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§ 10.2 “ALL OR SUBSTANTIALLY ALL” THE ASSETS UNDER SECTION 271

While these general rules may provide some guidance, any practitioner seeking to determine whether Section 271 applies to a corporate transaction must undertake both a qualitative and quantitative analysis of the assets being transferred by the corporation. Of course, there are several problems raised by the failure to determine properly whether stockholder consent is required for a proposed sale of assets. First, there is the possibility that a stockholder may attempt to enjoin consummation of the transaction until such time as the requisite consent is obtained. Second, and perhaps more importantly, is the fact that a sale in violation of section 271 may be void or voidable. However, if the "all or substantially all" threshold is not reached, the board of directors, without stockholder approval, can authorize the transaction.

15 Apple Computer, Inc. v. Exponential Tech., Inc., C.A. No. 16315 (Del. Ch. Jan. 21, 1999), slip op. at 18-19 (holding that a claim relating to the failure to obtain the requisite vote of stockholders under Section 271 would be mooted by subsequent stockholder ratification of the asset disposition since the “conduct, because it was not in bad faith, constitutes a voidable, not a void act”) . . . For an extensive discussion of the distinction between void and voidable actions under Delaware law, see Bigler & Tillman, Void or Voidable? -- Curing Defects in Stock Issuances Under Delaware Law, 63 Bus. Law.[c] 1109 (2008).