

THE LAW OF MERGERS AND ACQUISITIONS

Third Edition

Dale A. Oesterle

American Casebook Series®

THOMSON

WEST

THE LAW OF MERGERS AND ACQUISITIONS

Third Edition

By

Dale Arthur Oesterle

J. Gilbert Reese Chair

Michael E. Moritz College of Law

The Ohio State University

AMERICAN CASEBOOK SERIES®

THOMSON

WEST

Thomson/West have created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. Thomson/West are not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

American Casebook Series and West Group are trademarks registered in the U.S. Patent and Trademark Office.

COPYRIGHT © 1991 WEST PUBLISHING CO.

© West, a Thomson business, 2002

© 2005 Thomson/West

610 Opperman Drive
P.O. Box 64526
St. Paul, MN 55164-0526
1-800-328-9352

Printed in the United States of America

ISBN 0-314-15391-8



TEXT IS PRINTED ON 10% POST
CONSUMER RECYCLED PAPER



Preface

The casebook and the supplementary Teachers' Manual are designed to provide the materials for a three-credit, upper-class law school course on mergers and acquisitions. I have had great success and, well, fun with the course over many years and I offer these materials in the hope that you and your students will enjoy them as well. I recommend that students have available one of the soft cover, statutory supplements for the basic corporations course as they read this material. E.g., Jeffrey D. Bauman, *Corporations and Other Business Associations Statutes, Rules and Forms* (2005 Edition, Thomson-West publ.).

The Teachers' Manual can be acquired in hard copy or found on line at <http://lawschool.westlaw.com/TWEN>. The online version will feature updates on new events in M&A. A full set of power point slides for class, with diagrams on most of the edited cases in the text, may also be found on-line in my TWEN cite under "course materials" for my last taught class in M&A (taught every spring semester).

Acknowledgments

I owe heart-felt thanks to the secretarial staff at the Moritz College of Law, particularly Regina Robinson-Easter and Ebony Mobley, for their able and kind assistance. Several Moritz law students aided in the preparation of these materials and I thank them all, with special thanks to Benjamin Wright and Megan Decker (Classes of 2005 & 2006 respectively).

I am very fortunate to have a supportive and loving family who enable and inspire my work. I am honored to be the husband of Pat and am blessed by and very proud of my children, Helen, Annie and William.

Table of Cases

The principal cases are in bold type. Cases cited or discussed in the text are roman type. References are to pages. Cases cited in principal cases and within other quoted materials are not included.

255 Park Plaza Assoc., In re, 580

ABC Arbitrage Plaintiffs Group v. Tchuruk, 697

Abrams, 700

AC Acquisition Corp. v. Anderson, Clayton & Co., 416, 539

Accord Shamrock Holdings, Inc. v. Polaroid Corp., 427

A.E. Staley Mfg. Co. v. Commissioner, 853

AES Corp. v. The Dow Chemical Co., 372

Aguila, Inc., In re, 473, 477

AIG Acquisition Corp. v. Alaska Indus. Hardware, Inc., 308

Alessi v. Beracha, 478

All American of Ashburn, Inc., In re, 284

Allegheny Energy, Inc. v. DQE, Inc., 393, 394, 397, 580, 794

Allegheny International, Inc., In re, 670, 676

Allied Chemical & Dye Corp. v. Steel & Tube Co., 61

AM Int'l v. Datacard Corp., 287

Amanda, 614

American Cyanamid Co. v. Elizabeth Arden Sales Corp., 308

American Stores Co. v. Commissioner, 897

Anderson Clayton, In re, 767

Andra v. Blount, 104

Applestein v. United Board & Carton Corp., 62, 84

Aprahamian v. HBO & Company, 628

Air Line Pilots Ass'n Intern. v. UAL Corp., 659

Armstrong v. Marathon Oil Co., 120

Arnold v. Society For Savings Bancorp., Inc., 576, 617, 767, 771

Arnold Graphics Indus., 228

Aronson v. Lewis, 452, 454, 455, 562, 572, 573

Ascaro, Inc. v. Court, 511

Ash v. McCall, 427

Astor v. Texas Gulf Sulphur Co., 740

Auerback v. Bennett, 467

Backman v. Polaroid Corp., 681, 712

BankCorp v. Le Beau, 102

Bank of New York Co., Inc. v. Irving Bank Corp., 523

Barbara A. v. John G., 666

Barkan v. Amsted Indus., Inc., 422, 424, 449, 490, 571, 572, 574

Basic, Inc., V. Levinson, 482, 731, 736, 740, 741, 743, 745

Bazley v. Commissioner, 804

Bear Stearns Co. v. Jardine Strategic Holdings, 384

Beer v. State Bar, 666

Benchmark Capital Part IV. v. Vague, 87

Bersch v. Drexel Firestone, Inc., 939, 940

Bershad v. Curtiss-Wright Corp., 490, 571, 768

B.F. Goodrich v. Betkoski, 247, 248, 249, 250

Biderman Indus., In re, 580

Biesenbach v. Guenther, 692, 693

Blasius Indus., Inc. v. Atlas Corp., 570, 625, 630, 631, 632, 633, 634, 635, 637, 766

