Potter Anderson & Corroon LLP

Stockholder Voting and Subsidiary Asset Sales After Hollinger

Introduction

In today's world of complex corporate structuring, it is common for a public company to own its operating assets through direct or indirect, wholly-owned subsidiaries. In such structures, the public company is a holding company that generates income only through its equity ownership in its subsidiaries, and not as a direct result of owning the operating assets. However, when the operating assets held in a subsidiary are sold, other than through a sale of the equity of a particular subsidiary, counsel is frequently asked whether a court would consider such a sale to be a sale of the subsidiary's assets, rather than a sale of the parent corporation's assets. For Delaware corporations (and Delaware practitioners), this distinction is important. Pursuant to Section 271 of the General Corporation Law (the "General Corporation Law"), the sale by a corporation of all or substantially all of its assets triggers a stockholder vote.[2]

The recent decision by the Delaware Court of Chancery in *Hollinger Inc. v. Hollinger Int'l Inc.*[3] offered some fresh insight on how the Court of Chancery views Section 271 of the General Corporation Law ("Section 271"). Among other things, the *Hollinger* decision suggests reasons why, in certain circumstances, practitioners may not be able to rely on a technical statutory argument that a vote of the stockholders of a subsidiary, but not of the stockholders of the parent corporation, is required to approve any sale of assets by a subsidiary.[4] In addition, the *Hollinger* decision examines the traditional "qualitative" and "quantitative" analysis in the relevant Delaware precedent construing Section 271 and infers that the threshold for triggering a stockholder vote in an asset sale should be higher than prior precedent suggests. However, before considering the *Hollinger* decision, it is important to understand the common law landscape that developed in the years preceding the *Hollinger* decision.

I. The Law Prior To *Hollinger*

A. A Sale of Assets By a Subsidiary

Prior to *Hollinger*, many Delaware practitioners believed that a vote of the stockholders of a parent corporation was not required to approve a sale of assets by a subsidiary, even if the assets constituted all or substantially all of the assets of the parent corporation on a consolidated basis.[5] That view was based on two main components: (i) the plain language of Section 271; and (ii) the dicta of various decisions of the Delaware Court of Chancery.

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1. The Literal Language of Section 271.

Section 271 provides, in relevant part, as follows:

> Every *corporation* may at any meeting of *its* board ... sell, lease or exchange all or substantially all of *its* property and assets, including *its* goodwill and *its* corporate franchises ... as *its* board of directors ... deems expedient and for the best interests of *the corporation*, when and as authorized by a resolution adopted by the holders of a majority of the outstanding stock of *the corporation* entitled to vote thereon ....[6]

By expressly referring to "the corporation," "its board of directors," "its property and assets," and the approval of a resolution by the holders of a majority of the outstanding stock of that "corporation," the express terms of Section 271 suggest that the statute only triggers a stockholder vote at the corporation which is selling its assets. In light of the literal terms of Section 271, many Delaware practitioners had concluded that there was no reasonable basis on which to construe the literal language of the statute to require the approval by stockholders of any entity other than the selling corporation.[7]

Delaware jurisprudence also suggests that, for sound policy reasons, the Delaware courts would resist deviating from the literal language of the General Corporation Law:

> 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.
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> 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. When the task is to construe the meaning of reasonably precise words contained in our corporation statute ... our preference, generally, must be to accord them their usual and customary meaning to persons familiar with this particular body of law.[8]

Literal interpretation of Section 271 is supported by two parallel and well-established principles of Delaware corporate law. First, the mere fact that one corporation owns all of the stock of another does not, generally speaking, render the former the "owner" of the assets of the latter.[9] Rather, the parent corporation is "merely a stockholder [of its subsidiary] with all the incidents of such."[10] Second, a subsidiary corporation "is an entity, distinct from its stockholders even if the subsidiary's stock is wholly owned by one person or corporation."[11] In the absence of fraud or a showing that a subsidiary is the mere alter ego of its parent, the Delaware courts have declined to disregard the legally separate nature of the entities.[12]

2. Dicta From The Delaware Court Of Chancery

Although no Delaware decision definitively resolves the issue, judicial comment prior to *Hollinger* generally supported the conclusion that a stockholder vote of the parent corporation was not required for a sale of a subsidiary's assets even if such assets constituted, on a consolidated basis, substantially all of the parent's assets.[13] In *Mediatrics*, the plaintiff sought interim injunctive relief to preclude an allegedly imminent sale by the defendant's wholly-owned subsidiary of all or substantially all of the subsidiary's corporate assets. The plaintiffs, invoking the requirements of Section 271 in support of such relief, claimed that the statute required not only a vote of the parent, but also a vote of the parent's stockholders. As to the latter claim, the Court held:

> [I]n as much 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 a sale, the provisions of 8 Del. C. § 271 would appear to have been met.[14]

In *Leslie v. Telephonics Office Technologies, Inc.*,[15] the Court of Chancery was presented with a similar issue. In that case, the complaint asserted, in part, that a proposed sale of the assets of a wholly-owned subsidiary constituted substantially all of the consolidated assets of the parent and the subsidiary, and thus required the vote of the parent's stockholders pursuant to Section 271. The defendants moved to dismiss the complaint on the ground that Section 271 was not implicated because the parent was not selling *its* assets.

After observing that neither party had cited a case in which a court had required a stockholder vote at the parent level by reason of a sale of all or substantially all of the assets of a wholly-owned subsidiary, the Court declined to rule on the statutory issue directly. Instead, the Court denied the motion because of the possibility that a developed record could reveal that the subsidiary was " a mere instrumentality of [the parent] not warranting the dignity of separate entity treatment."[16] Despite the fact that the Court did not rule directly on the statutory issue, its observations are instructive. The Court's analysis strongly suggests that separate corporate identities will not lightly be disregarded in the context of a sale by a subsidiary of its assets and, more specifically, that absent fraud or a showing of facts that would justify piercing the corporate veil, no vote of a parent corporation's stockholders is required by Section 271 for the sale, lease, or exchange of the assets of a subsidiary, even if such assets constitute all or substantially all of the assets of the parent and its subsidiaries on a consolidated basis:

> A vote by [the parent's] shareholders might be required if it were the case that [the parent] and [the subsidiary] were, in effect, considered to be a single legal entity under the common control of [the parent's] management. The sale ... of substantially all of the business assets of both corporations would, in effect, be considered a sale of substantially all of [the parent's] assets under this theory. Under Delaware law, however, courts have generally recognized the independent legal existence of corporate entities which have been formed and maintained in accord with all of the statutory formalities. There are certain exceptions to this rule, however. The use of the corporate form to perpetrate a fraud has always constituted such an exception. [citation omitted] Furthermore, when courts determine that a corporation is, in substance, the mere alter ego, or instrumentality of its owners, they will in certain instances, deny legal effect to the otherwise valid creation of a corporate entity. [citation omitted] However, more often than not, Delaware

> courts have upheld the legal significance of corporate form, in a corporate-subsidiary complex, despite the fact of substantial overlap in the management and control of the two entities.[17]

B. The Quantitative And Qualitative Analysis.

Even if the assets to be sold by a subsidiary are deemed to be owned directly by the parent corporation, a vote of the stockholders of the parent corporation would be necessary only if the assets constitute all or substantially all of the assets of the parent corporation. The decision of the Court of Chancery in *Gimbel v. Signal Cos., Inc.*[18] is the leading case by a Delaware court as to what constitutes "all or substantially all" of a corporation's assets for purposes of Section 271.

