assets for stock and dismissed the claim because it was derivative.[64]

Plaintiffs have also been unable to convince Delaware courts of the reverse, i.e., that a merger was a sale of assets. The court in *Sterling* held that the distinction should be respected in both directions, rejecting a claim by plaintiffs that they were entitled in a merger to the liquidation value that they would have received in a sale of assets.[65] Similarly, the court applied ILS in *Rothschild International Corp. v. Liggett* to reject claims by holders of preferred stock who argued that a merger following a tender offer constituted a liquidation entitling them to their liquidation preference.[66]

57. *De facto* merger is circumscribed in Delaware. When the courts have adopted the theory it was "only then 'for the protection of creditors or shareholders who have suffered an injury by reason of failure to comply with the statute governing such sales.'" 1 *id*. § 9.3, at 9-7 (quoting Heilbrunn v. Sun Chem. Corp., 150 A.2d 755, 758 (Del. 1959)); *see also* Finch v. Warrior Cement Corp., 141 A. 54, 59 (Del. Ch. 1928) ("If the Gulf Company undertook in substance to effect a reorganization of itself, and the statutory provision governing a sale of all corporate assets was resorted to as a suitable method, it would be laying down a dangerous rule to hold that at the last and consummating stage of the business the statute's scheme might be entirely abandoned."); Drug, Inc. v. Hunt, 168 A. 87, 95 (Del. 1933) ("[T]hough termed a 'reorganization,' the transaction in question, was in its legal effect a de facto merger or combination of the two corporations which makes Drug, Incorporated, the defendant below, liable in this action."). The list of transactions in the Balotti and Finkelstein treatise that have been validated through ILS forms the basis for this section.

58. *Hariton*, 188 A.2d at 124; *see also* Heilbrunn v. Sun Chem. Corp., 150 A.2d 755, 755 (Del. 1959).

59. *Hariton*, 188 A.2d at 124.

60. *Orzeck*, 195 A.2d at 375.

61. *Id*. at 377.

62. *In re* Tri-Star Pictures, Inc. Litig., C.A. No. 9477, 1990 WL 82734, at *1 (Del. Ch. June 14, 1990).

63. *Id*. at *4.

64. *Id*. at *4–5.

65. Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 112 (Del. 1952).

66. Rothschild Int'l Corp. v. Liggett Group, Inc., 474 A.2d 133, 135 (Del. 1984).

The courts have also used ILS to validate multi-step transactions that would have been illegal if done in one step. For example, in *Edelman v. Phillips Petroleum Co.*, the Court of Chancery upheld a two-step transaction where, in the first step, common stock was reclassified as preferred stock and, in the second step, the preferred was redeemed.[67] The plaintiffs claimed that this was an unauthorized redemption of common stock,[68] but the court upheld the transaction because, broken into steps as it was, the transaction was technically compliant with the DGCL.[69]

The ILS doctrine has also been invoked in issues involving the stockholder vote. In *Warner Communications Inc. v. Chris-Craft Industries, Inc.*, the Court of Chancery held that a merger could proceed under section 251 of the DGCL without a class vote of the preferred stock even though the merger may have an adverse effect on the preferred stock that would have triggered a class vote under section 242.[70]

C. Recent Cases

In the last ten years, however, in decisions presaging *LAMPERS* and *Gatz*, the Court of Chancery has quietly circumscribed the use of ILS, often resolving cases instead under its ability to do equity.

In its 1997 *SICPA Holding* opinion, the Court of Chancery discussed the relationship between equity and ILS.[71] SICPA owned 40% of the shares of Flex Products, Inc., and Optical Coating owned the other 60%.[72] SICPA alleged that Flex was attempting to issue shares in a registered private placement for the "improper purpose of trying to destroy rights arising from several . . . contracts between SICPA and [Optical Coating] in their capacities as Flex's sole shareholders."[73] The court avoided the question of Flex's legal authority to sell the shares but did discuss the two-part analysis involved in deciding the propriety of corporate actions, stating that "fiduciary analysis is a different (supervening) level of analysis from legal analysis."[74] "That is," the court stated, "the question whether an act constitutes a breach of fiduciary duty and is subject to possible equitable remedy, such as rescission, is distinct from the question whether such an act was properly authorized or is legally valid."[75] Fiduciary analysis (based on equitable considerations) was, the court stated, distinct from the analysis of legal authority—the doctrine of independent legal significance.[76] The court noted that ILS "applies to exercise

67. C.A. No. 7899, 1985 WL 11534, at *7 (Del. Ch. Feb. 12, 1985).
68. Such a redemption is no longer unlawful. *See* Del. Code Ann. tit. 8, § 151(b) (2001).
69. *Edelman*, 1985 WL 11534, at *7.
70. 583 A.2d 962, 969–70 (Del. Ch.), *aff'd*, 567 A.2d 419 (Del. 1989) (unpublished table decision).
71. SICPA Holding S.A. v. Optical Coating Lab., Inc., C.A. No. 15129, 1997 WL 10263 (Del. Ch. Jan. 6, 1997).
72. *Id.* at *1.
73. *Id.*
74. *Id.* at *5.
75. *Id.*
76. *Id.*

of legal power. It does not apply to fiduciary review."[77] Because the two modes of analysis operate independently, the court reiterated that is it not

> always irrelevant that a board attempts to accomplish a transaction in a way other than a more conventional way that is blocked. In some circumstances, especially where the transaction has a disparate effect on shareholders and the board or a controlling shareholder benefits disproportionately, such transaction, though legally valid, will be subject to fiduciary or fairness review.[78]

Two months later, the court opted for equity instead of ILS in *Winston v. Mandor*.[79] The Mandor brothers were directors and officers of Milestone Properties, as well as the owners of Concord Assets Group.[80] The Mandors had caused Milestone to buy Concord properties with newly issued Milestone common stock, leaving the Mandors with nearly 80% of the outstanding Milestone common.[81] The Mandors later caused Milestone to spin off its original (pre-Concord) properties to a subsidiary called Union Properties Investors ("UPI") in return for UPI stock.[82] Milestone then distributed the UPI shares to the Milestone common stockholders in the form of a dividend.[83] Plaintiff held preferred Milestone shares, and subsection 6(d) of the company's certificate granted the preferred a conversion right upon the sale of all or substantially all of Milestone's assets.[84] Plaintiff sued, claiming that the Mandors had failed to comply with section 271 of the DGCL (the sale-of-assets statute) and had breached Milestone's certificate because the conversion right should have been triggered.