Blue Chip Stamps, 716

BNS, Inc. v. Koppers Company, Inc., 603, 611, 614

Borruso v. Communications Telesystems Int'l, 117

Branmar Theatre Co. v. Branmar Inc., 215

Branscan Ltd. v. Edper Equities Ltd., 173

Brazen v. Bell Atlantic Corp., 585, 590, 593

Brend v. Sames Corp., 289

Broad v. Rockwell, 698

Brown Shoe Co. v. United States, 873

Burns, 239, 246, 251

Business Roundtable v. SEC, 528

Butler v. Keystone Copper Co., 33

Buxbaum v. Deutsche Bank, 744

California v. American Stores Co., 895

Cardinal Health, 877

Caremark Int'l, Inc., In re, 435, 436

Carolina Transformer, 251, 252

Canteen Corp. v. National Labor Relations Board, 244, 246

Cargo Partner AG v. Albatrans, Inc., 227

Carmody v. Toll Brothers, Inc., 523

Carnation Co., In re, 733, 735

Cavalier Oil Corp. v. Harnett, 105, 113, 116, 117, 462

CBS v. Ziff-Davis Publishing Co., 386

Cede & Co. v. Technicolor, Inc., 104, 105, 112, 113, 116, 123, 127, 462

Cede & Co. v. Technicolor, Inc. [Cede II], 412, 414, 415, 418, 420, 421, 424, 426

Celotex Corp. v. Hillsborough Holdings Corp., 296

Centaur Partner IV v. National Intergroup, Inc., 521, 570
 Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 755
 Chateaugay Corp., In re, 280, 288
 Cheff v. Mathes, 627, 628
 Chemetall GMBH v. ZR Energy, Inc., 218
 Chesapeake Corp. v. Shore, 544, 624
 Chiarella v. United States, 678, 755, 758
 Chicago Corp. v. Munds, 60
 Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Tasemkin, 237, 279, 283, 284, 285, 288, 289
Cinerama, Inc. v. Technicolor, Inc. [Cede III], 415, 417, 418, 420, 421, 422, 423, 424, 425, 426, 465, 598
 Cities Co. v. Gulf Oil Corp., 388
 Clark v. Pennsylvania State Police, 396
 Colby v. Hologic, Inc., 679
 Cole v. Kershaw, 94
 Columbia, In re, 744
 Commissioner v. Morris Trust, 804
 Compare Jewel Cos., Inc. v. Pay Less Drug Stores Northwest, 359
 Computer Systems of America, Inc. v. IBM Corp., 308
 Condec Corp. v. Lukenheimer Co., 513
 Conrail, 393, 647
Consolidated Gold Fields, PLC v. Ninorco, S.A., 938
 Cooke v. Oolie, 502
 Cordova Chemical Co. v. Dept. of Natural Resources, 299, 302
 Cort v. Ash, 715
 Council of Better Business Bureaus v. Better Business Bureau, 212
 Coyne v. Park & Tilford Distillers Corp., 69
 Craftmatic, 694
 Credit Alliance Corp. v. Arthur Anderson & Co., 329
 CTS Corp. v. Dynamics Corp. of America, 57, 605, 607, 608, 609, 611, 612

Daisy Systems Corp., In re, 661, 669
 Daubert v. Merrell Dow Pharmaceuticals, Inc., 110, 111
Debaun v. First Western Bank and Trust Co., 496
 Delta Holdings, Inc. v. National Distillers & Chem. Corp., 329
 Digex, Inc., In re, 474, 492, 494
 Digital Island Securities, In re, 164
 Dirks v. SEC, 755
 D'Oench, Duhme & Co. v. FDIC, 368
 Dodier Realty & Investment v. St. Louis National Baseball Club, 211
 Domine v. Fulton Iron Works, 233
 Drug, Inc. v. Hunt, 60

 Eastman Kodak Co. v. Image Tech. Services Inc., 874

Edgar v. MITE, 605, 608, 612
 EEoc v. Vucitech, 237
 Eisenstadt v. Centel Corp., 710
 Eisner v. Macomber, 824, 825
 Elkind v. Liggett & Myers, Inc., 679
Elliott Assoc. v. Avatex Corp., 89
 Emerald Partners v. Berlin, 486, 618
 Emerging Comm., In re, 98, 104, 105
 Epstein v. MCA, 163
Equity Group Holdings v. DMG, Inc., 76, 132, 144
 Erickson v. Centennial Beauregard Cellular, LLC, 467
 Ernst & Ernst v. Hochfelder, 698, 755
 Esquire Radio & Elec., Inc. v. Montgomery Ward & Co., Inc., 311
Essex Universal Corp. v. Yates, 502

 Fairchild Aircraft Corp., In re, 285
Fall River Dyeing & Finishing Corp. v. NLRB, 237, 249, 250
 Farris v. Glen Alden Corp., 61, 62, 63
Federal United Corp. v. Havender, 65, 72, 86, 87, 97
 Field v. Allyn, 49, 73
 Field v. Trump, 163
 Financial Indus. Fund, Inc. v. McDonnell Douglas Corp., 741
 Finch v. Warrior Cement Corp., 60
Finnegan v. Campeau Corp., 880
 Flamm v. Eberstadt, 482, 735
 Flaughner v. Cone Automatic Mach. Co., 229
 Fliegler v. Lawrence, 509
 Flynn v. Bass Bros. Enter., Inc., 710, 728, 769
 Forbes Holdings, Inc., 642
 Ford Holdings, In re, 128, 145
 Forde v. Kee-Lox Mfg. Co., Inc., 285
 Freeman v. Seiberling Rubber Co., 209
 FTC v. H.J. Heinz Co., 873
 Fuller, 28
 F.W. Berk & Co. v. Derecktor, 320