In *Gimbel*, the plaintiff, a member of an investment group holding 12% of the outstanding stock of Signal Companies, Inc. ("Signal"), sought to enjoin a sale by Signal of all the outstanding capital stock of Signal Oil and Gas Company ("Signal Oil"), a wholly-owned subsidiary of Signal, for the sum of $480 million. The sale had been approved by Signal's board without stockholder action. According to the corporation's financial reports, Signal Oil represented 26% of the total assets of Signal, 41% of its total net worth, and produced about 15% of Signal's revenues.

In considering the applicability of Section 271 to the sale, the Gimbel court observed:

> It is important to note in the first instance that the statute does not speak of a requirement of shareholder approval simply because an independent, important branch of a corporate business is being sold.... Similarly, it is not our law that shareholder approval is required upon every "major" restructuring of the corporation.... The statute requires shareholder approval upon the sale of "all or substantially all" of the corporation's assets. That is the sole test to be applied. While it is true that test does not lend itself to a strict mathematical standard to be applied in every case, the qualitative factor can be defined to some degree notwithstanding the limited Delaware authority. But the definition must begin with and ultimately necessarily relate to our statutory language.[19]

Recognizing that one commentator had suggested that Section 271 would not apply to a sale made in furtherance of express corporate objects and in the ordinary and regular course of business, Chancellor Quillen further remarked:

> But any "ordinary and regular course of the business" test in this context obviously is not intended to limit the directors to customary daily business activities. Indeed, a question concerning the statute would not arise unless the transaction was somewhat out of the ordinary. *While it is true that a transaction in the ordinary course of business does not require shareholder approval*, the converse is not true. Every transaction out of normal routine does not necessarily require shareholder approval. *The unusual nature of the transaction must strike at the heart of the corporate existence and purpose.*
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> It is in this sense that the "unusual transaction" judgment is to be made and the statute's applicability determined. *If the sale is of assets quantitatively vital to the operation of the corporation and is out of the ordinary and*

> *substantially affects the existence and purpose of the corporation, then it is beyond the power of the Board of Directors.*[20]

The Chancellor thus concluded that the applicability of Section 271 involves both a quantitative and qualitative analysis. Applying that analysis to the sale of the stock of Signal Oil, the court held that the sale did not constitute a sale of all or substantially all of Signal's assets.[21]

In the years following *Gimbel*, the Delaware courts have consistently applied the quantitative and qualitative tests enunciated in *Gimbel*, but that application has yielded uneven results. For example, in *Katz v. Bregman*,[22] Chancellor Marvel held that a proposed sale of the defendant corporation's Canadian operations, constituting approximately 51% of its assets and accounting for 44.9% of its revenue and 52.4% of its pre-tax operating income, was a transaction subject to stockholder approval under Section 271. In *Katz*, the court found significant the fact that in the two most recent fiscal years, the corporation's Canadian operations had profits of $3.5 million and $5.3 million, respectively, while its operations in the U.S. incurred losses of $344,000 and $4.5 million in those years. The court concluded, moreover, that the contemplated sale and a related proposal to manufacture plastic drums, as opposed to steel drums, represented a radical departure from the corporation's historically successful line of business.[23]

In *Desmedt v. Gardner*,[24] on the other hand, Chancellor Marvel refused to find a stockholder vote was required under Section 271 in connection with a proposed sale of a shipping terminal operation representing 13.3% of total gross assets, 30% of net assets, and reporting an operating loss over a nine-year period. In addition to the low quantitative percentages, the court found significant the fact that the asset in question was no longer crucial to the operations of the corporation by reason of a slow but consistent evolution of the company from a shipping concern to a diversified conglomerate.

Subsequently, in *Bacine v. Scharffenberger*,[25] Chancellor Brown found that a proposed transaction involving the disposition by City Investing Company ("City") of three of its wholly-owned subsidiaries did not constitute a sale of substantially all of City's assets. The court in *Bacine* concluded that the transaction failed to meet the "quantitatively vital" standard of *Gimbel* where the three subsidiaries accounted for not more than 29% of City's consolidated revenues, 35% of its operating income, and 13% of its assets over the preceding three years. The plaintiffs' contention that the subsidiaries historically accounted for more than 50% of City's net income, and during the most recent quarter for 100% of City's net income, did not alter the result. The court also disagreed with the plaintiffs' assertion that the sale of the subsidiaries qualitatively affected City's purpose and existence because it resulted in a recommendation by City's management that the company be liquidated for tax reasons. The court suggested that this did not mean "City could not continue as a viable company with its remaining assets.[26]

In *Oberly v. Kirby*,[27] the Delaware Supreme Court found that the exchange by a charitable foundation of 85% of its assets held in the form of investment securities for other investment securities did not require approval of the foundation's members under Section 271. In so holding, the Court reasoned, in reliance upon Gimbel, that "[a]lthough the magnitude of the transactions was unquestionably large, ... the need for shareholder (or member) approval is to be measured not by the size of the sale alone, but also by its qualitative effect upon the corporation."[28] Based on that rationale and a finding that the foundation was in the business of holding investment securities and distributing the profits therefrom to charities,

the Court ruled that the exchange of one portfolio of securities for another of similar value did not substantially affect the foundation's purpose and, accordingly, that no member vote was required under Section 271.[29]

In *Thorpe v. CERBCO, Inc.*,[30] Chancellor Allen found that a sale by CERBCO of its equity interest in Insituform East, Inc. ("East") would have required approval of the CERBCO stockholders under Section 271 of the DGCL, not only because such a sale would have been out of the ordinary course of business and would substantially have affected the existence and purpose of the corporation, but also because such a sale would have radically transformed the pre-existing organization of the firm on both a qualitative and quantitative basis. CERBCO's assets consisted primarily of equity interests in three operating subsidiaries -- (i) CERBERONICS, which had been in the defense contracting industry but was no longer profitable and was about to be liquidated; (ii) Capital Copy, an office photocopy machinery leasing and services company; and (iii) East, a sublicensee of proprietary technology useful in the repair of underground pipes. While CERBCO owned only 31% of the total equity of East, it had 55% of the total voting power and thus controlled East. Based on these findings and the fact that CERBCO's East stock constituted 68% of CERBCO's assets on a fair market value basis and constituted CERBCO's primary income generating asset, the Court found that a sale by CERBCO of its East stock would have constituted a sale of all or substantially all of CERBCO's assets under Section 271 of the DGCL.