The defendants raised ILS as a defense, claiming that the spin-off was separate from the distribution, so the fact that the transaction might also have been structured as a sale of assets under section 271 of the DGCL was "therefore not relevant."[85] Although it assumed, "for the sake of argument," that ILS was relevant to the certificate of incorporation provision, the court had concerns about its application.[86] Ultimately, the court "accept[ed] plaintiff's assertion that the UPI

77. *Id.*

78. *Id.; see also* Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1077–78 (Del. Ch.) ("In general, there are two types of corporate law claims. The first is a legal claim, grounded in the argument that corporate action is improper because it violates a statute, the certificate of incorporation, a bylaw or other governing instrument, such as a contract. The second is an equitable claim, founded on the premise that the directors or officers have breached an equitable duty that they owe to the corporation and its stockholders."), *appeal denied*, 856 A.2d 1066 (Del. 2004) (unpublished table decision).

79. 710 A.2d 835 (Del. Ch. 1997), *appeal dismissed*, 713 A.2d 932 (Del. 1998) (unpublished table decision).

80. *Id.* at 836–37.

81. *Id.* at 837.

82. *Id.*

83. *Id.*

84. *Id.* at 840–41. As in *Warner Communications Inc. v. Chris-Craft Industries, Inc.*, 583 A.2d 962 (Del. Ch.), *aff'd*, 567 A.2d 419 (Del. 1989) (unpublished table decision), and *Benchmark Capital Partners IV, L.P. v. Vague*, C.A. No. 19719, 2002 WL 1732423 (Del. Ch. July 15, 2002), *aff'd sub nom. Benchmark Capital Partners IV, L.P. v. Juniper Financial Corp.*, 822 A.2d 396 (Del. 2003) (unpublished table decision), the transaction was apparently structured to avoid the contractual rights that otherwise would have arisen.

85. *Winston*, 710 A.2d at 841.

86. *Id.* ("There are two immediate difficulties with th[e ILS] argument. First, whether statutory provisions defining the outer limits of a Delaware corporation's authority may be relied upon to avoid

transactions constitute[d] a single transaction in satisfaction of subsection 6(d) of the Certificate" and denied "defendants' motion to dismiss plaintiff's claim for breach of subsection 6(d) of the Certificate."[87] The court seemed uncomfortable applying ILS where the question did not involve the legal validity of a corporate transaction, and its concatenation of the two transactions went far beyond the realm of ILS, as the court used its equitable powers to consider the substance of the two transactions rather than their form.

Chancellor Chandler's 1999 *Noddings* opinion presented an issue similar to that in *LAMPERS* (and the court reached a result similar to that in *Winston*), although under New York law.[88] Noddings Investment Group owned warrants to purchase shares of SFX Broadcasting; SFX Broadcasting, as part of a merger agreement, spun off SFX Entertainment and merged with a subsidiary of Hicks, Muse, Tate & Furst.[89] Noddings was entitled to the cash merger consideration, but the parties disagreed about whether Noddings was also entitled to the spun-off shares of SFX Entertainment pursuant to its warrants.[90] The SFX Broadcasting warrant agreements contained an adjustment provision (which would have given Noddings the right to purchase the spun-off shares) triggered by a "recapitalization, capital reorganization, or other change of outstanding shares of Common Stock."[91] Noddings sued for a declaration that it was entitled to the spun-off shares of SFX Entertainment as well as the cash merger consideration, arguing that the two transactions (the merger and the spin-off) together triggered the adjustment provision.[92]

Borrowing the step-transaction doctrine—which "treats the 'steps' in a series of formally separate but related transactions involving the transfer of property as a single transaction, if all the steps are substantially linked"[93]—from tax law, 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 [SFX] Entertainment stock distributed to shareholders."[94] 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

other statutory provisions placing limits on the manner in which those powers may be exercised, is an uncomfortable proposition. For example: if defendants' reliance upon section 122(4) is proper and sufficient in this instance, when must a corporation comply with the requirements of section 271? Second, it is not altogether clear nor am I prepared to resolve, from the face of the selective proxy materials submitted with the motions, all factual circumstances necessary to determine definitively whether the events must be considered as one or more transactions." (footnote omitted)).

87. *Id*. at 841, 843.

88. Noddings Inv. Group, Inc. v. Capstar Commc'ns, Inc., C.A. No. 16538, 1999 WL 182568 (Del. Ch. Mar. 24, 1999), *aff'd*, 741 A.2d 16 (Del. 1999) (unpublished table decision).

89. *Id*. at *1.

90. *Id*.

91. *Id*. at *2.

92. *Id*. at *1.

93. *Id*. at *6 ("Rather than viewing each step as an isolated incident, the steps are viewed together as components of an overall plan.") (internal quotation marks omitted).

94. *Id*. at *7. The step-transaction doctrine also has application in the fraudulent-conveyance context. *Id*.

the spun-off shares of SFX Entertainment).[95] Though applying New York law, the court in *Noddings* became the first Delaware court to expressly adopt the step-transaction doctrine.

Chancellor Chandler gave further insight into his thinking in *Noddings* when he denied Capstar's motion for reargument.[96] Capstar argued that ILS should have applied, but the court refuted this argument on two principal grounds: (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 Defendant's chosen doctrine."[97] Then, the Chancellor defended his adoption of the step-transaction doctrine, noting that Capstar had cited no cases holding "that this Court *cannot* apply the step transaction doctrine outside [the tax] realm or that of fraudulent conveyance."[98]

In a counterpoint to Chancellor Chandler's suggestion that ILS applies only to corporate law—and not to contract law—the Court of Chancery in 2002 in *Benchmark Capital Partners* adopted and reaffirmed the holding in *Warner Communications v. Chris-Craft*.[99] Though known as an ILS case,[100] the court in *Benchmark* never actually used the phrase. *Benchmark* concerned a merger "constructed for the sole purpose of stripping bargained-for rights and preferences from two series of preferred stock."[101] The court held that the certificate of incorporation did not clearly express a requirement that the preferred was entitled to a class vote on a merger, even though it required a class vote on amendments to the corporate charter, and even where the sole purpose of the merger was to effect an amendment to the charter.[102] The facts in *Warner* were quite similar, and the court in *Warner* had come to the same conclusion.[103]

D. Lampers and Gatz

In *LAMPERS*, discussed above, CVS and Caremark had proposed a merger, pursuant to which Caremark's stockholders "would receive a special $2.00 dividend [later raised to $6.00, and then to $7.50], to be declared by Caremark

95. *Id*.