 Gaffin v. Teledyne, Inc., 770
 Gallagher v. Abbott Laboratories, 712
 Gamco Investors, Inc. v. Century Telephone Enterprises, 524
 Gardner v. Nike, 211
 Genesis, 591
 Gerber v. Computer, 164
 Gerstle v. Gamble-Skogmo, Inc., 161, 728
 Gilbert, In re, 672
 Gilbert v. El Paso Co., 569
 Gimbel v. Signal Companies, Inc., 41, 44, 462
 Giuricich v. Emtrol Corp., 570, 626
 G-K-G, 283
 Glassman v. Unocal Exploration, 466, 476
 GlenFed, In re, 724
Golden State Bottling Co. v. NLRB, 234, 243, 249, 250, 283

- Goldman v. Postal Telegraph, 51
Goldstein v. MCI Worldcom, 695
 Gonsalves v. Straight Arrow Publishers, Inc., 113, 115, 117, 462
 Good v. Lackawanna Leather Co., 83, 98
 Gordon v. New York Stock Exchange, 881
 Gotham Partners, L.P. v. Hallwood Realty Partners L.P., 127
 Graham v. Allis-Chalmers Mfg. Co., 435
 Grant Thornton v. Windsor House, Inc., 391
 Graphic Arts v. Martin Podany Assoc., 243
 Greenfield v. Heublein, 712, 713, 732
Grossman, v. Novell, Inc., 712
 Group, Inc. v. Horn & Hardart Co., 307, 318
 Guidice v. BFG Electroplating & Manufacturing Co., 256, 257
 Guth v. Loft, 508, 509
- Harff v. Kerkorian, 656
Hariton v. Arco Electronics, Inc., 63, 64, 72, 73
 Harris v. Carter, 487, 501
 Harris v. Rapid-Am. Corp., 117
 Harsco Corp. v. Segui, 378
 Hecco Ventures v. Sea-Land Corp., 574
Heilbrunn v. Sun Chemical Corp., 58, 62, 63
 Heinz, 874
 Helwig v. Vencor, 711
 Hendricks v. Callahan, 333
Herald Co. v. Seawell, 647
Hewlett v. Hewlett-Packard Co., 440, 448
 Hillson Patners Ltd. v. Adage, Inc., 721
Hilton Hotels Corp. v. ITT Corp., 621, 624, 631
 Hintmann v. Fred Weber, Inc., 117
 Hollinger International, Inc. v. Conrad Black, 494
Hollinger Inc. v. Hollinger International, Inc., 42, 47
 Horizon Holdings, 23
 Hospital Corp. of America v. FTC, 874
 Howard Johnson Co., Inc. v. Detroit Local Joint Executive Bd., 243
 Hughes Aircraft Co. v. Jacobsen, 850
- IIT v. Vencap, Ltd., 940
 Imperial Enterprises v. Fireman Fund Insurance, 212
Indopco, Inc. v. Commissioner, 851
 Institute Pasteur v. Cambridge Biotech Corp., 211
 Interco, 496
 International Ass'n of Machinists & Aerospace Workers, AFL-CIO v. NLRB, 246
 International Business Machines, In re, 713
- International Union v. Eastover Mining Co., 244
Irving Bank Corp. v. Bank of New York Co., Inc., 66, 81, 132, 144
 Iteck Corp. v. Chicago Aerial Ind., Inc., 307
 Ivanhoe, 570
 Jackson v. Johnson, 665
 Jacobs v. Lakewood Aircraft Serv., Inc., 232
 James v. Gerber Products Co., 728
 Jefferson Industrial Bank v. First Golden Bank Corp., 56
 Jensen, In re, 288
 Jewel Cos., Inc. v. Pay Less Drug Stores Northwest, Inc., 588
 John Wiley & Sons, Inc. v. Livingston, 235, 241, 249
- Kademian v. Ladish Co., 693
 Kahn v. Lynch Communication Systems, Inc., 417, 418, 426, 453, 465, 467, 468, 472, 486
 Kahn v. Roberts, 537
 Kahn v. Tremont Corp., 465
 Kaiser, 92
 Kansas City Power & Light Co. v. Western Resources, Inc., 63
 Kaplan v. Goldsamt, 627
Katt v. Titan Acq., 163
 Katz v. Bregman, 42, 46, 47
 Katz v. NVF Co., 384
 Kelley v. EPA, 257
 Kern County, 761, 762, 763
 Kessinger v. Grafc0, Inc., 231
 Kleinwort Benson Ltd. v. Silgan Corp., 117
 Koppers Coal & transportation Co. v. United States, 210
 Kors v. Carey, 627, 628
 Krasner v. Moffett, 470
 Krim v. ProNet, Inc., 458
 Kumho Tire Co., LTD v. Carmichael, 111
- Landreth Timber Company v. Landreth, 372
 Langfelder v. Universal Laboratories, Inc., 72
 Lane v. Cancer Treatment Centers of America, 104
Lawton v. Nyman, 478
 Leasco Data Processing Equipment Corp. v. Maxwell, 939
 Lee Builders v. Wells, 595, 596
 Lerro v. Quaker Oats, 163
Levco Alternative Fund v. The Reader's Digest Assoc., 484
Lewis v. Chrysler Corp., 691
 Liberty Mutual Insurance Co. v. Williams Machine & Tool Co., 233
 Lieberman v. FTC, 892
Lionel Corp., In re, 193
 Lippe v. Bairnco, 297
 Lippi v. City Bank, 276
 Liquid Audio, 631