The foregoing cases evidence the "contextual approach" employed by the Delaware courts in evaluating whether a sale of assets involves "substantially all" of a corporation's assets. [31] There is no bright line test. Rather, the contextual approach involves a consideration of both the proportional value of the assets being transferred (a quantitative analysis) and also whether the transfer would result in a fundamental change in the corporate business and thereby "strike at the heart" of a company's corporate existence and purpose (a qualitative analysis).[32]

In keeping with the contextual approach, the Court of Chancery has observed that "there is no necessary quantifying percentage" for determining whether assets constitute "substantially all" of a Delaware corporation's assets for purposes of Section 271.[33] The foregoing decisions also establish that, under Delaware law, stockholder approval of a sale is not required simply because an important part of the company's business is being sold. Every sale outside of the normal routine does not require stockholder approval. In order to implicate Section 271, the unusual nature of the transaction must "strike at the heart of the corporate existence and purpose."[34] Only if the sale is of assets quantitatively vital to the corporation and substantially affects the existence and purpose of the corporation is stockholder authorization mandated.[35]

II. The Court Of Chancery's Decision In *Hollinger*

In *Hollinger*, Hollinger International, Inc. (the "Parent") had entered into an agreement to sell the assets (the "*Telegraph Group*") of its indirect, wholly-owned subsidiary, Telegraph Group Ltd. (England) (the "Subsidiary"). Among other things, Subsidiary published the *Telegraph*, a leading newspaper in the United Kingdom in terms of both circulation and journalistic reputation. A stockholder of Parent commenced a suit in the Court of Chancery seeking to enjoin the sale on the grounds that the stockholders of Parent had the right to vote on the sale because, although held by a subsidiary, the Telegraph Group constituted all or

substantially all of the assets of Parent. Parent argued that the Telegraph Group did not constitute all or substantially all of its assets on a consolidated basis, and, even if it did, that no vote of the stockholders of Parent was necessary because the sale involved assets owned by Subsidiary and not Parent.

The Court refused to decide the matter on the latter "technical statutory defense," and instead treated the assets of Subsidiary as if such assets were owned directly by Parent.[36] Having decided to treat the assets as those of Parent, the Court ultimately concluded that the Telegraph Group did not constitute all or substantially all of the assets of Parent, and thus no vote of Parent's stockholders was required.

A. The Sale Of Assets By A Subsidiary.

Contrary to the prior dicta on the issue, the Court in *Hollinger* expressed skepticism with respect to the technical statutory argument that a vote of the stockholders of Parent was unnecessary under the facts of the case. Without addressing at length the literal language of the statute, the Court decided to treat the Telegraph Group as if it was owned directly by Parent in light of the fact that, "as a matter of obvious reality," the sale process was directed and controlled by Parent.[37]

In reaching this conclusion, the Court noted that none of the subsidiaries, including Subsidiary, engaged independent financial or legal advisors. Moreover, all of the directors of the subsidiaries were officers of Parent, and those directors had a role in the sale, in their capacity as directors, only after the terms of the sale were completed.[38] In addition, the terms of the relevant contract evidenced the fact that Parent directed the sale process. Not only was Parent a signatory to the contract, but its legal advisors negotiated the terms of the contract. Pursuant to those terms, Parent agreed to cause Subsidiary to perform its obligations under the contract, guaranteed the payment of any breach of warranty claims brought against Subsidiary by the purchaser and was entitled to receive payments from claims belonging to its subsidiaries.

With these facts in mind, the Court considered the policy implications of determining whether a vote of the stockholders of Parent was required in such circumstances. The Court noted that a conclusion in favor of the technical statutory argument that a stockholder vote was not required had policy arguments in its favor because that argument "has virtues that accompany all bright-line tests, which are considerable, in that they provide clear guidance to transactional planners and limit litigation."[39] The Court continued as follows:

> That approach also adheres to the director-centered nature of our law, which leaves directors with wide managerial freedom subject to the strictures of equity, including entire fairness review of interested transactions. It is through this centralized management that stockholder wealth is largely created, or so much thinking goes.[40]

However, the Court also found that a conclusion in favor of requiring a stockholder vote in these circumstances had policy arguments in its favor. In particular, the Court noted that accepting the technical statutory argument would render Section 271 "largely hortatory - reduced to an easily side-stepped gesture, but little more, towards the idea that transactions that dispose of substantially all of a corporation's economic value need stockholders' assent to become effective."[41] The Court noted such a conclusion would allow a corporation

to sell all of its assets through its subsidiaries, that "would, taken together, result in a de facto liquidation of the firm's operating assets into a pool of cash, a result akin to a sale of the entire company for cash or liquidation."[42] The Court reasoned that, although the law recognizes the separate existence of wholly-owned subsidiaries for purposes of minimizing liability to third parties and tax liability, it does not necessarily mean that the law should recognize their separate existence for all purposes.

Ultimately, the Court declined to rule on the issue and instead assumed, without deciding, that the Telegraph Group was held directly by Parent. Nevertheless, to most practitioners, the Court's analysis will be seen as a strong indication of the Court's willingness, under the appropriate circumstances, to ignore the legal distinction between the parent and the subsidiary corporations.[43]

B. The Quantitative And Qualitative Analysis

After rejecting the technical statutory argument, the Court proceeded to evaluate whether the sale of the Telegraph Group constituted a sale of all or substantially all of Parent's assets. Although recognizing that *Gimbel* is the seminal case on the matter, and that the test set forth therein is the proper means to analyze a particular sale, the Court noted that the test set forth in *Gimbel* must be "read as an attempt to give practical life to the words 'substantially all.'"[44] The Court reasoned as follows:

> [I]t remains a fundamental principle of Delaware law that the courts of this state should apply a statute in accordance with its plain meaning, as the words that our legislature has used to express its will are the best evidence of its intent. To analyze whether the vote requirement set forth in § 271 applies to a particular asset sale without anchoring that analysis to the statute's own words involves an unavoidable risk that normative preferences of the judiciary will replace those of the General Assembly.[45]