96. Noddings Inv. Group, Inc. v. Capstar Commc'ns, Inc., C.A. No. 16538-NC, 1999 WL 350494 (Del. Ch. Apr. 16, 1999).

97. *Id*. at *1.

98. *Id*.

99. *Benchmark Capital Partners IV, L.P.*, 2002 WL 1732423, at *9–10 (adopting the analysis set forth in *Warner Commc'ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962 (Del. Ch.), *aff'd*, 567 A.2d 419 (Del. 1989) (unpublished table decision).

100. *See, e.g.*, D. Gordon Smith, *Independent Legal Significance, Good Faith, and the Interpretation of Venture Capital Contracts*, 40 Willamette L. Rev. 825, 826 (2004) (stating that *Benchmark* "ultimately was decided on the basis of the arcane doctrine of independent legal significance").

101. *Id*. at 825–26.

102. *Benchmark Capital Partners IV, L.P.,* 2002 WL 1732423, at *10.

103. *Warner Commc'ns Inc.*, 583 A.2d at 970 ("Our bedrock doctrine of independent legal significance (e.g., [*Orzeck* and *Rothschild*, discussed above]) compels the conclusion that satisfaction of the requirements of Section 251 is all that is required legally to effectuate a merger. It follows, therefore, from rudimentary principles of corporation law, that the language of 242(b)(2), which so closely

before the effective date of the merger and paid to Caremark's shareholders either at the time of, or immediately after, the merger"—but only if the merger were approved.[104] The court determined that this special dividend was merger consideration for purposes of determining whether the stockholders were "required" to accept anything other than listed stock in the merger (thus entitling them to appraisal rights), stating that the dividend, "although issued by the Caremark board, [was] fundamentally cash consideration paid to Caremark shareholders on behalf of CVS."[105] Chancellor Chandler rejected defendants' argument that ILS applied, noting that payment of the dividend was "specifically condition[ed]" on the merger's approval, that the payment became "due upon or even *after* the effective time of the merger," that CVS (not Caremark) controlled the dividend value,[106] and that the defendants had "warn[ed] in their public disclosures that the special cash dividend might be treated as merger consideration for tax purposes."[107] Thus, the Chancellor's analysis virtually mirrored his analysis of the similar issue presented under New York law in *Noddings*, suggesting that the applicability of New York law was not the determinative factor in that case.

Shortly after the Chancellor's opinion, the Delaware Supreme Court in *Gatz v. Ponsoldt* 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.[108] In a complex recapitalization, Royalty Holdings (controlled by Laurence Levy) loaned money to Regency Affiliates (controlled by William Ponsoldt) in exchange for notes convertible into Regency shares.[109] Royalty converted those notes and filled the Regency board with its designees.[110] Regency separately paid Statesman Group (also controlled by Ponsoldt) to redeem Statesman's Regency shares, in effect paying Royalty's money to Ponsoldt through Statesman so that Levy could take control of Regency.[111] The court in *Gatz* looked through the formalities of these separate transactions, recharacterizing them as one transaction that gave rise to a direct claim.[112] By doing so, *Gatz* became the first Delaware case since *Noddings*, and the only Delaware Supreme Court case, to rely explicitly on the step-transaction

parallels the language of 3.3(i) [of the corporation's charter], does not entitle the holders of a class of preferred stock to a class vote in a merger, even if (as we assume here) the interests of the class will be adversely affected by the merger.").

104. *LAMPERS, supra* note 7, 918 A.2d at 1183.

105. *Id.* at 1191.

106. The merger agreement would have otherwise prohibited the payment of the dividend, and CVS had to agree to amend the merger agreement to permit payment of the dividend.

107. *LAMPERS, supra* note 7, 918 A.2d at 1191–92.

108. Gatz v. Ponsoldt, 925 A.2d 1265 (Del. 2007). For a fuller description of the transaction in *Gatz* and further discussion of its importance in the direct-derivative context, see Gregory P. Williams & Evan O. Williford, *An Expanding* Tri-Star: *The Delaware Supreme Court Broadens the* Tri-Star/Rossette *Doctrine*, M&A LAW., June 2007, at 11.

109. *Gatz*, 925 A.2d at 1271.

110. *Id.* at 1272.

111. *Id.* at 1271–72.

112. *Id.* at 1280.

doctrine.[113] Though some commentators recognized that ILS did not directly apply in *Gatz*, there was also some sense that this was "another case where the much revered doctrine of independent legal significance takes a beating."[114]

III. Looking Forward

These recent cases have left corporate practitioners somewhat unsure as to the status of ILS and as to whether they can confidently plan transactions without fear of judicial recharacterization. We now build on the history—ancient and recent—of ILS, as well as the Court of Chancery's power to recharacterize transactions, in an attempt to predict its future.

A. Equitable Recharacterization: "Substance Over Form" and the Step-Transaction Doctrine

There has always been a tension between ILS and equitable principles. It is a maxim that "equity regards substance rather than form."[115] ILS, on the other hand, exalts formalism:[116] if something can be done one way, it can be done, even if the end result is something else in substance. The Court of Chancery deals with the tension in part by keeping the two analyses separate.[117] As the

113. *See id*. at 1280 n.31 ("In the area of tax law, courts have enunciated various doctrines such as step transaction, business purpose, and substance over form, all of which allow the substantive realities of a transaction to determine the tax consequences."). As this Article was going to press, the Court of Chancery applied the step-transaction doctrine in the September 2007 *Twin Bridges* case in deciding the validity of a two-step transaction that changed the governance structure of a limited partnership by amending the partnership agreement and merging the partnership into another limited partnership. Twin Bridges Ltd. P'ship v. Draper, C.A. No. 2351-VCP, 2007 WL 2744609, at *9–10 (Del. Ch. Sept. 14, 2007). The limited partnership agreement barred certain amendments without a unanimous vote of the limited partners, and defendants argued that the amendment-and-merger transaction violated the agreement by, in effect, reaching a prohibited result without a unanimous vote of the limited partners. The court held that the agreement did not bar the amendment and subsequent merger, even if considered as a single transaction. *Id*. at *16.

