

TABLE OF CONTENTS

ACKNOWLEDGMENTS	III
TABLE OF CASES	XXVII
Chapter I. Introduction	1
A. History	1
1. The Birth of Modern U.S. Merger Activity: The Erie War	1
2. First and Second Waves of U.S. Merger Activity: The Rise of Antitrust Regulation and the Trustbusters	4
a. Sherman Antitrust Act.....	5
b. Clayton Antitrust Act	7
c. Federal Trade Commission	8
d. The Great Depression and Subsequent Reform	8
3. Third Wave of U.S. Merger Activity: The Conglomerates	8
4. Fourth Wave of U.S. Merger Activity: Hostile Takeovers and the Rise of Private Equity	10
5. The Fifth Wave of U.S. Merger Activity	12
6. The Sixth Wave of U.S. Merger Activity: Modern M&A Activity....	13
B. Drivers of Mergers and Acquisitions.....	15
1. The Economic Rationales for Mergers and Acquisitions	15
2. When M&A Goes Wrong: The Case of AOL/Time Warner	18
3. The Regulatory Drivers of M&A: Examples from Tax Law	20
C. A Note on Applicable Law.....	21
D. An Introductory Note on Valuation	24
E. The Deals in This Casebook	26
Questions	28

PART I. DEAL STRUCTURES UNDER STATE AND FEDERAL LAW

Chapter II. Deal Structures: Introduction to Mergers and Asset Sales	31
A. Building Your Deal Vocabulary.....	31
B. Statutory Merger	32
1. DGCL Section 251	33
2. Voting Requirements.....	35
a. DGCL Voting Requirements	35
b. Stock Exchange Voting Requirements	37
3. Legal Effects of the Statutory Merger.....	38
4. Other Types of Statutory Mergers	39
a. Triangular Mergers	39
b. Short Form Mergers	42
c. Interspecies Mergers	46

C.	Mergers in Practice: The Fitbit Example	46
	Fitbit, Inc. Merger Agreement.....	47
D.	Sale of All or Substantially All the Assets.....	50
1.	DGCL Sections 271 & 275.....	50
2.	The Definition of “All or Substantially All”	53
3.	De Facto Merger Doctrine.....	55
4.	Fraudulent Conveyance	59
E.	Tax Considerations	59
	Questions	60
	Problems	62
Chapter III. Appraisal Rights.....		65
A.	Perfecting Appraisal Rights.....	66
1.	Who Can Exercise Appraisal Rights?.....	66
2.	Fitbit Appraisal Rights	68
3.	How Does a Shareholder Exercise Appraisal Rights?.....	69
a.	The Obligation to Make a Written Demand for Appraisal	69
b.	Must Remain a Shareholder	69
c.	The Obligation Not to Vote Yes	70
d.	Appraisal’s De Minimis Condition.....	73
e.	The Status of Shareholders Exercising Appraisal Rights.....	73
4.	Pursuing Appraisal Rights	74
B.	The Market out Exception	75
C.	Appraisal Arbitrage and “Fair Value”	79
1.	Appraisal Arbitrage.....	80
	Appraisal Arbitrage and the Future of Public Company M&A	80
2.	Defining Fair Value.....	83
3.	Merger Price as Fair Value	87
	DFC Global Corporation v. Muirfield Value Partners, LP et al.	88
D.	Quasi-Appraisal Proceedings.....	98
	Berger v. Pubco Corporation	99
E.	Appraisal Rights and Other Remedies: When Are Appraisal Rights Exclusive?	104
F.	Delaware and the MBCA Compared.....	105
	Questions	106
	Problem.....	107
Chapter IV. Regulation of Mergers and Acquisitions Under Federal Law—Section 13(d)		109
A.	Williams Act History	109
B.	Modernizing the Williams Act.....	111
C.	Section 13(d) Requirements.....	113
1.	What Is an Equity Security Subject to Section 13(d)?	114
2.	The Definition of Beneficial Owner.....	114
3.	Acting as a Group	116
4.	What Information Must the Filing Contain?.....	121
5.	When Must the Filing Be Updated?.....	125