- Louden v. Archer-daniels-Midland Co., 773
 Lukens, Inc., In re, 578
 Lynch v. Vickers Energy Corp., 410, 473, 476, 767
- Malpiede v. Townson, 427, 494, 618
Marcus v. Frome, 364,
 Marhart v. Calmat, 677
 Marx v. Computer Sciences Corp., 721
 Masters v. San Bernardino County Employees Retirement Ass'n., 667
 Matter of Chicago I, 288
 Matter of Chicago II, 287
 McDonnell Douglas, 740
 MCI Worldcom, Inc., In re, 744
McMahan & Company v. Wherehouse Entertainment, Inc., 657
McMullin v. Beran, 489, 775
Medcom Holding Co. v. Baxter Travenol Labs, Inc., 369
 Medical Software Solutions, In re, 290
 Medlantic Nat'l Bank v. New Jersey Dept. of Env. Protection, 280
 Merrill v. Crothall-American, 350
Merzin v. Provident Financial Group Inc., 390
Metropolitan Life Ins. Co. v. RJR Nabisco, Inc., 276, 649
 Mexico Feed, 251, 252
M.G. Bancorporation, Inc. v. Le Beau, 15, 16, 102, 105, 106, 116, 117, 122 107
Midwestern Machinery, Inc. v. Northwest Airlines, Inc., 865
 Mills Acquisition Co. v. Macmillan, 400, 416, 469, 490, 539, 569, 571, 572, 573, 574, 591, 683, 684
 Minstar Acquiring Corp. v. AMF, Inc., 511
 MM Companies v. Liquid Audio, Inc. 583, 630
 Mobay Corp. v. Allied-Signal, Inc., 231
 Mony Group, Inc., In re, 639, 640
 Moody v. Security Pacific business Credit, Inc., 277
 Moran v. Household Int'l, Inc., 541, 542, 543, 562, 563, 569
 Mozingo v. Correct Mfg. Corp., 250
 MPM Enterprises v. Gilbert, 122
 Mter, 900
 Municipal Consultants & Publishers, Inc. v. Town of Ramapo, 318
- Nachman Corp. v. Halfred, 175
 Nathenson v. Zonagen, Inc., 697
 Nazareth Regional High School v. NLRB, 245
 Nelson v. All American Life & Financial Corp., 54
 Neubauer v. Goldfarb, 484
 New England Fish Co., In re, 284
New York v. National Services Indus., Inc., 247, 282, 288
- Next Level Communications, Inc., v. Motorola, Inc., 471, 472
 Nguyen v. Johnson Mach. & Press Corp., 233
Ninth Avenue Remedial Group v. Allis-Chalmers Corp., 254, 255, 279, 281, 289, 290
 Nixon v. Blackwell, 426, 569
 NLRB v. Burns Intern. Sec. Serv., Inc., 242, 245
 Norfolk Southern v. Conrail, 641
 North Shore Gas Co. v. Salomon, Inc., 253, 254
- Oberly v. Kirby, 42, 510
 Ohio v. Kovaco, 286
 Olney v. Conanicut Land Co., 481
Omnicare Inc. v. NCS Health Care Inc., 359, 522, 581
 Oran v. Stafford, 713
Orman v. Cullman, 450, 593
 Orzeck v. Englehart, 72, 73
 Otis & Co. v. SEC, 681
O'Tool v. Genmar Holdings, Inc., 343
- Packard Instrument Co. v. ANS, Inc., 209
 Pan Am Corp. v. Delta Airlines, 384
 Panter v. Marshall Field & Co., 692, 728, 730
Paramount Communications v. QVC Network, Inc., 23, 400, 420, 424, 490, 491, 539, 566, 576, 577, 586
 Paramount Communications, Inc. v. Time, Inc., 420, 537, 538, 539, 548, 549, 576, 577, 583, 584
 Parnes v. Bally Entertainment Corp., 411
Pasternak v. Glazer, 80, 132
 Pegasus Management Co., Inc. v. Lyssa, Inc., 333
 Philadelphia Nat. Bank, 874, 877, 879, 881
 Phillips v. Insituform of North America, Inc., 628
 Phillips v. LCI International, Inc., 743
 Phillips Petroleum, In re, 712
 Piper v. Chris-Craft, 608
 Pittsburgh Terminal Corp. v. Baltimore & Ohio Ry. Co., 651, 652
 Plessey Co. PLC v. General Electric Co., 940
PNP Holdings Corp., In re, 274, 276
 Pogostin v. Rice, 407, 571
 PPG Industries, Inc. v. Guardian Industries Corp., 206, 211, 212, 214
 Pratt v. Ballman-Cummings Furniture Co., 63, 82
 Prescott Group Small Cap v. The Coleman Co., 104
 Prouty v. Gores Technology Group, 392
Pure Resources, Inc. In re, 471, 476, 477, 710

