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MERGERS AND ACQUISITIONS
Cases, Materials, and Problems

*Second
Edition*



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Law & Business

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Mergers and Acquisitions: Cases, Materials, and Problems

Second Edition

Therese H. Maynard

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Loyola Law School, Los Angeles



Wolters Kluwer
Law & Business

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Aspen Publishers
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PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-7484-7

Library of Congress Cataloging-in-Publication Data

Maynard, Therese H.

Mergers and acquisitions : cases, materials, and problems / Therese H. Maynard. — 2nd ed.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-7355-7484-7 (hardcover : alk. paper) 1. Consolidation and merger of corporations — United States. I. Title.

KF1477.M329 2009
346.73'06626 — dc22

2008046195



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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 first edition was published in the wake of numerous financial scandals involving high-profile companies such as WorldCom, Tyco, and Enron, all of which served to ignite greater interest in, and attention on, the topic of this book: the *law of mergers and acquisitions*. This interest level has only escalated in the years since the first edition was published — years in which the market for M&A activity continued to reach new highs and break old records. Not surprisingly, law schools today are facing increasing pressure to provide comprehensive treatment of this important area of modern 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.

Toward that end, the second edition of the 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, in revising for the second edition, I carried forward the essential goal of the first edition, 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 second edition continues to eschew string citations to the voluminous body of literature in this area of the law, in favor of a more accessible style that breaks down the law of mergers and acquisitions into manageable chunks. In both selecting and editing the cases and other materials to be included in the second edition, the guiding principle has been to present the material in a manner that will enable the law student to master the fundamental principles of the law of mergers and acquisitions 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 second 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.¹

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 first edition, I 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 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. As in the first edition, the problems and other materials in the second edition of my casebook are designed to fill in this gap. First, 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 first edition, the second edition of the casebook 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. In this way, the second 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,

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).

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

In addition to emphasizing the use of problems to illustrate the planning of modern M&A transactions, this second 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 second 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 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 asks the law student to consider the corporate governance implications of M&A transactions by critically assessing the relative balance of power among the shareholders, the board of directors, and the senior executive officers, most notably the role of the modern chief executive officer, a balance that has been sorely tested in the years since the first edition was published.

Finally, and most importantly, these themes are developed in the context of M&A activity that occurs *both* on 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 first edition, the general convention followed in this second edition of the casebook is to omit case and statute citations from the principal cases and 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.

August 2008

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Acknowledgments

I am indebted to many persons for helping me give birth to this labor of love. This project never would have been conceived without many generations of my students who impressed on me the need to write a casebook that facilitated the law student's ability to understand and master the law of mergers and acquisitions. To those many students who suffered through various iterations of teaching materials as I worked my way through various drafts of this casebook to produce the first edition and to those who suffered through the various ideas that I experimented with in writing this second edition, I am eternally grateful for your patience, understanding and feedback. This project is truly the better for having the benefit of your suggestions and guidance. In particular, I reserve a special word of gratitude to my colleagues, Rebecca Huss and Michael Dorff, who were brave enough to use the first edition of the casebook in their Mergers and Acquisitions courses while still in draft form. I am also deeply grateful for their detailed and insightful comments in revising the second edition of this casebook.

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.

Of course, over the years, many research assistants have made valuable contributions to the development and refinement of this project. I want to express particular thanks to Alex Shukman, Ann Carey Camacho, and Gregory Ezor for their invaluable help in writing the first edition. In addition, I want to thank Arif Sikora, April Ho and Clint Stiffler for their research assistance and helpful comments in drafting the second edition of this casebook.

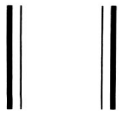
This casebook has required a lot of help, but a special word of appreciation goes out to my long-time administrative assistant, Thelma Wong Terre, without whose friendship, unfailing support, and amazing secretarial skills this project never would have come to fruition. In addition, a special word of thanks to the Pacific Club, Newport Beach, California, for providing me

with an atmosphere of warmth and hospitality that allowed me to complete this second edition. Finally, I had invaluable support at Aspen Publishers from Lynn Churchill, Taylor Kearns, and Carmen Corral-Reid (and, I am sure, many others unknown to me).

