

Business Planning for Mergers and Acquisitions

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**Business Planning for
Mergers and Acquisitions**
**Corporate, Securities, Tax, Antitrust,
International, and Related Aspects**
Third Edition

Samuel C. Thompson, Jr.

PROFESSOR OF LAW, ARTHUR WEISS DISTINGUISHED FACULTY SCHOLAR, AND
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This book is dedicated to the professors
at the University of Pennsylvania School of Law
who introduced me to the topics covered here:

Professor Robert H Mundheim,
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Dean Bernard Wolfman,
Corporate Tax

Visiting Professor David S. Ruder,
Securities Regulation

Professor Louis B. Schwartz,
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Legal Accounting and Creditor Rights

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Preface to the Third Edition

About the Book

The book provides a transactional approach to many of the issues that arise in mergers and acquisitions, including corporate, securities, antitrust, federal income taxation, accounting, and valuation. The principal purpose of this book is to help train law students in the art of doing merger and acquisition deals. The statutes, rules, regulations, and documentary appendices referred to in this book are contained in a companion volume: Thompson, *M&A Statutes, Rules, and Documents for Business Planning for Mergers and Acquisitions* (Carolina Academic Press, 2007).

As set forth more completely in Section 1.1, Scope of the Book, the book is divided into four parts:

- Part I, The Building Blocks,
- Part II, Consensual Transactions,
- Part III, Hostile Transactions, and
- Part IV, Special Topics.

Part I, The Building Blocks, looks at issues likely to be faced in both consensual and hostile transactions, including shareholder voting and dissenting rules, directors' fiduciary duties, basic securities considerations, tax aspects, accounting treatment, valuation, antitrust, pre-merger notification, and preliminary deal documents.

Part II, Consensual Transactions, looks at the following types of M&A transactions: acquisitions of the stock of closely-held corporations; acquisitions of the assets of closely-held corporations; acquisitions of publicly-held corporations by merger; leveraged buy-outs; and drafting of acquisition agreements.

Part III, Hostile Transactions, addresses proxy contests; the impact of the Williams Act provisions of the Securities Exchange Act of 1934 on open market purchases, tender offers, and going private transactions; state regulation of tender offers; and state regulation of defensive tactics employed by a target's management, such as the poison pill.

Part IV, Special Topics, considers several advanced M&A topics: spin-offs (*i.e.*, transactions in which a parent corporation distributes the stock of a subsidiary to the parent's shareholders); international acquisitions, including inbound acquisitions (*i.e.*, acquisitions by foreign acquirors of U.S. targets) and outbound acquisitions (*i.e.*, acquisitions by U.S. acquirors of foreign targets); M&A in three regulated industries (*i.e.*, the banking, telecom and public utility industries); bankruptcy M&A, joint ventures, which are an alternative to M&A; and finally, ethical issues in M&A.

Changes from the Second Edition

This edition follows the format of the second edition with the following major additions: (1) in view of the increasing importance of cross border M&A between China and the U.S., Chapter 26, International Acquisitions, has been expanded to include *A Case Study of an Acquisition by a U.S. Acquiror of a China Target* (see Sections 26.28-26.33); (2) chapters have been added on Utility M&A (Chapter 29) and Bankruptcy M&A (Chapter 30); and (3) ethics issues, which were previously addressed throughout the book, are now addressed in Chapter 32. The chapter on voting and dissenting rights has been moved from Chapter 3 to Chapter 2, and the chapter on fiduciary duties has been moved from Chapter 2 to Chapter 3. The materials have been updated through December 15, 2006.

How to Use the Book

I cover most of the material in the first three parts (Building Blocks, Consensual Transactions and Hostile Transactions) in a four semester-hour course, and I cover Part IV, Special Topics, in a two semester hour seminar. It would be difficult to cover all of the materials in this book in one course. I also occasionally teach a broad range of topics in the book in an M&A drafting course.

