PART I

DEAL STRUCTURES UNDER STATE AND FEDERAL LAW

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CHAPTER II

DEAL STRUCTURES: INTRODUCTION TO MERGERS AND ASSET SALES

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A. BUILDING YOUR DEAL VOCABULARY

This Part will discuss many different types of transactions. It will describe each type of transaction and set forth the applicable law. This Part will also discuss why parties might select one transaction form over another.

As you are reading this book, it is important to understand the vocabulary of deal lawyers and practitioners. For example, when deal lawyers say they are doing a "merger" they are actually referencing a particular type of transaction in which two or more companies become one company. Mergers can come in a variety of flavors, including reverse subsidiary mergers and forward subsidiary mergers, among others. Later in this Chapter you will be introduced in detail to the statutory basis for these merger transactions. Another common type of transaction is the "tender offer," in which a company's stock is acquired. A tender offer can come in two forms, an exchange offer or a cash tender offer. We will learn about the federal regulations governing these kinds of transactions later in this Part. This book will teach you about the law and practice of M&A; it will also teach you about the vocabulary of deal lawyers.

A variety of terms are used for the principal parties in mergers and acquisitions. A company making an acquisition can be called an acquirer, a purchaser, a buyer, or a bidder. As we will see, in a commonly used acquisition structure, a company forms a subsidiary, and the subsidiary is the actual acquirer. The company forming the subsidiary—the parent—will still for most purposes be called the acquirer (or buyer or purchaser or bidder). Another term, often used when a company is conducting its acquisition by means of a tender offer, is "offeror"—that term is sometimes used as a synonym for acquirer, purchaser, buyer or bidder. Yet another term used for some acquirers issuing securities as part of the transaction consideration is "issuers." One final point on acquirer terminology: the terms "bidder" and "offeror" (and of course bid and offer) are used in contexts where no deal is made—a company has, for instance, made a bid and been successfully rebuffed. Such a company is a "bidder" but not an "acquirer."

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A company being acquired may be called a seller or a target. The paradigmatic use of "target" is when a company is pursued—targeted—for acquisition, especially if there are several interested acquirers. But the term can be used more broadly, as a synonym for "seller." That being said, note that, as with "bidder" and "offeror," a "target" is not always acquired—a target may successfully rebuff a hostile bid, and not become a seller.

The term "seller" may be, and commonly is, used for a company being acquired, even if the acquisition is being made via a transaction to which the company's owners—its shareholders—are not parties. (The transaction will typically have obtained shareholder approval, though.) In private company acquisitions, we distinguish between the company being sold (also often called the seller or target) and the selling shareholders; in such a transaction, the shareholders will be parties, and indeed, will typically play an important role in many aspects of the transaction.

B. STATUTORY MERGER

The statutory merger is the basic building block of most acquisition transactions.[1] The statutory merger derives its name from the fact that the procedure is explicitly authorized by the corporate statute. Under the broad umbrella of the statutory merger, there are a variety of different merger "flavors." There are "direct mergers," "triangular mergers," "reverse triangular mergers," "interspecies mergers," "mergers of equals," "short-form mergers," "squeeze-out mergers," etc. One should not let the overabundance of jargon in merger practice cause distress. All of the previously mentioned mergers are simply versions of the same transaction, the statutory merger.

1. DGCL SECTION 251

Every state corporate code, as well as the Model Business Corporation Act ("MBCA"), includes a merger provision which lays out in some detail the formalities of the merger process. For example, the DGCL provides for mergers of two domestic corporations under § 251. Section 251(a) provides:

> (a) Any 2 or more corporations existing under the laws of this State may merge into a single corporation, which may be any 1 of the constituent corporations or may consolidate into a new corporation formed by the consolidation, pursuant to an

[1] The statutory merger is also known by tax professionals as an "A" reorganization. To qualify as an A reorganization under the tax rules, a merger must constitute a statutory merger or consolidation. The determination as to whether an "A" reorganization under IRC § 368(a)(1)(A) is a taxable event to the shareholders of the seller depends on "continuity of interest" in the surviving corporation. In order for there to be continuity of interest, at least forty percent of the consideration received by the selling shareholders must be stock of the acquiring corporation. To the extent consideration received in such circumstances is stock of the acquirer, that portion is not taxable at the time of the transaction.

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agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.

Section 251(a) includes some important jargon, which requires further definition. First, the "constituent corporations" are only those corporations *directly* involved in the transaction, not other affiliated corporate entities. Typically, in a direct merger, there are only two constituent corporations, usually the acquirer ("A") and the target ("T"), as diagrammed below:

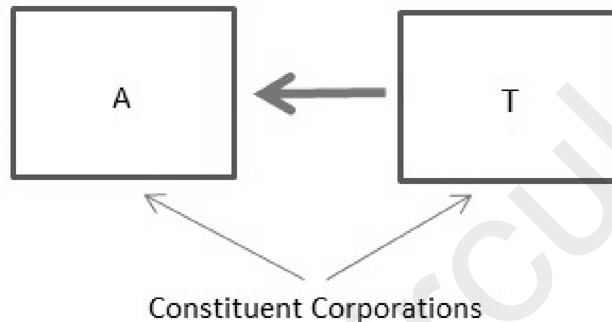

Figure 1: Merger of T "with and into" A, with A and T as the constituent corporations. Following the transaction, A is the "surviving" corporation and T is the "disappearing" corporation.

In a direct merger, the target merges with and into the acquirer. The statute uses the language "merge into" to identify which corporation is the "surviving corporation" and which corporation is the "disappearing corporation," sometimes known as the "non-surviving corporation." In the typical direct merger, the acquirer will be the survivor and the target will be the disappearing corporation. We will learn more about the implications of a constituent corporation disappearing in a merger transaction later in this Chapter.

Almost all statutory transactions are done by means of a merger. However, the language of § 251(a) describes two distinct transactions. In addition to a merger, the statute also describes a "consolidation." In a consolidation, the constituent corporations combine to form a new, third entity, called the "resulting corporation."

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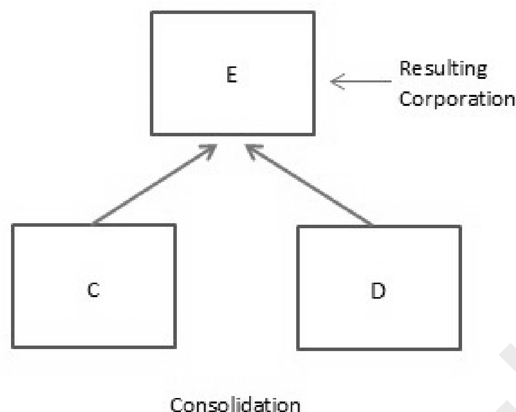

Figure 2: Consolidation. In a consolidation, two constituent corporations (C and D) combine to form a new entity (E), the "resulting corporation."

For either a merger or a consolidation, the statute sets forth specific procedures to be followed before the transaction can be completed. First, the board of directors of each of the constituent corporations must adopt resolutions approving an agreement of merger or consolidation and declare the advisability of that agreement.[2] The agreement approved by the boards must include details about the transaction's terms, consideration, and the method of implementing the merger, including any conversion of stock of the constituent corporations. The statute does not specify what counts as adequate consideration for a merger. Almost anything can be used as consideration, including cash, stock of the acquirer, stock of another corporation, assumption of indebtedness, etc. Because the merger transaction requires a vote of the shareholders of the constituent corporations, the statute permits amendments to the surviving corporation's certificate of incorporation in conjunction with the merger transaction. To the extent the transaction involves such amendments, those amendments must be specified in the merger agreement.

What sorts of amendments are typically made to certificates of incorporation in these contexts? In some instances, where a strategic acquirer is buying a private company, the private company's certificate of incorporation may be very long; in the transaction, a far shorter certificate is adopted. In other instances, parties aim to make other substantive changes to the certificate. Given that there is a vote on the merger in any event, the vote on the changes to the certificate is effectively "bundled" with the merger vote. In both instances, there may be provisions that are apt for the company pre-merger (or were apt at some point in the past) that are no

[2] Title 8 DGCL § 251(b).

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longer apt for the post-merged entity. For instance, some provisions that are appropriate for public companies, such as those relating to takeover defenses, are not needed for private companies. The merger may provide a good opportunity to bring provisions, such as indemnification provisions, up to the latest standards.

One example of a company making significant changes to its certificate of incorporation in a merger was Dell, when it went private in 2013. Prior to the merger, Dell's certificate of incorporation included provisions giving the board the right to issue series of preferred stock. These are not infrequently used as poison pills, discussed in Chapter XV.D. Once Dell became a private company, it had no further need for such provisions; consequently, the certificate of incorporation adopted in conjunction with the merger does not have them. But the new certificate has a provision giving shareholders the right to compete with the corporation under certain circumstances, something that may now be needed given that Dell is privately held following the transaction. The Online Appendix to this book contains Dell's certificate of incorporation in effect prior to the merger, and as of the effective time of the merger.

