I. DEAL STRUCTURES

A. TRADITIONAL STATUTORY MERGER (DIRECT MERGER)

1. Generally

- i. Stock for stock business combination
  - a. Two constituent corporations
    - (1) B enters into a plan of merger w/T
    - (2) B acquires T
      - (i) B survives, T disappears
- ii. Continuing ownership
  - a. Old T SHs are not cashed out-->continue to have equity participation (now as SHs in the combined company, instead of only in T).
- iii. ALL of T's assets and liabilities are transferred to B by operation of law when the merger becomes affected.

2. Plan of Merger Requirements

- **i. MBCA 11.02**
  - a. name of company that will merge and surviving company
  - b. Terms and conditions of merger
  - c. Details regarding the conversion of shares, cash for shares, etc.
  - d. Articles of the merged company
- **ii. DGCL 251(b)**
  - a. Terms and conditions of merger;
  - b. Mode of carrying same into effect;
  - c. For *merger*, amendments/changes to certificate of surviving corporation;
  - d. For *consolidation*, certificate of the resulting company;
  - e. Manner of converting shares;
  - f. Other such things as necessary.

3. Board Approval

- i. **MBCA 11.04(a)** = Plan of merger must be adopted by BOD of company that is party to the merger
- ii. **DGCL 252(b)** = Plan of merger must be adopted by BOD of company that is party to the merger

4. SH Approval

- **i. MBCA 11.04(a) =** Plan of merger must approved by the SHs of each constituent corp.
  - *a. Exceptions*
    - (1) **MBCA 11.04(g)**--SH approval not required if
      - (i) Surviving company or acquiring company in share exchange;
      - (ii) Articles will not be changed;
      - (iii) Each SH will hold same number of shares w/identical rights, privs and prefs; **and**
      - (iv) Issuance of shares does not require vote under MBCA 6.21(f)
        - (a) **MBCA 6.21(f)**--SH vote required IF
          - - Shares are issued for consideration other than cash; **and**
          - - Shares issued to T will comprise more than 20% voting power (20% trigger)
    - **(2) MBCA 11.05**--Short Form Merger
      - (i) If Parent (B) owns 90% of subsidiary (T), then no vote is required-->forgone conclusion.
  - b. Notice requirement [**MBCA 11.04(d)**]
    - (1) If *special meeting* SHs must get proper notice --date, time, place and purpose.
    - (2) Board must present summary of plan and give recommendations.
- **ii. DGCL 251(c)** = Plan of merger must be approved by SHs of each constituent corp.(**majority of quorum**)
  - *a. Exceptions*
    - (1) **DGCL 251(f)**--SH approval NOT required if:
      - (i) Agreement does not amend certificate of the constituent corp.;

- **ii. <u>DGCL 251(c)</u>** = Plan of merger must be approved by SHs of each <u>constituent</u> corp.(**majority of quorum**)
  - *a. <u>Exceptions</u>*
    - (1) **<u>DGCL 251(f)</u>**--SH approval NOT required if:
      - (i) Agreement does not amend certificate of the constituent corp.;
      - (ii) Each share remains the same--no changes to rights, privs or prefs
      - (iii) Shares issued will not exceed 20% of the shares of common stock of *surviving*, constituent corp.
    - (2) **<u>DGCL 253(a)</u>**--Short Form Merger
      - (i) SH approval not required if Parent (B) owns at least 90% of Sub (T).
  - b. Notice Requirement [**DGCL 251(c)**]
    - (1) Whether *special meeting* OR *annual meeting*, SHS need notice of time, place and purpose, whether voting or nonvoting, at least 20 days prior to meeting.
    - (2) Must have copy of agreement or summary.
- **iii. NYSE Rule 312**
  - a. SH approval required prior to the issuance of common stock or securities convertible into common stock IF: (majority of quorum)
    - (1) The common stock has or will have upon issuance voting power of 20% or more; **<u>or</u>**
    - (2) Number of shares of common stock to be issued will be 20% or more of outstanding shares
  - b. No SH approval required when the issuance involves
    - (1) Public offering for cash;
    - (2) Bona fide private financing involving either the sale of common stock OR securities convertible into common stock for cash at book and market value

<u>5. Successor Liability</u>

- **i. MBCA 11.07 =** B succeeds to ALL rights and ALL liabilities of T.
- **ii. DGCL 259** = B succeeds to ALL rights and ALL liabilities of T.

<u>6. Appraisal Rights</u>

- **i. MBCA 13.02(a)** grants the right of appraisal
  - a. <u>Txs that trigger the SH ROA:</u>
    - *(1) Merger Txs IF*
      - (i) SH right to vote OR
        - (a) <u>Exception</u>
          - - No appriasal rights for shares of any class/series that remain outstanding after the merger
      - (ii) Corporation = subsidiary in a short form merger governed by MBCA 11.05
    - *(2) Share exchange IF*
      - (i) Company whose shares will be acquired AND
      - (ii) SH right to vote
        - (a) <u>Exception</u>
          - - No appraisal rights for any class/series of shares that are not exchanged.
    - *(3) Sale of assets pursuant to MBCA 12.02 IF*
      - (i) SH right to vote
    - *(4) Certain articles amendments*
      - (i) Reduces the # shares owned by SH to a fraction of a share if corp has an obligation or right to repurchase those fractional shares
    - *(5) Permits private order that grants right of appraisal in certain types of Txs.*
  - **b.** Appraisal rights are **<u>eliminated</u>** if [**MBCA 13.02(b)(1)(i)-(i)]**:
    - *(1) Market-out Exception*
      - (i) Appraisal rights are elminated IF
        - (a) Shares are listed on NYSE, AMEx, NASDAQ's NMS, **<u>or</u>**
        - (b) Shares satisfy liquidity test
          - - Not listed, but at least 2k SHs and the outstanding shares of such class or series has a market value of at least $20 million (exclusive of value of such shares held by subs, senior execs, directors and beneficial SHs owning more than 10% of shares).
  - c. Appraisal rights are **<u>restored</u>** if [**MBCA 13.02(b)(3)**]:
    - (1) SH is required to accept any consideration other than cash or publicly traded securities OR
    - (2) Certain Txs involving COIs.
- **ii. DGCL 262(a)** grants appraisal rights to SHs of DE corp. that is constituent to merger, whether such corp. is disappearing or surviving and DGCL 262(c) does allow for private ordering (can grant appraisal rights where statute does not mandate it)

c. Appraisal rights are **restored** if [**MBCA 13.02(b)(3)**]:

(2) Certain Txs involving COIs.

ii. DGCL 262(a) grants appraisal rights to SHs of DE corp. that is constituent to merger, whether such corp. is disappearing or surviving and DGCL 262(c) does allow for private ordering (can grant appraisal rights where statute does not mandate it)

a. Appraisal rights are **eliminated** where:

(1) **DGCL 262(b)(1)(i)-(ii) -** Shares to be eliminated are publicly traded **or**

(i) Either listed on exchange or held of record by more than 2k SHs

(2) DGCL 262(b)(1) - right to vote is eliminated under DGCL 251(f).