114. Delaware Business Litigation Report, http://www.delawarebusinesslitigation.com/archives/case-summaries-supreme-court-explains-its-rossette-decision.html (Apr. 16, 2007) ("Supreme Court Explains Its *Rossette* Decision"); *see also* ProfessorBainbridge.com, http://www.professorbainbridge.com/2007/04/gtaz_v_ponsoldt.html (Apr. 16, 2007) ("*Gatz v. Ponsoldt* and Equity versus Equal Dignity") ("How are we to square [statements in *Gatz*] with the 'equal dignity doctrine' [ILS]?").

115. Monroe Park v. Metro. Life Ins. Co., 457 A.2d 734, 737 (Del. 1983).

116. *See* Smith, *supra* note 100, at 828 n.24 ("[W]hile formalism can be difficult to define, the doctrine of independent legal significance would seem to qualify under any conception of that word."); *see also* Uni-Marts, Inc. v. Stein, C.A. Nos. 14713 & 14893, 1996 WL 466961, at *9 (Del. Ch. Aug. 12, 1996) ("While the essential fiduciary analysis component of corporation law is not formal but substantive, the utility offered by formality in the analysis of our statutes has been a central feature of Delaware corporation law. Most notably, the established doctrine of 'independent legal significance' provides that a form of transaction valid under one section of the statute is not subject to attack because it reaches a functional result that would require other or additional steps under a different section of the statute.").

117. *But cf*. Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable To Take That Action: The Implicit Corollary to the Rule of* Schnell v. Chris-Craft, 60 Bus. Law. 877, 904 (2005) (noting "how blurry the line between law and equity sometimes is in our corporate law").

court in *SICPA* stated, ILS "applies to exercise of legal power. It does not apply to fiduciary review."[118] Thus, the fiduciary obligations inherent in corporate law "impose an equitable obligation 'on top of,' so to speak, duly exercised power."[119] The Delaware Supreme Court famously said, "inequitable action does not become permissible simply because it is legally possible."[120] And "[n]othing about [ILS] alters the fundamental rule that inequitable actions in technical conformity with statutory law can be restrained by equity."[121]

The cases discussed above demonstrate that the Court of Chancery has been willing to look beyond the form to the substance of the transaction to achieve equitable goals. The Delaware courts have explicitly used the step-transaction doctrine[122] to do so. In *Noddings*, the Court of Chancery used the doctrine to combine two transactions into one for the purpose of holding applicable a clause in a warrant agreement.[123] In *Gatz*, the Delaware Supreme Court looked "beyond form" to recharacterize two separate transactions as one to distill the direct nature of a claim against a controlling stockholder.[124] In neither case was the court trying to determine whether the transaction was legal or valid—in one case it was interpreting the words of a contract governed by New York law to try to determine the drafters' intent, and in the other it was trying to determine whether a claim relating to a recapitalization by a controlling stockholder was direct or derivative. In both cases the court was trying to rectify what it viewed as an inequitable result: in *Noddings* to give the warrant holders the rights they had bargained for under the warrant contract,[125] and in *Gatz* to preserve an individual claim that otherwise would have had to be brought derivatively.[126] The court in *Gatz* stated that a "dif-

118. SICPA Holding S.A. v. Optical Coating Lab., Inc., C.A. No. 15129, 1997 WL 10263, at *5 (Del. Ch. Jan. 6, 1997).

119. *Id.*

120. Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) (holding that a board's facially legal use of a bylaw to shorten the time available for stockholders to conduct a proxy contest was inequitable, and thus impermissible); *see also* Jack B. Jacobs, *The Uneasy Truce Between Law and Equity in Modern Business Enterprise Jurisprudence*, 8 DEL. L. REV. 1, 9 (2005) ("[By the 1990s, i]t was no longer sufficient to ask if the exercise of power by corporate fiduciaries conformed to the corporate statute, the certificate of incorporation or the by-laws. Now it also was necessary to ask whether that exercise of power was fair and equitable to the investors who were adversely affected by the decision.").

121. *In re* Pure Res., Inc. S'holders Litig., 808 A.2d 421, 434 (Del. Ch. 2002).

122. At least some commentators have referred to the step-transaction doctrine (in the context of tax law) as an equitable doctrine. *See, e.g.*, David M. Guess, *Disregarding the Mona Lisa's Disappearing Mustache: An Analysis into the Increased Judicial Scrutiny of the Tax Treatment of Family Limited Partnership Interests*, 32 W. ST. U. L. REV. 177, 192 (2005); Andre L. Smith, *Deferential Review of Tax Court Decisions of Law: Promoting Expertise, Uniformity, and Impartiality*, 58 TAX LAW. 361, 382 (2005).

123. Noddings Inv. Group, Inc. v. Capstar Commc'ns, Inc., C.A. No. 16538, 1999 WL 182568, at *7 (Del. Ch. Mar. 24, 1999), *aff'd*, 741 A.2d 16 (Del. 1999) (unpublished table decision).

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

125. *See Noddings*, 1999 WL 182568, at *9 ("I fail to see how giving Plaintiffs what they would have received gives them a windfall. . . . Nothing in this decision runs counter to the expectations of Warrant holders who are presented with a transaction such as this, where a spin-off and merger create a reasonable expectation that they will receive the market value of their Warrants.").

126. *Gatz*, 925 A.2d at 1280 (stating that "equity will not permit a fiduciary to deprive his beneficiaries of their entitlement to seek direct redress for fiduciary misconduct by structuring a transaction so as to obscure that entitlement").

ference in form, which is a product of transactional creativity, should not affect how the law views the substance of what truly occurred, or how the public shareholders' claim for redress should be characterized."[127] These decisions are in line with the Delaware Supreme Court's 1994 statement in *Farahpour* that, "[w]here inequitable conduct is established, a court will act to correct the inequity."[128]

The step-transaction doctrine as explained in *Noddings* can be applied through one of three distinct tests: "the end result test, the interdependence test, [or] the binding commitment test."[129] The step-transaction doctrine applies pursuant to the end result test "if it appears that a series of separate transactions were prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate result."[130] The interdependence test, a variation of the end result test, "focuses on whether the steps are so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series. [That is,] a court must determine whether the individual steps had independent significance or whether they had meaning only as part of the larger transaction."[131] The binding commitment test is satisfied "only if, at the time the first step is entered into, there was a binding commitment to undertake the later steps."[132] Courts may apply the step-transaction doctrine if any one of these tests is met.[133]

The court in *Gatz* did not expound on the step-transaction doctrine but merely cited three cases (including *Court Holding*, a famous U.S. Supreme Court step-transaction case) for the proposition that courts of equity are loath to exalt form over substance.[134]