2. VOTING REQUIREMENTS

a. DGCL Voting Requirements

Section 251(c) requires that the merger agreement be submitted to the shareholders of each of the constituent corporations for approval at a shareholder meeting called for the purpose of approving the agreement. Approval of the agreement requires an affirmative vote of a majority of the outstanding shares of the corporation. Alternatively, the merger agreement may, if the constituent corporation's bylaws so allow, be approved by written consent pursuant to § 228.

Although the default rule under DGCL § 251(c) is that shareholders of each of the constituent corporations are required to vote to approve the merger, there are certain exceptions. Under DGCL § 251(f), the shareholders of the surviving corporation are not required to vote on the merger if each of the following conditions is satisfied:[3]

[3] Title 8 DGCL § 251(f) states that "Notwithstanding the requirements of subsection (c) of this section, unless required by its certificate of incorporation, no vote of shareholders of a constituent corporation surviving a merger shall be necessary to authorize a merger if (1) the agreement of merger does not amend in any respect the certificate of incorporation of such constituent corporation, (2) each share of stock of such constituent corporation outstanding immediately prior to the effective date of the merger is to be an identical outstanding or treasury share of the surviving corporation after the effective date of the merger, and (3) either no shares of common stock of the surviving corporation and no shares, securities or obligations convertible into such stock are to be issued or delivered under the plan of merger, or the authorized unissued shares or the treasury shares of common stock of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under such plan do not exceed 20% of the shares

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- The company's certificate of incorporation is not amended;
- There is no change in the characteristics of the outstanding stock of the surviving corporation; and
- The surviving corporation does not issue more than twenty percent of its outstanding stock in connection with the transaction.

The last requirement, that the surviving company issue no more than twenty percent of its stock, is often what prevents § 251(f) from applying, such that a vote of the shareholders of the surviving corporation is required. For instance, if the surviving corporation had 100 shares of stock outstanding before the merger, § 251(f) would not be available if it issued twenty-one shares as consideration in the merger. Section 251(f) will also not apply where the surviving company amends its certificate of incorporation in connection with the merger.

If all three conditions of § 251(f) are met, then shareholders of the surviving corporation are not required to vote to approve the merger. This exemption from the voting requirement makes sense because a transaction in which all three conditions are met is likely not a transaction that will fundamentally alter the relationship of the survivor's shareholders to the corporation. An acquirer can thus "work around" the voting requirement by simply issuing less stock (or no stock) so long as the conditions are otherwise still met. Note, however, that the vote of shareholders of the disappearing corporation will nevertheless be required to approve the merger transaction.

After shareholder approval for the merger has been received, the merger transaction is not yet complete. The merger will only become effective upon the filing of a certificate of merger with the state pursuant to § 251(c). The certificate of merger contains very basic information about the transaction, including statements identifying the constituent corporations to the transaction as well as statements that the transaction has been approved by the shareholders of the constituent corporations and that copies of the merger agreement are available for inspection by former shareholders. The effect of the certificate of merger (a form of which is available in the Online Appendix to this book) is to put the state authorities on notice that two corporate entities have merged, and indicates to the state which of the two is the surviving corporation. Although filing the certificate is a ministerial act, it is an extremely important milestone in any merger transaction. The merger only becomes "effective" at the time the certificate is filed. If the certificate is not filed, the merger never becomes "effective," and none of the legal consequences of a statutory

of common stock of such constituent corporation outstanding immediately prior to the effective date of the merger.

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merger are triggered. The certificate is traditionally filed by the counsel to the acquirer.

b. Stock Exchange Voting Requirements

Although a vote of the shareholders may not be required to approve a merger under state corporate law, the New York Stock Exchange (NYSE) or NASDAQ may still require one for companies whose stock is listed or quoted on one of the respective exchanges. This stock exchange vote requirement is most often triggered when an acquirer acquires a target using stock as consideration in a reverse triangular (or subsidiary) merger (we will discuss the mechanics of reverse subsidiary mergers below). Under the NYSE and NASDAQ's listing rules, Rule 312 and Rule 4350(i) respectively, where greater than twenty percent of a company's outstanding shares are issued in connection with a merger transaction, the share issuance (but not the merger) will require a vote of a majority of company's shareholders voting at a meeting with a valid quorum.[4] Note that under state corporate law, no vote is required for *issuance* of authorized shares (that is, shares authorized in the certificate of incorporation). Such shares can normally be issued with a simple resolution of the board of directors. Nevertheless, again, where more than 20% of the publicly-listed parent's stock is used as consideration in a merger transaction, the issuance of stock must be approved by shareholders. The exchange rules require a vote because the issuance of a large block of stock, although permissible under state law, is dilutive of incumbent shareholders. It is important to remember that this vote is a vote to approve only the issuance of stock in connection with a merger and not an approval of the merger transaction itself. It is important as well to note that the potential votes at issue are those of the two constituent corporations to the merger and the parent. Stock exchange rules may require the vote of the shareholders of any company listed on the exchange and issuing more than 20% of its stock, whether or not it is a constituent company in the merger. By contrast, the only shareholders who would be required to vote under the merger statute are constituent company shareholders. The parent in a reverse subsidiary merger is not a constituent company in the merger; thus, under state corporate law, no vote of its shareholders is required for the merger.

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[4] Previous iterations of this rule had required a majority of shareholders voting at a meeting where at least fifty percent of the shareholders were present. This could sometimes trip up parties with corporate bylaws with lower quorum requirements (e.g. thirty-three percent). For purposes of a valid vote under the exchange rules, these firms would have to comply with the requirements of the exchange rule rather than their own corporate bylaw. These rules have since been amended. The NYSE's new rule on this point, NYSE Rule 312.07, came into effect on July 11, 2013.

3. LEGAL EFFECTS OF THE STATUTORY MERGER

Mergers and consolidations have a number of important legal consequences. The first and most important such consequence is that upon the filing of the certificate of merger, the separate existence of all the constituent corporations ceases and the constituent corporations are merged into one. Following the merger, by operation of law, all the rights, privileges, powers, and assets of the disappearing corporation(s) become the rights, powers, and assets of the surviving corporation.[5] At the same time, the surviving corporation becomes subject to all the restrictions, disabilities and duties of the disappearing corporation(s). All property, real, personal and mixed, and all debts due to any of the disappearing corporation(s) becomes by operation of law the property and debts of the surviving corporation. All rights of creditors on any property of the disappearing corporation(s) are preserved unimpaired, and all debts, liabilities and duties of the disappearing corporation(s) become the debts, liabilities, and duties of the surviving corporation. These debts and obligations may be enforced against the surviving corporation to the same extent as if they had been originally contracted by the surviving corporation.

For example, in *Fitzsimmons v. Western Airlines*, 290 A.2d 682 (1972), Western Airlines merged with American Airlines, with American Airlines being the surviving corporation and Western Airlines being the disappearing corporation. Plaintiffs in the lawsuit were representatives of Western Airlines' mechanics union who sought a declaratory judgment from the court that their collective bargaining agreement with Western would survive the merger and that the agreement, including its arbitration provisions, would be binding on American Airlines. The Delaware Chancery Court in *Fitzsimmons* found:

> It is [. . .] a matter of statutory law that a Delaware corporation may not avoid its contractual obligations by merger; those duties "attach" to the surviving corporation and may be "enforced against it." In short, the survivor must assume the obligations of the constituent.

As a consequence, following the merger American Airlines was subject to the arbitration provisions of the collective bargaining agreement signed between Western Airlines and its labor unions. In the context of a more

[5] In *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP,* 80 A. 3d 155 (Del. Ch. 2013), the question for the court was whether the attorney-client privilege of the seller passed to the buyer upon the closing. In *Great Hill*, the seller sought to prevent the buyer from getting post-closing access to privileged attorney-client communications of the seller. Attorneys for Great Hill asked the court to rule that when DCGL § 259 said all "privileges" it did not mean the seller's attorney-client privilege. That argument fell short. Then-Chancellor Strine noted that "[t]o indulge the Seller's argument would conflict with the only reasonable interpretation of the statute, which is that all means all as to the enumerated categories, and that this includes all privileges, including the attorney-client privilege."

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typical merger, § 259's survival provision means that where the target's contracts are silent with respect to the effects of a merger, the fact of the merger will result in the target's contracts becoming the contracts of the acquirer. Typical contracts that are passed to the acquirer in this manner will often include leases, licenses, vendor agreements, and employment agreements, among others.[6]

The same is true with respect to any civil, criminal, or administrative proceedings that the disappearing corporation is a party to prior to the merger. Where the disappearing corporation is a party to a civil, criminal or administrative matter, following the merger the surviving corporation is substituted for the disappearing corporation as if the merger had never taken place. An exception to this general rule is the derivative suit. In *Lewis v. Anderson*, 477 A.2d 1040 (Del. 1984), the Delaware Supreme Court ruled that following a merger, shareholder plaintiffs in the disappearing corporation lose standing under DGCL §§ 259, 261, and 327. This is so because plaintiffs in these cases are no longer shareholders of the corporation with the claim but rather, holders of rights to receive cash or stock of the surviving corporation. In any event, the loss of standing upon the effectiveness of the merger is one reason why merger litigation is often won and lost at the preliminary injunction stage.