In focusing on the plain language of the statute, the Court examined the dictionary definitions of the words "substantially" and "all" and concluded that "[a] fair and succinct equivalent to the term 'substantially all' would ... be 'essentially everything.'"[46] The Court noted, however, that "words of this kind long ago passed from the sight of our judicial rear view mirrors, to be replaced by an inquiry more focused on the judicial gloss put on the statute than on the words of the statute itself."[47]

In light of that fact, the Court admitted that Delaware case law "provides less than ideal certainty about the application of the statute to particular circumstances," and attributed this uncertainty to cases that deviated from the statutory language[48] or other cases that "dilated perhaps longer than they should have in evaluating asset sales that do not seem to come at all close to meeting the statutory trigger for a required stockholder vote."[49] With respect to this latter category of cases, the Court pointed to *Gimbel* itself, noting that the assets discussed therein which comprised 26% and 41% of the corporation's total and net assets, even though constituting the oldest line of business of the corporation, did not "seem to approach § 271's gray zone."[50]

Therefore, the Court concluded that the test articulated in *Gimbel* - "requiring a stockholder vote if the assets to be sold 'are quantitatively vital to the operation of the corporation' and 'substantially affect[] the existence and purpose of the corporation' - must therefore be read as an attempt to give practical life to the words 'substantially all.'"[51] In this sense, the Court

applied the *Gimbel* test to the facts before it and determined that the sale of the assets of the Telegraph Group did not constitute all or substantially all of the assets of Parent.

With respect to the quantitative analysis, the Court concluded that the Telegraph Group constituted 56-57% of the corporation's asset value on a fair market value basis, generated less than 50% of the corporation's revenue for the last three years, did not even approach 50% of the corporation's asset value on a book value basis and generated less free cash flow than the remaining assets. Thus, the Court concluded that although the Telegraph Group is somewhat more valuable than the remaining assets, the corporation would be able to continue as a viable entity without the Telegraph Group because the remaining assets would be "quantitatively vital economic asset[s]."[52]

With respect to the qualitative test, the Court noted that the relationship between the quantitative test and the qualitative test is unclear. Seemingly collapsing the tests, the Court reasoned that "[i]f the assets to be sold are not quantitatively vital to the corporation's life, it is not altogether apparent how they can 'substantially affect the existence and purpose of' the corporation within the meaning of *Gimbel*, suggesting either that the two elements of the test are actually not distinct or that they are redundant."[53] Rather than fully exploring this question, however, the Court simply analyzed the qualitative importance of the Telegraph Group, and rejected an argument that, because the asset to be sold was one of the world's most highly regarded newspapers, it was qualitatively vital to the corporation.

In rejecting that argument, the Court noted that the qualitative test does not measure whether the assets sold are aesthetically superior to those assets being retained, but focuses on the economic quality of the assets, and "at most, on whether the transaction leaves the stockholders with an investment that in economic terms is qualitatively different than the one they now possess."[54] The Court also noted that this focus is merely a gloss on the statutory language of "substantially all" and not an attempt to "identify qualitatively important transactions but ones that 'strike at the heart of the corporate existence.'"[55]

In concluding that the sale did not strike at the "heart or soul" of the corporation,[56] the Court noted that, among other things, the acquisition and disposition of newspaper businesses was part of the ordinary course of business of the corporation. In addition, any unique qualities of the asset would certainly be represented in the price to be received in the sale. Thus, the Court noted that it was not reasonable to assume that stockholders invested in the corporation "with the expectation that [Subsidiary] would retain the Telegraph Group even if it could receive a price that was attractive in light of the projected future cash flow of that" asset.[57] Finally, the Court noted that the stockholders of the corporation would remain invested in a corporation "with profitable operating assets, a well-regarded tabloid newspaper of good reputation and large circulation, a prestigious newspaper in Israel, and other valuable assets."[58] The Court noted that "[w]hatever the social importance of the *Telegraph* in Great Britain, the economic value of that importance to [Subsidiary] as an entity is what matters for the *Gimbel* test, not how cool it would be to be the *Telegraph's* publisher."[59]

III. Practice Points Resulting From *Hollinger*

The Court's decision in *Hollinger* is a marked departure from the reasoning of prior decisions in several respects. As such, the Court's decision has implications for practitioners who are advising a corporation considering an asset sale, whether the sale is by the corporation

directly or by its subsidiary. At its core, the *Hollinger* decision indicates that the Court will read Section 271 in accordance with its view of the intent behind the statute. Thus, the Court will (i) view with skepticism any technical argument that a stockholder vote of a parent corporation is not triggered by a sale of assets by its subsidiary, and (ii) strictly interpret the words "substantially all," resulting in the possibility that a practitioner may conclude that a stockholder vote will not be required even when the assets to be disposed of in the sale constitute considerably more than 50% of the total assets of the Company on a fair market value basis.[60]

A. The Sale Of Assets By A Subsidiary

The Court's decision in *Hollinger* demonstrates a willingness of at least one member of the Court of Chancery to ignore the recognized independent corporate existence of a parent corporation and its subsidiary at least in certain circumstances. This aspect of the Court's decision raises questions about the continued recognition of the separate existence of parent and subsidiary corporations and the principle that literal statutory language should be respected.[61] In light of *Hollinger*, Delaware practitioner's are unlikely to conclude that a stockholder vote of a parent corporation is not required in connection with a sale of assets by a subsidiary unless the structure of the transaction does not implicate the concerns expressed in *Hollinger*. Accordingly, it is imperative that counsel of a parent corporation contemplating a sale of a subsidiary's assets, which may also constitute all or substantially all of the assets of the parent corporation on a consolidated basis, consider the implications of the proposed structure of the transaction on the ability to conclude that a vote of the stockholders of the parent corporation is not required.

In planning a proposed transaction, counsel should consider whether or not a Delaware court will conclude that the parent corporation directed the sale of the subsidiary's assets. In order to bolster the "technical" statutory defense that the *Hollinger* court discounted, counsel should ensure that the subsidiary has: (i) engaged independent financial advisors or legal counsel; (ii) negotiated the terms of the relevant contract; and (iii) an intention to present the terms of the relevant contract and the transactions contemplated thereby to the directors of the subsidiary for their consideration and, after appropriate deliberation, approval.[62] In addition, counsel should also advise the client that the "technical" statutory defense may be compromised if the parent corporation: (i) is a party to the relevant contract; (ii) guarantees any obligations of the subsidiary, (iii) agrees to cause the subsidiary to perform its obligations under the relevant contract; or (iv) obtains the ability to receive any payments in connection with the relevant contract or the transactions contemplated thereby.