We argue that the Delaware Court of Chancery issued another step-transaction case in 2007—*LAMPERS*.[135] Like the *Noddings* and *Gatz* courts, the *LAMPERS* court (with Chancellor Chandler, author of *Noddings*, writing for the court) was trying to determine whether two independent transactions, a special dividend and a merger, should be considered so interdependent that they were in reality one transaction.[136] The *Noddings* analysis and the *LAMPERS* analysis were quite similar. Both cases examined whether the two-part transactions contained conditions making them more like single transactions.[137] The courts in both cases found public

127. *Id.* at 1281.
128. Farahpour v. DCX, Inc., 635 A.2d 894, 901 (Del. 1994).
129. *Noddings*, 1999 WL 182568, at *6.
130. *Id.* (internal quotation marks omitted).
131. *Id.* (internal quotation marks omitted).
132. *Id.* (internal quotation marks omitted).
133. *See, e.g.*, Greene v. United States, 13 F.3d 577, 583–85 (2d Cir. 1994).
134. *Gatz*, 925 A.2d at 1280 & n.31 (citing Comm'r v. Court Holding Co., 324 U.S. 331, 334 (1945), Falconwood Corp. v. United States, 422 F.3d 1339, 1349 (Fed. Cir. 2005), and Brown v. United States, 329 F.3d 664, 671 (9th Cir. 2003)); *see also* Rhodes v. SilkRoad Equity, LLC, C.A. No. 2133-VCN, 2007 WL 2058736, at *5 (Del. Ch. July 11, 2007) ("In addition, the Court's inquiry is not restricted to the abstract structuring of the transaction or course of conduct under scrutiny. Instead, the Court must focus on the 'true substantive effect' of the challenged transaction." (citing *Gatz*)).
135. *LAMPERS*, *supra* note 7, 918 A.2d 1172.
136. *Id.* at 1191–92.
137. *Id.* at 1191 (noting that "defendants specifically condition payment of the $6 cash 'special dividend' on shareholder approval of the merger agreement"); *Noddings*, 1999 WL 182568, at *5 ("Plaintiffs next demonstrate that the Merger Agreement made express provision for the Spin-Off . . . .").

statements important in suggesting that the defendants saw the transactions as single wholes.[138] In other words, when the *LAMPERS* court held that the facts "belie[d] the claim that the special dividend has legal significance independent of the merger,"[139] it was not referring to the doctrine of independent legal significance, but really to the interdependence test of the step-transaction doctrine—whether two steps in a transaction have independent significance or whether they only make sense as part of one transaction. Thus, the holding in *LAMPERS* was not contrary to ILS, because *LAMPERS* was not an ILS case. The court in *LAMPERS* did not decide whether the merger or the dividend was valid pursuant to a statute; it was only deciding whether the dividend should be deemed merger consideration for purposes of the appraisal statute. ILS did not apply because the court was not deciding whether to test the validity of a transaction under an alternative statutory scheme.[140]

B. Implications for ILS

Courts traditionally apply ILS to reject a claim that a transaction that has been accomplished in compliance with one statute should be tested under the standards applicable to a different statute. If the corporation has effected a transaction by complying with a statute that permits the transaction, a court will honor the corporation's choice under ILS. Thus, the choice faced by a court in an ILS case is whether a transaction validly accomplished under one provision of the DGCL should be tested under the requirements applicable to a different provision of the DGCL under which the same end result would have been obtained. For a simple example, if a corporation effects a short-form merger in compliance with section 253 of the DGCL, a court will not test it under the requirements that would have applied had the merger been done as a long-form merger under section 251.[141]

138. *LAMPERS*, *supra* note 7, 918 A.2d at 1191–92 ("Defendants even warn in their public disclosures that the special cash dividend might be treated as merger consideration for tax purposes."); *Noddings*, 1999 WL 182568, at *6 (quoting a letter from the defendant's executive chairman to the stockholders that "clearly indicate[d] that this was all one transaction").

139. *LAMPERS*, *supra* note 7, 918 A.2d at 1191.

140. The court did, however, leave some inconsistencies unresolved. Perhaps most significantly, the dividend would be payable even to stockholders who dissented from the merger and demanded appraisal, whereas merger consideration in other cases is *not* paid to stockholders who dissent from the merger. *Cf.* Del. Code Ann. tit. 8, § 262(k) (2001), *amended by* 76 Del. Laws ch. 145, § 16 (2007). In addition, a dividend is different from merger consideration in the sense that merger consideration can be paid without regard to whether the corporation has sufficient funds, while dividends may not be paid without sufficient capital, *see id.* § 170(a). The availability of legal funds was not an issue in *LAMPERS*, so this was purely a theoretical issue there, but it can be an issue in other contexts. *See, e.g., In re* Buckhead Am. Corp., 178 B.R. 956, 969 (D. Del. 1994) ("Plaintiff claims that the payments made by DIA in connection with the subject LBO transactions 'were, in substance, unlawful dividends and/or stock purchases in violation of §§ 160 and/or 173 of the [DGCL].'" (alteration in original)).

141. *Cf.* Glassman v. Unocal Exploration Corp., 777 A.2d 242, 247–48 (Del. 2001) (noting that a short-form merger under section 253 differs from a long-form merger under section 251 in the context of whether a minority stockholder has a right to equitable relief for an entire fairness claim; holding that because short-form mergers are not reviewable for unfair dealing, a minority stockholder's only remedy in challenging a short-form merger absent fraud is appraisal).

ILS has two typical formulations. The first applies when two statutory alternatives exist (A and B) that would each legally reach the same result.[142] As the Court of Chancery has described this formulation, ILS "provides that a form of transaction valid under one section of the statute is not subject to attack because it reaches a functional result that would require other or additional steps under a different section of the statute."[143] The court in *Orzeck* stated that ILS provides that "action taken under one section of [the DGCL] is legally independent, and its validity is not dependent upon, nor to be tested by the requirements of other unrelated sections under which the same final result might be attained by different means."[144]

The second formulation also applies when there are statutory alternatives, each reaching the same end result, but where one (X) forbids the transaction and the other (B) allows the corporation to reach this end result through a different statutory method.[145] Other courts have described this formulation: "[the ILS] doctrine stands only for the proposition that the mere fact that a transaction cannot be accomplished under one statutory provision does not invalidate it if a different statutory method of consummation exists."[146] "[T]he doctrine of independent legal significance holds that legal action authorized under one section of the corporation law is not invalid because it causes a result that would not be achievable if pursued through other action under other provisions of the statute."[147]

ILS also applies in cases involving class-voting rights granted by certificates, like *Warner* and *Benchmark*, where the issue is whether a corporate charter that provides a

142. *See, e.g.*, Hariton v. Arco Elecs., Inc., 188 A.2d 123, 125 (Del. 1963) ("[T]he sale-of-assets statute and the merger statute are independent of each other. They are, so to speak, of equal dignity, and the framers of a reorganization plan may resort to either type of corporate mechanics to achieve the desired end.").