4. OTHER TYPES OF STATUTORY MERGERS

a. Triangular Mergers

The statutory mergers described above (except for those described in Subsection 2.b above) are all "direct" mergers. They are known as direct mergers because the constituent corporations which are directly combining—that is, merging—in the transaction are operating companies. Direct mergers like the ones described above are not common. Rather, the "triangular" merger, sometimes referred to as a "subsidiary" merger, is the deal structure most commonly used. A triangular merger is one in which the acquirer incorporates a subsidiary that will act as one of the constituent corporations in the merger (the "merger subsidiary"). The sole purpose of this merger subsidiary is to play a role in the transaction, either as the company to be merged into the target or the company into which the target is to be merged. In a reverse subsidiary merger, the wholly-owned subsidiary then merges with and into the target. Following the merger

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[6] Many commercial contracts include anti-assignment provisions that purport to restrict assignment of a contract in the event of a merger or a change of control. Absent such restrictions, the general rule under contract law is that contracts are assignable in a merger. However, this default rule with respect to the assignability of contracts is subject to an exception. Where the contract rights are "personal," for example rights related to intellectual property, courts have ruled that the default rule does not apply-that permission must be sought to assign such rights. *See PPG Industries v. Guardian Industries Corp.*, 597 F.2d 1090 (6th Cir. 1979); *see also SQL Solutions, Inc. v. Oracle Corp.*, 1991 WL 626458 (N.D. Cal. December 18, 1991).

transaction, the merger subsidiary disappears and the target survives as a wholly-owned subsidiary of the acquirer.

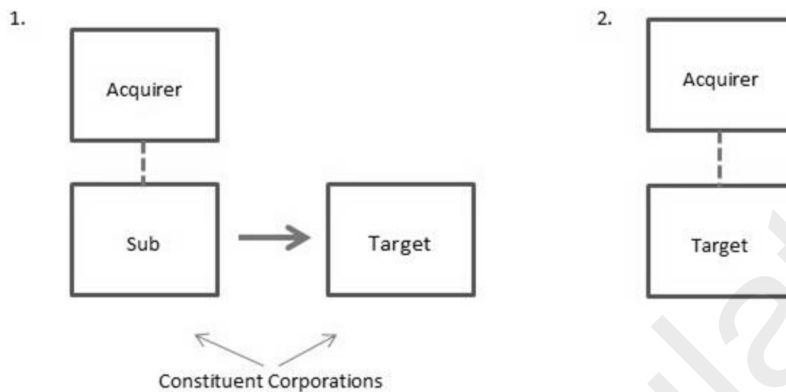

Figure 3: Reverse Triangular Merger. In the example above, the acquirer forms a wholly-owned subsidiary. This subsidiary and the target are the constituent corporations in a merger. The merger subsidiary merges with and into the target and then, as a result of the merger, the target is a wholly-owned subsidiary of the acquirer.

The merger between the target corporation and the wholly-owned subsidiary is itself a § 251 statutory merger. The transaction adopts the moniker of a triangular, or subsidiary, merger because the transaction involves a merger subsidiary wholly-owned by the ultimate acquirer and the structure of ownership results in the surviving corporation being held at arm's length by the acquirer. Triangular mergers where the target is the surviving corporation are known as reverse triangular mergers, or reverse subsidiary mergers (Figure 3). Triangular mergers where the merger subsidiary is the surviving corporation are known as forward triangular mergers, or forward subsidiary mergers (Figure 4).

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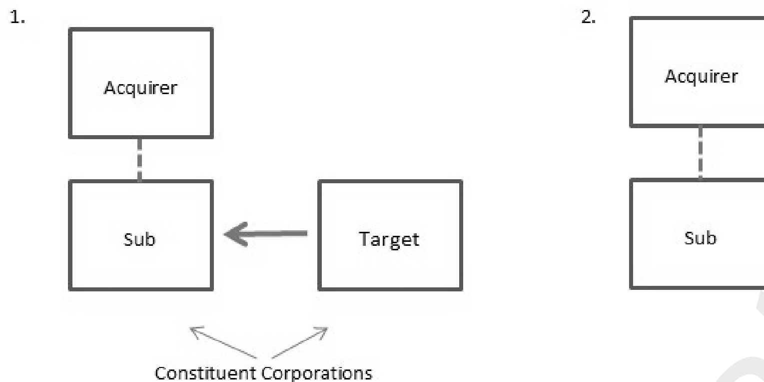

Figure 4: Forward Triangular Merger. In the example above, the acquirer forms a wholly-owned subsidiary. This subsidiary and the target are the constituent corporations in a merger. The target merges with and into the merger subsidiary and then as a result of the merger, the merger subsidiary, a wholly-owned subsidiary of the acquirer, survives and the target has disappeared.

A triangular merger is generally preferred by dealmakers over a direct merger of the acquirer and target described in Figure 1. A triangular merger allows the acquirer to keep the assets and liabilities of the target at arm's length in a subsidiary corporation. The reverse triangular merger structure, a § 251 statutory merger between the target and a shell subsidiary of the acquirer where the target is the surviving corporation, is perhaps the most common transaction structure.

In addition to keeping the target's liabilities at a distance, there are a number of other reasons, both business and legal, why the reverse triangular merger structure is so often used. These include, but are not necessarily limited to, the following:

- Because § 251's voting and other requirements only apply to the constituent parties in a merger, the triangular structure dispenses with the need for a § 251 vote of the shareholders of the acquirer since it is not a constituent corporation in the merger transaction. As discussed above, other legal or stock exchange rules may still require that the acquirer have a shareholder vote, such as the NYSE and NASDAQ rules which require a shareholder vote if the acquirer issues greater than twenty percent of its outstanding stock or the requirement to have a vote to amend the parent's certificate of incorporation if it needs to authorize additional shares in connection with the transaction.

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- Engaging in a merger at the subsidiary level requires little, if any, operational changes at the acquirer level. Consequently, it is administratively easier on the acquirer.
- There may be significant brand value in the target entity: a direct merger where the target entity disappears would destroy some of the value that the acquirer is seeking in the merger. By selecting a structure that permits the target to survive, the acquirer is able to take advantage of that existing brand value.
- When the acquirer holds the target at arm's length as a subsidiary, the target can continue to operate independently of the acquirer, thus reducing the need to engage in integration of the entities' operations.

While the reverse triangular merger is the most common structure for the reasons listed above, there may be circumstances when dealmakers would prefer a forward triangular structure with the target corporation disappearing and the merger subsidiary surviving. The most common circumstance when this occurs is due to tax benefits, which are discussed briefly in Section E below. In addition, when the target has negative brand value, it may be in the best interests of the acquirer not to continue the brand of the target. For example, in 2001, Dynegy and Enron announced a transaction in which Enron was to be acquired by Dynegy in a forward triangular merger. The parties' intent was for Dynegy to acquire Enron while allowing the Enron brand to die. (The transaction never closed.)

b. Short Form Mergers

In addition to the § 251(c) "long form" mergers described in the previous Sections, "short form" mergers provide for a merger without the requirement of a shareholder vote. Short form mergers may be accomplished: between a parent corporation and a wholly-owned subsidiary pursuant to § 251(g); between a parent and a subsidiary in which the parent owns at least 90% of the outstanding stock pursuant to § 253; between a parent and a wholly-owned foreign corporation or a foreign subsidiary in which a parent owns at least 90% of the outstanding stock pursuant to § 267; and between an acquirer and a target in connection with a two-step friendly tender offer pursuant to § 251(h). A short form merger accomplished pursuant to § 251(h) is also known as an "intermediate form" merger. The reason for permitting certain mergers without shareholder votes is one of economy. To the extent all or a very high percentage of the shares of a subsidiary are owned by the parent corporation, no rights are vindicated by requiring a shareholder vote. The result of such a vote would never be in doubt and is thus not necessary. In such cases, the statute protects minority shareholders through the availability of the appraisal remedy (see Chapter III). Recall as well that

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there is no shareholder vote required for the surviving shareholders in a merger meeting the conditions of § 251(f). Here, the reason is that the shareholders' investment has not changed sufficiently that they should get a vote, just as they do not get a vote on most other (non-major) transactions their company engages in.