If a particular transaction is structured so as to not implicate the concerns evident in *Hollinger*, a parent corporation should be able to assert the "technical" statutory defense that a vote of the stockholders of the parent corporation is not required to approve a sale of assets by a subsidiary.[63] However, as a practical matter, it remains to be seen whether it will be practical to structure a sale so as to avoid significant participation by the parent corporation, as a purchaser likely will require the participation of the parent corporation (at least to guarantee the obligations of the subsidiary) and a parent corporation may not wish to indulge such autonomy in a subsidiary (a fact of which the court is undoubtedly cognizant). Accordingly, the availability of the "technical" statutory defense may depend on the ability of the subsidiary to convince the purchaser to agree to a transaction that requires minimal participation by the parent corporation.

B. The Quantitative And Qualitative Analysis

Several aspects of the Court's discussion of the quantitative and qualitative analysis are of note to practitioners considering asset sales. As an initial matter, the Court restates the statutory test ("substantially all" means "essentially everything") in a way that raises the "quantitative" trigger. As a result, the *Hollinger* decision may encourage corporations to undertake more transactions without a stockholder vote. In addition, the Court engaged in a detailed discussion of the qualitative element of the *Gimbel* test, focusing on the economic quality, as opposed to the aesthetic superiority of the assets, and articulated, in stronger terms than in prior precedent, a reliance on the expectations of a reasonable investor.

1. All or Substantially All is Not Approximately 50%

Prior to *Hollinger*, many practitioners were of the view that a stockholder vote was advisable if the assets to be sold constituted more than 50% of the assets of a corporation on a fair market value basis. In *Hollinger*, relying on the literal language of the statute, the Court suggested that a significantly higher percentage of assets might be sold without triggering a stockholder vote.[64] Although this decision may strike some practitioners as an expansion of their understanding of the prior case law, it is evident that the Court has indicated in at least one prior decision that a sale of assets consisting of considerably more than 50% of a corporation's assets may not trigger a stockholder vote under Section 271.[65]

Starting with the view that "substantially all" means "essentially everything," the Court reviewed a number of quantitative factors in determining whether the assets constituted all or substantially all of the assets of Parent.[66] In particular, the Court reviewed the following quantitative factors: (i) the fair market value of the assets to be sold as a percentage of the fair market value of the total assets of Parent, (ii) the relative contribution to Parent of the revenues of the assets to be sold and those to be retained, (iii) the book value of the assets to be sold as a percentage of the book value of total assets of Parent,[67] and (iv) the contribution to Parent of EBITDA by the assets to be sold and those to be retained.[68] Despite the fact that the Telegraph Group constituted more than 50% of the assets of Parent on a fair market value basis, the Court concluded that these assets were not "essentially everything" because they were not quantitatively vital to Parent and because the remaining assets were profitable and valuable economic assets.[69]

The Court went on to note in a footnote that the Model Business Corporation Act (the "MBCA") includes a safe harbor provision that sets forth a two part objective test which essentially sanctions asset sales without a stockholder vote when the remaining assets represent "at least 25 percent of total assets...and 25 percent of either income from continuing operations before taxes or revenues from continuing operations."[70] The Court noted that the MBCA and the ALI Principles of Corporate Governance "usefully turn the 'substantially all' inquiry on its head by focusing, as *Gimbel* does in a more oblique way, on what remains after a sale."[71] The Court concluded that strictly adhering to "the words 'substantially all' (a la MBCA), could be viewed as the most faithful way to give life to the General Assembly's intended use of § 271."[72] This statement by the Court, together with its statement that "substantially all" means "essentially everything", invite one to infer that the Court believes that a vote under Section 271 should not be triggered unless the sale involves substantially more than 50% - perhaps as much as 75% - of a corporation's assets.[73]

Thus, practitioners considering whether certain assets constitute all or substantially all of the assets of a corporation should, among other things, consider each of the factors considered

by the Court in *Hollinger*, including fair market value, book value, revenues and EBITDA. Even if an analysis of these factors demonstrates that the assets to be disposed of constitute profitable and valuable economic assets which amount to significantly more than 50% of the corporation's assets, it may still be possible (especially when the remaining assets are profitable and valuable economic assets[74]) to conclude that no stockholder vote is required under Section 271.

2. Economic Quality Trumps Aesthetic Superiority

The Court expressed some confusion over the relationship of the qualitative element of the *Gimbel* test to the quantitative element. If the assets to be sold were not quantitatively vital to the corporation, the Court noted that it was unclear how those assets could "substantially affect the existence and purpose of" the corporation within the meaning of *Gimbel*.[75] With this in mind, the Court rejected an argument that the sale of the assets was qualitatively vital to Parent, even if it was not quantitatively vital, because of the unique "journalistic superiority" and "social cachet" of the *Telegraph*. The Court reasoned as follows:

> [The qualitative] element is not satisfied if the court merely believes that the economic assets being sold are aesthetically superior to those being retained; rather, the qualitative element of Gimbel focuses on economic quality and, at most, on whether the transaction leaves the stockholders with an investment that in economic terms is qualitatively different than the one they now possess. Even with that focus, it must be remembered that the qualitative element is a gloss on the statutory language "substantially all" and not an attempt to identify qualitatively important transactions but ones that "strike at the heart of corporate existence."[76]

Accordingly, practitioners should focus on the economic quality of the assets in order to determine whether, as a qualitative matter, the disposal of the assets would strike at the heart of the corporate existence. Practitioners should not place undue weight on the social importance or trophy nature of an asset in evaluating its qualitative importance to the corporation.

3. The Expectations Of A Reasonable Investor

In evaluating the qualitative aspects of a proposed asset sale, practitioners also should consider the expectations of a reasonable investor, and whether those expectations will be impacted by the sale. In *Hollinger*, the Court spent some time discussing the expectations of a stockholder investing in Parent. Although an investor would have expected Parent to take advantage of the unique nature of the Telegraph Group in considering the price to be received in any sale, the Court noted that a reasonable investor would not have invested in Parent with the intention that the Telegraph Group would not be sold regardless of the price that was offered.

