MESSAGE FROM THE CHAIR

Kathleen M. Shay*

The Business Law Section continued to be active over the summer despite the slowdown in formal events and activities. In June, I served as a co-moderator of a corporate counsel roundtable discussion entitled “What’s Next for Corporate Counsel?” The roundtable discussion was designed to begin a dialogue with corporate counsel and key members of the business community to provide their views on “critical law firm business issues such as law firm selection, client service, efficiency and pricing models.” The roundtable discussion was organized and co-moderated by Lisa Goldstein of Rainmaker Trainers and was published in the Fall 2005 edition of *The Philadelphia Lawyer*.

Roundtable panelists were Charisse Lillie, a former practicing attorney who recently became the Vice President of Human Resources at Comcast Corporation; David Fresschman, a venture capitalist who serves on the boards of many emerging businesses; Richard J. DePiano, Jr., General Counsel of Escalon Medical Corp.; John Gregory, General Counsel of Streamlight, Inc.; and Ramona Romero, Corporate Counsel at DuPont. I would like to thank all of the panelists for their insights and provide special thanks to Lisa Goldstein for her many efforts in organizing the roundtable discussion and Kate Maxwell, the managing editor of *The Philadelphia Lawyer*, for a tremendous job in editing the material into an article that I believe you will all enjoy reading. We welcome your feedback.

The Philadelphia Bar Association’s 2005 Bench-Bar Conference was held in Atlantic City on September 30 and October 1. Although this event has historically been focused on litigation attorneys, efforts have been made to encourage the attendance of transactional attorneys by providing CLE courses and other content of interest to them. Mitchell Bach, the 2004 Chair of the Business Law Section, co-chaired this year’s conference with Sayde Ladov.

The Business Law Section Committees continue to be active, with many meetings and events planned for the upcoming months. Committee leaders were invited to attend the September meeting of the Business Law Section Executive Committee to report on activities and initiatives.

It is difficult to believe that 2005 is almost over. In just a couple of months, we will be planning the annual Business Law Section reception, for January 2006, and will be soliciting your input for the annual Dennis H. Replansky Memorial Award and the Business Law Section Committee of the Year and Committee Chair of the Year awards. More information will be forthcoming in the next issue of *The Business Law Report*.

*Kathleen M. Shay is the Chair of the Business Law Section and a partner at Duane Morris LLP.*
THE BILT-RITE CASE: IMPLICATIONS FOR
THE GIST OF THE ACTION DOCTRINE AND
THE ECONOMIC LOSS RULE IN PENNSYLVANIA

William K. Pelosi, Esq.*

It is not unusual for business litigation to contain causes of action sounding in both contract and tort. The tort causes of action are often especially important to the plaintiff because they provide a path for recovering damages not available in a breach of contract claim, such as attorney’s fees and punitive damages. Sometimes the tort claim is all the plaintiffs have because no contract existed between the parties. Often it is possible to challenge tort causes of action in business litigation by invoking the gist of the action doctrine or the economic loss rule. This article will consider the implications of one case, Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270 (Pa. 2005), for the future in Pennsylvania of these two important doctrines.

The gist of the action doctrine stands for the proposition that a cause of action resulting from the breach of a contract will sound in contract and not tort. Hence, you cannot sustain a tort cause of action by pleading that someone negligently breached a contract. Nor can you elevate your claim to the land of punitive damages by alleging that the defendant recklessly or willfully breached a contract. The test for determining whether a cause of action will survive the gist of the action doctrine runs to the origin of the duty that was allegedly breached. If the duty was “imposed by law as a matter of social policy,” the action sounds in tort. However, if the duty was “imposed by mutual consensus agreements between particular individuals,” the action sounds in contract. Bash v. Bell Telephone Co. of Pa, 601 A.2d 825, 829 (Pa. Super. 1992). Further, an action sounding in contract commonly precludes it from also sounding in tort. There is, however, an exception to that rule. A breach of contract action may also sound in tort where the wrongful act sounding in tort (i.e. the breach of the duty that arose as a matter of social policy) is “the gist of the action, the contract being collateral.” Id.

The economic loss rule, in its original application by Pennsylvania’s superior court, simply provided that, absent a special relationship between the parties, “no cause of action exists for negligence that causes only economic loss.” Aikens v. Baltimore and Ohio R. Co., 501 A.2d 277 (Pa. Super. 1985). Absent allegations of a “special relationship,” the inquiry stopped with the kind of damages alleged. There was no inquiry as to whether the plaintiff’s action sounded chiefly in contract or tort.