We begin with § 253. Section 253 permits firms with a shareholder who holds at least ninety percent of the company's outstanding shares (the parent) to eliminate or squeeze out the minority shareholders without such shareholders being able to vote. The parent's shareholders can't vote either, unless the parent will be merged with and into its 90% owned subsidiary such that the subsidiary survives. A § 253 short form merger is initiated by the parent corporation with the filing of a certificate of ownership and merger that sets forth the terms of a merger between the subsidiary and the parent. The effect of the merger is to eliminate the equity interests of the minority shareholders. Although such shareholders do not have the right to vote to approve the transaction as they would with other statutory mergers, they have the right to an appraisal if they believe the price to be paid to them in the merger did not represent their shares' fair value (see Chapter III on appraisal).

In 2013 the Delaware legislature adopted § 251(h), which provides for an alternative short form merger, known as an intermediate form merger for companies the stock of which is listed on a national securities exchange or is held by more than 2000 holders. The Section 251(h) intermediate form merger is used in combination with friendly tender offers, and permits a back-end merger without a vote of the target shareholders following a tender offer if its conditions are satisfied. (The regulatory regime applicable to tender offers is discussed in Chapter V). The back end is needed because it is almost never the case that 100 percent of the shares will be tendered. Before § 251(h), squeezing out the remaining shareholders required a shareholder vote unless the conditions for a § 253 short form merger were satisfied, and they often were not. Not only would offerors not get 100 percent of the shares, they might not even meet the ninety percent threshold needed for a § 253 short form merger. To allow a merger without a shareholder vote under these circumstances, targets regularly granted "top-up options" to acquirers following completion of a friendly tender offer transaction. As the name suggests, top-up options are options for the amount of shares needed to "top up" the tender offeror's shareholdings to reach the ninety percent threshold. Having reached this level of ownership, the acquirer could then proceed with a § 253 short form merger.

Before the adoption of § 251(h), top-up options were commonly used. One article recounts the following history and statistics: "[s]urfacing in a handful of deals in 2000, it spread quickly. By 2004, one-third of tender

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offers included a top-up, according to MergerMetrics. By 2008, it was virtually 100 percent."[7]

One reason for the challenges against top-up options is that getting an acquirer to at least 90% ownership sometimes required the target to issue very large amounts of stock. These very large issuances caused concern with stock exchanges, and raised the specter that stockholders who did not tender might find themselves adversely affected in subsequent appraisal proceedings. Top-ups have been challenged in court, but their validity under certain conditions, including protection of non-tendering shareholders' rights in appraisal, has generally been upheld.[8]

Adoption of § 251(h) by the Delaware legislature was intended to make the top-up option irrelevant. Under § 251(h), a vote is not required for a squeeze-out merger so long as the parties (the tender offeror and the target) first enter into a merger agreement in conjunction with the announcement of a tender offer. That merger agreement must specify that the transaction is governed by § 251(h), and that the acquirer will have voting control of the corporation following completion of the tender offer, and that the shares to be cancelled pursuant to § 251(h) will be converted into the right to receive the same consideration as shares tendered in the tender offer immediately prior to the § 251(h) short form merger. The tender offer may be conditioned on a minimum number or percentage of shares being tendered, and the shares received in the tender offer must carry sufficient votes to approve a merger. The shares received in the tender offer must carry sufficient votes to approve the merger. In most cases, this simply means that a majority of shares must be tendered. But if a corporation's charter required a percentage greater than a majority to approve a merger, at least that percentage of shares would need to be tendered. § 251(h)(3).

The § 251(h) structure is functionally equivalent to the top-up option but it is far simpler, doing directly in one step what the top-up option required two steps to do. In states which have not adopted the § 251(h) structure, top-up options are still viable methods for conducting a back-end squeeze-out merger that does not require target shareholder approval. Other states are now beginning to adopt analogues to Section 251(h) in their corporation laws. Among the states to have so far adopted their own versions of the law are Maryland, Minnesota, Texas, and Virginia.[9]

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[7] Liz Hoffman, *Top-Up Option, We Hardly Knew Ye*, Law360, April 26, 2013, available at http://www.law360.com/articles/436259/top-up-option-we-hardly-knew-ye.

[8] *Olson v. Ev3, Inc.*, 2011 WL 704409 (Del. Ch. 2011) (holding that a top-up option is lawful provided the option holder first possesses voting control and the value of the minority shares in appraisal are not adversely affected by the exercise of the option).

[9] Noah Kornblith, Delaware's Latest M&A Export to Other States: Streamlined Tender Offers and Section 251(h), O'Melveny & Myers, January 19, 2016, available at https://www.omm.com/resources/alerts-and-publications/alerts/delawares-latest-manda-export-to-other-states-streamlined-tender-offers-and-section-251h/.

One of the first transactions to use DGCL § 251(h) was Paulson & Co.'s acquisition (through a wholly owned subsidiary) of Steinway Musical Instruments, Inc. by means of a friendly tender offer.

Given that § 251(h) had just recently been enacted, the Steinway merger agreement also granted a top-up option, to be used if § 251(h) was not available. Here is relevant language from the offer to purchase sent by Paulson to Steinway shareholders:[10]

> If we acquire at least one Share more than 50% of the Shares on a fully-diluted basis in the Offer, in accordance with the terms of the Merger Agreement, we will complete the Merger without a vote of the stockholders of Steinway pursuant to Section 251(h) of the General Corporation Law of the State of Delaware (the "DGCL"). We do not foresee any reason that would prevent us from completing the Merger pursuant to Section 251(h) of the DGCL within one business day following the consummation of the Offer. However, in the event that we are unable for any reason to complete the Merger pursuant to Section 251(h) of the DGCL within one business day following the consummation of the Offer, and if we do not acquire at least one Share more than 90% of the Shares on a fully-diluted basis in the Offer, then the Purchaser will exercise the Top-Up Option (as described below), and thereafter effect the Merger pursuant to Section 253 of the DGCL without a vote of the stockholders of Steinway. Whether the Merger is effected pursuant to Section 251(h) or Section 253 of the DGCL, (i) stockholders of Steinway will be entitled to appraisal rights under Delaware law if they do not tender Shares in the Offer and (ii) stockholders of Steinway who do not validly exercise appraisal rights under Delaware law will receive the same cash consideration for their Shares as was payable in the Offer.

The offer to purchase summarizes the merger agreement and the tender offer, entered into at the time of the tender offer as required under § 251(h). Note, too, that as required by DGCL § 251(h), the merger is to be completed promptly after the tender offer is consummated, and that the non-tendering shareholders who do not exercise appraisal rights will receive the same consideration as that paid to shareholders who tendered in the offer.

c. Interspecies Mergers

Until now, we have focused on the mechanics and the legal effects of statutory mergers where the constituent corporations are two Delaware corporations. However, mergers are not limited to transactions between

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[10] The offer to purchase is available at http://www.sec.gov/Archives/edgar/data/911583/000119312513342308/d587541dex99a1a.htm.

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domestic corporations. There are many "interspecies mergers" between corporations incorporated in different states, or between different types of business organizations (e.g. an LLC merging with a corporation or a Delaware corporation merging with a California corporation). All of these types of mergers are permitted. However, they are covered under provisions of the code other than § 251. For example, § 252 covers mergers between Delaware corporations and "foreign" corporations.[11] The requirements to effectuate a merger under § 252 are substantially the same as for a merger under § 251. In addition to the requirements under the domestic law, the foreign corporation will also have to ensure that the merger complies with the applicable interspecies merger provisions of its own jurisdiction.

C. MERGERS IN PRACTICE: THE DELL EXAMPLE

The following Section discusses the mechanics of a statutory merger using the example of Dell.

Typically, sections 1 and 2 of a merger agreement describe the merger transaction as well as the effect of the merger on the capital stock of the seller and whether and how the certificate of incorporation and the bylaws of surviving corporation will be affected by the merger transaction.

Below are excerpts of the Dell merger agreement. The merger is structured as a reverse subsidiary merger with the merger subsidiary disappearing and Dell continuing as the surviving corporation and wholly-owned subsidiary of the parent. The merger agreement lays out a number of the changes to be affected by the transaction. For example, the merger agreement describes amendments to the existing certificate of incorporation and bylaws, as well as designation of new directors for the surviving corporation. Upon the merger, the merger agreement provides that the directors of the merger subsidiary will become the directors of Dell and the previous directors of Dell will be out. Officers of Dell remain the same before and after the transaction.

There is a common misperception that in a merger transaction, the stock of the target corporation remains outstanding and that the merger involves an exchange of cash for the target's stock. What actually happens is a little more subtle than that. In a merger, the rights and status of stock of both the surviving and disappearing corporations are re-designated as specified in the merger agreement. In the Dell merger transaction, upon filing of the certificate of merger with the state, the publicly traded shares of Dell are cancelled and converted into the right to receive cash. Although

[11] "Domestic" corporations are incorporated in Delaware or the home jurisdiction. "Foreign" corporations are any corporations incorporated in a jurisdiction other than Delaware or the home jurisdiction. These include truly foreign corporations (e.g. incorporated in the U.K.) and corporations from other states (e.g. Nevada).