Not only was Parent a public corporation prior to the time that it acquired the Telegraph Group, but Parent also was in the business of buying and selling newspaper businesses. Based on these facts, and because the qualitative element of the *Gimbel* test addresses the "rational economic expectations of reasonable investors, and not the aberrational sentiments of the peculiar (if not, more likely, non-existent) persons who invest money to help fulfill the social ambitions of inside managers," the Court concluded that the sale of the Telegraph Group did not "strike a blow to [Parent's] heart."[77] Accordingly, practitioners should consider the expectations of a reasonable investor when evaluating the qualitative element

of the *Gimbel* test. In considering the expectations of a reasonable investor, practitioners may wish to consider, among other things, any publicly available information, including a corporation's public disclosures generated in the course of its ongoing operations (e.g., discussions in year end financials, quarterly financials, annual reports and proxy statements), and, perhaps more importantly, the prospectus or any other documents filed in connection with the initial public offering of the corporation's shares.

Conclusion

The Court's decision in *Hollinger* has complicated the analysis as to whether a stockholder vote of a parent corporation is required in connection with the sale of assets by its subsidiary when the assets to be sold constitute all or substantially all of the assets of the parent corporation on a consolidated basis. The Court has indicated a willingness to ignore the separate corporate existence of a parent corporation and its subsidiary at least where the parent corporation directs the asset sale. Accordingly, if an asset sale by a subsidiary is contemplated, counsel should consider, as early as possible, whether the structure of the contemplated transaction may impact whether or not a vote of the stockholders of the parent corporation will be required pursuant to Section 271. While the technical statutory argument may not be available in all circumstances, the *Hollinger* decision arguably has clarified the quantitative and qualitative analysis in a manner that may permit a parent corporation to effect subsidiary asset sales without a vote of the parent corporation's stockholders in situations in which many practitioners may have previously thought a stockholder vote was necessary.

Notes

1 Mark A. Morton is a partner and Michael K. Reilly is an associate in the Wilmington, Delaware law firm of Potter Anderson & Corroon LLP. The views expressed are solely those of the authors and do not necessarily represent the views of the firm or its clients.

2 Section 271(a) of the General Corporation Law provides, in pertinent part, as follows:

> Every corporation may at any meeting of its board of directors or governing body sell, lease or exchange all or substantially all of its property and assets, including its goodwill and its corporate franchises, upon such terms and conditions and for such consideration, which may consist in whole or in part of money or other property, including shares of stock in, and/or other securities of, and other corporation or corporations, as the board of directors of governing body deems expedient and for the best interests of the corporate, when and as authorized by a resolution adopted by the holders of a majority of the outstanding stock of the corporation entitled to vote thereon...., at a meeting duly called upon 20 days notice....

8 *Del. C.* § 271(a).

3 C.A. No. 543-N, 2004 WL 1728003, Strine V. C. (Del. Ch. July 29, 2004), appeal denied, C.A. No. 331-2004, 2004 WL 1732815 (Del. July 29, 2004).

4 Even if a vote of the stockholders of the parent corporation is not required, the sale must be approved by the board of directors of the subsidiary corporation and then by the parent corporation, qua stockholder of the subsidiary. An issue unaddressed by the *Hollinger* decision is whether a vote of the stockholders of the parent corporation is required for a parent corporation to transfer all or substantially all of its assets to a subsidiary in the first instance.

5 This conclusion typically is subject to the existence of the following facts: (i) the assets are and, for a significant period of time, have been owned by a wholly-owned subsidiary of the parent corporation; (ii) the subsidiary is not being operated or maintained in perpetration of a fraud; and (iii) such subsidiary is in fact a formally distinct legal entity having its own corporate identity and purposes and is not merely the alter ego or artificial instrumentality of the parent corporation.

6 8 *Del. C.* § 271(a) (emphasis supplied).

7 We note in that regard that the General Corporation Law specifically requires a vote of the stockholders of a parent Delaware corporation as a condition to certain action by a subsidiary Delaware corporation in only one instance. *See* 8 *Del. C.* § 251(g)(7)(i) (providing that an operating company may switch to a holding company structure by undertaking a merger, without a stockholder vote, provided that the certificate of incorporation of the corporation that will become the subsidiary corporation following the merger is "amended in the merger to contain a provision requiring that any act or transaction by or involving the [subsidiary] corporation that requires for its adoption under [the General Corporation Law] or its certificate of incorporation the approval of the stockholders of the [subsidiary] corporation shall, by specific reference to this subsection, require, in addition, the approval of the stockholders of the holding company (or any successor by merger), by the same vote as is required by this chapter and/or by the certificate of incorporation of the [subsidiary] corporation....").

8 *Speiser v. Baker*, 525 A.2d 1001, 1008 (Del. Ch.) (citations omitted), *appeal denied*, 525 A.2d 582 (Del. 1987); *see Uni-Marts, Inc. v. Stein*, C.A. Nos. 14713, 14893, 1996 WL 466961, at * 9, Allen, C. (Del. Ch. Aug. 12, 1996) ("[W]hen construing the reach and meaning of provisions of the Delaware General Corporation Law, our law is formal.... Formality has significant utility for business planners and investors..... [T]he utility offered by formality in the analysis of our statutes has been a central feature of Delaware corporation law."); *see also Arbern-Wilmington, Inc. v. Director of Revenue*, 596 A.2d 1385, 1390 (Del. 1991) (stating that a court is "required to give words of a statute their normal meaning").

9 *See Orzeck v. Englehart*, 195 A.2d 375, 377 (Del. 1963); *Bird v. Wilmington Society of Fine Arts*, 43 A.2d 476, 483 (Del. 1945); *see also Buechner v. Farbenfabriken Bayer Aktiengesellschaft*, 154 A.2d 684, 686 (Del. 1959) (finding that a corporate stockholder has right to share in corporate profits and in distribution of corporate assets on liquidation, but has no interest in any specific assets of corporation).

10 *Orzeck*, 195 A.2d at 377.

11 *Buechner*, 154 A.2d at 687 (citing *Bird*, 43 A.2d at 483).

12 *See, e.g., Leslie v. Telephonics Office Techs., Inc.*, C.A. No. 13045, 1993 WL 547188, at *8, Allen, C. (Del. Ch. Dec. 30, 1993); *Hart Holding Co. v. Drexel Burnham Lambert, Inc.*, C.A. No. 11514, 1992 WL 127567, at *10 n.11, Allen, C. (Del. Ch. May 28, 1992); *Harco Nat'l Ins. Co. v. Green Farms, Inc.*, C.A. No. 1131, 1989 WL 110537, at *4, Hartnett, V.C. (Del. Ch. Sept. 19, 1989); *Mabon, Nugent Co. v. Texas Am. Energy Corp.*, C.A. No. 8578, 1988 WL 5492, at *4, Berger, V.C. (Del. Ch. Jan. 27, 1988); *Field v. Allyn*, 457 A.2d 1089, 1097-98 (Del. Ch.), aff'd, 467 A.2d 1274 (Del. 1983); *Pauley Petroleum, Inc. v. Continental Oil Co.*, 31 A.2d 450, 452-53 (Del. Ch. 1967), *aff'd*, 239 A.2d 629 (Del. 1968).