6. Remedies Under Section 13(d).....	126
7. Schedule 13G	127
Questions	129
Problems	129
 Chapter V. Regulation of Mergers and Acquisitions Under Federal Law—the Williams Act and Tender Offers.....131	
A. What Is a Tender Offer?	131
B. When Is a Tender Offer Preferable to a Merger?	132
C. Substantive Rules Governing Tender Offers.....	136
1. Commencement of the Offer	136
2. Filing Requirements.....	137
3. Dissemination	137
Tender Offer, Java Corp.....	138
4. Offer Period.....	141
5. Subsequent Offering Period.....	142
6. Amendments	142
7. All Holders/Best Price Rule	142
8. Withdrawal Rights	143
9. Pro Ration	143
10. Purchases Outside the Offer.....	143
11. Target Board Response to a Tender Offer	145
12. All Holders/Best Price Rule: Special Issues.....	147
D. Tender Offer Timing	147
E. Tender Offer Practicalities	149
F. Empirical Evidence on the Williams Act	150
Questions	151
Problems	151
 Chapter VI. Regulation of Mergers and Acquisitions Under Federal Law—Proxy Rules.....153	
A. Overview	153
Proxy Contests.....	154
B. The Proxy Rules in Practice	159
C. The Mechanics of the Shareholder Vote	160
1. Setting the Record Date	160
Setting the Record (Date) Straight.....	160
2. Adjusting the Record and Meeting Dates	162
3. Other Requirements	165
Questions	167
Problems	168
 Chapter VII. Regulation of Mergers and Acquisitions Under Federal Law—Registering Stock 169	
A. Section 5 Registration	169

B.	Exempt Issuances.....	170
1.	Regulation D and Rule 506	170
	Private Placement of Publicly Traded Equity Securities as Consideration in an M&A Transaction After the JOBS Act.....	171
	Private Placement of Publicly Traded Equity Securities as Consideration in an M&A Transaction After the JOBS Act.....	174
2.	3(a)(10) Fairness Hearing Process	175
C.	Resales	179
	The Curious Case of How to Resell Securities Obtained in an M&A Transaction—Rules 144 and 145.....	179
D.	The Choice Between Form S-4 and Form S-3	181
E.	Communication Filing Requirements.....	182
	Final Rule: Regulation of Takeovers and Security Holder Communications	183
F.	Special Purpose Acquisition Companies.....	184
	Questions	192
	Problems	192
Chapter VIII. Other Regulatory Requirements		193
A.	Antitrust Clearance.....	193
1.	Hart-Scott-Rodino Premerger Notification	194
a.	Who Has to File?.....	195
b.	“4(c)” and “4(d)” Documents	197
c.	Transactions Not Subject to Filing Requirements	199
d.	Gun Jumping	201
e.	Penalties.....	201
2.	International Antitrust	202
B.	National Security Review—Exon-Florio Amendment	204
1.	History.....	204
2.	Extent of Coverage	205
3.	CFIUS in Practice.....	207
C.	Other U.S. Regulatory Reviews.....	213
	Questions	214
	Problem.....	214

PART II. ACCOUNTING AND VALUATION

Chapter IX. Accounting.....		217
A.	Introduction	217
B.	The Balance Sheet.....	217
C.	The Income Statement.....	219
D.	A Note on Goodwill.....	222
E.	A Note on Contingencies and Reserves.....	222
F.	How Is Accounting Used in M&A?	223

G. Purchase Accounting.....	224
Pooling or Purchase? A Merger Mystery	224
Questions	229
Problems	230
Chapter X. Valuation	231
A. Introduction	231
B. Valuation Techniques	232
1. Discounted Cash Flow Analysis	232
Dell Definitive Proxy Statement	234
2. Comparable Company Analysis.....	237
Dell Definitive Proxy Statement	237
a. Premium Analysis	242
Dell Definitive Proxy Statement.....	242
b. Other Valuation Analyses	245
c. A Note on Technology Company Valuations.....	246
Facebook Buys Whatsapp for \$19 Billion: Value and Pricing Perspectives.....	246
C. Valuation in Practice.....	248
1. Negotiating Price	248
2. Appraisal Rights.....	249
Doft & Co. v. Travelocity.com Inc.....	250
3. Fairness Opinions.....	259
a. What Is a Fairness Opinion?	259
Fairness Opinions in Mergers and Acquisitions.....	259
b. Criticism of Fairness Opinions	261
c. The Legal Reasons for Fairness Opinions.....	263
d. The Role of Lawyers in Fairness Opinions	264
Questions	264

