

Syllabus
Mergers, Acquisitions, and Split-Ups
Harvard Law School
Robert C. Clark
Leo E. Strine, Jr.
Room: Pound 101

Class One (Monday, September 11, 2006): M&A Economics: Reasons, evidence, waves (RC)

RICHARD A. BREALEY, STEWART C. MYERS, & FRANKLIN ALLEN, PRINCIPLES OF CORPORATE FINANCE (8th ed. 2006) (hereafter, "BREALEY, MYERS, & ALLEN"), ch. 32, Mergers, pp. 870-903, and ch. 33, Corporate Restructuring, pp. 905-10. Note: More from chapter 33 is assigned for class 12; feel free to read it now if you have time and are curious.

F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (3d ed. 1990), excerpts on merger patterns in U.S. history, pp. 153-59.

Martin Lipton, Mergers: Past, Present and Future (2001).

Dennis K. Berman & Jason Singer, *Blizzard of Deals Heralds an Era of Megamergers*, WALL STREET JOURNAL, June 27, 2006, at A1. On the shape of the current wave.

Class Two (Tuesday, September 12, 2006): Foundations (LS)

8 Del. C. §§ 251, 253, 271.

William T. Allen, *Our Schizophrenic Conception Of The Business Corporation*, 14 CARDOZO L. REV. 261 (1992).

Schnell v. Chris-Craft Indus., Inc., 285 A.2d 430 (Del. Ch. 1971).

Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971).

Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101 (1979).

Ronald J. Gilson, *A Structural Approach To Corporations: The Case Against Defensive Tactics In Tender Offers*, 33 STAN. L. REV. 819, 821-831 & 845-48 & 875-81 (1981).

Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

Coursewide Resource: Wachtell, Lipton, Rosen & Katz, *Takeover Law and Practice 2006* (Posted on course website)

Class Three (Monday, September 18, 2006): *Securities Law Overview: Registrations, Rights, Proxies (RC)*

WILLIAM J. CARNEY, *MERGERS AND ACQUISITIONS: CASES AND MATERIALS* (Foundation Press 2000), ch. 9, *Securities Law Issues in Seller Financing and Mergers*, pp. 781-88, 799-816, and 2005 Supplement, pp. 369-74 (replacement for ch. 9, sec. 2, on the timing of registration and disclosure).

Class Four (Tuesday, September 19, 2006): *The Core Cases (LS)*

Martin Lipton, Wachtell, Lipton, Rosen & Katz, *Takeover Response Checklist* (revised June, 2005).

Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985).

Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

Class Five (Monday, September 25, 2006): *Williams Act Basics and Key Issues (RC)*

STEPHEN J. CHOI & A.C. PRITCHARD, *SECURITIES REGULATION: CASES AND ANALYSIS* (Foundation Press 2005), ch. 12 pp. 725-73, *Takeover Regulation*.

Note: The key statutes and rules cited at the beginning of this casebook chapter will be posted on the course website. You may also be able to find them in whatever statutory supplement you used in your corporations course. You may need to refer to them as you work through the authors' problems.

Class Six (Tuesday, September 26, 2006): *Who Decides? Episode I (LS)*

City Capital Assocs. Ltd. P'ship v. Interco Inc., 551 A.2d 787 (Del. Ch. 1988).

Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is there Substance to Proportionality Review*, 44 *BUS. LAW.* 247 (1989).

TW Servs., Inc. v. SWT Acquisition Corp., 1989 WL 20290 (Del. Ch. Mar. 2, 1989).

Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988).

Class Seven (Monday, October 2, 2006): *Tax and Accounting Overview (RC)*

PETER V. LETSOU, *CASES AND MATERIALS ON CORPORATE MERGERS AND ACQUISITIONS* (Aspen Publishers 2006), pp. 14-18, *Tax and Accounting Consequences of Forms of Acquisitions*. A short but clear introduction.

HOWARD E. ABRAMS & RICHARD L. DOERNBERG, FEDERAL CORPORATE TAXATION (Foundation Press, 2002), section introducing liquidations, pp. 177-79; ch. 9, Taxable Acquisitions, pp. 199-217; and ch. 10, Reorganizations, pp. 218-61. Dense but important; some parts can be skimmed.