143. Uni-Marts, Inc. v. Stein, C.A. Nos. 14713 & 14893, 1996 WL 466961, at *9 (Del. Ch. Aug. 12, 1996).

144. Orzeck v. Englehart, 195 A.2d 375, 378 (Del. 1963).

145. *See, e.g., Havender II, supra* note 17, 11 A.2d 331 (facing the issue whether a certificate amendment as part of a merger could destroy dividend arrearages when such an amendment alone could not have done so); Baron v. Wolf, C.A. No. 4972, 1976 WL 2444, at *2 (Del. Ch. Jan. 15, 1976) (facing the issue whether a redemption of preferred stock under section 160 of the DGCL was valid when it had the "effect of satisfying unpaid dividends out of capital, which could not have been done under § 170"). *But cf*. Winston v. Mandor, 710 A.2d 835, 841 (Del. Ch. 1997) (mentioning, as a "difficult[y]" with an ILS argument, that "whether statutory provisions defining the outer limits of a Delaware corporation's authority may be relied upon to avoid other statutory provisions placing limits on the manner in which those powers may be exercised, is an uncomfortable proposition"), *appeal dismissed*, 713 A.2d 932 (Del. 1998) (unpublished table decision).

146. *In re* Pure Res., Inc. S'holders Litig., 808 A.2d 421, 434 (Del. Ch. 2002).

147. SICPA Holding S.A. v. Optical Coating Lab., Inc., C.A. No. 15129, 1997 WL 10263, at *5 (Del. Ch. Jan. 6, 1997); *see also* Posting of Gordon Smith, *supra* note 15 (stating that ILS "only matters when two characterizations of a transaction are mutually exclusive").

In his *Noddings* opinion on reargument, Chancellor Chandler implicitly makes this point. Noddings Inv. Group, Inc. v. Capstar Commc'ns, Inc., C.A. No. 16538-NC, 1999 WL 350494 (Del. Ch. Apr. 16, 1999). To reiterate, the defendant in *Noddings* argued that the court had improperly applied the step-transaction doctrine, citing *Edelman v. Phillips Petroleum Co.*, C.A. No. 7899, 1985 WL 11534 (Del. Ch. Feb. 12, 1985), to support its argument that the step-transaction doctrine had no place in corporate law. *Noddings*, 1999 WL 350494, at *1. Chancellor Chandler correctly pointed out that, in *Edelman*,

class vote on an "amendment" would grant a vote if the "amendment" is effected as a merger.[148] Amendments effected through a merger are accomplished pursuant to section 251, which does not provide for class voting, while amendments accomplished pursuant to section 242 require class voting. Therefore, an amendment effected by merger will be subject to the voting requirements for a merger, not those applicable to an amendment.[149] The logical corollary to all the above is that ILS will not be a defense where there is no statutory alternative expressly permitting or forbidding the result achieved by the challenged transaction or where the issue is whether the corporation simply complied with a single statute.[150]

Practitioners often rely on ILS to convince a court to accept their intended form over the other side's desired substance. For example, in the 2004 Court of Chancery *Hollinger* case, a holding company caused some of its subsidiaries to

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the plaintiff was "unable to prove a step transaction," and, "[f]urthermore, that case was decided under Delaware's doctrine of independent legal significance." *Id*. Indeed, the court in *Edelman* faced the issue of the legality of a recapitalization in which a company intended to exchange each share of its common stock "for .62 share of common and .38 share of preferred[, where t]he preferred would be immediately exchanged for a package of debt securities valued at $60 per share of preferred." *Edelman*, 1985 WL 11534, at *2. *Edelman* was decided back when it was illegal to redeem common stock. (This aspect of section 151 of the DGCL was changed in 1990. *See* 67 Del. Laws ch. 376, § 4 (1990) (codified at DEL. CODE ANN. tit. 8, § 151(b) (2001)).) So the court in *Edelman* was deciding an ILS question of the second formulation: whether the transaction was an illegal redemption of common or whether it was a legal exchange under section 151(e). *Edelman*, 1985 WL 11534, at *7.

148. On reargument, the court in *Noddings* suggested that ILS does not apply to contract interpretation. *Noddings*, 1999 WL 350494, at *1 ("Furthermore, the law at issue in this matter was related to contractual interpretation, not corporate law, further distancing this case from the protection of Defendant's chosen doctrine [ILS]."). The cases dealing with certificates of incorporation (*Warner, Benchmark*, and *Winston*) suggest otherwise, though, as noted above, the court in *Benchmark* never mentions ILS and the *Warner* court cites it only for the uncontroversial proposition that "satisfaction of the requirements of Section 251 is all that is required legally to effectuate a merger." Warner Commc'ns Inc. v. Chris-Craft Indus., Inc., 583 A.2d 962, 970 (Del. Ch.), *aff'd*, 567 A.2d 419 (Del. 1989) (unpublished table decision). And the court in *Winston v. Mandor* accepted that ILS applied only "for the sake of argument." 710 A.2d 835, 841 (Del. Ch. 1997), *appeal dismissed*, 713 A.2d 932 (Del. 1998) (unpublished table decision). It is thus less than perfectly clear that the courts view these as ILS cases. *But see* Smith, *supra* note 100, at 837 (stating that "the Delaware Supreme Court has changed the doctrine of independent legal significance from a rule of statutory interpretation into a rule of contract interpretation"). In *Twin Bridges*, the Court of Chancery applied the step-transaction doctrine and declined to use ILS in the limited partnership context. *See* Twin Bridges Ltd. P'ship v. Draper, C.A. No. 2351-VCP, 2007 WL 2744609, at *10 n.47 (Del. Ch. Sept. 14, 2007) ("Whether the doctrine of independent legal significance applies in the context of a limited partnership dispute is an open question in this State.").