- Quickturn Design Systems, Inc. v. Shapiro**, 522, 593, 624
- Rabb v. General Physics Corp., 710, 720
- Rabkin v. Philip A. Hunt Chemical Corp., 462
- Radiology Assoc., In re, 116
- Radol v. Thomas, 710
- Rales v. Blasband, 455
- Ramirez v. Amsted Indus., Inc., 232
- Rapid-American Corp. v. Harris, 101, 111, 112, 113, 117
- Rath v. Rath Packing Co., 53, 62, 63
- Rauch v. RCA Corp.**, 70, 74, 75, 81
- Ray v. Alad Corp., 229, 231, 233, 234
- Raytech Corp. v. White, 296
- Rego Company, In re**, 262
- R.G. Group, 319
- Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.**, 400, 490, 493, 511, 516, 549, 558, 567, 569, 571, 574, 576, 578, 579, 580, 581, 582, 591, 616, 642, 669
- Richmond v. Peters, 23, 350
- Rio Grande Indus., 769
- RJR Nabisco, Inc., In re, 449, 572, 656
- Rogath v. Siberman, 333
- Rogath v. Siebenmann, 386
- Rojas v. TK Comm., Inc., 236
- Rondeau v. Mosinee Paper Corp.**, 167, 748
- Rosenblatt v. Getty Oil Co., 420, 427, 464, 467, 767, 768
- Ross v. A.H. Robbins Co., 712
- Roth v. Hartl, 396
- Rothschild Int'l Corp. v. Liggett Group, 72, 73, 74, 75, 81, 92
- RP Acquisition Corp. v. Staley Continental, Inc., 613
- Rubinstein v. Collins, 721
- Rubio's, 701
- Ruiz v. Blentech Corp.**, 229
- San Leandro Emergency Medical Group Profit Sharing Plan v. Philip Morris Cos., Inc., 710, 720
- Santa Fe Industries, Inc. v. Green, 693, 714
- Sawyer v. Raymark Industries, Inc., 294
- Scheck v. Francis, 318
- Schmoll v. ACands, Inc.**, 290, 297
- Schneider v. Lazard Freres & Co., 669
- Schnell v. Chris-Craft Indus., Inc., 570, 626, 631
- Schoenbaum v. Firstbrook, 938
- Schreiber v. Carney, 442, 445
- Schumacher v. Richards Shear Co., 228, 234
- Schwartz B. Greenberg, 318
- Sealy Mattress Co. v. Sealy, Inc., 449
- Searls v. Glasser, 721
- SEC v. Carter Hawley Hale Stores, 173
- SEC v. Coates, 740
- SEC v. Geon Industries, Inc., 734
- SEC v. Ralston Purina, 175
- SEC v. Texas Gulf Sulphur Co., 734, 740
- Semerenco v. Cendant Corp., 376
- Shamrock Holdings, Inc. v. Polaroid Corp., 549
- Shannon v. Samuel Langston Co., 232
- Sharon Steel Corp. v. Chase Manhattan Bank, 220
- Shearson/American Express, Inc. v. McMahon, 376
- Shell Petroleum, Inc. v. Smith, 768
- Shepley v. New Coleman Holdings, 850
- Shidler v. All American Life & Financial Corp.**, 51
- Shoen, 637
- Siliconix, Inc., In re, 471, 476, 477
- Silver v. New York Stock Exchange, 881
- Simons v. Cogan, 655
- Sinclair Oil Corp., v. Levien, 573
- Skeen v. Jo-Ann Stores, Inc.**, 772
- Smith v. Van Gorkom**, 400, 401, 412, 413, 417, 423, 583, 588, 766
- Software Publishing, In re, 721
- Solar Cells v. True North Partners, LLC, 449
- Solomon v. Pathe Comm., 472, 473
- SPC Plastics Corp. v. Griffith, 277
- SQL Solutions v. Oracle Corp., 211
- Stac Elec., In re, 723
- Starkman v. Marathon Oil Co., 710, 728
- State Teachers Retirement Bd. v. Flour Corp., 741
- Steinbach v. Hubbard, 237
- Sterman v. Ferro Corp., 763
- Stephens Indus. v. McClung**, 197
- Stephenson v. Capano Dev., Inc., 770
- Storage Technology Corp., In re, 721
- Stotter Div. Of Graduate Plastic Co. v. District 65, United Auto Workers, 237
- Stransky v. Summins Engine Co., 712
- Straub v. Vaisman and Co., Inc., 376
- Strong v. Repide, 481
- Stroud v. Grace, 536, 570, 625, 632, 633, 766
- Sugarman v. Sugarman, 483
- Sullivan Money Management Inc. v. FLS Holdings Inc., 89, 92
- Suvada v. White Motor Co., 233
- Taylor v. American Specialty Retailing Group, Inc., 127
- Teachers Ins. & Annuity Assoc. v. Tribune Co., 307
- Terry v. Penn Central Corp., 62, 63, 75
- Texaco, Inc. v. Pennzoil Co.**, 315
- Texas International Airlines v. National Airlines, Inc.**, 760
- Textile Workers Union v. Lincoln Mills, 249
- Thorpe v. Cerbco, Inc.**, 41, 42, 46, 506
- Time-Warner, Inc., 3, 571, 578, 712
- Tri-Continental Corp. v. Battye, 113, 118, 119

