

Business Planning for Mergers and Acquisitions

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Business Planning for Mergers and Acquisitions

*Corporate, Securities, Tax, Antitrust,
International, and Related Aspects*

FOURTH EDITION

Samuel C. Thompson, Jr.

PROFESSOR OF LAW, ARTHUR WEISS DISTINGUISHED FACULTY SCHOLAR,
AND DIRECTOR, CENTER FOR THE STUDY OF MERGERS AND ACQUISITIONS
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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,
Corporations

Dean Bernard Wolfman,
Corporate Tax

Visiting Professor David S. Ruder,
Securities Regulation

Professor Louis B. Schwartz,
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Professor Martin J. Aronstein,
Legal Accounting and Creditor Rights

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Preface to the Fourth 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, 2015) (available without charge at www.cap-press.com/files/thompson_bpma4e_supp).

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, due diligence, and preliminary deal documents.

Part II, Consensual Transactions, looks at the following types of M&A transactions:

- (1) acquisitions of the stock of closely-held corporations;
- (2) acquisitions of the assets of closely-held corporations;
- (3) acquisitions of publicly-held corporations by merger;
- (4) leveraged buy-outs;
- (5) going private transactions; and
- (6) the drafting of various types of acquisition agreements.

Part III, Hostile Transactions, addresses the following Federal and state law aspects of these transactions:

- (1) proxy contests;
- (2) the impact of the Williams Act provisions of the Securities Exchange Act of 1934 on open market purchases;
- (3) the impact of the Williams Act on tender offers;
- (4) state regulation of tender offers; and
- (5) state regulation of defensive tactics employed by a target's management.

Part IV, Special Topics, examines or provides an introduction to the following advanced M&A topics:

- (1) spin-offs (*i.e.*, transactions in which a parent corporation distributes the stock of a subsidiary to the parent's shareholders);
- (2) shareholder activism;
- (3) 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);
- (4) brief introductions to (a) M&A in three regulated industries (*i.e.*, the banking, telecom and public utility industries), (b) bankruptcy M&A, and (c) joint ventures, which are an alternative to M&A; and
- (5) ethical issues in M&A.

All of the topics covered in this book are also addressed in my five volume treatise *Mergers, Acquisitions, and Tender Offers* (PLI 2010, updated periodically) (*MATO*).

Changes from the Third Edition

This edition follows the structure of the third edition with the following major changes and additions:

- (1) the materials dealing with freeze-out mergers and going private transactions, which previously were addressed in Chapter 24, have been integrated into the coverage of LBOs in Chapter 14;
- (2) in view of the increasing importance of shareholder activism, Chapter 25 now focuses on that topic; and
- (3) Chapter 27 now provides brief introductions to the following topics, which were covered in greater detail in the third edition: banking M&A (former Chapter 27); telcom M&A (former Chapter 28); public utility M&A (former Chapter 29), bankruptcy M&A (former Chapter 30) and joint ventures (former Chapter 31).

My *MATO* treatise contains chapters dealing with each of the special topics covered in Chapter 27.

How to Use the Book

I generally cover the entire book in two three-semester-hour courses. Most of the material in the first three parts (Building Blocks, Consensual Transactions and Hostile Transactions) could be covered in a four-semester-hour course. Part IV, Special Topics, could be covered in a two-semester-hour course or 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.

Use of Terms: Acquirer, Acquiror, Acquiring Corporation, AC, Target, Target Corporation, and TC

The terms “Acquirer,” “Acquiror,” “Acquiring Corporation,” and “AC” all refer to the acquiring corporation in a merger or acquisition transaction. The terms “Target,” “Target Corporation,” and “TC” all refer to the target corporation in a merger or acquisition transaction.

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 44 years ago. Those courses excited my interest in mergers and acquisitions. All editions of this book are, therefore, appropriately dedicated to my Penn Law 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). In that seminar, the title of my paper was: *It is Time to Render a Death Blow to the Ill-Reasoned Birnbaum*. Notwithstanding my position, *Birnbaum* still lives and is set out in Chapter 11.

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. Indeed two of my other casebooks published by Carolina Academic Press deal with tax law, with a particular focus on tax aspects of M&A: *Corporate Tax Through the Lens of M&A*, and *U.S. International Tax Planning and Policy, Including Cross-Border M&A*.

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 44 years, the foundation Professor Schwartz provided has helped me to better appreciate the evolving landscape of Section 7.

Finally, the ideas explored in several chapters can be traced to Professor Aronstein, who introduced me to M&A 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.

In this book, I return to my roots in Professor Mundheim's Corporation's course, and also explore other merger and acquisition topics that piqued my interest at Penn, such as tax, antitrust, and accounting.

I am forever indebted to Penn Law and the great education I received there. Indeed, Penn set me on a path I could not have dreamed of before it. It is my privilege again 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 Penn State Law, 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.

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Third, thanks to my Fellows at the Penn State Center for the Study of Mergers and Acquisitions: Taimoor Choudhry and Joshua Bam.

Fourth, thanks to my former student Dao Fu, who is now an associate at Davis Polk in New York City, for his helpful comments on the China M&A section of Chapter 26.

Finally, I thank my wife, Becky, and our son, Samuel C. Thompson, III, (Tommy), for their love, support, and understanding.

Samuel C. Thompson, Jr.
Professor of Law and Director of the
Center for the Study of Mergers and Acquisitions
Penn State Law School
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