149. *See, e.g.*, Benchmark Capital Partners IV, L.P. v. Vague, C.A. No. 19719, 2002 WL 1732423, at *9–10 (Del. Ch. July 15, 2002), *aff'd sub nom.* Benchmark Capital Partners IV, L.P. v. Juniper Fin. Corp., 822 A.2d 396 (Del. 2003) (unpublished table decision).

150. This is not to say that an ILS case may not involve, indirectly, the issue of compliance with a single statute. *De facto* merger cases involve issues of whether appraisal rights exist (compliance with the single appraisal statute), but the threshold question in those cases is whether the transaction is a sale of assets (in which there are no appraisal rights) or a merger (in which there are appraisal rights). *Cf*. Hariton v. Arco Elecs., Inc., 188 A.2d 123 (Del. 1963) (facing the issue whether a sale of assets under section 271 of the DGCL, followed by the dissolution of the selling corporation and the distribution of its shares, was legal even though the parties did not comply with the provisions of section 251).

The issue of whether parties have complied with the appraisal statute (section 262 of the DGCL) can be of fundamental importance, in that a merger that does not comply with the appraisal statute may

sell a "crown jewel" asset.[151] The question arose whether section 271 of the DGCL applies at the parent level where a parent causes a subsidiary to sell assets. Plaintiffs argued that the Court would be "elevat[ing] form over substance" to hold that the parent company need not comply with section 271 because the subsidiaries were the actual sellers.[152] The defendant responded that for the court to ignore the actual structure of the sale and look to the economic substance of the transaction would violate the principles of ILS.[153] The court ignored defendant's ILS argument (and declined to answer the question altogether), though it stated that:

> When an asset sale by the wholly owned subsidiary is to be consummated by a contract in which the parent entirely guarantees the performance of the selling subsidiary that is disposing of all of its assets and in which the parent is liable for any breach of warranty by the subsidiary, the direct act of the parent's board can, without any appreciable stretch, be viewed as selling assets of the parent itself.[154]

Thus, the court suggested that, in interpreting the reach of a statute, it would have (had it been faced with the issue) looked to the form of the transaction over its substance.

The reason that the defendant's ILS argument was unavailing was that *Hollinger* was not an ILS case. The court did not have to reach the issue whether the parent could sell its subsidiaries' assets, because it found that the assets involved were not

be invalid. *See* Jackson v. Turnbull, C.A. No. 13042, 1994 WL 174668, at *6 (Del. Ch. Feb. 8, 1994), *aff'd*, 653 A.2d 306 (Del. 1994) (unpublished table decision). Accordingly, the technical question of whether a merger provides appraisal rights can be of the utmost significance to transactional planners. In prior cases, the Court of Chancery has suggested that purposefully structuring a merger so as to avoid appraisal rights might give rise to a quasi-appraisal remedy, relying on equitable principles rather than statutory interpretation to describe that remedy. *See, e.g., In re* Maxxam Group, Inc. S'holders Litig., C.A. No. 8636, 1987 WL 10016, at *9 (Del. Ch. Apr. 16, 1987).

151. Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342 (Del. Ch.), *appeal refused*, 871 A.2d 1128 (Del. 2004) (unpublished table decision).

152. Plaintiffs' Opening Brief in Support of Their Motion for Preliminary Injunction (Public Version) at 35, Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342 (Del. Ch. 2004) (C.A. No. 543-N), *appeal refused*, 871 A.2d 1128 (Del. 2004) (unpublished table decision).

153. *See* Answering Brief of Defendant Hollinger International Inc. in Opposition to Plaintiffs' Motion for Preliminary Injunction (Public Version) at 45, Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342 (C.A. No. 543-N), *appeal refused*, 871 A.2d 1128 (Del. 2004) (unpublished table decision). *See generally* Leslie v. Telephonics Office Techs., Inc., C.A. No. 13045, 1993 WL 547188, at *8 (Del. Ch. Dec. 30, 1993) ("Neither party has cited a case in which a court has required a shareholder vote at the parent level in order to authorize a sale of all or substantially all of the assets of a wholly owned subsidiary. I need not decide this issue, however, because I conclude that the pleadings and record cannot rule out at this time the possibility that [subsidiary] Telephonics will be held to be a mere instrumentality of [holding company] TOT not warranting the dignity of separate entity treatment. . . . A vote by TOT shareholders might be required if it were the case that TOT and Telephonics, were, in effect, considered to be a single legal entity under the common control of TOT management. The sale to Precision of substantially all of the business assets of both corporations would, in effect, be considered a sale of substantially all of TOT's assets under this theory."); J.P. Griffin Holding Corp. v. Mediatrics, Inc., C.A. No. 4056, 1973 WL 651, at *2 (Del. Ch. Jan. 30, 1973) (stating that, "inasmuch as defendant is the record holder of all of the shares of its subsidiary, . . . and has voted all of said shares in favor of such sale, the provisions of 8 Del. C. § 271 would appear to have been met").

154. *Hollinger*, 858 A.2d at 375. Section 271 was amended after *Hollinger* to make clear that the assets of a corporation include the assets of any subsidiary of that corporation. 75 Del. Laws ch. 30, § 28 (2005) (codified at DEL. CODE ANN. tit. 8, § 271(c) (Supp. 2006)).

all or substantially all the parent's assets and that a vote of the parent's stockholders would not have been required to sell the assets, even if section 271 had been applicable at the parent level.[155] Because the dispositive question in *Hollinger* would only have been whether the parent company complied with section 271, ILS did not apply. There was no argument that the company had accomplished the asset sale by compliance with an alternative statutory regime. Rather, the parties were only arguing about whether the court should or should not have recharacterized the transaction within the confines of compliance with a single statute. The court did not accept the argument that ILS applied in this context.[156]

Similarly, in *LAMPERS*, defendants argued that, under ILS, a dividend being paid in connection with a merger was not merger consideration for purposes of the appraisal statute.[157] But because the appraisal statute does not foreclose the possibility that a dividend paid by the purchasing company to the stockholders of a target as part of a merger transaction could be merger consideration, whether ILS applied was not the relevant question. There was no issue about either the merger or the dividend being lawful or in accordance with statute—the only issue was whether the dividend should be deemed merger consideration for purposes of the appraisal statute. Therefore, the court's decision to look beyond the form to the substance of the transaction did not implicate ILS.