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THE BUSINESS LAW REPORT
The periodic newsletter of the Business Law Section of the Philadelphia Bar Association

Ellen Jerrehian, Editor

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The jurisprudence applying these doctrines in actual disputes evolved significantly since their introduction into Pennsylvania case law. The doctrines have been applied inconsistently by different courts, under different circumstances. Further, until recently, the Pennsylvania Supreme Court had not expressly addressed either doctrine, leaving the federal courts significant leeway concerning these doctrines in cases applying Pennsylvania law.

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THE BILT-RITE CASE: IMPLICATIONS FOR THE GIST OF THE ACTION DOCTRINE AND THE ECONOMIC LOSS RULE IN PENNSYLVANIA

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Not surprisingly, there has been significant overlap in the fact scenarios to which the two doctrines have been applied. Still, before Bilt-Rite, the doctrines remained distinct in that the gist of the action doctrine sought to strike tort actions where the cause of action properly sounded in contract, and the economic loss rule sought to strike tort actions (especially negligence actions) regardless of whether the plaintiff had a cause of action sounding in contract. Put another way, the gist of the action doctrine focused on keeping tort causes of action out of breach of contract cases, and the economic loss doctrine focused more on restricting the class of potential plaintiffs in commercial transactions. For reasons to be discussed, however, the above distinctions between the gist of the action doctrine and the economic loss rule may be receding (but without a fight) into the past.

Returning to Bilt-Rite, we have the first Pennsylvania Supreme Court case that addressed the economic loss rule by name. In its most narrow sense, this case formally adopted Section 522 of the Restatement (Second) of Torts as the law governing claims for negligent misrepresentation in Pennsylvania. In doing so, the Court explained why the economic loss rule should not be applied to bar such a claim where the parties were not in privity with one another. Although this case would be notable simply for having formally made Section 522 part of the law in Pennsylvania, it is far more notable for its discussion of the economic loss rule that may have done much to erase the distinction between that rule and the gist of the action doctrine.

In Bilt-Rite the plaintiff bid on a construction job based on plans developed by the defendant architect. The architect had been hired not by the plaintiff, but by the owner of the project. The plaintiff won the bid, but the plans contained inaccuracies that caused cost overruns on the job. The plaintiff sued the architect for the cost overruns in an action for negligent misrepresentation that followed the elements set forth in Section 522 of the Restatement (Second) of Torts. That Section allows torts for a recovery where: (1) defendant is in the business of providing information to others; (2) the defendant provides incorrect information as the result of failing to exercise reasonable care or competence; (3) others for whom the information was intended reasonably rely on the information; and (4) they suffer a pecuniary loss as a result of the flaw in the information upon which they relied. The defendant succeeded in having this claim dismissed pursuant to the economic loss rule because it was a negligence claim seeking purely economic damages and there was no privity between the parties. The superior court affirmed the trial court, but the Pennsylvania Supreme Court reversed it.

In reversing the lower courts and deciding to adopt Section 522, the Court first surveyed Pennsylvania’s lower court opinions in cases dealing with negligent misrepresentation. Id. at 277-280. At the conclusion of its survey, the Court determined that adopting Section 522 would not supplant the common law, but would clarify it. Id. at 280.

The Court then turned its attention to the question of whether such a claim could be maintained absent privity between the parties. In doing so it turned to a test that weighs five discrete factors to determine whether the defendant owed a legally recognized duty to the plaintiff: (1) the relationship between the parties; (2) the social utility of the actor’s conduct; (3) the nature of the risk imposed and the foreseeability of the harm incurred; (4) the consequences of imposing a duty; and (5) the overall public interest. Id. at 281. Focusing on the first factor, the Court surveyed the case law of several jurisdictions with respect to claims for negligent misrepresentation where there is no privity between a design professional and a builder. The Court paid particular attention to how the economic loss rule was applied in those cases. At the end of its examination of those cases, the Court expressly held that: (1) Section 522 was adopted in Pennsylvania; (2) Section 522 claims did not require privity between the parties; and (3) the economic loss doctrine would not bar section 522 cases. Id. at 285. In doing so, the Court noted that the third element of a Section 522 claim, requiring it to be foreseeable that the plaintiff would rely on the information supplied by the defendant, served the principal function of the economic loss rule - appropriately limiting the universe of possible plaintiffs resulting from a commercial transaction. Id. at 286.