- Tri-Star Pictures, Inc., In re, 416, 422, 510
 Troy Iron & Nail v. Corning, 208
 Trubowith v. Riverbank Canning, 212
 Trump, 721
TSC Industries, Inc. v. Northway, Inc., 682, 691, 714, 720, 732, 733, 734, 767, 768, 773, 775
 TSN Liquidating Corp. v. United States, 816
 Tuchman v. DSC Communications Corp., 697
 Turner v. Bituminous Casualty Co., 229, 232
 TXO Production Co. v. M.D. Mark, Inc., 212
- Union Oil Co. v. United States, 63
 United States v. Automatic Data Processing, 890
United States v. Bestfoods, 247, 248, 249, 250, 251, 253, 282, 298, 302,
 United States v. Chestman, 758
United States v. Computer Associates International, Inc., 897
 United States v. El Paso Natural Gas Co., 884
 United States v. E.I. du Pont & Co., 874
 United States v. Fleet Factors, 256
 United States v. Input/Output, 903
 United States v. Koenig, 741
 United States v. Marine Bancorp., Inc., 873
 United States v. Maryland Bank and Trust, 256
 United States v. National Association of Securities Dealers, 881
United States v. Oracle Corp., 867
 United States v. Penn-Olin Chem. Co., 873
 United States v. Tabor court Realty Corp., 276
 United States v. Tengelmann Warehandels-gesellschaft, 894
 United States v. Titan Wheel International, Inc., 903
 United States v. W.T. Grant Co., 750
Unitrin, Inc. v. American General Corp., 415, 534, 543, 544, 549, 585, 590, 591, 625, 632, 634
 Unocal Corp. v. Mesa Petroleum Co., 400, 477, 534, 536, 537, 538, 539, 542, 543, 547, 548, 549, 551, 557, 562, 563, 564, 565, 566, 567, 569, 571, 573, 574, 578, 581, 582, 583, 584, 585, 590, 593, 598, 609, 616, 627, 628, 630, 632, 633, 634, 642
- Uranium Antitrust Litigation, In re, 947
- Van Gemert v. Boeing Co., 651
 Vaughn v. Teledyne, Inc., 728
VGS, Inc. v. Castiel, 94
Virginia Bankshares, Inc. v. Sanberg, 705, 713, 721
 Vitalink Communications Corp., In re, 574
- Waggoner v. Laster, 92
Walker v. Action Industries, Inc., 725
Warner Communications, Inc. v. Christ-Craft Indus., Inc., 80, 81, 89, 90, 91, 92, 136
 Warner Communications, Inc. v. Murdoch, 692, 693, 694
 Waterman Steamship Corp. v. Commissioner, 816
 Weinberger v. Rio Grande Indus., Inc., 770
Weinberger v. UOP, Inc., 70, 103, 104, 105, 109, 111, 115, 118, 123, 126, 413, 415, 417, 418, 422, 426, 449, 453, 461, 462, 465, 466, 493, 569, 570, 669, 768
 Weiner v. Quaker Oats Co., 682, 712, 744
 Wellman v. Dickinam, 173
 Wheelabrator Tech., Inc., In re, 511
 White Motor Credit Corp., In re, 284, 286
 Wieboldt Stores v. Schottenstein, 276
 Willard v. Moneta Building Supply, Inc., 566
 Williams v. Geir, 585, 597
 Williams v. WMX Techs., Inc., 697
 Wilson v. Electro Marine Systems, Inc., 342
 Wilson v. Louisiana-Pacific Resources, Inc., 57
 Winston v. Mandor, 46
 Winston v. Mediafare Entertainment Corp., 318, 319
 WLR Foods, Inc. v. Tyson Foods, Inc., 614
 Worldcom, 797
 Worlds of Wonder, In re, 721
 W.R. Grace & Co. v. Taco Tico Acq., 307
 W.R. Grace v. Sealed Air Corp., 297
- Zerand-Bernal, Inc. v. Cox, 284, 285, 286, 290
Zetlin v. Hanson Holdings, Inc., 487, 494
Zirn v. VLI Corp., 416, 765, 768

Summary of Contents

PREFACE	v
ACKNOWLEDGMENTS	vi
TABLE OF CONTENTS	xi
TABLE OF CASES	xxv
Chapter One. An Introduction to Acquisitions	1
A. Introduction.....	1
B. M & A Terminology.....	2
1. Customary Informal Understanding of Basic Terms.....	2
2. The Varying Typologies of M & A Professionals	6
C. Introduction to M & A Negotiations	9
1. Valuation	13
2. Negotiating Tactics.....	16
3. Pricing Issues in Deferred Closing Transactions	18
D. Do Acquisitions Create Value	25
Chapter Two. The Mechanics of an Acquisition	30
A. State Corporate Codes.....	30
1. Introduction	30
2. The Basic Provisions of State Corporate Codes Relevant to Acquisitions.....	32
3. The Dissenting Shareholders' Appraisal Remedy	97
B. Listing Requirements on Our National Stock Exchanges	128
1. Introduction to Stock Exchange Listing Requirements	128
2. The New York Stock Exchange Listing Requirements on Shareholder Voting in Acquisitions.....	132
3. The Policy Debate: Is the California Approach Better Than Delaware's, or Vice Versa?	135
C. Federal Securities Law Affecting the Mechanics of Acquisitions	156
1. Federal Law on Shareholder Voting: Proxy Regulations for Publicly-Traded Companies That Affect Votes on Acquisitions	156
2. Federal Law on Stock Acquisitions: The Regulation of Tender Offers	161
3. Federal Law Affecting Stock Swaps: Regulation of Public Offerings Under the Securities Act of 1933.....	176
4. Federal Law on Stock Purchases Outside the Acquisition During an Acquisition by Constituent Parties	188
D. Purchases of Financially Troubled Companies: The Requirements of Federal Bankruptcy Law	190
Chapter Three. Successorship to Assets and Liabilities: The Effect of an Acquisition on Outstanding Patent Licenses, Leases, Collective Bargaining Agreements,	