13 *See Leslie v Telephonics Office Techs., Inc.*, C.A. No. 13045, 1993 WL 547188, Allen, C. (Del. Ch. Dec. 30, 1993); *J.P. Griffin Holding Corp. v. Mediatrics, Inc.*, C.A. No. 4056, 1973 WL 651, Marvel, V.C. (Del. Ch. Jan. 30, 1973).

14 *Id.* at *2 (citation omitted). A similar view has been expressed by other courts and by certain commentators. *See Cross Properties, Inc. v. Brook Realty Co.*, 322 N.Y.S.2d 773, 779-80 (N.Y. App. Div. 1971), *aff'd*, 293 N.E.2d 95 (N.Y. 1972); Andrew Moore II, *The Sale of All or Substantially All Corporate Assets Under Section 271 of the Delaware Corporate Code*, 1 Del. J. Corp. L. 56, 61 (1976); Leo Herzel et al., *Sales and Acquisitions of Divisions*, 5 Corp. L. Rev. 3, 25-26 (1982). *But See* Melvin A. Eisenberg, *Megasubsidiaries: The Effect of Corporate Structure on Corporate Control*, 84 Harv. L. Rev. 1577, 1589-1602 (1971) (suggesting that the stockholders of a parent corporation may be entitled to vote on certain asset sales by subsidiaries under Section 271 and similar statutory provisions of other jurisdictions).

15 C.A. No. 13045, 1993 WL 547188, Allen, C. (Del. Ch. Dec. 30, 1993).

16 *Id.* at *8.

17 *Id.* (footnote omitted). The Delaware decision in *Auerbach v. Earth Energy Systems, Inc.*, C.A. No. 8568, 1986 WL 8930, Jacobs, V.C. (Del. Ch. Aug. 19, 1986), contains dicta that could be read to suggest that a vote of a parent corporation's stockholders may, in some circumstances, be required by Section 271 to authorize the sale of a division even though "most, if not all, of the assets" of the division being sold are assets of a subsidiary. In Auerbach, the plaintiffs contended, among other things, that a meeting of the parent corporation's stockholders to authorize the sale of a division of the corporation had been called on insufficient notice. The Court of Chancery declined to grant a temporary restraining order, holding that plaintiffs' contentions under Section 271 were mooted when the parent corporation's majority stockholder authorized the proposed sale by written consent. The Court noted, however, that "[a]t the time this action was filed, the plaintiffs' claim that the [asset] sale would violate [Section] 271 afforded ample cause for concern" and that "the evidence strongly suggests that the [division to be sold] represents 'all or substantially all' of [the parent corporation's] assets." *Id.* at *4.

In view of well-settled principles of Delaware corporate law and the judicial comment relating to the issue in

Mediatrics and *Leslie*, many Delaware practitioners had concluded prior to *Hollinger* that a Delaware court would not find the dicta in *Auerbach* to be persuasive authority for the proposition that a vote of a parent corporation's stockholders is required when the assets of a subsidiary are to be sold and those assets constitute all or substantially all of the assets of the parent corporation on a consolidated basis. We note in this regard that *Auerbach* was not cited in either *Leslie* or *Hollinger.*

18 316 A.2d 599 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974).

19 316 A.2d at 605.

20 *Id.* at 606 (emphasis added).

21 *Id.* at 608.

22 431 A.2d 1274 (Del. Ch. 1981), *appeal refused sub nom., Plant Indus. v. Katz*, 435 A.2d 1044 (Del. 1981) (TABLE).

23 *Katz*, 431 A.2d at 1276.

24 C.A. No. 6430, 1981 WL 15605, Marvel, C. (Del. Ch. June 26, 1981).

25 C.A. Nos. 7826, 7866, 1984 WL 21128, Brown, C. (Del. Ch. Dec. 11, 1984).

26 *Bacine*, 1984 WL 21128, at *3.

27 592 A.2d 445 (Del. 1991).

28 *Kirby*, 592 A.2d at 464.

29 *Id.*

30 C.A. 11713, 1995 WL 478954, Allen, C. (Del. Ch. Aug. 9, 1995), *aff'd in part, rev'd in part on other grounds*, 676 A.2d 436 (Del. 1996).

31 *See generally In re General Motors Class H S'holders Litig.*, 734 A.2d 611, 623 (Del. Ch. 1999) (describing "contextual approach" in contrast to a "definitional approach").

32 *See, e.g., Winston v. Mandor*, 710 A.2d 835, 843 (Del. Ch. 1997) ("whether there is a sale of substantially all assets so as to trigger Section 271 depends upon the particular qualitative and quantitative characteristics of the transaction at issue") (citing *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996)).

33 *Winston*, 710 A.2d at 843 (citing *Thorpe*, 1995 WL 478954, at *9).

34 *Gimbel*, 316 A.2d at 606.

35 *See Apple Computer, Inc. v. Exponential Tech., Inc.*, C.A. No. 16315, 1999 WL 39547, at *5, Chandler, C. (Del. Ch. Jan. 21, 1999) (quoting *Gimbel*, 316 A.2d at 606).

36 *Hollinger*, slip op. at 6.

37 *Id.*, slip op. at 55. The Court reasoned that a ruling on the technical statutory defense would "render § 271 an illusory check on unilateral board power at most public companies." *Id.*, slip op. at 6. While acknowledging that a "technical" statutory defense would "involve a rational reading of § 271," the Court noted that it did not represent the only possible interpretation of that statute. *Id.*

38 At that time, the directors of the subsidiaries were brought into a meeting so that they could hear the presentation of Parent's financial advisor and the final discussion about selling the assets of Subsidiary. After hearing the presentations, the directors of each of the subsidiaries, including Subsidiary, approved the sale at meetings that lasted approximately five minutes. *Id.*, slip op. at 56.

39 *Id.*, slip op. at 59.

40 *Id.*, slip op. at 59.

41 *Id.*

42 *Id.*, slip op. at 60.

43 The Court suggests that this distinction may be ignored without harming the utility of a holding company structure: "At first blush, it is not apparent why the distinctive considerations that apply to the relationship between stockholders and corporations within the corporate family cannot be recognized without doing violence to the wealth-creating value of limiting the ability of third parties who deal with wholly-owned subsidiaries to seek recourse against parent corporations." *Id.*, slip op. at 61.