(i) DGCL 251(f) - SH right to vote is eliminated where

(a) No amendment to certificate;

(b) Same number of shares with identical rights, privs and prefs before and after Tx; AND

(c) Either

- - No common stock or securities convertible into common stock of surviving corp is issued OR
- - Issued stock does not exceed 20% of outstanding stock.

b. Eliminated appraisal rights are **restored**

I'M STILL UNCLEAR ON THIS ONE

(1) Even if shares are publicly traded unless the shares fall w/in one of the following situations:

(i) Shares of a surviving corporation;

(ii) Shares of stock in any other corp that is publicly traded;

(iii) Cash for fractional shares;

(iv) Any combination of the foregoing

B. SHORT FORM MERGERS-"Reorganizational Tx"

1. If Parent (B) owns 90% of Sub (T), then B can absorb T w/o a vote of SHs of either B or T [**DGCL 253**]

i. Vote is a foregone conclusion.

ii. Can typically be effected by duly adopted resolution by the BOD.

iii. Fiduciary duties protect the minority SHs.

a. Weinberger entire fairness test

(1) Fair dealing +

(2) Fair price

2. Downstream/Upstream Mergers

i. Upstream = parent survives

a. Typical short-form merger rules

ii. Downstream = subsidiary survives

a. Requires approval of Parent's SHs

b. Same rule for both DE and MBCA

3. Equal Dignity Rule

i. If a certain action is authorized by statute, the court will give it equal dignity--i.e., independent legal significance--even if it deprives a right that was otherwise reserved.

a. *Federal United Corp. v. Havende*r: During Great Depression, Federal has a dividend overhang for their cumulative preferred SHs. Mgmt decides to merge w/wholly owned sub to get rid of dividend overhang. Federal preferred SHs get no right to vote in this merger (only outstanding stock). π is upset b/c the merger seems to be an end around amending the Articles. Held, no problem. Federal was able to cleanse its balance sheet w/this reorganization--change the internal capital structure. π lost the right to vote, but this was provided in the Articles--not the merger statute. Court will give

(1) ****NOTE - MBCA comes out different (willing to look at substance over form.

4. Board Approval

i. MBCA

a. Sub = no board approval when Parent owns at least 90% stock [**MBCA 11.05(a)**

b. Parent = board approval required [**MBCA 11.04]**

ii. DGCL

a. Sub = no board approval when Parent owns at least 90% [**DGCL 253(a)]**

b. Parent = board approval required, duly adopted board resolution. [**DGCL 253(a)]**

iii. SH Approval

ii. DGCL

b. Parent = board approval required, duly adopted board resolution. [**DGCL 253(a)]**

iii. SH Approval

a. MBCA 11.05 = SH approval not required

b. DGCL 253(a) = SH approval not required

(1) For downstream merger, Parent SHs will be granted right to vote

IS THIS RIGHT????

5. Appraisal Rights

i. MBCA 13.02(a)(1)(ii) = Appraisal rights for SHs of Sub only

ii. DGCL 253(d) = Appraisal right for SHs of Sub only

C. ASSET ACQUISITIONS

1. Generally

i. Can be done either for cash or for stock

a. Stock-for-asset acquisition

(1) Typically two steps

(i) Step 1 = B gives stock to T, and in exchange T gives all or substantially all of its assets to B.

(a) After this step, T is now just a shell or holding company (its only asset is B stock)

(b) It can either continue as a holding company, collecting and distributing dividends, or go on to Step 2.

(ii) Step 2 = T dissolves, and distributes B's stock to its own SHs.

(a) If both steps are carried out, then this looks just like the statutory merger when the dust settles.

b. Cash-for-asset acquisition

(1) No plan of merger

(2) Two step process

(i) T sells its assets to B

(a) All assets go to B, cash goes to T

(b) Liabilities stay w/T UNLESS B assumes them

(ii) T dissolves through liquidating distribution

(3) SH approval?

(i) T = YES

(a) Fundamental change

(ii) B = NO

(a) No fundamental change, just acquiring assets.

- (1) Options for B SHs
  - Vote w/feet;
  - Sue for breach of duty of care (must overcome BJR)
  - Try to vote in a new board

2. Threshold question: Whether the selling corp. (T) proposes to sell all or substantially all of its assets.

i. If so = fundamental change, requires SH vote.

ii. If not = Corporate norm [**DGCL 141(a); MBCA 8.01],** limited only by BJR.

3. Board Approval

i. MBCA 12.02(b) = sale of assets must be initiated by a resolution of T's BOD; B's BOD falls under BJR

ii. DGCL 271 = T BOD must make judgment that the terms of an asset sale are expedient and for the best interests of the company.

4. SH Approval

i. MBCA 12.02(b) = SH approval required if the **disposition would leave the corporation w/o a signifiant continuing business activity**.

a. Safe Harbor - Company is deemed to have a significant continuing business activity ***if***:

(1) 25% of assets are retained **and**

(2) 25% of either income from operation (net sales) OR revenue from operations (earnings)

ii. DGCL 271 = SH approval required if it constitutes the sale of **all or substantially all** of the assets

a. Two step analysis to determine if it is the sale of all or substantially all of the company's assets:

(1) Qualitative

(i) Whether the sale is an **unusual** Tx or one that is made **in the ordinary course of business of the seller** (in which case, it is left to the discretion of the board).