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the merger subsidiary disappears, its stock is converted into the stock of the surviving corporation. Following the transaction, former public shareholders of Dell are left holding rights to receive cash while the former shareholders of the merger subsidiary are left in control of Dell, the surviving corporation, now owning all of its shares.

Below, you will find excerpts from the Dell merger agreement. Read the agreement to understand the mechanics of a merger transaction in practice:

DELL, INC. MERGER AGREEMENT

ARTICLE I

THE MERGER

Section 1.1 The Merger. On the terms and subject to the conditions set forth in this Agreement, and in accordance with the DGCL, at the Effective Time, Merger Sub will merge with and into the Company [Dell], the separate corporate existence of Merger Sub will cease and the Company will continue its corporate existence under Delaware law as the surviving corporation in the Merger (the "Surviving Corporation").

[*This section describes the transaction that will occur. In this case, you can see that Section 1.1 describes a reverse triangular (subsidiary) merger in which a wholly-owned subsidiary of the acquirer is merged into the target, with the target surviving*.]

Section 1.2 Closing. The closing of the Merger (the "Closing") shall take place at the offices of Debevoise & Plimpton LLP, 919 Third Avenue, New York, New York at 9:00 a.m. Eastern Time, on a date which shall be the second Business Day after the satisfaction or waiver (to the extent permitted by applicable Law) of the conditions set forth in Article VI (other than those conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of such conditions) or at such other place, time and date as the Company and Parent may agree in writing; provided that without the prior written consent of Parent, the Closing shall not occur prior to the earlier of (x) a date during the Marketing Period specified by Parent on no fewer than two (2) Business Days' notice to the Company (it being understood that such date may be conditioned upon the simultaneous completion of the Parent Parties' financing of the transactions contemplated by this Agreement) and (y) the final day of the Marketing Period. [*Marketing Period is defined as the first twenty consecutive business days starting after the date of the agreement.*] The date on which the Closing actually occurs is referred to herein as the "Closing Date".

[*This section describes the completion of the transaction, known as the Closing. The Closing can occur only after all the conditions precedent set*

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forth in the merger agreement have been fulfilled or waived. Although the customary language of this provision describes an in-person closing in the offices of the acquirer's counsel, these days it is more likely that a transaction will close by e-mail without a ceremony.]

Section 1.3 Effective Time. Subject to the provisions of this Agreement, at the Closing, the Company shall cause a certificate of merger (the "Certificate of Merger") to be duly executed, acknowledged and filed with the Secretary of State of the State of Delaware in accordance with Section 251 of the DGCL. The Merger shall become effective at such time as the Certificate of Merger has been duly filed with the Secretary of State of the State of Delaware or at such later date or time as may be agreed by the Company and Parent in writing and specified in the Certificate of Merger in accordance with the DGCL (the effective time of the Merger being hereinafter referred to as the "Effective Time").

[*After the closing has occurred, the acquirer will cause a Certificate of Merger to be filed with state authorities. Once this certificate has been accepted by the state, the merger is effective*.]

Section 1.4 Effects of the Merger. The Merger shall have the effects set forth in this Agreement and the applicable provisions of the DGCL.

Section 1.5 Certificate of Incorporation and Bylaws of the Surviving Corporation. At the Effective Time, (a) the certificate of incorporation of the Surviving Corporation shall be amended and restated in its entirety to be in the form attached hereto as Exhibit A (the "Charter"), until thereafter amended, subject to Section 5.10, as provided therein or by applicable Law and (b) the by-laws of the Surviving Corporation shall be amended and restated, subject to Section 5.10, in their entirety to be in the form attached hereto as Exhibit B (the "Bylaws"), until thereafter amended as provided therein or by applicable Law.

[*In the course of a merger, the statute permits the surviving corporation to amend its certificate of incorporation as part of the transaction. Section 1.5 indicates that at the effective time of the merger, Dell will amend its certificate. The amended certificate is attached to the merger agreement as an exhibit*.]

Section 1.6 Directors. The directors of Merger Sub immediately prior to the Effective Time shall, from and after the Effective Time, be the directors of the Surviving Corporation and shall hold office until their respective successors are duly elected and qualified, or their earlier death, incapacitation, retirement, resignation or removal, in accordance with the Charter and Bylaws.

[*Section 1.6 specifies the identities of the board of directors of the surviving corporation. In this case, the directors of the target are replaced and the board of the merger sub becomes the board of the surviving*

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corporation. In some cases, this provision is highly negotiated. More often in a reverse triangular merger, the board of the target is replaced by a board comprised entirely of employees of the acquirer.]

Section 1.7 Officers. The officers of the Company immediately prior to the Effective Time shall, from and after the Effective Time, be the officers of the Surviving Corporation and shall hold office until their respective successors are duly elected or appointed and qualified, or their earlier death, incapacitation, retirement, resignation or removal, in accordance with the Charter and Bylaws.

[*Just as the directors can be replaced as part of the merger transaction, corporate officers can and often are replaced pursuant to this section of the merger agreement. In this case, the corporate officers of the target are not changed as part of the merger. The pre-merger officers of Dell remain the post-merger officers of Dell*.]

ARTICLE II

CONVERSION OF SHARES; EXCHANGE OF CERTIFICATES

Section 2.1 Effect on Capital Stock. At the Effective Time, by virtue of the Merger and without any action on the part of the Company or the Parent Parties or the holders of any securities of the Company or any other Person:

(a) Conversion of Common Stock. Each Share, other than Excluded Shares, Company Restricted Shares and Dissenting Shares, issued and outstanding immediately prior to the Effective Time shall be converted automatically into the right to receive $13.65 in cash [*Editor: The agreement was amended to raise the consideration to $13.75 per share, and a dividend of $.13 per share, for a total of $13.88 per share*.], without interest (the "Merger Consideration"), whereupon all such Shares shall be automatically canceled upon the conversion thereof and shall cease to exist, and the holders of such Shares shall cease to have any rights with respect to such Shares other than the right to receive the Merger Consideration (less any applicable withholding Taxes), upon surrender of Certificates or Book-Entry Shares in accordance with Section 2.2.

. . . .

(c) Conversion of Merger Sub Common Stock. Each share of common stock, par value $0.01 per share, of Merger Sub issued and outstanding immediately prior to the Effective Time shall be converted into and become one validly issued, fully paid and nonassessable share of common stock, par value $0.01 per share, of the Surviving Corporation.

[*In a merger transaction, there is no actual purchase of the stock of the target corporation. Rather, coincident with the merger—and by operation of*

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law—the rights of the stock of the constituent corporations are re-designated pursuant to the terms of this Section 2.1. The stock of the target outstanding immediately prior to the merger ceases to have any rights with respect to the surviving corporation and is converted into the right to receive the merger consideration. The stock of the disappearing merger subsidiary is re-designated as the stock of the surviving corporation. Following the transaction, shareholders of the target are holding stock representing a right to receive payment from the acquirer while the acquirer is holding the stock of the surviving corporation.]

D. SALE OF ALL OR SUBSTANTIALLY ALL THE ASSETS

1. DGCL SECTIONS 271 & 275

Another common statutory transaction structure is the asset sale. Firms can sell assets at any time. In fact, sales of divisions or subsidiaries are not uncommon transactions. For the most part, sales of corporate assets are simply corporate actions taken in the ordinary course, and do not necessarily implicate the corporate law.[12] Indeed, sale of a corporate asset differs little from the sale of any other property. It requires a title transfer and perhaps payment of sales tax. Statutory corporate law is implicated only when "all or substantially all the assets of the corporation" are being sold.[13] The underlying reason is that, like a merger, a sale of "all or substantially all the assets of the corporation" is a significant event in the lifecycle of the company, requiring shareholder approval.

A sale of all or substantially all the assets of a corporation is typically structured as two separate transactions to be undertaken very close in time. The first transaction is the actual sale of "all or substantially all the assets" of the corporation pursuant to § 271. This transaction is then immediately followed by a voluntary dissolution pursuant to § 275. Although the mechanics of this transaction are slightly more complicated, the result is functionally equivalent to a direct merger in that post-transaction, the seller no longer exists and the acquirer holds title to the seller's assets.

The asset sale, like the statutory merger, is a friendly transaction in that it may only be accomplished with the assent and cooperation of the

[12] Indeed, one important body of at law at issue in these contexts is contract law. The parties specify what they want to transfer, and if a disagreement arises, the court interprets the contract to determine what assets were in fact transferred by the contract. A recent case that used contract principles to decide such a dispute is *Friendfinder Networks Inc. and Various, Inc. v. Penthouse Global Media, Inc.*, C.A. No. 12436–VCMR (Del. Ch. May 26, 2017).

[13] A sale of substantially all the assets of the corporation is known by tax professionals as a "C" reorganization. In order for an asset sale to be deemed a non-taxable event under IRC § 368(a)(1)(C), the acquiring corporation must acquire substantially all the assets of the seller in exchange solely for voting stock of the acquirer.