Nonetheless, substance-over-form arguments could also arise in a case where ILS does apply. Because ILS cannot preclude equitable review, the possibility always exists that a court could recharacterize a transaction even if parties have complied with the applicable statutes. ILS provides a buffer for judicial review of a transaction, in that a court will not find unlawful or inequitable *per se* a corporation's use of a statutory alternative to achieve a given result, but it cannot defeat a court's authority to look beyond the form of a transaction to its substance.[158]

155. *See Hollinger*, 858 A.2d at 375–86. Therefore, the court did not have to answer the question whether the sale could have been accomplished at the subsidiary level (though it did discuss its likely answer in dicta).

156. A similar question about whether a subsidiary-level transaction required stockholder approval at the parent level arose in *Bacine v. Scharffenberger*, C.A. Nos. 7862 & 7866, 1984 WL 21128 (Del. Ch. Dec. 11, 1984). City Investing Company, "a diversified holding company involved in six separate areas of business, agreed to sell three wholly-owned subsidiary companies comprising its manufacturing and printing divisions to Kohlberg Kravis Roberts & Co." *Id*. at *1. Plaintiffs (City stockholders) wished to enjoin this sale, making two alternative arguments: (1) the sale was a sale of substantially all of City's assets, which could not legally be consummated without a stockholder vote, and (2) the sale of three subsidiaries was simply the first step of a plan to liquidate, which would also require a stockholder vote. *Id*. The defendants countered the first argument with an ILS response: the transactions were merger transactions under section 251, so only City's approval (as the sole stockholder) was required. *Id*. at *2. Plaintiffs responded with an equitable argument: "equity looks to the substance of a transaction and not to its form, and . . . the realities of modern business are such that the stock of wholly-owned subsidiary corporations necessarily constitutes the assets of a holding company such as City." *Id*. at *3. The Court found "considerable logic in this proposition," but ultimately did not decide the question, finding that the transaction did not require approval of City's stockholders because the three subsidiaries did not constitute substantially all of City's assets. *Id*.

157. *LAMPERS, supra* note 7, 918 A.2d at 1191.

158. *Cf. SICPA Holding S.A.*, 1997 WL 10263, at *5 (Del. Ch. Jan. 6, 1997) ("[U]nder the doctrine of independent legal significance, the fact that [a] proposed transaction could not be accomplished in

Parties may dispute whether legal analysis or equitable analysis should prevail in review of a challenged transaction, but ILS will only apply when a statutory alternative exists that would permit the result reached. The courts do not view it as applying when the issue is whether the corporation complied with a single statute or a provision in a contract. Nonetheless, equity is available in both circumstances, and the courts can apply the equitable substance-over-form doctrine (or its tax-law equivalent, the step-transaction doctrine) to override the transactional form desired by the corporation, regardless of whether the transaction is statutorily valid.[159]

IV. Conclusion

The boundaries of ILS as applied by the courts are much narrower than those sometimes assumed by practitioners. Recent cases suggest that the Delaware courts view ILS as applying only where a transaction is effected in accordance with a statutory regime that reaches a result identical to the result either permitted or forbade by another statute. The implications of the distinction between legal review (ILS) and equitable review (the substance-over-form and step-transaction doctrines) for planners of corporate transactions are these: if planners have a choice of structuring a transaction under one or more statutory sections, and what planners propose is legal under one statutory section (and the transaction is structured to comply with that section), because of ILS the validity of the transaction will not be tested under an alternative statute. But if the issue is whether a vote or other stockholder rights exist under a specific statute or contract where there is no alternative statute with which the planners could have complied, the chosen structure may not be dispositive of the outcome, because a court may look beyond the form to the substance of the transaction to resolve the issue.

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a way that required shareholder approval, does not mean that an alternative way to accomplish the same end is 'unauthorized' or 'invalid' or 'void'."); *id*. ("[T]he question whether an act constitutes a breach of fiduciary duty and is subject to possible equitable remedy, such as rescission, is distinct from the question whether such an act was properly authorized or is legally valid. The foundational fact of fiduciary obligations is that they are equitable in origin and impose an equitable obligation 'on top of,' so to speak, duly exercised legal power. Thus, regardless of the fact that the Flex board may have the legal power to sell authorized stock, should it do so in the present circumstances, it would be under a duty to justify any such action to a court of equity as fair in the circumstances."); *cf. also* Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1078 (Del. Ch.) ("The DGCL is intentionally designed to provide directors and stockholders with flexible authority, permitting great discretion for private ordering and adaptation. That capacious grant of power is policed in large part by the common law of equity, in the form of fiduciary duty principles. The judiciary deploys its equitable powers cautiously to avoid intruding on the legitimate scope of action the DGCL leaves to directors and officers acting in good faith."), *appeal denied*, 856 A.2d 1066 (Del. 2004) (unpublished table decision).

159. Of course, the courts may also opt to not recharacterize a transaction. *See, e.g., In re* Buckhead Am. Corp., 178 B.R. 956 (D. Del. 1994) (holding that a subsidiary paying for the acquisition of its parent's outstanding stock, allegedly for no consideration, did not result in the subsidiary violating the statutory ban on a corporation purchasing or redeeming its own shares of capital stock). Significantly, the court in *Buckhead* held that defendants' ILS arguments did not apply because the defendants did "not assert that their challenged actions complied with the requirements of any section of the DGCL." *Id*. at 970.

Accordingly, a merger that amends the certificate of incorporation can be accomplished by compliance with the voting provisions of the merger statutes, and without regard to the class voting requirements of section 242, so long as it is done in accordance with section 251. If a transaction is structured in accordance with the statutory provisions applicable to a sale of assets or a dissolution, it will not be analyzed or subjected to the statutory requirements that would have been applicable if it were a merger. That is, ILS assures that a transaction structured in compliance with one provision of the DGCL will not be tested under the legal standards applicable to a different provision of the DGCL under which the same result would be achieved. But ILS will not preclude a court's invocation of its equitable powers.

Though ILS may be raised in many cases in which the parties dispute the character, substance, or validity of a transaction, the Delaware courts may be disinclined to accept the doctrine unless the defender of a challenged transaction demonstrates its affirmative choice to effect the transaction by complying with an alternative statutory regime. ILS does not apply at all in cases like *Gatz* or *SICPA*, where the primary issue is equitable. If the question is whether a process was unfair or whether fiduciary duties were breached, ILS cannot save the transaction. Moreover, in cases like *Hollinger* and *LAMPERS*, where the validity of a transaction does not rest on compliance with an alternative statutory regime, ILS may not be dispositive. These cases simply involve the question of compliance with a single statute (and may involve equitable review), so ILS does not provide an alternative means of demonstrating the transaction's validity.