ii. **DGCL 271** = SH approval required if it constitutes the sale of **all or substantially all** of the assets
  a. Two step analysis to determine if it is the sale of all or substantially all of the company's assets:
    (1) Qualitative
      (i) Whether the sale is an **unusual** Tx or one that is made **in the ordinary course of business of the seller** (in which case, it is left to the discretion of the board).
    (2) Quantitative
      (i) Exactly what it sounds like--look at assets, profits etc ($$, %)
        (a) *Gimbel v. The Signal Copmanies, Inc.*: π = SH of Signal. Sues for injunctive relief to prevent sale of all outstanding capital stock of Signal for $480 million to Burmah. Sale was approved by BOD. In order to succeed, π must establish (1) irreparable harm and (2) substantial likelihood of success on the merits. *Held,* there will be irreparable harm for both π and Δ (π claims $300k in damages, the deal comes off the table for Δ), but it is not the sale of all or substantially all of Δ's assets. Δ was in the business of regularly acquiring and disposing of independent branches of it's corporate business.
        (b) Katz v. Bregman: π = owner of 170k shares of Plant industries, brings SH derivative action seeking order enjoining the sale of the Canadian assets of Plant Industries to Vulcan. The BOD of Plant Industries, under of CEO Bregman, sold off a number of unprofitable subsidiaries, and then began the process of selling off Plant Nat'l (Plant Industries' entire Canadian operation)--allegedly Plant's only income producing facility for the last 4 years. Bregman said sale was to improve Plant's balance sheets. π argues this triggers DGCL 271 and so requires SH vote b/c it is the sell of substantially all of Plant's property and assets. *Held*, this is the sale of all or substantially all of Plant's property and assets. Qualitatively, plant was in the business of manufacturing steel drums for use in bulk shipping, not to buy and sell industrial facilities (as opposed to *Gimbel*)--the decision to switch to plastic drums was a drastic departure from the regular line of business (I GUESS!). Quantitatively, Plant Canada = 51% of Plant's remining assets, 44.9% of sales revenues, 52% of it's pre-tax operating income, and revenues of $3,500,000 (compared to losses of $344 million in US).

5. Appraisal Rights
 i. **MBCA 13.02(a)(3) =** appraisal rights are **granted** if there is a SH right to vote
  a. **MBCA 13.02(b)(1)(i)-(ii) = eliminates** appraisal rights if EITHER:
    (1) Their shares are listed on a national exchange **or**
    (2) 2k SHs and the outstanding stock has value of at least $20 million
  b. **MBCA 13.02(b)(3)** = **restores** the right of appraisal if SH is required to receive anything other than cash or publicly traded securities
 ii. **DGCL 251(c) =** NO appraisal rights unless granted in the certificate.

D. STOCK-FOR-STOCK EXCHANGE (SHARE EXCHANGE)

1. Generally
 i. No plan of merger
  a. Instead, B makes separate deal w/each T SH, giving that holder shares in B Co. in exchange for their T Co. shares.
  b. Each T SH will independently decide whether to accept the offer of exchange.
    (1) B Co. may make its offer contingent upon receiving a set % of T Co. shares (i.e., 50%)
      (i) MBCA
        (a) If a majority of T SHs approve the exchange offer, even those dissenting will have to participate in the exchange.
 ii. Once B Co. acquires T Co., B can then liquidate T and then distribute T's assets to itself (as T's SH).
  a. This will end up looking exactly like the statutory merger
 iii. Rationale
  a. Can be carried out over T board's opposition
  b. May be able to avoid T SH vote

2. Board Approval
 i. For all codes
  a. B BOD must approve (under the corporate norm).
  b. T BOD approval not required b/c dealing w/T SHs directly

3. SH Approval
 i. B = No SH approval required unless there is a stock issuance trigger

3. SH Approval

i. B = No SH approval required unless there is a stock issuance trigger

ii. T = No SH right to vote; either sell or don't sell

4. Appraisal Rights

i. No appraisal rights for SHs of either B or T

E. TRIANGULAR MERGERS

1. Generally

i. Involve 3 parties

a. B (acquiring company)

b. T (target in acquisition)

c. New Co (a subsidiary of B created specifically for the Tx)

ii. Forward Triangular Merger

a. B creates NewCo.

(1) Typically NewCo has no assets except shares of stock in the parent or cash from the parent in exchange for NewCo stock.

b. T is then merged into NewCo.

(1) T SHs receive stock in B (not NewCo, the acquiring company)

(i) T's business is now owned by B's subsidiary NewCo rather than directly by B.

(2) T disappears, NewCo survives

(i) NewCo typically assumes the transaction costs of changing its name to T Co.

c. Rationale

(1) Guaranteed to eliminate all minority interest in T

(i) Every T SH is forced to become a B SH

(2) Allows B to avoid SH vote

iii. Reverse Triangular Merger

a. Same as a Forward Triangular Merger, except NewCo. merges into T

(1) Same result as a stock exchange

b. Rationale

(1) Allows B to effect merger w/o SH vote

2. Board Action

i. Forward Triangular Merger

a. MBCA 11.04(a) = BOD approval required by T and NewCo.--NewCo's vote is a foregone conclusion

b. DGCL 251(b) = BOD approval for both T and NewCo--NewCo's vote is a foregone conclusion

ii. Reverse Triangular Merge

a. MBCA 11.04(a) = BOD approval required by T and NewCo.--NewCo's vote is a foregone conclusion

b. DGCL 251(b) = BOD approval for both T and NewCo--NewCo's vote is a foregone conclusion

3. SH Approval

i. Forward Triangular Merger

a. MBCA 11.04(b) = grants right to vote for SHs of both T and NewCo.

(1) MBCA 11.04(g) = **eliminates** right to vote for surviving corp.

(2) If there is an issuance of shares, may trigger vote for B SHs under **MBCA 6.21(f)**

b. DGCL 251(c) = **grants** SH right to vote for both T and New Co.

(1) DGCL 251(f) will **eliminate** NewCo's right to vote

DO I KNOW WHY THIS IS?

(2) If there is an issuance of shares by B, may trigger right to vote under **DGCL 152**.

ii. Reverse Triangular Merge

a. MBCA 11.04(b) = grants right to vote for SHs of both T and NewCo.

(1) MBCA 11.04(g) will not eliminate SH right to vote of either T or NewCo.

(2) If there is an issuance of shares by B, may trigger vote for B SHs under **MBCA 6.21(f)**

b. DGCL 251(c) = grants SH right to vote for both T and New Co.

(1) DGCL 251(f) will not eliminate SH right to vote for either T or NewCo.

(2) If there is an issuance of shares, may trigger right to vote under **DGCL 152.**

4. Right of Appraisal

b. **DGCL 251(c)** = <u>grants</u> SH right to vote for both T and New Co.

(2) If there is an issuance of shares, may trigger right to vote under **DGCL 152.**

4. <u>Right of Appraisal</u>

i. *Forward Triangular Merger*

a. **MBCA**

(1) NewCo does not get appraisal rights b/c there is no right to vote

(2) T will get an appraisal right; but may be eliminated under **MBCA 13.02**

b. **DGCL 262(a) = <u>grants</u>** appraisal rights to NewCo and T SHs

(1) DGCL 262(b)(1) <u>eliminates</u> right of appraisal for NewCo b/c right to vote is eliminated under **DGCL 251(f)**

(i) May also eliminate right for T; depends on facts.

ii. *Reverse Triangular Merger*

a. **MBCA**

(1) T gets appraisal rights (look to **MBCA 13.02** for exceptions)

(i) NewCo is non-issue, b/c B is the only SH

(ii) B SHs don't get appraisal rights b/c B isn't a constituent to the merger

b. **DGCL 262(a)** = **<u>grants</u>** right of appraisal to T's SHs (check for exceptions)

(1) NewCo is a non-issue b/c B is the only SH

(2) B's SHs don't get appraisal rights b/c B is not constituent to the merger.

iii. ***NOTE: NYSE Rule 312 may trigger vote in DE (would already be triggered in MBCA)

F. <u>BINDING/COMPULSORY SHARE EXCHANGE (MBCA ONLY)</u>

WHAT ELSE DO I NEED HERE?

