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*Third  
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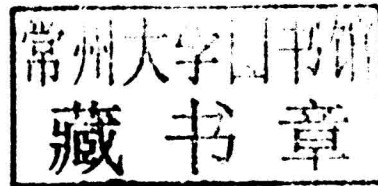


# Mergers and Acquisitions Cases, Materials, and Problems

Third Edition

**Therese H. Maynard**

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Loyola Law School, Los Angeles*



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*To my Mom and Dad, Anne and Bill Huber,  
for always believing in me*

*and*

*to my four daughters, who are the source of all inspiration  
in my life—Catherine, Hayley Del, Annie, and Remington*



# Preface

The third edition of this casebook was written in the wake of the meltdown within the financial industry and the ensuing Great Recession. These events have only served to intensify interest in, and attention on, the topic of this book: the *law of mergers and acquisitions*. While in the past, this subject may not have been offered on a regular basis, law schools today are facing increasing pressure to provide comprehensive treatment of this important area of modern corporate transactional law practice. Recognizing the increasing importance of this subject within the modern law school curriculum, this casebook is designed to meet the needs of the upper-division law student who seeks to master the basic principles that form the framework of the ever-evolving body of law related to mergers and acquisitions (M&A).

Toward that end, the third edition of this casebook continues to be organized based on the fundamental precept that the law student who takes this course is curious about this subject, but generally has limited familiarity with the business world of mergers and acquisitions. Therefore, the third edition of this casebook carries forward the essential goal of the earlier editions, which is to introduce the topics traditionally covered in the study of M&A law in terms that are accessible to the uninitiated law student, and further, to stimulate the student's curiosity in this subject by demystifying what is often an intimidating and overwhelmingly jargon-laden body of law. As such, this third edition continues to eschew string citations to the ever-growing body of literature in this area of the law, in favor of a more accessible style that breaks the law of mergers and acquisitions down into manageable chunks. In both the selection and editing of the cases and other materials to be included in this edition of this casebook, the guiding principle has been to present the material in a manner that will enable the law student to master the fundamental principles of M&A and to appreciate the public policies that underlie this legal framework.

The other, closely related objective of my casebook is to present the relevant legal principles of mergers and acquisitions in a manner that will allow law students to hit the ground running when they graduate and enter the practice of business law, which I presume will include M&A transactions. To this end, the third edition of this casebook continues to be designed so that the law student will appreciate the inherent dynamics of M&A transactions and will be able to become an effective junior member of a law firm whose practice includes representing businesses involved in M&A transactions. As part of this effort, this

casebook endeavors to instill in the law student a sense of what it takes to be a good business lawyer in the modern practice of law in a transactional setting.<sup>1</sup>

A big part of the modern practice of business law involves analyzing statutes and advising business clients about how to structure their business and financial affairs in order to comply with the mandate of the relevant statute(s). As was the case when I wrote the earlier editions, I (regrettably) continue to believe that, for many law students today, their law school education does not provide them with rigorous and systematic exposure to statutory analysis. This casebook attempts to address this void, primarily by requiring students to analyze problems in light of the relevant state and/or federal statutes. In particular, the problems in Chapter 2, which I consider to be the very heart of the casebook, require the students to work through the terms of various statutes in order to understand what must be done in order to validly consummate the transaction and also to understand why the law imposes these requirements. In so doing, the law student will develop a framework for understanding the materials to be covered in *all* of the remaining chapters, as well as a perspective that allows the student to better appreciate how to *integrate* all of these materials as part of planning an M&A transaction.

Along these same lines, another common complaint (made, most often in my experience, by experienced lawyers who work with recent law school graduates) is that students fail to appreciate the important role that statutes play in the modern practice of business law. The most common complaint is that today's law students tend to view statutes as prescriptive, whose literal terms are to be mechanically complied with — almost like following the steps in a recipe. As a result, students often fail to appreciate that literal or strict compliance with statutory requirements may yield a harsh or anomalous result. In these cases, students are ill equipped to analyze the proper course in order to avoid inequitable results. Like the first and second editions, the problems and other materials in this edition of my casebook are designed to fill in this gap. Most importantly, I require my students to buy a statutory supplement that includes relevant provisions of the Delaware and California corporations codes as well as the full text of the ABA's Model Business Corporation Act (along with selected provisions of the federal securities laws that are relevant to M&A transactions). Like the earlier editions, the third edition includes numerous problems that require the students to work through the various requirements imposed by these statutes. In the process, students analyze the differences (if any) in the results obtained under these statutes. Where there are differences, the materials in the casebook are designed to promote class discussion that explores the public policy premise(s) that lead the legislature (or other state or federal regulators, as the case may be) to opt for a particular statutory treatment.