PART III. DOING THE DEAL

Chapter XI. Deciding to Do a Deal	269
A. Make or Buy Decisions.....	269
B. How to Sell a Company	271
1. Guiding Sale Principles.....	271
2. Auctions Versus Negotiations.....	273
3. Strategic and Financial Buyers.....	276
4. Negotiauctions	277
Questions	283
Chapter XII. Important Actors and Their Roles.....	285
A. Attorneys.....	285
B. Investment Bankers and Deal-Making.....	286
1. The Role of Investment Bankers in M&A.....	286
a. Sell-Side Representation	286
b. Buy-Side Representation	288

2.	The Concentrated Nature of M&A Investment Banking.....	289
3.	Investment Banks' Added Value	289
4.	A "Real World" View of Investment Banks?	290
a.	The Interaction of Lawyers and Investment Bankers	291
5.	Investment Banker Conflicts.....	292
a.	The Move Toward Heightened Review of Advisor Conflicts.....	293
	Addressing Financial Advisor Conflicts in the Wake of <i>Del Monte</i> and <i>El Paso</i>	300
b.	The Issue of Sell-Side Financing	301
c.	The Rise of Boutique Investment Banks.....	303
C.	Other Professionals	304
1.	Accountants	304
2.	Public Relations	306
3.	Proxy Solicitors and Information Agents.....	306
4.	Proxy Advisory Firms.....	307
	Questions	309
	Problem	310
	Chapter XIII. Preliminary Negotiations.....	311
A.	Investment Banker Engagement Letter.....	311
	Negotiating Investment Banking M&A Engagement Letters: Keeping the Investment Bank Incentivized While Protecting Your Interests	312
B.	Non-Disclosure and Confidentiality Agreements.....	314
	Reviewing the M&A Nondisclosure Agreement	314
	Martin Marietta Materials, Inc. v. Vulcan Materials Company	320
C.	Standstills.....	326
D.	Letters of Intent/Memorandum of Understanding (MOU).....	340
	Preliminary Note, Letter of Intent	340
E.	Due Diligence.....	345
	Due Diligence for Public Mergers and Acquisitions.....	345
	Questions	353
	Problems	353
	Chapter XIV. Documentation and Negotiation: The Merger Agreement	355
A.	Overview	355
B.	Landscape of the Merger Agreement	355
C.	Pricing Formulas, Collars, and Risk Allocation	359
D.	Earnouts.....	367
E.	Information Production and Risk Allocation: Representations and Warranties.....	374
F.	Representations and Warranties Generally	377
	1. Special Issue: Filing the Disclosure Schedule	386
G.	Covenants and Additional Agreements	388
	1. Covenants.....	389

2.	Additional Agreements	390
3.	No-Shop Provisions	394
4.	Change of Board Recommendation	398
5.	Go-Shop Provisions.....	401
H.	Closing Conditions	403
1.	“Bring Down” Condition.....	404
2.	Other Conditions	408
3.	A Note on “Sandbagging”.....	409
I.	Termination Provisions.....	410
J.	Termination Fees	413
K.	Risk Allocation and the Material Adverse Change Clause	416
	Akorn, Inc. v. Fresenius Kabi AG	423
L.	Allocating Risk in the Private Company Sale: Escrow, Indemnification, and Insurance	443
M.	A Return to Contract Principles: Drafting and Negotiating the Merger Agreement	453
	Questions	457
	Problems	457
Chapter XV. Resisting a Hostile Offer.....		459
A.	The Market for Corporate Control	459
	Takeover Theory and the Law and Economics Movement	459
B.	The Initial Approach	463
1.	The Bear Hug.....	463
2.	The Hostile Tender Offer	465
3.	A Note About Toeholds.....	468
C.	The Target Response.....	468
1.	Just Say No	469
2.	White Knight and White Squire Defenses	471
3.	<i>Pac Man</i>	473
4.	Leveraged (Dividend) Recapitalization	475
5.	Stock Repurchase	475
6.	Defensive Acquisitions and Sales	476
7.	Golden and Tin Parachutes	477
D.	The Target Defense: The Poison Pill.....	479
1.	The Invention of the Poison Pill	479
2.	The Mechanics of the Poison Pill.....	480
3.	The Effect of a Poison Pill	482
4.	Dead Hand and Slow Hand Poison Pills	483
5.	Timing of Pill Adoption	484
E.	The Acquirer Response: The Proxy Contest	484
F.	Structural Defenses.....	487
1.	Dual Class Stock.....	489
2.	Advance Notice Bylaw Provisions	489
3.	Fair Price Provisions	490
4.	Poison Put	490