1. MBCA 11.03

i. B obtains ownership of all of T's shares in exchange for either cash or shares of B.

ii. Must be approved in accordance w/**MBCA 11.04**

iii. SH's most approve

iv. BODs of B and T negotiate this deal

a. If the requisite SH vote is met, then the terms of the offer are forced on all of T's SHs

(1) Triggers right of appraisal

(2) B SHs generally do not get appraisal rights b/c the rights only go to those whose shares are being acquired.

2. Old T SHs become B SHs, T remains in tact as a wholly owned subsidiary

i. Same result as reverse triangular merger

G. <u>STOCK PURCHASE FOR CASH ("CHANGE OF CONTROL TX")</u>

1. <u>Generally</u>

i. T SHs sell shares to B for cash.

a. Each signs the stock certificates/K of sale

b. B tenders the shares to the secretary of the corporation who cancels them and issues a new certificate to B.

(1) New owner is B, not B's SHs

(i) Typically members of B management and T management get elected to T's board.

ii. Low Tx costs

a. When T = large PTC, typically done through a tender offer.

iii. T is not involved--only T SHs.

2. <u>Board Approval</u>

i. MBCA:

a. T BOD = No action required b/c they are not a party to the Tx

b. B BOD = Approval of resolution to use the cash to purchase the stock pursuant to the corporate norm.

ii. DGCL:

a. T BOD = No action required b/c they are not a party to the Tx

b. B BOD = Approval of resolution to use cash to purchase stock pursuant to the corporate norm.

3. <u>SH Approval</u>

i. MBCA:

a. T SHs = No right to vote--they vote with their feet (either sell or don't sell)

3. **SH Approval**
   i. **MBCA:**
      a. T SHs = No right to vote--they vote with their feet (either sell or don't sell)
      b. B SHs = No right to vote because purchase with cash does not constitute a fundamental change.
   ii. **DGCL:**
      a. T SHs = No right to vote--they vote with their feet (either sell or don't sell)
      b. B SHs = No right to vote because purchase with cash does not constitute a fundamental change.
4. **Appraisal Rights**
   i. **MBCA:**
      a. T SHs = No appraisal rights--they don't have the right to vote, and either sell or don't sell
      b. B SHs = No appraisal rights--they don't have the right to vote.
   ii. **DGCL:**
      a. T SHs = No appraisal rights--they don't have the right to vote, and either sell or don't sell
      b. B SHs = No appraisal rights--they don't have the right to vote.

H. CALIFORNIA LAW

1. **Reorganizations [CCC 181]**
   i. *Merger Reorganization* [CCC 181(a)]
      a. Merger pursuant to Ch. 11 other than a short ferm merger
   ii. *Exchange Reorganization* [CCC 181(b)]
      a. Acquisition by one domestic corp in exchange in whole or in part for its equity securities (or equity securities of a domestic corp which is in control of the acquiring entity) of equity shares of another domestic corp if, immediately after the acquisition, the acquiring corp has control of the other
         (1) Control [CCC 160]
            (i) Ownership directly or indirectly of shares or equity securities possessing more than 50% of the voting power of a corp.
   iii. *Sale-of-Assets Reorganization* [CCC 181(c)]
      a. Acquisition by one domestic corp. in exchange, in whole or in part, for its equity securities (or the equity securities of a domestic corp which is in control of the acquiring corp) or for its debt securities (or debt securities of a domestic corp which is in control of the acquiring corp) which are not adequately secured and which have a maturity date in excess of five years after the consummation of the reorganization, or both, of all or substantially all of the assets of another domestic corp.
   iv. ***NOTE: If all cash deal, then not a reorganization
2. **Direct Merger [CCC 181(a)]**
   i. Board Approval
      a. **[CCC 1200(a)]** **requires** BOD approval by each constituent corp.
   ii. SH Approval
      a. [CCC 1201(a)] **requires** SH approval
         (1) [CCC 1201(b)] **eliminates** SH right to vote if after the Tx the old SHs own more than 5/6 (83.33%) of the voting power of the surviving or acquiring corp.
            (i) So if B is giving up about 17% of stock, then there may be a vote.
            (ii) Otherwise this isn't a fundamental change.
            (iii) But remember **NYSE Rule 312** if PTC.
      b. Mandatory class voting in CA
   iii. Appraisal Rights
      a. [CCC 1300] **grants** appraisal right if SH vote is required and not eliminated.
         (1) [CCC 1300(b)(1)] **eliminates** right of appraisal w/**market out exception**
            (i) Right of appraisal is **restored** if more than 5% SHs dissent.
               (a) Bs concerned w/dissenting SHs should make it a condition of closing that less than 5% dissent.
3. **Asset Acquisition for Cash**
   i. Threshold question
      a. Is it "all or substantially all"?
   ii. Board Approval
      a. [CCC 1001(a)] T BOD must approve; B BOD does it pursuant to corporate norm **[CCC 300]**
   iii. SH Approval

ii. Board Approval

a. [CCC 1001(a)] T BOD must approve; B BOD does it pursuant to corporate norm **[CCC 300]**

iii. SH Approval

a. [CCC 1001(b)] requires T SH approval for the sell/lease/conveyance/transfer/other disposition of all or substantially all of its assets if the BOD approves **and** the Tx is not in the usual and regular course of business. B SHs have no right to vote.

iv. Appraisal Rights

a. No appraisal rights--this is not a reorganization, and there is no statutory provision granting appraisal rights.

4. Asset Acquisition for Stock [CCC 181(c)]

i. Board Approval

a. [**CCC 1200(c)] requires** BOD approval from both boards b/c equities are being exchanged.

ii. SH Approval

a. [CCC 1201(a)] grants right to vote if BOD has to vote under **CCC 1200**.

(1) [CCC 1201(b)] eliminates SH right to vote if the the corp or its SHs will own 5/6 of the surviving corp.

(i) Restored if:

(a) Amendment to Articles that would require approval [**CCC 1201(c)];**

(b) SHs receive shares of the surviving/acquiring corp w/different rights/prefs/privs than the ones they surrender [**CCC 1201(d)]**

(c) 2/3 approval if close corp and receiving shares in PTC [**CCC 1201(e)]**

iii. Appraisal Rights

a. [CCC 1300] grants appraisal right if SH approval is required and not eliminated.

