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Mergers and Acquisitions

William J. Carney



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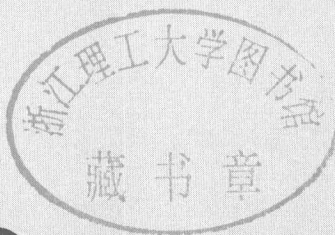
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Preface

My hope is that this book will serve as a concise yet informative introduction to mergers and acquisitions, both for the student enrolled in a course and perhaps for the new graduate assigned to an M&A group in a law firm without previous background in the area. While I've tried to keep this relatively brief and readable, I can't help but provide some background about the development of the law in various areas to help the reader understand how the law (mostly Delaware's) got to where it is as I write this.

Mergers and acquisitions is a multi-specialty area, involving as it does issues of contract law, corporate law, securities regulation, taxation, finance, and a multitude of other legal areas that may arise in a particular deal, such as real property, environmental law, intellectual property, labor and employment law, secured transactions, antitrust, fraudulent transfers, employee benefits, and regulation of the industry in which the firms operate, to name the more obvious ones. This book only touches on the areas of corporate law that may demand attention in a deal and does not include those important skills that are not strictly legal, such as valuation, operation of financial markets, and negotiations. At the same time, it addresses transactional issues, such as due diligence and contract terms, that are outside traditional law school courses, but that are essential to practicing in the area. It is this richness and complexity, which includes constant variations in the applicable

laws, that makes the area constantly challenging. One practicing in the area must realize that learning is a lifelong activity.

In this book we view the area as one that involves bargaining in the shadow of some of these laws. The central part of the exercise in virtually all deals is negotiation of the terms of an acquisition agreement. Even uninvited “hostile” takeover bids often involve some negotiations, either before or at the conclusion of a hostile bid. In this process the participants learn about the risks of the businesses in which they are investing, and then price those risks and assign them, hopefully to the party best able to minimize or assess them. There are debates about the role of lawyers in such deals in the academic literature. One school claims that lawyers are “transaction cost engineers” who, as repeat players in deals, can assist clients to negotiate the best terms and to get through the process at the lowest possible cost.¹ Others argue that the lawyer’s role is more narrowly that of a legal expert, charged primarily with worrying about the legal (as opposed to the business) risks and perils facing the client.² Whatever the answer, at a minimum the deal lawyer must be skilled at advising clients about the applicable laws, their application to the particular circumstances, the consequences of running afoul of their strictures, and how to navigate through the legal maze. But even if one takes the narrower view of the role of the lawyer, understanding the business background is important even for the beginning lawyer. The task of this book is to set deals in their legal and business background.

1. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

2. Steven L. Schwartz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J. L., BUS. & FIN. 486 (2007).

Acknowledgments

No work is solely the author's. We build on the work of others. In my case, I owe a debt of gratitude to four anonymous reviewers who generously took the time to read my manuscript with care and perception. Their comments were very helpful, and I believe led to significant improvements in the final version.

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