G. State Anti-Takeover Statutes.....	491
1. The History of State Anti-Takeover Statutes.....	491
Is Delaware's Antitakeover Statute Unconstitutional? Evidence from 1988–2008	492
2. Second Generation Anti-Takeover Statutes and Beyond	496
3. Anti-Takeover Statutes in Action.....	498
4. DGCL 203 in Application: <i>Digex, Inc. Shareholders Litigation</i>	499
In re Digex, Inc. Shareholders Litigation	499
5. Empirical Studies of Anti-Takeover Statutes.....	502
Questions	503
Problems	503

PART IV. FIDUCIARY DUTIES

Chapter XVI. Fiduciary Duty Litigation.....	507
A. Overview of Fiduciary Duty Lawsuits	507
B. Fiduciary Duties	509
C. Standards of Review.....	512
D. How the Standard of Review Affects Transaction Structuring.....	516
1. In General	516
2. The Relevance of Coercion	518
E. Disclosure.....	520
F. Remedies.....	524
Chapter XVII. The Decision to Defend the Corporation	527
A. Introduction	527
B. Defending the Corporation: <i>Unocal</i>	527
1. Precursor to <i>Unocal</i> : <i>Cheff v. Mathes</i>	529
<i>Cheff v. Mathes</i>	529
2. The <i>Unocal</i> Standard: <i>Unocal v. Mesa Petroleum Co.</i>	532
<i>Unocal Corp. v. Mesa Petroleum Co.</i>	533
3. Note on Williams Act Amendment	540
C. The “Poison Pill”/Shareholder Rights Plan	540
<i>Moran v. Household International, Inc.</i>	541
D. <i>Unitrin</i> —Modifying the <i>Unocal</i> Standard.....	548
<i>Unitrin, Inc. v. American General Corp.</i>	552
E. <i>Unocal</i> in the Modern Day.....	569
F. The “Just Say No” Defense Under <i>Unocal</i> : <i>Air Products & Chemicals v. Airgas</i>	573
<i>Air Products & Chemicals, Inc. v. Airgas, Inc.</i>	574
G. Defending the Deal.....	583
1. Voting Protections	583
2. Exclusivity Measures	585
3. Compensatory Devices	586
4. <i>Brazen v. Bell Atlantic Corp.</i>	587
<i>Brazen v. Bell Atlantic Corp.</i>	588