(1) [CCC 1300(b)(1)] eliminates appraisal rights w/market out exception

(i) Restored if more than 5% SHs dissent.

5. Stock Purchase For Cash

i. Not a reorganization under CCC 181

a. B BOD has to follow fiduciary duties

6. Stock Exchange Agreement [CCC 181(b)]

i. Board Approval

a. [CCC 1200(b)] requires BOD approval of B; no T BOD action required b/c deal is directly w/T SHs.

ii. SH Approval

a. No T SH approval--vote w/feet.

b. [CCC 1201(a)] requires B SH approval

(1) [CCC 1201(b)] eliminates SH right to vote if they will own 5/6 of B after Tx.

iii. Appraisal Right

a. [CCC 1300] grants appraisal right if SH vote is required and not eliminated.

(1) [CCC 1300(b)(1) eliminates appraisal rights w/market out exception.

(i) Restored if more than 5% SHs dissent.

7. Reverse Triangular Merger [CCC 181(b)]

i. Board Approval

a. [CCC 1200(a)] requires BOD approval by both T and NewCo

b. [CCC 1200(e)] requires BOD approval by B.

(1) Won't apply if all cash deal--only equity exchange.

ii. SH Approval

a. [CCC 1201(a)] grants SH right to vote (except for preferred shares where the rights/privs/prefs don't change)

(1) [CCC 1201(b)] eliminates SH right to vote for SHs that will own 5/6 voting power of the surviving/acquiring corporation.

(i) [CCC 1201(c)] restores SH right to vote if there is an amendment to the Articles;

(ii) [CCC 1201(d)] restores SH right to vote if the SHs receive shares of the surviving/acquiring corp with different rights/privs/preferences than those surrendered.

(iii) [CCC 1201(e)] restores SH right to vote if SHs of closed corp receive shares of a PTC.

(a) CHECK FOR MORE RESTORATIONS IN THIS SECTION*****

(iii) [CCC 1201(e)] restores SH right to vote if SHs of closed corp receive shares of a PTC.

(a) CHECK FOR MORE RESTORATIONS IN THIS SECTION*****

iii. Appraisal Rights

a. [CCC 1300(a)] grants appraisal rights to any SHs that are entitled to vote.

(1) [CCC 1300(b)(1)] eliminates appraisal rights w/Market Out, **UNLESS** more than 5% of SHs dissent.

8. Short Form Mergers

i. Upstream

a. Board Approval

(1) If Parent owns 100% then only Parent BOD must approve; if Parent owns more than 90% but less than 100%, both Parent and Sub must approve. [**CCC 1110(a)]**

b. SH Approval

(1) No SH right to vote.

c. Right to Appraisal

(1) Parent SHs don't get ROA;

(2) Sub SHs do get ROA; see CCC 1300 for exceptions and restorations.

ii. Downstream

a. Board Approval

(1) Same as above

(2) Must have pro rata issuance of stock to Parent SHs.

b. SH Approval

(1) If it qualifies as merger reorganization, then Prent SHs get right to vote just like a merger.

(2) Subs do not get to vote.

c. Appraisal

(1) If SH had right to vote, then there will be appraisal rights.

I. CLASS VOTING

1. Voting Standards by Jdx

i. CA =

ii. DE =

iii. MBCA =

2. Prerequisites

i. Triggered when there are multiple classes of outstanding stock.

ii. The right to a class vote must be in the state's corporation statute.

a. CA = mandatory class vote

b. DE = allows class vote if bargained for

c. MBCA = Class vote for mergers

3. Procedure

i. Each class of shares entitled to vote on a Tx must approve it by the requisite majority

ii. SH approval votes are not tallied in the aggregate for all outstanding shares; instead, the requisite approval must be obtained separately w/in each distinct class.

a. EXA: Class A = 1,000 shares; Class B = 500 shares; Class C = 250 shares

(1) So, Class A needs 501, class B needs 251, class C needs 126.

4. Internal Affairs governs

i. *VantagePoint v. Examen*: Examen = DE web based corp. Was going into a reverse triangular merger where Examen would become a wholly owned subsidiary of Reed. VP = DE LLP, owned 83% of Examen's outstanding Series A preferred stock. SH approval required under DE law = Class A and common stock as a single class. Class A holders had the number of votes equal to the number of common stock they would have if their preferred stock was converted. This meant there were 10,297,608 votes, requiring an affirmative vote of 5,148,805. If the vote was done by class, VP could block the merger. VP argued that Examen = quasi-CA corp, and so CA law applies (class vote allowed). *Held*, internal affairs governs, Examen = DE corp, no class vote.

II. DE FACTO MERGER DOCTRINE

A. BACKGROUND

II. DE FACTO MERGER DOCTRINE

A. BACKGROUND

1. De facto merger theory = *theory that a Tx which is not literally a merger, but which is the functional equivalent of a merger in its substantive result, should be treated as if it were one for purposes of appraisal rights and SH vote.*
   i. Usually seek the court, in equity jdx, to issue an injunction unless the statutory requirements for a merger Tx are satisfied.
2. Certain deal structures allow the companies to deny their SHs certain protections that they otherwise would be entitled to.
3. Rests on principle of **equivalency**.
   i. Txs that have the same substantive effect ought to be entitled to the same legal safeguards.
4. Purpose
   i. Protect SHs
   ii. Protect creditors

B. CALIFORNIA

1. ***Fundamental maxim of equity: Substance over form***
   i. *Applestein v. United Board and Carton Corporation*: United, Interstate and Epstein (sole SH of Interstate) = parties to the Tx, structured as a share exchange. At closing, all of Interstate's shares, assets and liabilities go to United; Interstate then dissolves. In return, Epstein gets 160k of authorized but unissued shares of United. When the dust settles, Interstate = wholly owned subsidiary of United. π, a United SHs, sues b/c of share dilution (book value of shares went from $32/share to $23/share). π agues that in essence this is a merger, so π should get appraisal rights as well as NJ voting standard (instead of just NYSE Rule 312--NJ had higher voting standard of 75% of quorum). Held, in substance the Tx is a merger, so United must comply w/statutory requirements.
      a. Factors
         (1) *Transfer of all assets and liabilities?*
         (2) *Pooling of interests?*
         (3) *Pooling of SHs?*
         (4) *Pooling of management?*
         (5) *Dissolution of T?*
      b. Public Policy
         (1) CA accepts that all the same legal safeguards ought to be extended regardless of how you go about the Tx.