The book can be used flexibly in a variety of courses. For example, the book could be used in a two semester-hour course focusing on friendly transactions by covering the Building Block chapters in Part I (with the exception of the chapters on valuation, antitrust, and pre-merger notification) and the Consensual Transactions chapters in Part II. A three semester-hour course could cover these materials, plus the materials on Hostile Acquisitions in Part III, and a four semester-hour course could cover, as I do, essentially all of Parts I, II and III.

The Genesis of the Book

This book had its genesis in several of the courses I had as a student at the University of Pennsylvania School of Law 35 years ago. Those courses excited my interest in mergers and acquisitions. The book is, therefore, appropriately dedicated to my Penn professors who introduced me to this subject: Professors Robert H. Mundheim, Bernard Wolfman, David S. Ruder, Louis B. Schwartz, and Martin J. Aronstein.

I was first exposed to mergers and acquisitions by Professor Mundheim in my second year Corporations course. That course, undoubtedly one of the best Corporations courses ever offered, opened my eyes to the fascinating world of corporate and securities law. In that course, I first read many of the cases examined in this book (such as *Farris v. Glen Alden*, see Chapter 2).

The “icing on the cake” was provided by Visiting Professor David Ruder in his Securities Regulations course and Rule 10b-5 seminar. I distinctly remember studying SEC Rule 133, which has now been replaced by Rule 145 (see Chapter 13) in Professor Ruder’s Securities Regulations course. His Rule 10b-5 seminar, which was by far the best seminar I have experienced, explored in depth topics addressed at several points in this book (see Chapters 4, 13, and 20).

Dean Wolfman’s Corporate Tax course introduced me to taxable acquisitions and tax-free reorganizations (see Chapter 5). Indeed, after I finished Professor Mundheim’s Corporations course, I was certain that I wanted to be a corporate and securities lawyer, but Dean Wolfman sent me off in the direction of the tax law, which I have pursued for most of my career. In this book, I return to my roots in Professor Mundheim’s Corpora-

tion's course, and also explore other merger and acquisition topics that piqued my interest at Penn, such as tax, antitrust, and accounting.

Professor Louis Schwartz introduced me to antitrust law and to Section 7 of the Clayton Act (*see* Chapter 8). Even though the law under Section 7 has changed significantly in the past 35 years, the foundation Professor Schwartz provided has helped me in trying to understand the evolving landscape of Section 7.

Finally, the ideas explored in several chapters can be traced to Professor Aronstein, who introduced me to purchase and pooling accounting (*see* Chapter 6) in his Legal Accounting course and to fraudulent conveyance law in his Creditor Rights course. Fraudulent conveyance law has become important in LBOs (*see* Chapter 14), which were not nearly as visible when I first studied Creditor Rights.

I am greatly indebted to Penn Law and the great education I received there. Penn Law is one of the best things that has happened to me. Indeed, it set me on a path I could not have ever dreamed of. It is my privilege to publicly thank Professors Mundheim, Wolfman, Ruder, and Aronstein, and all my other great professors at Penn Law.

Thanks

First, thanks to the input from the students in my Mergers and Acquisitions courses who have used prior editions of this book at the UCLA School of Law, the University of Virginia School of Law, the University of Miami School of Law, and the University of Pretoria School of Law, Pretoria, South Africa.

Second, thanks to my research assistants for this Third Edition: Becky Sue Thompson, a student at the Chapman University School of Law, Melissa Minkle and Jane Edwards of the UCLA School of Law, and Ryan Christopher Fleisher of the Penn State Dickinson School of Law. Also thanks to Jane Fan, a Chinese National who completed her LLM at the UCLA School of Law, for her assistance on the China M&A Case Study in Chapter 28, and to Katherine Splan, a graduate of the UCLA School of Law, for her permission to use her law school paper as a basis for Section 1.7, Introduction to Event Studies.

Third, thanks to the speakers at the three annual UCLA Law Institutes on Mergers and Acquisitions (Corporate, Securities and Related Aspects; Tax Aspects; and U.S., E.U. and Canadian Antitrust Aspects) for their insightful views on important issues in this dynamic area of the law.

Fourth, thanks to Cathy Yu, the Conference Coordinator for the UCLA Law Center for the Study of Mergers and Acquisitions, for her logistical assistance.

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