H. <i>Omnicare</i> and the Further Development of <i>Unocal</i>	596
Questions	599
Problem.....	601
Chapter XVIII. The Sale Process	603
A. <i>Smith v. Van Gorkom</i> and the Board's Duty of Care	603
<i>Smith v. Van Gorkom</i>	604
The Business Judgment Rule and the Trans Union Case.....	615
B. The Legislative Response to <i>Van Gorkom</i>	618
C. <i>Van Gorkom</i> and the Duty of Care in Modern Times	621
Did Facebook's Zuckerberg Just Have a Van Gorkom Moment?	622
1. The Present-Day Duty of Care	624
Questions	624
Problem.....	625
Chapter XIX. Selling the Corporation	627
A. Maximizing Shareholder Value: <i>Revlon</i> Duties	627
1. Setting the Stage: Perelman and Bergerac Meet	628
2. The <i>Revlon</i> Case	629
<i>Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.</i>	629
B. What Triggers <i>Revlon</i> ?.....	637
1. <i>Paramount v. Time</i>	637
<i>Paramount Communications, Inc. v. Time Incorporated</i>	637
2. <i>QVC v. Paramount</i>	646
<i>Paramount Communications, Inc. v. QVC Network, Inc.</i>	647
C. <i>Revlon</i> Today	664
1. In General	664
a. <i>Lyondell Chemical v. Ryan</i>	665
<i>Lyondell Chemical Company v. Walter E. Ryan, Jr.</i>	665
b. <i>Revlon</i> as a Good Faith Test	673
2. <i>Revlon</i> 's Substantive Requirements.....	676
3. The Market Check	678
4. <i>Corwin</i> Cleansing	683
D. Go-Shops	683
E. <i>Revlon</i> and Deal Protections.....	687
F. <i>Revlon</i> in Mixed Stock/Cash Transactions	690
G. <i>Revlon</i> in Other States, and Other Constituency Provisions	693
H. Other Issues.....	695
Questions	697
Problems	699
Chapter XX. Conflicts of Interest: Director, Officer, and Shareholder Conflicts.....	701
A. Conflict of Interest Regulation	703
1. History and Background of Director and Officer Conflicts	703
2. Director Conflict Transactions	705
3. Shareholder Approval	707

B. Freezeouts.....	709
1. History of Freezeouts	709
2. <i>Weinberger v. UOP</i>	711
<i>Weinberger v. UOP, Inc.</i>	712
3. <i>Weinberger</i> : Establishing Entire Fairness and Rejecting Business Purpose.....	720
4. Remedies After <i>Weinberger</i>	722
5. Entire Fairness after <i>Weinberger</i>	722
6. <i>Weinberger</i> in the Modern Age	723
7. Post- <i>Pure Resources/Siliconix</i> Practices.....	727
8. Towards Harmony in Freezeouts	728
9. Resolution of the Weinberger Split: <i>Kahn v. M&F Worldwide</i>	730
<i>Kahn v. M&F Worldwide Corp.</i>	730
10. The Future of Freezeout Transactions.....	734
<i>In re Books-a-Million, Inc. Stockholders Litigation</i>	734
11. Extending <i>MFW</i> 's Protections to Non-Controller Transactions	744
C. Management Buy-Outs.....	746
1. Background on MBOs	747
Form over Substance? The Value of Corporate Process and Management Buy-Outs	747
2. Regulating MBOs	751
3. Additional Process in MBOs	752
4. Empirical Evidence on MBOs	754
D. Other Conflict Transactions: The Example of SPACs	756
<i>In re MultiPlan Corp. Stockholders Litigation</i>	757
Questions	766
Problem.....	767

PART V. OTHER M&A ISSUES

Chapter XXI. Shareholder Activism	771
A. Introduction	771
B. What Is Shareholder Activism?	772
C. Sotheby's: A Typical Activist Campaign	780
1. The Initial Activist Steps	780
2. The Company Response	785
3. The Proxy Contest	787
D. Defenses Against Shareholder Activism	789
Second Generation Advance Notification Bylaws	790
E. Federal Issues.....	793
1. Section 13(d)	793
2. Hart-Scott-Rodino Act Filings	794
3. Proxy Issues	795
4. Section 16	796
F. State Issues.....	797
1. Internal Organization Issues with Shareholder Activism	797
<i>Jana Master Fund, Ltd. v. CNET Networks, Inc.</i>	797

a.	Poison Pills and Shareholder Activism	804
	Third Point LLC v. William F. Ruprecht, et al.....	804
G.	Assessing Shareholder Activism	818
	Questions	823
	Chapter XXII. International Issues.....	825
A.	Introduction	825
B.	The Scope of U.S. Jurisdiction.....	825
C.	The Exclusionary Offer	828
D.	Regulation S	831
	Summary of SEC Regulation S	831
E.	A Note About Schemes of Arrangement	834
F.	Tier I and Tier II Offers	836
	Getting U.S. Security Holders to the Party: The SEC's Cross-Border Release Five Years On	836
G.	U.K. Takeover Code	843
	The Takeover Code.....	844
H.	A Concluding Remark	846
	Questions	847
	Problems	847
	Online Appendix	849
	INDEX.....	851