DALE A. OESTERLE, MERGERS AND ACQUISITIONS IN A NUTSHELL (Thomson/West, 2d ed. 2006), ch. 8, Federal Income Tax Treatment of Mergers, Acquisitions and Reorganizations, pp. 186-227. You may read this excerpt instead of the Abrams and Doernberg excerpt if you find it more to your liking.

Class Eight (Tuesday, October 3, 2006): *Who Decides? Episode II* (LS)

Paramount Commc'ns, Inc. v. Time Inc., 1989 WL 79880 (Del. Ch. July 14, 1989).

Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1990).

Paramount Commc'ns, Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994).

Class Nine (Wednesday, October 4, 2006): *Corporate Financial Policy: Debt, Buybacks, Acquisitions* (RC)

BREALEY, MYERS, & ALLEN, cited *supra* for class 1, pp. 414-97. This excerpt includes ch. 16, Payout Policy; ch. 17, Does Debt Policy Matter?; and ch. 18, How Much Should a Firm Borrow? It is long but clear; some sections can be skipped or skimmed.

Class Ten (Monday, October 9, 2006): *Case Study: The Merger Agreement As A Contract* (LS)

In re IBP, Inc. S'holders Litig., 2001 WL 406292 (Del. Ch. Apr. 18, 2001).

In re IBP, Inc. S'holders Litig., 789 A.2d 14 (Del. Ch. 2001).

Simpson Thacher & Bartlett, Delaware Chancery Court Orders Specific Performance of Merger Agreement: An Analysis of the IBP-Tyson Litigation (2001).

Suggested Reading:

- Victor I. Lewkow, *Allocating Market Risk in Stock-for-Stock Acquisitions*, INSIGHTS (vol. 8, no. 9, p.15, Sept. 1994).
- Example Definitions: “Material Adverse Effect” or “Material Adverse Change.”

Class Eleven, (Tuesday, October 10, 2006): *The Merger As A Contract II (Panel Discussion 1) (LS)*

LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS, §§ 11.01 – 11.04[1], § 11.04[9], 11-2 – 11-27, 11-57 – 11-60.7 (2003).

KLING & NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS, §§ 13.01 – 13.02[1], §§ 14.01 – 14.02, §§ 15.01 – 15.02[1][b], 13-1 – 13-8, 14-2 – 14-14, 15-2 – 15-9 (2001).

David A. Katz, Memo on Representations & Warranties (2002).

David A. Katz, Annotated Merger Agreement.

Suggested Reading:

- *Abry Partners V, L.P. v. F & W Acquisition, LLC*, 891 A.2d 1032 (Del. Ch. 2006).

Panel Discussion (Richard Climan, Cooley Godward; Eileen Nugent & Lou Kling, Skadden Arps).

Class Twelve (Monday, October 16, 2006): *Conglomerate Discounts & De-Diversifications (RC)*

BREALEY, MYERS, & ALLEN, cited *supra* class 1, pp. 910-21. Quick but good overview of spin-offs, carve-outs, and conglomerates. You may wish also wish to read the excerpt on sales and breakups in chapter 11 bankruptcy proceedings, pp. 921-27, which are included for the diligent.

Justin Pettit, *Where M&A Pays: Who Wins and How?* UBS INVESTMENT BANKING REPORT, December 2004, pp. 16-18.

Timothy R. Burch & Vikram Nanda, *Divisional diversity and the conglomerate discount: evidence from spinoffs*, 70 J. of FINANCIAL ECONOMICS 69-98 (2003).

Belen Villalonga, *Diversification Discount or Premium? New Evidence From the Business Information Tracking Series*, 59 J. of FINANCE 479-506 (April 2004).

Recommended readings on tax aspects:

- ABRAMS & DOERNBERG, cited *supra* class 7, section on divisive reorganizations, pp. 261-78. On the tax treatment of spin-offs and the like.

- Wilkie Farr & Gallagher LLP, Tax Increase Prevention & Reconciliation Act of 2005: Tax-Free Spin-Off Developments, Client Memorandum of June 16, 2006. The latest rules about the latest hot technique: cash-rich split-offs.
- Jesse Drucker & Matthew Karnitschnig, *Tax Advantage Is Driving Deal to Buy Braves*, WALL STREET JOURNAL, May 27, 2006, at B1. (An interesting recent example.)