C. DELAWARE

1. Does **not recognize** de facto merger doctrine
   i. Equal dignity doctrine/independent legal significance
      a. Each path that is created by the legislature is separate and independent, and so long as you follow the corporate formalities you can pick and choose.
      b. Even if, in substance, you get an outcome that resembles another path, there is no problem
         (1) *Hariton v. Arco Electronics*: Arco (T) is going to sell all assets and liabilities to Loral (B) in exchange for stock, and then T is to dissolve and distribute stock to SHs. π = T SH, claiming that this Tx is a merger, which would mean π can enjoin the Tx b/c π would be entitled to appraisal rights. This looks like a merger b/c old T SHs are mixed w/old B SHs; all assets and liabilities are pooled in B. *Held*, equal dignity rule applies.
         (2) *Rauch v. RCA Co*: GE forms GE Sub to merge w/RCA in reverse triangular merger (RCA survives). RCA shares will be converted into cash (acquisition consideration). At closing, 1 share of RCA common stock has right to receive $66.50; one stock certificate of $3.65 cumulative preferred has right to receive $42.50; one stock certificate of $3.50 cumulative preferred has right to receive $40.00. π, a $3.65 preferred SH, complains that the Tx looks like a redemption--getting cashed out, but the redemption price in the articles is set at $100/share. Articles have also specified that the corp has the right to exercise the redemption. *Held*, equal dignity rule applies. π should have negotiated better when he bought in.

CONTRAST WITH

         (3) *Pasternak v. Glazer:* Forward triangular merger involving Zapata, Zsub and Houlihan. Acquisition consideration = stock of Zapata for all of Houlihan's assets and liabilities. Negotiated by BODs of Zapata and Houlihan's. SHs of Zsub and Houlihan have to approve deal--but Zpata SHs don't get to vote. However, since Zapata is issuing stock for the acquisition consideration, NYSE Rule 312 kicks in and Zapata SHs get right to vote. Under Rule 312, Zapata only needs a majority of outstanding shares entitled to vote to be present, then need a majority of the votes cast to be YES (i.e., yes votes have to be more than no votes). π, Zapata SH, argues that there needs to be an 80% supermajority

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c. ***POLICY
   (1) Creates predictable rules
   (2) Givs BODs and corporate planners confidence

III. APPRAISAL RIGHTS

A. PURPOSE OF APPRAISAL RIGHTS

1. *General Purpose*

i. Based in property rights--protecting owner of property from being stripped of that property.
ii. Holding management accountable--making sure they fulfill their fiduciary duties.
iii. Competing interests
   a. Dissenter's interest in not being dragged into a Tx that he doesn't want to be involved in, right to be paid fair value;
   b. The interests of all the assenting SHs;
   c. Corporation's interest in being able to move on, not being held hostage by dissenting SHs.

2. *Two main problems*

i. Unfairness
   a. The majority approval procedure gives no guarantee that the dissenting SHs are being treated fairly.
ii. Merger
   a. Even if the Tx is financially fair, a dissenting SH may be forced to trade his investment for an investment in a stranger company he or she is not familiar with or interested in.

3. *Nature of Appraisal Rights*

i. Permit the SH to disinvest at a fair price determined by a court.

B. PROCEDURES

1. *Notice by Company*

i. When company gives SHs notice of the special SH meeting to approve Tx, must also advise SHs that they have appraisal rights.

2. *Written demand*

i. SH must notify company of intent to demand appraisal **before** SH vote
   a. Puts management on notice of dissent;
   b. Puts B on notice that it may have to pay appraisal rights
      (1) Often leads to a **walkaway right**
         (i) Closing is contingent on there being a certain max % of dissenting shares.

3. *Voting*

i. Must abstain or vote against merger at SH vote

4. *Deposit of Shares*

i. Early in the process, SH must deposit his or her shares with the company

5. *Timely notice by written demand*

i. Must file a notice that SH doesn't think the acquisition price is fair value, and let management know what you believe is fair value.
ii. Management then either pays that price (won't happen, b/c this is basically an admission that the Tx price was too low) or send a letter saying that the price is actually fair.

6. *Ownership*

i. Must hold shares through effective date of merger.

7. *Hearing on the fairness of the price*

i. Fair price will be the sole issue.

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    i. Fair price will be the sole issue.

C. DETERMINING FAIR VALUE

1. ***Valuation Methods***
    i. Exclude the influence of the triggering Tx
        a. i.e., court will not take into account the proposed Tx when determining fair price.
        b. Rationale
            (1) Since SH is objecting to the Tx and voting against it, he should not be able to benefit from the proposed Tx.
    ii. No discount for minority status or non-marketability
        a. Minority blocks are typically worth less per-share than the corporation as a whole is worth per share--but this will not be taken into account when deciding fair price.
    iii. "Delaware Block"
        a. Most courts consider 3 factors:
            (1) Market price of the shares just before the Tx is announced;
                (i) But not too influential--market price doesn't take into account the control premium
            (2) Net asset value of the company; **and**
                (i) i.e., what the value of the company would be if all the assets were sold.
            (3) Earnings valuation of the company
2. ***DE Approach: Any Acceptable Methods***
    i. *DE courts must allow proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court.*

D. APPRAISAL RIGHTS AS EXCLUSIVE REMEDY

1. ***When Appraisal is Exclusive Remedy***
    i. If fair price is the only issue, then appraisal rights = exclusive remedy
2. ***When Appraisal is NOT Exclusive Remedy***
    i. Illegality
    ii. Procedural Irregularity
    iii. Deception of SHs
        a. May have action under Securities law, see below.
    iv. Self Dealing
        a. *Rabkin v. Phillip Hunt Chemical Co.*: Hunt = subsidiary of Turner and Newhall, Inc. Hall owned 64% common stock. In stock purchase, Hall sold all 64% to Olin at $25/share. There was a provision in the agreement requiring Olin to pay $25/share if they decided to buy out the remaining minority interest w/ in one year. After Olin gets control, 3 of Olin's representatives join the Hunt board, and 3 outside members join the board. As the year is about to expire, Olin decides to acquire the remaining shares. But instead of paying $25/share, they decide to do a reverse triangular merger at $21/share. Need simple majority of Hunt to approve (which it will, since Olin owns 64%). Hunt's minority SHs didn't exercise their appraisal rights b/c at that time, $21/share was fair value--but they wanted the $25/share according to the agreement. **Entire fairness** is triggered b/c Olin is getting benefit to the exclusion of Hunt's minority SHs. Held, Olin must pay the $25/share--there was not fair dealing b/c Olin manipulated the process to get a lower price on the back-end.
            (1) *****Public Policy
                (i) Wrong incentives otherwise--If a company wants to cash out the minority SHs, it could drive the company into the ground to lower the stock prices, write off the losses and buy minority shares at a reduced price, then invest in the company to raise it up again.
        b. See Weinberger, below.