I also want to gratefully acknowledge the permission of the following publishers, authors, and periodicals to reprint excerpts from their publications:

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- Campbell, Rutherford B., Jr., Fair Value at Fair Price in Corporate Acquisitions, 78 N.C.L. Rev. 101, 110-11 (1999). Copyright © 1999. Reprinted with permission of North Carolina Law Review.
- Campbell, Rutherford B., The Impact of Modern Finance Theory in Acquisition Cases, 53 Syracuse L. Rev. 1, 2-3, 5-6, 9-11, 14-16 (2003). Copyright © 2003. Reprinted with permission of Syracuse Law Review.
- Cox, James D. and Thomas Lee Hazen, Corporations, Introduction to Law Series, Second Edition, p. 661, §23.07, copyright © 2003 by James D. Cox and Thomas Lee Hazen. All Rights Reserved. Reproduced by permission of Aspen Publishers.
- Gilson, Ronald J., *Unocal* Fifteen Years Later (and What We Can Do About It), 26 Del. J. Corp. L. 491-492, 513 (2001). Copyright © Delaware Journal of Corporation Law 2001. Reprinted by permission.
- Grant, M. Duncan and Phillip T. Mellett, Delaware Supreme Court Upholds *Caremark* Standard for Director Oversight Liability; Clarifies Duty of Good Faith. Originally published in Pepper Hamilton LLP law firm memo, dated November 21, 2006. Reprinted with permission of Pepper Hamilton LLP.
- Grinberg, David and Gordon Bava, A Comeback for Tender Offers? Mergers and Acquisitions 73-77 (March 2007). Reprinted with permission of Source Media.
- Manne, Henry, Mergers and the Market for Corporate Control, 73 Journal of Political Economy 110, 112-113 (1965). Originally published in 73 Journal of Political Economy 110 (University of Chicago Press, 1965).
- Mooney, Marilyn, et. al., Amendments to the Best Price Tender Offer Rules, INSIGHTS, vol. 20, December 2006, p. 5 copyright © 2006 by Aspen Publishers. All Rights Reserved. Reproduced by permission of Aspen Publishers.
- Silk, David, and David Katz, Takeover Law and Practice (PLI Program, Doing Deals 2003 at 327-329). Copyright © 2003 by David Silk and David Katz. Reprinted with permission of the authors.
- Small, Marshall L., Corporate Combinations under the New California General Corporation Law, 23 UCLA L. Rev. 1190, 1190-1193 (1976). Originally published in 23 UCLA L. Rev. 1190 (1976).
- Wachtell, Lipton, Rosen & Katz, The Share Purchase Rights Plan (1996). Copyright © 1996. Reprinted by permission.
- Welch, Edward R. and Andrew J. Turezyn, Folk on the Delaware General Corporation Law: Fundamentals, Fifth Edition, p. 276, §146.1, copyright © 2006 by Aspen Publishers, Inc. All Rights Reserved. Reproduced by permission of Aspen Publishers.
- Wertheimer, Barry M., The Purpose of the Shareholders' Appraisal Remedy, 65 Tenn. L. Rev. 661, 662-664 (1998). Copyright © 1998 by Tennessee Law Review Association, Inc. Excerpt reprinted with permission of the Tennessee Law Review Association, Inc.
- Wertheimer, Barry M., The Shareholders' Appraisal Remedy and How Courts Determine Fair Value, 1998 Duke L.J. 613, 616-617, 626-632, 643-645, 696-701. Copyright © 1998 by the Duke Law Journal. Reprinted with the permission of the Duke Law Journal.



Mergers and Acquisitions

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