Class Thirteen (Tuesday, October 17, 2006): *The Death of “Enhanced” Scrutiny?* (LS)

Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995).

Moore Corp. v. Wallace Computer Servs., Inc., 907 F. Supp. 1545 (D. Del. 1995) (**skip Antitrust Section**).

Marcel Kahan, *Paramount or Paradox: The Delaware Supreme Court’s Takeover Jurisprudence*, 19 J. CORP. L. 583 (1994).

Suggested Reading:

- Leo E. Strine, Jr., *Professorial Bearhug: The ESB Proposal as a Conscious Effort to Make the Delaware Courts Confront the Basic “Just Say No” Question*, 55 STAN. L. REV. 863 (2002).
- Lucian Ayre Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Further Findings and a Reply to Symposium Participants*, 55 STAN. L. REV. 885 (2002).

Class Fourteen (Wednesday, October 18, 2006): *Spinoffs and Break-ups: The Case of Time Warner and Carl Icahn* (Panel Discussion 2) (RC)

(The Lazard Report on Time Warner Inc. (February 1, 2006) will be posted for reference on the course website.)

News clippings regarding the 2006 struggle between Time Warner and Carl Icahn.

Panel Discussion (Richard Parsons, CEO, Time-Warner; Gene Sykes, Goldman Sachs; Bruce Wasserstein, CEO, Lazard Ltd., Paul Cappuccio, Exec. VP & General Counsel, Time-Warner)

Class Fifteen (Monday, October 30, 2006): *The Revival of “Enhanced” Scrutiny?* (RC)

Chesapeake Corp. v. Shore, 771 A.2d 293 (Del. Ch. 2000) (**Do not read portions on § 203**).

Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998).

Class Sixteen (Tuesday, October 31, 2006): *Proxy Fights: How Do They Really Work?* (Panel Discussion 3) (LS)

David Millstone & Guhan Subramanian, *Oracle v. PeopleSoft: A Case Study*, HARVARD NEGOTIATION LAW REVIEW (forthcoming 2006), available at <http://ssrn.com/abstract=816006>.

Panel Discussion (Daniel Burch, MacKenzie Partners, Inc.; Alan Miller, Innisfree M&A Incorporated; Joele Frank, Wilkinson Brimmer Katcher, Dan Stoller, Skadden, Arps).

Class Seventeen (Monday, November 6, 2006): *The New Realities Of Stockholder Activism For M&A Defenses.* (RC)

Class Eighteen (Tuesday, November 7, 2006): *Stockholder Activism And M&A: Has Just Say No Become Always Say Yes?* (Panel Discussion 4) (LS)

The following readings are for Class 17 and Class 18:

Leo E. Strine, Jr., *Toward A True Corporate Republic: A Traditionalist Response To Bebchuk's Solution For Improving Corporate America*, 119 HARV. L. REV. 1759 (2006).

Martin Lipton, et. al., *Delaware Adopts Majority Voting Amendments* (July 7, 2006), available at <http://realcorporatelawyer.com/pdfs/wlrk071006.pdf>.

Battling for Corporate America, THE ECONOMIST, Mar. 11, 2006, at 69.

Martin Lipton & Mark Gordon, *Deconstructing American Business* (April 10, 2006), available at <http://www.venulex.com/viewdoc.asp?documentID=5389>.

ABA Comm. on Corporate Laws, *Changes in the Model Business Corporation Act — Proposed Amendments to Chapters 8 and 10 Relating to Shareholder Voting for the Elections of Directors* 61 BUS. LAW. 399 (NOV. 2005).

ABA Comm. on Corporate Laws, *Report of the Committee on Corporate Laws on Voting by Shareholders for the Election of Directors*, 61 BUS. LAW. 401 (NOV. 2005).

Council of Institutional Investors, *Letter to Chair of ABA Committee on Corporate Laws* (August, 1, 2005).

Business Roundtable, *News Release of June 22, 2005 and Letter to Chair of ABA Committee on Corporate Laws* (August, 12, 2005).

David A. Katz and Laura A. McIntosh, *Corporate Governance: A Seismic Shift in the Mechanics of Electing Directors* (July 27, 2006).

Suggested Reading:

- Martin Lipton & Gregory Ostling & David Adlerstein, *Majority Voting – A Look Back at the 2006 Proxy Season*, (June 12, 2006).