The Court further found that, even absent a contractual relationship between the parties, there was no reason to preclude the action for negligent misrepresentation because the liability arose “from the negligent breach of a common law duty of care flowing from the parties working relationship.” This sounds like the sort of language commonly employed when applying a gist of the action analysis. Here, the Court cited approvingly to, and arguably adopted, an analysis set forth by the Supreme Court of South Carolina that recasts the economic loss rule in the mold of the gist of the action doctrine. “Purely ‘economic loss’ may be recoverable under a variety of tort theories. The question, thus, is not whether the damages are physical or economic. Rather, the question . . . turns on the determination of the source of the duty plaintiff claims the defendant owed.” Id. at 288, quoting Tommy L. Griffin Plumbing & Heating Co. v. Jordon Jones & Goulding, Inc., 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995). This analysis of the source of the defendant’s duty follows exactly the criteria of the gist of the action doctrine. “A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract . . . . A breach of duty arising independently of

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any contract duties between the parties, however, may support a tort action." Id.

In developing that point further, the Court effectively affirmed that not only were negligent misrepresentation actions exempt from the economic loss rule, professional malpractice actions were exempt as well. "Like South Carolina, Pennsylvania has long recognized that purely economic losses are recoverable in a variety of tort actions including the professional malpractice actions . . . We agree with that court that a plaintiff is not barred from recovering economic losses simply because the action sounds in tort rather in contract." Id. In that regard, the Court was affirming a position generally assumed by Pennsylvania trial and intermediary courts for some time, though without specific reference at the appellate level to either the gist of the action doctrine or the economic loss rule. See, e.g., Gorski v. Smith, 812 A.2d 683, 700-701 (Pa.Super. 2002), appeal denied, ---Pa. ---, 856 A.2d 834. (recognizing that malpractice actions in Pennsylvania may sound in tort); Rapidigm Inc. v. ATM Management Services LLC, 63 D.&C. 4th (CCP Allegheny Cty. 2003) (citing numerous Pennsylvania Supreme Court and superior court cases that do not themselves refer to the economic loss doctrine as demonstrating that "the economic loss doctrine does not apply to professional negligence actions where there is privity of contract.").

The only part of the Court's final analysis that arguably diverged from the traditional gist of the action analysis was its use of the five factor test to determine whether a duty was owed by the defendant to the plaintiff. Arguably that analysis serves the function of limiting the universe of possible plaintiffs, which is the traditional role the economic loss rule. On closer examination, however, it seems more accurate to characterize the five factor test as determining whether there exists a duty between the defendant and the plaintiff and the basis for that duty. In that regard, the five factors are better viewed as being intrinsic to a gist of the action analysis. Either way, it appears that the law may be evolving toward a single method for analyzing causes of action that serves the traditional purposes of both the economic loss rule and the gist of the action doctrine.

Whether or not this is actually the case will probably not be known until we have the benefit of several post-Bilt-Rite appellate level decisions. In the mean time, early indications are that the courts of common pleas may choose to conservatively interpret Bilt-Rite to apply only to actions for negligent misrepresentation. See e.g., Danlin Management Group, Inc. v. School Dist. of Philadelphia, 2005 WL 2140314 (CCP Philadel-phia Cty. 2005); Samuel Grossi and Sons, Inc. v. U.S. Fidelity and Guar. Co., 2005 WL 1522043 (CCP Philadelphia Cty. 2005).

In conclusion, the Pennsylvania Supreme Court has advanced the common law in several important ways through the Bilt-Rite case. First and most obviously, it has formally adopted Section 522 of the Restatement (Second) of Torts as the law in Pennsylvania and declared that the economic loss rule will not bar the application of that Section to any matter where the elements of the cause of action are met. Second, it has validated the determination of lower Pennsylvania courts that the economic loss rule did not apply to actions for professional malpractice. Third, it may have taken a significant step toward redefining the economic loss rule so that it and the gist of the action doctrine cease to be separate doctrines in Pennsylvania. With respect to this last point, it will be interesting to watch how the case law develops.

ARTICLES WANTED!

Please send any articles or news that would be of interest to the Business Law Section to:
Ellen Jerrehian at jerrehian@ballardspahr.com

The next deadline is November 18, 2005

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PATENT CLAIM INTERPRETATION
(LESSONS LEARNED, IF ANY,
FROM PHILLIPS V. AWH CORP.)