Section	Page
Pensions, and Contingent Product, Environmental, and Civil Rights Claims	199
A. Acquisition Negotiation as a Multi-Issue Bargain	199
1. Introduction to Multi-Issue Bargaining	199
2. Externalities and Other Forms of Opportunistic Behavior in Acquisitions	202
B. Transfer of Assets, Licenses and Leaseholds in Acquisitions.....	206
1. Statutory Mergers: Vests in Survivor	206
2. Stock Acquisition: No Transfer	215
3. Asset Acquisition: Transfer and Tradeoffs.....	217
C. Successor Liability.....	226
1. Asset Acquisitions and State Law on Successor Liability ---	226
2. Successor Liability and Federal Statutes	234
D. Liability Avoidance Strategies and Countervailing Legal Rules	259
1. Asset Sale Followed by a Distribution of the Proceeds	259
2. Purchasing Assets From a Bankrupt Company.....	279
3. Spin-Offs, Split-Offs, Triangulars and Other Sleight of Hand With Subsidiaries.....	290
4. The Debtor's Residual Strategy: Bleed and Default	301
 Chapter Four. Acquisition Documents	 304
A. Preliminary Documents.....	305
1. Confidentiality Agreements	305
2. Letters of Intent	307
B. The Acquisition Agreement and Supporting Documents.....	326
1. The Basic Agreement	326
2. Supplemental Documents.....	340
3. Acquisition Review Documents.....	352
4. Contingent Terms in, Amendments to and Abandonment of Acquisition Agreements.....	356
5. Deal Protection Covenants.....	358
C. Closing Documents	360
D. Litigation on Acquisition Contracts.....	369
1. Buyer Purchases a "Pig in a Poke"	369
2. The Buyer Refuses to Close.....	379
3. Third Party Beneficiary Claims.....	390
 Chapter Five. The Legal Duties of Boards of Directors, Senior Executives and Controlling Shareholders	 400
A. A Board's Duties in Negotiated Acquisitions	400
1. Duty of Care	401
2. Duty of Loyalty: Conflict of Interest Transactions	449
3. Legal Duties of Controlling Shareholders in Negotiated Acquisitions.....	487
B. A Target Board's Decision to Block a Takeover	511
1. Introduction to Firm-Specific Takeover Defenses	511

Section	Page
2. Fiduciary Duty and a Board's Decisions to Block Takeovers-----	533
3. State Statutes That Aid Directors' Efforts to Thwart Unwanted Takeovers: "Anti-Takeover Statutes," "Other Constituency Statutes," and "Liability Limitation Statutes"-----	599
4. What's Left for Hostile Bidders?-----	620
C. The Stakeholder Debate: Should the Board's Primary Obligation in Acquisitions Be to Maximize Shareholder Value?-----	641
1. Long-Term Interests of the Community: The CSX Acquisition of Conrail and Herald's Attempt to Buy the Denver Post-----	641
2. The Plight of Pre-Existing Bondholders in an LBO: The RJR Nabisco Buy-Out-----	649
3. Data on Stakeholder Welfare in Acquisitions-----	660
D. Fiduciary of Acquisition Consultants and Advisors-----	661
E. Takeovers in Bankruptcy: Claims Trading-----	670

Chapter Six. The Disclosure Requirements of the Federal Securities Acts and State Law-----

A. Disclosure Requirements of the Federal Securities Acts-----	677
1. Introduction to Mandatory Disclosure Requirements Under Federal Securities Law-----	677
2. Materiality-----	682
3. Pleading Standards: The PSLRA-----	695
4. Projections of Post-Acquisition Performance-----	704
5. The Duty to Disclose Preliminary Merger Negotiations-----	731
6. Gun Jumping: Pre-Filing Announcements-----	747
7. Disclosing Stock Purchases of Five Percent or Greater-----	748
B. Insider Trading in Advance of Acquisitions-----	753
1. SEC Rules 10b-5 and 14e-3-----	753
2. Section 16(b) of the 1934 Act: A Trap for Losing Bidders-----	760
C. State Law-----	766

Chapter Seven. Accounting and Tax Issues in

Mergers and Acquisitions-----	776
A. Accounting for Mergers and Acquisitions-----	777
1. Introduction to Financial Statements-----	777
2. Introduction to Accounting Issues in Intercompany Ownership-----	779
3. Cost Method: Acquisitions of Less Than 20 Percent of Target's Outstanding Common Stock-----	781
4. Equity Method: Acquisitions of 20 Percent to 50 Percent of Target's Outstanding Stock-----	784
5. Consolidations: One Company Acquires Over 50 Percent of the Stock of Another-----	787
6. Accounting for LBOs-----	797