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seller's board of directors. The statute requires the seller's board to recommend the transaction to its shareholders. In the typical asset sale, the buyer and the seller agree to an asset purchase agreement, which, like a merger agreement, outlines the terms and conditions of the sale. The agreement will usually describe with some level of specificity the assets to be sold to the buyer as well as the assets and liabilities to be left behind.

Unlike in a merger, where the assets of the seller become the assets of the buyer by operation of law upon consummation of the transaction, in the asset sale transaction, the title for each of the identified assets must be individually transferred to buyer. This makes the asset sale more cumbersome. The asset sale also generates sales tax liabilities that are not present in a merger transaction. Notwithstanding these drawbacks, there are reasons why parties might opt to structure their transaction as a sale of substantially all the assets rather than a merger. First among these is the ability, subject to limitations discussed below, to leave certain liabilities behind.

The statute requires that the seller's board adopt a resolution that "deems [the proposed asset sale] expedient and for the best interests of the corporation."[14] At the same board meeting, board members will typically adopt another resolution "deem[ing] it advisable in the judgment of the board" that the corporation be dissolved upon completion of the asset sale. The dual transactions are then sent to shareholders for their votes. The affirmative vote of a majority of the outstanding stock of the corporation is required to adopt a resolution approving the sale of substantially all the assets of the corporation. Similarly, the affirmative vote of a majority of the outstanding stock of the corporation is required to adopt a resolution approving the voluntary dissolution of the corporation.

When the sale is consummated, the designated assets of the seller are transferred to the buyer, and the seller receives the consideration. The consideration is used to pay off the liabilities of the seller and any franchise taxes it owes, and then the balance is distributed to the seller's shareholders in the form of a special dividend. Immediately following the dividend payment, the seller files a certificate of dissolution with the state and its separate existence ends. The result of the transaction is that all or substantially all the assets of the seller are now in the hands of the buyer and the shareholders of the seller are holding consideration for their pro rata shares of the selling corporation. In effect, the result is the same as a direct merger. The transaction can be structured so that a subsidiary of the buyer is the actual acquirer; this yields the same result as a triangular merger.

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[14] *See* Title 8 DGCL § 271(a).

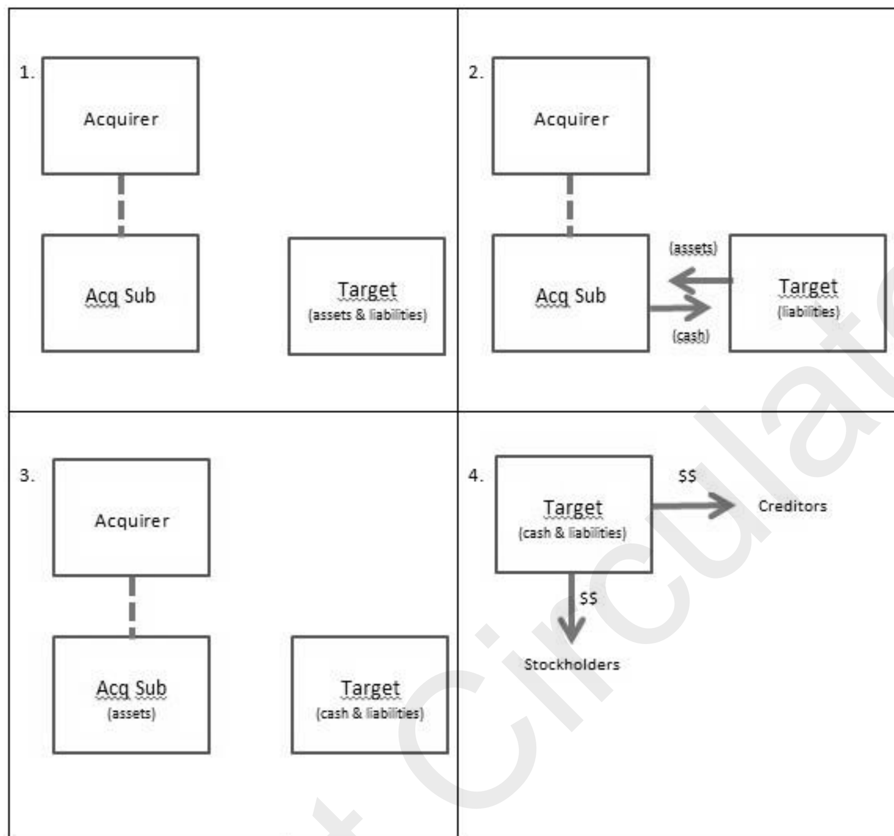

Figure 5: Sale of All or Substantially All the Assets. This asset purchase is structured as a purchase through a wholly-owned acquisition subsidiary of the buyer. In exchange for cash consideration, all or substantially all the assets of the seller are transferred to the acquisition subsidiary of the buyer. Following the transaction, the former assets of the seller are held by the buyer's subsidiary. The seller holds cash and liabilities. The seller then pays off its creditors and distributes whatever cash is left to the shareholders in the form of a special dividend. Following this, the seller voluntarily dissolves.

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2. THE DEFINITION OF "ALL OR SUBSTANTIALLY ALL"

Sales of corporate assets are sometimes challenged by shareholders. The issues raised are often about whether the asset(s) sold by the corporation constituted "all or substantially all the assets" of the corporation. If they do, then shareholders have the right to vote to approve the transaction. If not, then boards are free to dispose of assets without the consent of shareholders. Consequently, what constitutes "all or substantially all the assets of the corporation" can be hotly contested. Take, for example, the case of *Hollinger v. Hollinger Int'l, Inc.*, 858 A.2d 342 (Del.

2004). In *Hollinger*, the board decided to sell certain assets of the corporation, including the high profile United Kingdom (U.K.) newspaper, The Telegraph (Hollinger also owned the Chicago Tribune and the Jerusalem Post). The controlling shareholder, who was temporarily unable to exert direct control over the corporation because of legal action against him at the time, sought to block the sale, claiming that Hollinger's Telegraph newspaper unit constituted "all or substantially all the assets" of the corporation, so a sale could not proceed without shareholder approval.

In deciding whether a vote of the shareholders was required, the Chancery Court relied on a test announced many years prior in *Gimbel v. Signal Companies, Inc.*, 316 A.2d 599 (Del. 1974). Section 271, the statute governing voting requirements for asset sales, does not require a vote when any major asset or trophy is sold; it requires a vote only when the assets to be sold, when considered quantitatively and qualitatively, amount to "all or substantially all" of the corporation's assets. In this case the Telegraph comprised fifty-six to fifty-seven percent of the assets of Hollinger Int'l as well as forty-nine percent of the earnings of the revenue.

The court in *Hollinger Int'l* stuck to the principle that if the sale is of assets quantitatively vital to the operation of the corporation, is out of the ordinary, and substantially affects the existence and purpose of the corporation, then it is beyond the power of the board of directors without a shareholder vote. Assets are "quantitatively vital" to the corporation when they are necessary to the continuation of the corporation's life. Merely being an important or a large asset, or even more than fifty percent of net assets as was the case of the Telegraph, does not necessarily make the assets quantitatively vital. More is required. In addition, the transaction in question has to be out of the ordinary for the corporation. The modern corporate holding company structure, in which corporations move into and out of businesses through the purchase and sale of subsidiaries, makes it difficult these days to characterize the sale of any single subsidiary as "qualitatively vital" such that it affects the purpose and existence of the ongoing business enterprise.

When asked to decide whether a sale of Hollinger's Telegraph Group constituted a sale of substantially all the assets of Hollinger, which would have triggered the requirement for a shareholder vote, the court ruled that it did not. Certainly, the Telegraph was a high-profile asset that brought with it a high degree of social prestige in the U.K. for the controlling shareholder. However, social cachet and the ability to "have dinner with the Queen" is not the same as the asset being qualitatively vital to the corporation. Following the transaction, Hollinger remained an active participant in the publishing business, although now focused on different markets. The sale of the Telegraph division did not affect either the existence or the purpose of the corporation.

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The court also ruled that the Telegraph Group was not quantitatively vital to the corporation as a whole. Although it did make up just over half of the corporation's assets at the time, the court noted that half is not "substantially all." Indeed, in selling the U.K. assets while holding onto U.S. based publishing assets, Hollinger retained the fastest growing assets in its portfolio. While certainly smaller post-transaction, with the growth prospects of the remaining assets there was no question that Hollinger would be in a position to continue profitably. Ultimately, the court concluded that the sale was not quantitatively vital under the *Gimbel* test; although the "Telegraph Group is somewhat more valuable than" the Chicago Tribune, it was not qualitatively vital since Hollinger Int'l could "continue as a profitable entity" after the Telegraph's sale.[15]

3. DE FACTO MERGER DOCTRINE

In some states, sales of all or substantially all the assets of a corporation not only require a shareholder vote but also give shareholders appraisal rights. But this is not true in all states. In those states, including Delaware, sales of all or substantially all assets do not give appraisal rights. Some shareholders in such states have nevertheless sought appraisal rights upon an asset sale, arguing that because the result is the same as a statutory merger, they should get the same rights that they would get in a merger. Parties should not, according to the de facto merger doctrine, be able to avoid the protections afforded shareholders by reason of managers' decisions as to how to structure transactions. In a de facto merger, shareholders receive the same rights, including the right to an appraisal, that would otherwise be afforded them had the board of the seller elected to conduct the transaction as a merger and not an asset sale.