Wesley T. McMichael and Anthony S. Volpe*

Introduction

The much anticipated en banc decision of the Court of Appeals for the Federal Circuit in Philips v. AWH Corporation published on July 12, 2005.1 Unfortunately, the Philips decision did little to clarify the law concerning patent claim construction in patent infringement actions. Although the court held that intrinsic evidence, such as the patent specification and the patent's prosecution history, should be the first sources of information on claim interpretation, it did not foreclose the use of dictionaries. Rather, it held that the use of dictionaries should have a less prominent role than the patent specification and patent prosecution history in defining the ordinary meaning of patent claim terms. Instead of taking this opportunity to overrule the three judge panel's decision in Texas Digital Systems, Inc. v. Telegenix, Inc., the en banc court chose to reconcile the decisions in what is a somewhat confusing discussion of the cases.2

Three Lessons Learned from the Phillips Decision

The holdings in this Phillips case reinforced three valuable lessons in proper patent drafting. First, the specification should include a clear meaning for each claim term or it must be so well known in the art that there is no dispute. Disputed terms will be addressed in the first instance with reference to the specification and/or the prosecution history. In some cases, reference to dictionaries may still be permissible, however, the exact conditions for this permissibility are not clear from the decision.

Second, "means plus function" limitations should still be avoided where structural limitations are feasible. The court reaffirmed that where the term "means" does not appear, there is a rebuttable presumption that the term is not a means plus function. Therefore, the best way to protect against unintended claim constructions is to use structural limitations, rather than "means plus function" limitations, whenever possible.

Finally, claim construction will remain a matter of law that is reviewed by the Federal Circuit without deference to the district court's claim construction. The court had asked the parties to brief this issue, but chose not to address it in the opinion. This leaves the Court's prior en banc decision, in Cybor Corp. v. FAS Technologies, Inc. undisturbed, and does not affect the strategies of patent prosecution, or litigation.3

Conclusion

The Phillips decision will not likely change much in the way that claim construction is carried out. Instead of providing firm guidelines for claim construction, as many thought it would, the court choose to focus generally on the available types of evidence and why certain types are more valuable than others in construing claims. For now, patent prosecutors, litigators and inventors will have to continue the wait for bright line rules of claim construction.

3 Cybor Corp. v. FAS Technologies, Inc., 138 F.3d 1448 (Fed. Cir. 1998).

PHILADELPHIA LAWWORKS UPDATE

Alison Altman*

Philadelphia LawWorks, a pro bono referral service for non-profit organizations and small businesses, will be holding two events for attorneys in the fall. On September 22, 2005, the second annual Corporate Pro Bono Day took place. In collaboration with the Delaware Valley Association of Corporate Council America, LawWorks provided a CLE for in-house counsel, along with an opportunity to volunteer at a legal clinic for small business owners. On November 3, 2005, LawWorks will hold a two-hour CLE entitled "How to Form a Nonprofit Entity in Pennsylvania." In addition to these events, LawWorks always has opportunities available for business lawyers to volunteer, either by taking a case or teaching a seminar on a legal issue for our clients.

If you are interested in volunteering with Philadelphia LawWorks or attending one of our events, please contact Alison Altman at 215-523-9563 or aaltman@philadelphilawworks.org.

*Wesley T. McMichael is a patent agent and Anthony S. Volpe is president and a shareholder of Volpe and Koenig, P.C.

*Alison Altman is the Philadelphia LawWorks Americorps Attorney.
2005 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW

Michael B. Tumas and John F. Grossbauer

Effective August 1, 2005, Delaware amended its General Corporation Law. As in past years, several of the amendments are technical in nature and serve to clarify the existing Delaware law and to aid practitioners in rendering advice to Delaware corporations. In addition to “technical” changes, however, the 2005 amendments also address long standing issues under Section 271 of the General Corporation Law with regard to the sale of “all or substantially all” of a corporation’s assets. The amendments also contain a provision eliminating the requirement that paper stock certificates be made available in all instances and a host of provisions regarding the conversion and domestication of a non-corporate entity to a Delaware corporation.

Sales of Assets

Perhaps the most significant amendment adopted in 2005 was the amendment to Section 271, which requires stockholder approval for the “sale, lease or exchange” of “all or substantially all” of a corporation’s assets. The 2005 amendment added a new subsection (c) to Section 271 that (a) provides that the assets of wholly owned subsidiaries are considered to be assets of the parent corporation for purposes of making the determination of whether assets proposed to be sold constitute “all or substantially all” of the parent’s assets, and (b) expressly permits a parent corporation to transfer assets to a wholly owned subsidiary, without a vote under Section 271, even if the transferred assets constitute “all or substantially all” of the parent corporation’s assets.