Panel Discussion Class 18 (Martin Lipton, Wachtell Lipton; Jay Lorsch, Harvard Business School; Lucian Bebchuk, HLS; Josh Friedman, Canyon Capital Advisors; James C. Morphy, Sullivan & Cromwell, Ed Haldeman, CEO, Putnam Investments).

Class Nineteen (Wednesday, November 8, 2006): *Controlling Stockholders I* (RC)

Kahn v. Lynch Communication Sys., 638 A.2d 1110 (Del. 1994).

Glassman v. Unocal Exploration Corp., 777 A.2d 242 (Del. 2001).

Solomon v. Pathe Communications Corp., 672 A.2d 35 (Del. 1996).

In re Siliconix Inc. S'holders Litig., 2001 WL 716787 (Del. Ch. June 21, 2001).

In re Pure Resources, Inc., S'holders Litig., 808 A.2d 421 (Del. Ch. 2002).

Class Twenty (Monday, November 13, 2006): *Contract v. Fiduciary Duty Principles?: Deal Protections I* (RC)

Ace Ltd v. Capital Re Corp., 747 A.2d 95 (Del. Ch. 1999).

Phelps Dodge Corp. v. Cyprus Amax Minerals Co., 1999 WL 1054255 (Del. Ch. Sept. 27, 1999).

Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919 (2001).

James C. Morphy (Sullivan & Cromwell), *Where Has Time Gone? A Case For Real Protection Of Mergers Of Equals* (2002).

Negotiating Acquisitions of Public Companies, 10 U. MIAMI BUS. L. REV. 219 apps. D-K (2002) (sample deal protection provisions).

Suggested Reading:

- Mark A. Morton et al. (Potter Anderson & Corroon), *Recent Delaware Law Developments Concerning No-Talk Provisions — From “Just Say No” to “Can’t Say Yes”?*

Class Twenty-One (Tuesday, November 14, 2006): *Contract v. Fiduciary Duty Principles?: Deal Protections II (LS)*

In re NCS HealthCare, Inc. S'holders Litig., 825 A.2d 240 (Del. Ch. 2002) *rev'd*,

Omnicare, Inc. v. NCS Healthcare, Inc., 822 A.2d 397 (Del. 2002) (ORDER).

Omnicare Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003).

Suggested Reading:

- Is *Omnicare* Now an Omnipresent Specter? Lessons From the Deal and the Opinion, M&A Journal (Vol. 4, No. 4, p. 13).
- Dueling Briefs in *Omnicare v. NCS*: How Each Side Argued *Unocal* Before the Delaware High Court, M&A Journal (Vol. 4, No. 4, p. 22).
- *Orman v. Cullman*, 794 A.2d 5 (Del. Ch. 2002).
- Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances In Which It Is Equitable To Take That Action: The Implicit Corollary To The Rule Of Schnell v. Chris-Craft*, 60 BUS. LAW. 877 (2005)
- Keith A. Flaum, *First Annual Deal Points Study — Public Targets*, 10 No. 5 M&A LAW. 3 (May 2006).

Class Twenty-Two (Monday, November 20, 2006): *Controlling Stockholders II (LS)*

Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971).

Mendel v. Carroll, 651 A.2d 297 (Del. Ch. 1994).

McMullin v. Beran, 765 A.2d 910 (Del. 2000).

In re Digex, Inc., 789 A.2d 1176 (Del. Ch. 2000) (**only skim reasoning related to 15%/85% § 203 statutory interpretation issue**).

Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785 (2003).

Class Twenty-Three (Tuesday, November 21, 2006): *Special Transaction Committees: How (and how well) do they work? (Panel Discussion 5) (LS)*

Suggested Reading:

- Guhan Subramanian, *Fixing Freezeouts*, 115 YALE. L. J. 2 (2005).

- *In re Cox Commc'ns, Inc.*, 879 A.2d 604 (Del. Ch. 2005).

Panel Discussion (Marshall Cohen, Cassels Brock & Blackwell and director of several public companies; Robert Spatt, Simpson Thacher & Bartlett; Robert Kindler, Morgan Stanley; Paul Rowe, Wachtell, Lipton).

Class Twenty-Four (Monday, November 27, 2006): *The Future Of M&A: A Look Forward From Here (LS)*

Guest Speaker: Peter Atkins, Skadden, Arps.