Some states have allowed shareholders to obtain appraisal rights under the de facto merger doctrine. But most states, including Delaware, do not.[16] Delaware follows the equal dignity doctrine. The equal dignity doctrine provides that each provision of the corporate statute has equal dignity before the law. Delaware courts will not penalize boards of directors who comply with one provision of the statute and not another, and so will not apply the laws related to a merger to an asset sale (and vice versa). A leading case, *Hariton v. Arco Electronics, Inc.*, 188 A.2d 123, 125 (Del. 1963), quoted approvingly from an earlier case describing "the general theory" of Delaware corporate law, "that action taken pursuant to the

[15] "Although both Groups are profitable, valuable economic assets and although the Telegraph Group is somewhat more valuable than the Chicago Group, International can continue as a profitable entity without either one of them."

[16] See *Hariton v. Arco Electronics, Inc.* 188 A.2d 123 (Del. 1963). The seminal case applying the de facto merger doctrine to allow shareholders to get appraisal rights in an asset sale is *Farris v. Glen Alden Corp.*, 143 A.2d 25 (Pa.1958), decided under Pennsylvania law. After that case, there have been various statutory amendments and cases which, together, make it seem as though the use of the de facto merger doctrine in Pennsylvania to obtain appraisal rights may be dead, or at least severely limited. See *Terry v. Penn Central Corp.*, 668 F. 2d 188 (3rd Cir. 1981).

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authority of the various sections of that law constitute acts of independent legal significance and their validity is not dependent on other sections of the Act."

Delaware's strict statutory construction rule was recently upheld in *North Miami Beach General Employees' Retirement Plan v. Dr Pepper Snapple Group, Inc.*[17] In that case, Keurig was the "acquirer" in the ordinary sense of the term since its shareholders would control 87% of the combined companies.

> However, the transaction was structured so that Keurig became an indirect wholly-owned subsidiary of Dr Pepper through a reverse triangular merger in which a newly formed wholly-owned subsidiary of Dr Pepper was merged into the parent company of Keurig. As a result of such structure, Dr Pepper stockholders received a one-time cash dividend (funded by cash infusions to Dr Pepper at the time of the merger, in part from third-party sources, but also including a dividend that it was receiving from Keurig's parent company as its direct subsidiary immediately following the merger) and retained their shares of Dr Pepper, which post-merger accounted for only 13% of the equity of the combined company and the indirect owners of Keurig (the stockholders of its holding company parent) received shares of Dr Pepper resulting in them holding the remaining 87% of the equity of Dr Pepper. As such, the Dr Pepper stockholders would customarily be considered as the sellers and Dr Pepper as the "target," as the substance of the transaction was that they received the cash dividend in exchange for transfer of 87% ownership of Dr Pepper.[18]

The court held that stockholders of Dr Pepper were not entitled to appraisal rights under DGCL § 262 because the stockholders were not stockholders of "constituent corporations" in a merger as the statute requires. The court held that under Delaware's doctrine of strict statutory construction "the term 'constituent corporation' as used in Section 262 means an entity actually being merged or combined and not the parent of such an entity."[19]

If a board decides not to structure its transaction as a statutory merger, but rather a sale of substantially all the assets of the corporation, and the corporation complies with the provisions of the statute with respect to that transaction, Delaware courts will not look through the transaction

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[17] C.A. No. 2018–0227–AGB (June 1, 2018).

[18] Marc Casarino and Lori Smith, Delaware Chancery Court Applies Strict Statutory Construction to Reject Appraisal Rights Following Reverse Merger, White & Williams Client Alert, Jun. 8, 2018 available at https://www.whiteandwilliams.com/resources-alerts-Delaware-Chancery-Court-Applies-Strict-Statutory-Construction-to-Reject-Appraisal-Rights-Following-Reverse-Merger.html.

[19] *Dr Pepper* at 2.

and provide shareholders with rights available only under another provision of the law. Rejection of the de facto merger doctrine and Delaware's embrace of the doctrine of equal dignity is extremely important for transaction planners. The doctrine of equal dignity provides transaction planners with sufficient certainty that should they desire to structure their transaction in a particular manner, courts will not disregard that considered choice.

The effect of the equal dignity doctrine is to give deal lawyers substantial latitude in how to structure transactions in order to avoid shareholder votes and appraisal rights. In the prior Sections, we have already seen that acquirers can avoid the need for a shareholder vote by structuring the transaction as a subsidiary merger. Lawyers can also choose between the merger structure and an asset sale to also avoid appraisal rights, and sometimes, a shareholder vote.

All of this being said, however, most states, including Delaware, do allow creditors to use the de facto merger doctrine as a successor liability doctrine. Different states formulate the test differently, but all the tests seek to protect creditors from what might be considered an abuse, where the assets or operations that were their source of repayment have gone elsewhere and the liabilities have not been assumed. A related doctrine allows creditors to recover where the asset buyer is a "mere continuation" of the asset seller.[20] To the extent transaction planners opt for an asset sale structure solely to avoid the successor liability effects of § 259, Delaware courts may look through the form of the transaction and assign liability to the successor entity.

4. FRAUDULENT CONVEYANCE

An important risk facing transaction planners when conducting a sale of substantially all the assets of a company is the risk of fraudulent conveyance under bankruptcy law.[21] For many firms, particularly tech firms, a sale of substantially all of its assets may be being done as an alternative to bankruptcy proceedings; firms engaging in such sales may be vulnerable to such claims. An asset sale may be considered a fraudulent conveyance if at the time the transaction is undertaken, there was actual intent to defraud creditors or if the consideration received for the assets was not of reasonably equivalent value. In order to sustain a fraudulent

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[20] A seminal case on this matter is *Fehl v. SWC Corp.*, 433 F. Supp. 939 (D. Del. 1977). In *Fehl*, the court stated that "If the seller corporation is absorbed into the buyer, and if the seller's shareholders continue to have an ownership interest in the buyer, a merger may be found even though statutory requirements were not followed. Similarly, if a new corporation is formed to acquire the assets of an existing corporation, which then ceases to exist, the successor may be found to be a mere continuation of the predecessor." *See also* *Spring Real Estate LLC v. Echo/RT Holdings, LLC.*, CA No. 7994–VCN (Del. Ch. Dec. 31, 2013). *See generally* John Matheson, *Successor Liability*, 96 MINN. L. REV. 371 (2011).

[21] Fraudulent conveyance is also a significant risk in the context of a LBO transaction.

conveyance claim, the claimant must also show that after the sale, the company was either insolvent (i.e., its liabilities exceeded its assets), or was unable to continue to pay its debts in the ordinary course. Creditors of companies that are about to transfer some or all of their assets may have the right to prevent such transfers before they occur if they are deemed fraudulent conveyances. If the transaction has been consummated, action for fraudulent conveyance and consequent money damages is available against the board of the seller as well as the acquirer of the assets in question.

Fraudulent conveyance issues are common when there is an asset sale. A board will be concerned about future liability for selling an asset for inadequate value or otherwise assuring that the company is neither insolvent nor unable to pay its bills after the sale. To provide comfort on this issue, it is not uncommon for a board to request a "fraudulent conveyance" or "bulk sale" opinion from the company's lawyers in order to ensure that the board is sufficiently protected. The opinion will speak to the value of the asset being sold and consideration received in exchange, as well as the solvency and ability of the company to pay its bills after the transaction. In preparing this opinion the lawyers will rely on certificates as to the financial state of the company and value of the sold asset as provided by either corporate officers or external financial advisers. For a sample bulk sale opinion, see the Online Appendix.

E. TAX CONSIDERATIONS

Tax considerations often drive the structuring of transactions. For deal lawyers, perhaps one of the most significant tax points is the difference between the treatment of forward triangular mergers and reverse triangular mergers.

In a forward triangular merger, an acquirer can pay approximately fifty percent of the consideration in stock, and the stock component of the consideration will be considered a tax-free exchange. The effect of this is that the target's shareholders will not pay tax on the stock consideration they receive in the merger. The cash component, however, is always taxable. In a reverse triangular merger, an acquirer can only pay up to twenty percent of the consideration in cash for the stock component of the consideration to be treated as non-taxable.