For all of these reasons, the third edition continues to be reflective of the modern practice of M&A law, both from a transactional perspective as well as from the litigator's perspective. Like many other areas of business law, M&A law comes from the courts, legislatures, regulatory agencies, and the ever-changing

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1. As for my understanding of the qualities that I consider important to being a good business lawyer, see Therese Maynard, *Teaching Professionalism: The Lawyer as a Professional*, 34 *GEORGIA LAW REVIEW* 895, 909-920 (2000).

practices of the modern business world. While the book includes many cases, the third edition of this casebook continues to be designed for use in conjunction with a supplemental text that includes the statutes and regulations. The cases included in the casebook then serve to illustrate how the judges endeavor to interpret (and apply) the statutes and regulations to further shape our understanding of M&A law.

In addition to a heavy emphasis on the use of problems to illustrate the planning of modern M&A transactions, this third edition also incorporates a heavy emphasis on the following themes in its presentation of the law of mergers and acquisitions. First, unlike the focus of many other casebooks dealing with mergers and acquisitions, the third edition of this casebook continues to emphasize the role of the lawyer as transaction planner. Second, as part of this focus on transaction planning, my casebook emphasizes the increasing importance of fiduciary duty law over the past twenty-five years and its all-important role in guiding the transaction planner in structuring M&A deals. Starting with the problems in Chapter 2 and continuing throughout the remaining chapters, as part of our analysis of the role of fiduciary duty law in M&A deals, this casebook is constantly asking the law student to consider the corporate governance implications of M&A transactions. Most notably, the third edition asks the students to critically assess the relative balance of power among the shareholders, the board of directors, and the senior executive officers—most importantly, the role of the modern chief executive officer—a balance that has been sorely tested in the years since the first edition was published. Indeed, Chapter 7 of the third edition (dealing with fiduciary duty obligations) was expanded considerably to address corporate governance concerns that have emerged in the wake of the Great Recession, as well as to include a new unit on “going private” transactions.

Finally, and most importantly, these themes are developed in the context of M&A activity that occurs on *both* Wall Street *and* on Main Street. That is to say, this book emphasizes not only the type of high-profile M&A transactions that the law student is likely to read about on the front pages of the Wall Street Journal, but also provides comprehensive treatment of the sale of a closely held business, the type of transaction that continues to form the basis of M&A practice for many of today’s transactional lawyers.

As was the case with the earlier editions, the general convention followed in this edition is to omit case and statute citations from the principal cases as well as quoted excerpts from other materials. In addition, most footnotes have been omitted without indication in the original case or other text, but those footnotes that remain do retain their original numbering.

December 2012

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This book was inspired not only by my students and others in the academy, but also by the many fine business lawyers who practice in the area of M&A law. While there are many who gave me the benefit of their sage counsel over the years, there are several who were instrumental in guiding me toward the goal of educating the law student to be prepared to hit the ground running on graduating law school and embarking on the practice of M&A law. I am particularly grateful to Greg Noell, Mark Bonenfant, Keith Bishop, Jennifer Guzee, Jeff Sklar, and most importantly, my husband, Philip Maynard, who is the best corporate lawyer I know.

Over the years, many research assistants have made valuable contributions to the development and refinement of this casebook, which I consider to still be a "work-in-progress." I want to express particular thanks to Alex Shukman, Ann Carey Camacho, Gregory Ezor, Arif Sikora, April Ho and Clint Stiffler for their invaluable help in writing the first and second editions. With respect to this third edition, words can never express my appreciation and gratitude for the extraordinary efforts of my research assistant, Sean Montgomery. His research and editorial contributions to the third edition were extremely valuable.

This casebook has required a lot of help, but a special word of appreciation goes out to my administrative assistants, Ruth Busch and Elisa Gonzalez, without whose friendship, unfailing support, and amazing secretarial skills this project never would have come to fruition. Finally, I had invaluable support at Aspen Publishers from Lynn Churchill, Darren Kelly, and Lisa Connery (and, I am sure, many others unknown to me).

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