These amendments address directly a set of issues that has long been the subject of debate—namely, whether and how Section 271 applies to asset dispositions by or to subsidiaries arguably constituting “all or substantially all” of the parent corporation’s assets. This debate came to the fore following the release in July 2004 of the opinion of the Court of Chancery in Hollinger Inc. v. Hollinger International, Inc., 2004 WL 1728003 (Del. Ch., July 29, 2004). In Hollinger, Vice Chancellor Strine, in dicta, suggested that the better reading of Section 271 was that Section 271 requires a vote to approve an asset sale by a subsidiary that meets the “all or substantially all” test on a consolidated basis, at least where the parent guarantees the subsidiary’s performance of the sale contract and negotiates the sale itself. The Court recognized that the precise language of Section 271 only requires a vote on covered sales by a corporation of “its” assets, but felt the veil-piercing approval to analyzing dispositions by subsidiaries suggested in Leslie v. Telephonics Office Technologies, Inc., 1993 WL 547188 (Del. Ch., Dec. 30, 1993) was too rigid.

New subsection 271(c) essentially codifies the dicta in Hollinger, at least as to sales by wholly owned subsidiaries. It does not, however, purport to address the applicability of Section 271 to an asset disposition by a less-than wholly owned subsidiary, and also does not on its face appear to apply to transactions structured as a merger of a subsidiary with a third party.

The second portion of Section 271(c) also brings clarity to the issue of the applicability of Section 271 to “dropdowns” of assets to subsidiaries. In short, it does not apply to such transactions. Thus, so long as assets stay within the corporate “family,” Section 271 does not require a stockholder vote for asset transfers. Accordingly, it is now clear that the creation of a holding company structure through the contribution of assets to a subsidiary does not require stockholder approval. All transfers outside the “family” (or to a non-wholly owned subsidiary), however, will now require analysis under the “all or substantially all” test, regardless whether the assets in question are owned by a parent or a subsidiary.

Director Voting

Section 141(d) was amended in 2005 to give additional flexibility to corporations to permit the certificate of incorporation to confer upon certain directors voting rights different than or in addition to the voting rights of other directors, whether or not those directors are elected by a separate class or series of stock. Prior to this amendment, there was some uncertainty whether different directors elected by the same class or series of stock could be accorded different voting rights (for example, a requirement that independent directors approve certain transactions or that the approval of individual directors was required for specified board actions), because Section 141(d) spoke of differential voting only in the context of directors elected by separate classes or series of stock. In contrast, Section 141(a) contains language permitting management authority to be vested in “persons” other than the board of directors. Amended Section 141(d) harmonizes these provisions.

Stock Certificates

Section 158 was amended to eliminate the requirement that a corporation be required to deliver a paper stock certificate upon request even though its shares are otherwise uncertificated. It may still honor such a request in its discre-
2005 AMENDMENTS TO THE
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Holding Company Conversions

A technical amendment was made to Section 251(g)(7) permitting the certificate of incorporation of the subsidiary resulting from a holding company conversion effected pursuant to Section 251(g) to eliminate a staggered board provision or other “nonstandard” director voting provisions that were included in its certificate prior to the conversion.

Conversion of an “Other Entity” to a Delaware Corporation

Prior to the 2005 amendments, Section 265 permitted a limited liability company, general partnership, limited partnership, limited liability partnership and statutory trust of the State of Delaware to “convert” to a Delaware corporation. An entity formed in another state could not convert to a Delaware corporation unless such entity followed a two step process - a conversion to another Delaware entity (which is expressly permitted by the LLC Act, LP Act, Partnership Act and Statutory Trust Act) followed by a conversion of the Delaware alternative entity to a Delaware corporation. This two step process proved to be cumbersome. Subsection (a) of Section 265 was amended to permit a conversion of an “other entity” to a Delaware corporation. “Other entity” is defined as a limited liability company, statutory trust, business trust or associate, real estate investment trust, common-law trust or any other unincorporated business including a partnership (whether general or limited) or a foreign corporation.