The net effect of this difference is that if the acquirer wants to pay more than twenty percent of the consideration in stock but still have a non-taxable stock component, the forward triangular merger is the only option.

We do not include an extensive discussion of the tax treatment of M&A transactions in this casebook. However, we encourage you to take a corporate taxation class in order to familiarize yourself with these issues.

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The best transactional lawyers can work easily with both tax and corporate law principles as they structure and complete transactions.

QUESTIONS

1. What is the rationale for allowing mergers under some circumstances without a shareholder vote? Do you agree with the rationale? Do you think shareholders are adequately protected?

2. Do you agree with Delaware's rejection of the de facto merger doctrine in the context of appraisal rights for asset sales? What are the benefits of allowing form to trump substance? The costs? What are the benefits of allowing equity to override statutes? The costs?

3. Apex Tech and Beta Corp enter into a merger agreement. Pursuant to the agreement Apex will merge with and into Beta with Apex Tech as the disappearing corporation and Beta Corp as the surviving corporation. Shareholders of Apex Tech will receive cash as consideration for their stock. As part of the merger, the surviving corporation will formally amend its certificate of incorporation to change its name to ApexBeta Tech Corp. and increase the number of authorized shares. Do shareholders of Apex Tech have the right to vote on the transaction? Why or why not? Do shareholders of Beta Corp have the right to vote on the transaction? Why or why not?

4. If in the question above the shareholders of Beta Corp are asked to vote on the transaction, what is the minimum number of votes in favor required at a duly called meeting of the shareholders for purposes of considering the merger agreement if you have the following information:

a.	Number of Beta shares authorized:	10,000,000
b.	Number of Beta shares outstanding:	8,000,000
c.	Number of Beta shares present at meeting:	6,000,000

5. Apex Tech and Beta Corp enter into a merger agreement. Pursuant to the agreement, Apex Acquisition Sub, a wholly owned subsidiary of Beta Corp, will merge with and into Apex Tech, with Apex Acquisition Sub as the disappearing corporation and Apex Tech as the surviving corporation. Shareholders of Apex Tech will receive cash as consideration for their stock. Do shareholders of Apex Tech have the right to vote on the transaction? Why or why not? Do shareholders of Beta Corp have the right to vote on the transaction? Why or why not?

6. Apex Tech and Beta Corp enter into a merger agreement. Pursuant to the agreement, Apex Acquisition Sub, a wholly owned subsidiary of Beta Corp, will merge with and into Apex Tech with Apex Acquisition Sub as the disappearing corporation and Apex Tech as the surviving corporation. Shareholders of Apex Tech will receive stock of Beta Corp as consideration for their stock. As a result of the transaction, former Apex Tech shareholders will hold 30% of the outstanding stock of Beta Corp. Do shareholders of Apex Tech

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have the right to vote on the transaction? Why or why not? Do shareholders of Beta Corp have the right to vote on the transaction? Why or why not?

7. Apex Tech and Beta Corp enter into a merger agreement. Pursuant to the agreement, Apex Tech will merge with and into Beta with Apex Tech as the disappearing corporation and Beta Corp as the surviving corporation. Shareholders of Apex Tech will receive stock of Beta Corp as consideration for their stock. As a result of the transaction, former Apex Tech shareholders will hold 10% of the outstanding stock of Beta Corp. Do shareholders of Apex Tech have the right to vote on the transaction? Why or why not? Do shareholders of Beta Corp have the right to vote on the transaction? Why or why not?

8. Delta LLC and Beta Corp enter into a merger agreement. Pursuant to the agreement Delta LLC will merge with and into Beta Corp with Delta LLC as the disappearing corporation and Beta Corp as the surviving corporation. Unitholders of Delta LLC will receive stock of Beta Corp as consideration for their units. As a result of the transaction, former Delta LLC unitholders will hold 10% of the outstanding stock of Beta Corp. Do unitholders of Delta LLC have the right to vote on the transaction? Why or why not? Do shareholders of Beta Corp have the right to vote on the transaction? Why or why not?

9. Apex Tech and Beta Corp enter into an agreement pursuant to which Apex Tech agrees to sell substantially all of its assets to Beta Corp. Apex Tech will receive cash as consideration (which it may then distribute to its shareholders as a dividend). Do shareholders of Apex Tech have the right to vote on the transaction? Why or why not? Do shareholders of Beta Corp have the right to vote on the transaction? Why or why not?

10. Apex Tech and Beta Corp enter into an agreement pursuant to which Apex Tech agrees to sell substantially all of its assets to Beta Corp. Apex Tech will receive stock of Beta Corp as consideration, and Apex Tech will then dissolve. As a result of the transaction, former shareholders of Apex Tech will hold 25% of the stock of Beta Corp. Do shareholders of Apex Tech have the right to vote on the transaction? Why or why not? Do shareholders of Beta Corp have the right to vote on the transaction? Why or why not?

11. Apex Tech and Beta Corp enter into an agreement pursuant to which Apex Tech agrees to sell two of its four divisions to Beta Corp. The two divisions they are selling are the two original corporate divisions of Apex Tech from when Apex was a major force in the manufacture of electronic typewriters. Those divisions, which long made up the corporate identity, have hit on hard times recently. The two remaining divisions are almost equal in size to the original divisions but are in a totally different line of business. Apex Tech will receive cash as consideration. Do shareholders of Apex Tech have the right to vote on the transaction? Why or why not? Do shareholders of Beta Corp have the right to vote on the transaction? Why or why not?

12. Apex Tech agrees to sell substantially all its assets to Beta Corp. As part of the transaction, Beta Corp decides that there are a number of liabilities

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that it would like to leave behind. Is Beta Corp permitted to leave behind certain liabilities or is it required to take all of Apex's liabilities? If Beta is not required to accept all the Apex liabilities, what provisions must be made?

PROBLEMS

1. KKW, a private equity firm wishes to acquire the mining operations of Beta Corp., a publicly traded diversified conglomerate with mining operations (70% of revenues and profits) and a newspaper business (30% of revenues and profits). The mining operations of Beta Corp. have significant liabilities. KKW does not wish to assume these liabilities. The consideration is cash. Please recommend and diagram an acquisition structure for this deal. Please note which company's shareholders will be required to vote in the transaction.

2. Apex Tech, a publicly traded financial services company, wishes to acquire Beta Corp, a publicly traded diversified conglomerate. Apex Tech's general counsel comes to you and says that Apex Tech does not want to have its shareholders vote on the transaction. Please recommend and diagram an acquisition structure for this deal. Does it matter what type of consideration Apex Tech offers?

3. Kappa Corporation, a Delaware corporation, is publicly traded. It presently has 10 million shares outstanding; each share is traded on the NYSE, and the share price has been stable, at $100/share. Kappa has an additional 100,000 shares authorized. Kappa is interested in acquiring the Delta Corporation, and is considering how to structure the acquisition. Recently, Delta turned down a bid for $350,000,000 on grounds that it was too low, but stated that it was interested in being acquired for an appropriate price. On what matters might Kappa shareholders have a vote if Kappa uses its own stock in the transaction? Consider both a purchase of Delta's assets and a direct merger in which Kappa survives.

4. Using the information available in the Dole Merger Agreement in the Online Appendix (primarily Sections 1 and 2), draft a certificate of merger that complies with the requirements of DGCL § 251 as well as § 103.

5. Using the information available in the Dole Merger Agreement in the Online Appendix, draft board resolutions for the board of the target firm that comply with the requirements of DGCL § 251.

6. Diagram the transaction described here. Of the parties, who gets to vote? Dr Pepper has public shareholders, and is the parent of Merger Sub. Maple Parent Holdings Corp. ("Maple Parent") is a private entity that indirectly owns non-party Keurig Green Mountain, Inc., a leader in specialty coffee and single-serve brewing systems. Non-party JAB Holdings Company S.à r.l. ("JAB") controls Maple Parent.

> On January 29, 2018, Dr Pepper, Maple Parent, and Merger Sub entered an Agreement and Plan of Merger (the "Merger Agreement"). Under the Merger Agreement, Merger Sub will merge "with and into

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Maple Parent," with Maple Parent surviving the transaction as a wholly-owned subsidiary of Dr Pepper (the "Merger"). Each share of Merger Sub common stock will be converted into one share of the surviving corporation (i.e., Maple Parent), and each share of Maple Parent common stock will be converted into the right to receive shares of newly issued Dr Pepper common stock determined pursuant to an exchange ratio set forth in the Merger Agreement. Before the closing of the Merger, Maple Parent will declare a $9 billion cash dividend to Dr Pepper. If completed, the equity holders of Maple Parent immediately before the effective time of the Merger (the "Effective Time") will own approximately 87% of Dr Pepper's common stock immediately after the Effective Time. The public stockholders of Dr Pepper immediately before the Effective Time will retain their shares and own approximately 13% of Dr Pepper after the Merger. After the Merger, JAB will be Dr Pepper's controlling stockholder.

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