44 *Id.*, slip op. at 68; *see also Gimbel*, 316 A.2d at 605 (noting that the test utilized in analyzing a particular sale

under Section 271 "must begin with and ultimately necessarily relate to our statutory language").

45 *Id.*, slip op. at 64.

46 *Id.*, slip op at 65.

47 *Id.*

48 The Court indicated that one such case that seems to have completely deviated from the plain language of the statute was *Katz v. Bregman*. In that case, the Court of Chancery determined that a stockholder vote was necessary for a corporation to sell assets that constituted 51% of the corporation's asset value, 44.9% of the corporation's sales and 52.4% of the corporation's pre-tax net operating income.

49 *Id.*, slip op. at 67.

50 *Id.*

51 *Id.*, slip op. at 68.

52 *Id.*, slip op. at 71.

53 *Id.*, slip op at 76.

54 *Id.*, slip op. at 77.

55 *Id.* (citing *Gimbel*, 316 A.2d at 606).

56 *Id.*

57 *Id.*, slip op. at 79.

58 *Id.*

59 *Id.*, slip op. at 78.

60 The Court distilled its views on how practitioners (and perhaps legislators) should construe (and perhaps revise) Section 271 when it observed:

> Indeed, taken together, a reading of § 271 that: 1) required a stockholder vote for any sales contract to which a parent was a party that involved a sale by a wholly owned subsidiary that, in economic substance, amounted to a disposition of substantially all of the parent's assets; combined with 2) a strict adherence to the words "substantially all" ..., could be viewed as the most faithful way to give life to the General Assembly's intended use of § 271. That is, § 271 would have substantive force but only with regard to transactions that genuinely involved substantially all of the corporation's assets.
>
> *Id.*, slip op. at 82 n.79.

61 Because the Court of Chancery's decision is in direct conflict with the statute, an amendment to the statue would be required to bring the literal language of the statute in line with the Court of Chancery's decision. Accordingly, the Court of Chancery's decision raises questions about the role of the judiciary in interpreting statutes in accordance with the literal statutory language, as opposed to ignoring statutory language in order to reach a result that a court believes is more in line with its interpretation of relevant public policy concerns.

62 The Court in *Hollinger* noted that the directors of Subsidiary were also officers of Parent. In order to avoid questions as to whether a parent corporation has directed a sale of a subsidiary's assets, it is advisable that the subsidiary's board consist of directors who are not also officers of the parent corporation, or that the transaction be considered, negotiated and ultimately approved by a committee of directors who are not also officers of the parent corporation.

63 By preserving the "technical" statutory defense, a parent corporation also may preserve counsel's ability to render a legal opinion (i.e., that no vote of the parent corporation's stockholder is required for the proposed sale of the subsidiary's assets). Of course, even if such an opinion is unavailable, it remains possible that under the quantitative and qualitative test articulated in *Gimbel* (and re-examined by *Hollinger*) that the assets to be sold will not constitute all or substantially all of the assets of the parent corporation, even if the separate corporate existence of the subsidiary is ignored.

64 When reading the *Hollinger* decision, some may be struck by the Court's reference to the literal language of the statute as support for its conclusion that, from a quantitative standpoint, the sale did not constitute "substantially all" of the assets of Parent, especially when juxtapositioned with the court's willingness five pages earlier to disregard the literal language of the statute when rejecting the "technical" statutory argument that Section 271 did not apply because the assets were being sold by a subsidiary. *Compare Hollinger,* slip op. at 64 ("As I will note, our courts arguably have not always viewed cases involving the interpretation of §

271 through a lens focused by the statute's plain words. Nonetheless, it remains a fundamental principle of Delaware law that the courts of this state should apply a statute in accordance with its plain meaning, as the words that our legislature has used to express its will are the best evidence of its intent. To analyze whether the vote requirement set forth in § 271 applies to a particular asset sale without anchoring that analysis to the statute's own words involves an unavoidable risk that normative preferences of the judiciary will replace those of the General Assembly") with *Hollinger*, slip op. at 59 (suggesting that acceptance of the "technical" argument that Section 271 is not triggered for a parent corporation by a sale of a subsidiary's assets would render Section 271's vote requirement "largely hortatory-reduced to an easily side-stepped gesture.").

65 *See In re General Motors S'holders Litig.*, 734 A.2d 611, 622-24 (Del. Ch. 1999) (refusing to find that a corporation committed a disclosure violation by indicating that there was "substantial uncertainty" that a recapitalization provision in a charter, which would become applicable upon a sale of "substantially all" of the corporation's assets, was triggered upon a sale which purportedly constituted 60% of the corporation's total assets, and finding that the corporation's hesitance to take a definitive stand was understandable "[g]iven the intensely factual analysis under the *Gimbel* test and the lack of clear mathematical guidelines").

66 *Hollinger*, slip op. at 65-79.

67 Based on prior precedent, Delaware practitioners have tended to give lesser importance to the book value of the assets, a quantitative factor that may not be as reliable an indicator as other factors of the overall importance of an asset to a corporation on a quantitative basis. Although clearly not the most important factor to the Court in *Hollinger*, it is notable that the Court has included book value as one aspect of the quantitative analysis that should be considered.

68 *Hollinger*, slip op. at 70-76.

69 *Id.*, slip op. at 75.

70 *Id.*, slip op at 81 n.79.

71 *Id.*

72 *Id.*

73 This conclusion is bolstered by the fact that the Court was aware that Parent, after the sale of the Telegraph Group, will have sold approximately 75% of its assets on a fair market value basis within the prior three years. *Id.*, slip op. at 13 (indicating that in 2000 Parent had sold the bulk of its Canadian newspaper holdings for over $2 billion).

74 Although the Court appears to place primary importance on the fair market value of the assets, the Court also relies on the fact that the remaining assets will be profitable assets that generate free cash flow. Given this focus, it is unclear how a court would view a sale of assets by a corporation that has no profitable business assets. If profitability and cash flow are important qualities of the remaining assets, one wonders if the Court is suggesting that a sale of assets by an unprofitable, albeit viable corporation, is more likely to trigger a stockholder vote than a sale by a profitable corporation.

75 *Hollinger*, slip op. at 76. The Court fails to consider, however, that the quantitative and qualitative test is considered by many practitioners to be a conjunctive test. In other words, a stockholder vote will be required only if the assets constitute all or substantially all of the assets of a corporation both on a quantitative and qualitative basis.

76 *Id.*, slip op. at 77 (quoting *Gimbel*, 316 A.2d at 606).

77 *Id.*, slip op. at 75.