E. VALUATION TECHNIQUES AND FAIR PRICE

1. One step merger, fair value = fair market value
2. Two step merger, fair value = fair value at time of second step, so any value that is added after first step (or by plans to be carried out after first step) are attributed to the company as a going concern and taken into account.--**entitled to fair value <u>on date your shares are acquired.</u>**
    i. *Cede & Co. v. Technicolor*: Kamerman = CEO of Technicolor, Pearleman = CFO of MAF. They meet, eventually agree to $23/share. Will be a two step acquisition: first step = cash tender offer for all of Technicolor's stock at $23/share; second step = cash out merger for $23/share via reverse triangular. Pearleman discloses intent to be a bust-up bid, SHs approve. Cinerama (minority SH) is upset, institutes appraisal proceeding. Cinerama argues that fair value = value of the shares after Pearleman's plan was instituted (so that the value will be higher); Pearleman argues that fair price = $23/share, i.e. value at time of the first step. *Held*, Cinerama entitled to the higher value.

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IV. SUCCESSOR LIABILITY

I NEED TO CLARIFY THIS WHOLE SECTION--WHAT'S THE DIFFERENCE B/T IP RIGHTS, LEASES, ETC.?????

A. IMPACT OF DIFFERENT TXs

1. ***Nature of the Issue***
   i. Mergers and stock exchanges are fundamental changes for T--typically they disappear. What about their creditors?
   ii. Generally, B assumes all of T's assets and liabilities in the case of a merger.
2. ***Protections for 3rd Parties in Merger Situations***
   i. Non-assignment clauses
   ii. Change of control clauses
   iii. Standstill Agreements
      a. Needs to protect parties in interest and be specific. But might have been obtuse on purpose to induce signing (but will suffer later on when it doesn't protect them).
      b. Will not extend to a third party or successor in interest unless they are specifically in the agreement.
   iv. Personal guarantee
   v. Anything other protection that can be contracted for
3. ***General Rules Re: Transferability***
   i. Leases
      a. Default rule = Leases are freely transferable--can be restricted, but must be reasonable.
      b. Even if there is a non-assignable lease, public policy requires that a merger does NOT trigger a non-assignment clause.
         (1) Even though it is still a transfer--just b/c it occurs by operation of law does not make it not a transfer.
      c. EXA: T has 10 years left on a commercial lease. What will happen in the following Txs?
         (1) Direct Merger = B takes over lease; LL will be able to satisfy claims through B's assets.
         (2) Stock Purchase = T remains, so lease is still under T. Old assets are there to satisfy the lease, CANNOT go after B's assets (unless piercing the corporate veil/enterprise liability).
         (3) Reverse Triangular Merger = T remains, so lease will remain with T.
         (4) Forward Triangular = T disappears, but lease is now in the hands of NewCo. LL can only go after B's assets by piercing the corporate veil/enterprise liability.
         (5) Sale of Assets = Unless B actually assumes the lease, T holds. If there is an actual transfer, must be done in writing and meet any requirements of a non-transfer clause.
   ii. Triggering of Non-Assignment Clauses
      a. *Direct Merger:* Merger does not trigger non-assignment clause in a transfer of real property; for other situations, a merger DOES trigger the clause.
      b. *Stock Purchase*: Not triggered, T remains
      c. *Reverse Triangular Merger*: Not triggered, T remains
      d. *Forward Triangular*: Triggered b/c its a transfer by operation of law; in the case of real property, it will not be triggered due to public policy.
      e. *Sale of Assets*: Triggered b/c things are transfered through writing, not by operation of law--would need permission.
   iii. Employment Agreeemnts
      a. Non-transferable and personal.

B. DIRECT MERGERS V. TRIANGULAR MERGERS

1. ***Direct Merger***

B. DIRECT MERGERS V. TRIANGULAR MERGERS

1. Direct Merger

i. Patent rights

a. **Default Rule**: NOT assignable unless the agreement expressly makes them transferable--the license agreement, NOT the merger agreement.

b. Unlike real property, there is no public policy supporting free transferability--**KNOW THE DEFAULT RULE!**

(1) *PPG Industries, Inc. v Guardian Industries*: In 1964 Permaglass and PPG struck a cross-licensing agreement. Permaglass granted an exclusive license to PPG for 9 patents (meaning PPG is the only one who can use the patents)--but Permaglass reserved the right to use their 9 patents only in their own business (so Permaglass gets royalty payments from PPG). PPG granted a non-transferable, non-exclusive license to PPG patents. Permaglass was acquired by Guardian by way of direct merger--Guardian survived, PPG disappeared. PPG sued claiming the patent was not assignable. Guardian, relying on state law, argued that they obtained the rights to the patent licenses b/c they are succesors in interest to the rights of Permaglass as a result of the direct merger. *Held*, the transfer of patents is not a matter of state law, but a matter of federal law, so there license agreement must specify the rights are transferable.

(i) Just because in a merger the assignment takes place **by operation of law**--there is still an assignment.

(2) Options

(i) B can insist that purchase price gets reduced since patent won't transfer

(ii) Address the non-transferability in the merger agreement.

(iii) Structure the deal as a reverse triangular so that T remains in place and maintains patent holdings

(a) ***NOTE, will not be effective if there is a change in control clause in the patent agreement.

ii. Standstill Agreements

a. *Mesa Partners v. Phillips Petroleum:* GAO is T of hostile bid launched by Mesa. Mesa makes a TO. GAO's financial advisor found Phillips--a White Knight (someone else who might want to acquire GAO), that will offer $45/share conditioned on Mesa withdrawing the TO. GAO and Mesa negotiate for a **standstill agreement.** GAO drafted the standstill agreement, hinted (but did not make it explicit) that Mesa would also be restricted form buying Phillips stock during the standstill period. Phillips argues that as a result of the merger, Phillips is protected from Mesa as successor in interest to the standstill agreement. *Held*, if Phillips wanted to be protected, they should have put that in the agreement. The only thing both parties agreed to was GAO.

2. Triangular Mergers

i. If reverse triangular merger, there is no assignment or transfer of the licenses T holds, b/c T remains in place.

a. But there is a change in control--so any clauses triggered by a change in control will be triggered.