Section 265 also now permits a corporation not incorporated in the State of Delaware to convert to a Delaware corporation thus permitting a non-Delaware corporation to reincorporate in Delaware via a conversion rather than a merger.

A new subsection (f) of Section 265 makes clear that the property rights and privileges of the converting entity remain vested in the Delaware corporation and that the rights of creditors and all liens on the property of such other entity remain unaffected by the conversion. Subsection (f) also makes it clear that the conversion does not result in a transfer of the assets and liabilities of the converting entity and provides further that when an “other entity” has been converted to a Delaware corporation, the Delaware corporation shall be deemed to be the same entity as the converting entity.

Finally, new subsection (j) of Section 265 provides that in connection with a conversion, the rights or securities of or interests in the converting other entity may be exchanged for or converted into stock of the Delaware corporation, cash, property or interests in another entity or domestic corporation or may be cancelled. The foregoing changes to Section 265 serve to clarify the legal effect of a conversion to a Delaware corporation.

Conversion of a Delaware Corporation to an “Other Entity”

Prior to the 2005 amendments, Section 266 only permitted a Delaware corporation to convert to a Delaware other entity. As a result of recent amendments to the Delaware alternative entity statutes, no other Delaware entity is so limited. The amendments to Section 266 permit a Delaware corporation to convert to an other entity whether or not the other entity is a Delaware entity or to a corporation not incorporated in Delaware. Such a conversion must still be approved by a unanimous shareholder vote.

Subsections (c)(5) and (6) of Section 266 conform the section to Section 252 of the General Corporation Law (relating to the merger of a Delaware corporation with and into a non-Delaware corporation). These subsections require a corporation that converts to another entity or business form organized under laws of a jurisdiction other than Delaware to consent to service of process in Delaware and to the appointment of the Secretary of State as agent.

New subsections (g) and (h) of Section 266 accomplish the same result as new subsection (f) of Section 265. Finally, new subsection (f) provides that if a corporation seeking to convert has no stock outstanding, no shareholder vote is required for a conversion, as is the case under Section 251(f) with respect to mergers.

Domestication of a “non-United States entity”

The amendments to Section 388 provide that any non-United States entity may domesticate in Delaware. The key new term is “non-United States entity” as opposed to the old term “Non United States corporation.” The new terminology recognizes that all of the types of non United States business forms may domesticate in Delaware as a Delaware corporation. Similarly, the revised statute uses the term certificate of corporate domestication rather than “certificate of domestication” in reference to the required filing in recognition of the fact that a non-United States entity may also domesticate as a limited liability company, limited partnership, etc. under the alternative entity statutes.

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New subsections (c)(5) and (h) of Section 388 provide that prior to domesticating a non-United States entity must obtain the requisite approval under the laws of the jurisdiction of the domesticating entity and must so certify in the certificate of corporate domestication. Prior to the 2005 amendments, there was no reference to such a requirement in Section 388.

New subsection (i) of Section 388 provides that for purposes of Delaware law all of the property, rights and privileges of the non-United States entity remain vested in the Delaware corporation, the debts and liabilities remain, no transfer is deemed to occur and the Delaware corporation is deemed to be the same entity as the domestically non-United States entity.

Finally, subsection (k) of Section 388 provides that in connection with a domestication, the rights or securities of or interests in the non-United States entity may be exchanged for or converted into stock of the Delaware corporation, cash, property or interests in another entity or may be cancelled.

Additional amendments were made to Section 389 to conform the terminology of that Section to Section 388.

Transfer or Continuance of a Domestic Corporation

The amendments to subsection (a) of Section 390 conform the terminology of Section 390 to the terminology of Section 388. The amendments to subsection (b) provide that there are two types of filings under Section 390 - (i) a certificate of transfer when the Delaware corporation is not to continue its existence in Delaware, and (ii) a certificate of transfer and domestic continuance when the Delaware corporation elects to continue its existence as a Delaware corporation. The latter certificate has been renamed to make it clear that the corporation is continuing as a domestic corporation.

The amendments to this subsection also provide that the transfer, domestication or continuance of a corporation outside the State of Delaware does not require the Delaware corporation to wind up its affairs and that for as long as the Delaware corporation continues to exist, the continuing Delaware corporation and the resulting entity shall constitute a single entity.

New subsection (f) of Section 390 is intended to make it clear that the property, rights and privileges of the transferring, domesticating or continuing Delaware corporation remain vested in the resulting entity and that such rights and privileges shall not be deemed to be transferred to the resulting entity.

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