Section	Page
B. Tax Treatment of Mergers, Acquisitions, and Reorganizations--	799
1. Introduction to the Transactional Base of Our Federal Income Tax -----	799
2. The Definition of a Tax-Free Reorganization -----	800
3. The Tax Consequences of Qualifying as a Tax-Free Reorganization -----	810
4. The Policy Debate on Tax-Free Reorganizations -----	819
5. When Are Acquisitions Driven Purely by Tax Avoidance? ---	825
6. Miscellaneous Tax Provisions Relevant to Acquisitions: Golden Parachutes, Greenmail, Poison Pills, and Acquisition Expenses-----	846
Chapter Eight. Protecting Consumer Interests in Mergers and Acquisitions: The Clayton Act -----	854
A. The Clayton Act -----	854
B. Price Fixing Among Bidders-----	880
C. Pre-Merger Notification: The Hart-Scott-Rodino Antitrust Improvements Act of 1976 -----	883
1. The HSR Notification and Report Form -----	890
2. The HSR Waiting Period -----	890
Chapter Nine. Issues in International Acquisitions -----	907
A. Foreign Acquisitions of United States Corporations -----	907
1. Acquisitions That "Impair National Security"— the Exon-Florio Amendment -----	907
2. Federal Legislation Specific to Foreign Acquisitions in Particular Industries or Assets -----	920
3. Other Countries' Investment Barriers -----	923
4. International Agreements on Foreign Direct Investment -----	925
B. Extra-territorial Application of United States Laws to Foreign Acquisitions -----	933
1. Federal Securities Laws -----	933
2. Antitrust Laws -----	941
C. Comparative Takeover Law -----	
INDEX -----	962

Table of Contents

PREFACE	v
ACKNOWLEDGMENTS	vi
SUMMARY OF CONTENTS	vii
TABLE OF CASES	xxv
 Chapter One. An Introduction to Acquisitions	 1
A. Introduction	1
B. M & A Terminology	2
1. Customary Informal Understanding of Basic Terms	2
2. The Varying Typologies of M & A Professionals	5
C. Introduction to M & A Negotiations	9
Note: An M & A Deal Time Table	9
1. Valuation	13
2. Negotiating Tactics	16
David A. Lax & James K. Sebenius, The Manager	
as Negotiator	16
3. Pricing Issues in Deferred Closing Transactions	18
Note: Price Terms in Stock Swaps	19
Note: Post-Closing Adjustments	22
D. Do Acquisitions Create Value	25
Questions	28
 Chapter Two. The Mechanics of an Acquisition	 30
A. State Corporate Codes	30
1. Introduction	30
2. The Basic Provisions of State Corporate Codes	
Relevant to Acquisitions	32
a. The Three Basic Forms: The Stock Swap Statutory	
Merger, the Cash-for-Assets Acquisition and the	
Cash-for-Stock Acquisition	35
i. A Plain Vanilla (or Stock Swap) Statutory Merger:	
Delaware	35
ii. Cash-for-Assets Acquisition	39
Note: "Substantially All"	41
<i>Hollinger Inc. v. Hollinger International, Inc.</i>	42
iii. Cash-for-Stock Acquisition: Delaware	48
iv. Corporate Codes in Other States	49
<i>Shidler v. All American Life and Financial Corp.</i>	51
v. The Extraterritorial Effect of State Corporate Code	
Provisions on Shareholder Voting	56
b. Transaction Planning Alternatives	57
i. Stock-for-Asset Acquisitions	57
<i>Heilbrunn v. Sun Chemical Corporation</i>	58
Note: Reverse Asset Sale	63
<i>Hariton v. Arco Electronics</i>	64

Section	Page
ii. Stock-for Stock Acquisitions -----	65
<i>Irving Bank Corp v. Bank of New York Co., Inc.</i> -----	66
iii. Cash-Out Mergers -----	68
<i>Rauch v. RCA Corporation</i> -----	70
Question -----	74
iv. Triangular Acquisitions -----	74
<i>Equity Group Holdings v. DMG Inc.</i> -----	76
v. Two-Stage Stock Acquisitions -----	80
vi. Partnership and Long-Term Supply Contracts -----	81
<i>Pratt v. Ballman-Cummings Furniture Co.</i> -----	82
<i>Good v. Lackawanna Leather Co.</i> -----	83
c. Single-Firm Reorganizations, Reincorporations and	
Conversions -----	84
<i>Federal United Corporation v. Havender</i> -----	86
<i>Elliot v. Avatex Corporation</i> -----	89
Note: Conversions: Changes in Entity Form -----	93
<i>VGS, Inc. v. Castiel</i> -----	94
Question -----	97
3. The Dissenting Shareholders' Appraisal Remedy -----	97
a. The Mechanics of the Appraisal Remedy -----	98
ALI-ABA Rev. Model Business Corp. Act,	
§ 13.31(a) (1999 rev.) -----	102
Barry M. Wertheimer, The Shareholders' Appraisal	
Remedy and How Courts Determine Fair Value -----	102
Note: Appraisals in Merger Involving a Controlling	
Shareholder -----	104
b. Case Law on Fair Value in Appraisal Proceedings -----	105
<i>Cavalier Oil Corp. v. Harnett</i> -----	105
Questions -----	106
<i>M.G. Bancorporation, Inc. v. Le Beau</i> -----	106
<i>Weinberger v. UOP, Inc.</i> -----	118
<i>Cede & Co. v. Technicolor, Inc. (Cede III)</i> -----	123
Questions -----	127
Note: Contractual Modification of the Appraisal	
Rights of Preferred Stock -----	128
B. Listing Requirements on Our National Stock Exchanges -----	128
1. Introduction to Stock Exchange Listing Requirements -----	128
2. The New York Stock Exchange Listing Requirements on	
Shareholder Voting in Acquisitions -----	132
New York Stock Exchange Listed Company Manual -----	132
3. The Policy Debate: Is the California Approach Better	
Than Delaware's, or Vice Versa? -----	135
a. The Limits of Legislation -----	139
b. Should Rules for Shareholder Voting on Acquisitions Be	
Optional -----	144
Frank Easterbrook & Daniel Fischel,	
The Corporate Contract -----	146