(1) Same for forward triangular mergers and stock purchase

3. Change in Control Clauses

i. *Branmar Theatre v. Branmar*: R family entered lease w/Δ to build and run a theater. Δ decided to lease to R b/c he had experience and industry contacts. R family had formed a corp. that would then enter the lease as tenant (limited liability purposes). R then entered a deal w/S. R first attempted to assign the lease from R corp to S, but this required LL approval. LL refused assignment. R then sold the shares of R corp to S--so R corp remains the tenant, but S now has control, not R. Δ claimed R violated the lease by not getting Δ's consent, so the lease was cancelled and Δ could move in any tenant he wanted. *Held*, the sale of shares was not a transfer of the lease. If LL wanted to prevent this scenario, he should have included a change of control clause in the lease.

C. SUCCESSOR LIABILITY IN ASSET ACQUISITIONS

1. Generally

i. General rule*:* B has no liability on T's debts.

C. SUCCESSOR LIABILITY IN ASSET ACQUISITIONS

1. *Generally*

i. General rule: B has no liability on T's debts.

a. Both B and T are usually indifferent as to whether B will assume any of T's liabilities; whether B does end up assuming them will affect the purchase price.

ii. Issue

a. Asset acquisitions usually result in the voluntary winding up of T--there are often **long tail claimants** (involuntary creditors of T) who don't show up until long after T is gone--how do you deal with them?

iii. Exceptions to General Rule

a. Express assumption

b. Fraud on creditors

c. De Facto Merger (different from above)

2. *Contract Creditors*

i. De Fact Merger Doctrine

a. Different from de facto merger above, b/c here the purpose is to protect creditors, not SHs.

b. Argument --> continuation of management b/t B and T.

c. Requirements to establish de facto merger on "**mere continuation**"

(1) Pooling of assets &

(2) Continuity of SHs

d. General requirements to prove de facto merger for successor liability (i.e., protection of creditors)

(1) Continuation of the enterprise of the seller corp, so there is a continuity of management, personnel, physical location, assets and general business operations;

(2) Continuity of SHs which results from the purchasing corp paying for the acquired assets w/shares of its own stock, this stock ultimately coming to be held by the SHs of the seller corp so that they become a constituent part of the purchasing corp;

(3) Seller corp ceases its ordinary business operations, liquidates and dissolves as soon as legally and practicably possible;

(4) Purchasing corp assumes those liabilities and obligations of seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corp.

ii. *Bud Antle, Inc. v. Eastern Foods, Inc.*: Eastern was thinking about acquiring B&B. Before acquiring, Eastern entered a management K w/B&B and basically took control--like an option to purchase. Eastern paid $50k in order to run the company for a while to help make its decision. Eastern was very careful about keeping the two companies separate, funds, etc. Bud Antle supplied lettuce to B&B, , had an overdue account before Eastern took over. Eastern decided to terminate its management agreement. They made sure that everyone they dealt with while running B&B got notice that the relationship was severed, paid all debts that accrued while they were running it. Bud Antle sued Eastern for fraud and claimed there was a de facto merger. *Held*, there was no continuity of SHs, nor of management.

3. *Tort Creditors*

i. Main sub-groups

a. Products liability

(1) *Ruiz v. Blentech*: π's ER bought a product manufactured by Custom Stainless in 1983. Custom Stainless sold all of its assets to Blentech and dissolved. Custom and Blentech were both CA companies. π then gets injured in 1992 in IL. π argued that Blentech's acquisition of Custom included assumption of SL product defect claims. π wants CA law to apply, b/c CA has a products line exception--liabilities are assumed in a reorganization. Held, IL law applies as to the products liability issue, but CA law applies to reorganization issue. However, the products line exception is a matter of tort law, not corporation law, so the liabilities were not assumed.

b. Environment cases

ii. This public policy problem is only created by the **asset purchase**.

a. Long tail claimant's options

(1) Go after dissolved company's SHs

(i) High Tx costs, not realistic

iii. DE gives option of setting up a trust fund for long-tail claimants

a. Protects management from personal liability for illegal distribution after dissolution

V. FEDERAL SECURITIES LAW

iii. DE gives option of setting up a trust fund for long-tail claimants
a. Protects management from personal liability for illegal distribution after dissolution

V. FEDERAL SECURITIES LAW

A. 1933 ACT

1. Main rule

i. ***Anytime** a **corporation**, publicly traded or privately held, proposes to use an instrumentality of i**nterstate commerce** in order to **issue its stock** (or any other securities such as convertible debentures), the corporation as the issuers of the securities must **register** the offering **or** find an **exemption** for the Tx.*
a. "Issue" = any disposition for value

ii. *Procedure (when issuing shares for valuable consideration):*
a. Register the Tx;
b. Issuer must file registration statements (Form S-4) w/SEC
c. T SHs must receive *prospectus*
d. SEC reviews the S-4 and approves.
e. If B is purchasing T w/B stock, then
(1) B must send this registration statement to T SHs
(2) Then B may issue (sell) its securities to complete the acquisition of T.
(i) Certain T insiders (***affiliates***) maybe subject to restrictions on the resale of the stock they receive.

iii. *Fundamental premise*
a. Prospective investors must be provided w/information about the issuers and the terms of the proposed offering so that the investors can make an informed decision whether to purchase the issuer's securities.

iv. *****NOTE: Does not apply to all cash deals b/c no shares are being issued.*

v. *****NOTE: Anytime SH approval is required, SHs will need to receive a proxy statement.*

2. Exemptions (from registration)

i. Resale Exemption [Section 4(1)]
a. Allows the unregistered resale of a security, even if purchased in a registered Tx, in Txs *not involving an issuer, underwriter or dealer.*
(1) Exempts most securities sales.

ii. Private Placement Exemption [Section 4(2)]
a. Where B issues shares to a limited number of investors, the expense and delay associated w/preparing a registration statement will not produce sufficient public benefit to justify the Tx costs.
b. Issuer must show that the Tx is a ***non-public*** offering
(1) Non-public offering = the proposed offer and sale of issuer's securities is limited to **self-fending, financially sophisticated investors**
(i) Must be sophisticated and have access to the kind of info that a registration would disclose
(a) Factors surrounding sophistication level
- Ability to evaluate merits and risks of proposed investment;
- Access to info re value of B's shares (for fair value determination);
- Access to info about B (all financial info, future projections, etc.).
- Access to **all material facts**
(ii) If one member of the purchasing class fails to meet the standard, he destroys it for the entire class
(a) So the purchasers are entitled to get back the purchase price paid from the issuer.

iii. Limited Offering Exemption
a. SEC can exempt offerings up to $5M

3. General requirements to qualify for one of the above exemptions

i. Offering must be done on non-public basis
ii. No advertising or general solicitation

4. Important consideration for T Co SHs receiving B stock as acquisition in unregistered Tx

i. Shares issued are treated as **restricted securities**
a. Significant restrictions on the resale of these shares, even if publicly traded.
b. Generally, shares may only be resold after a one-year holding period
(1) May then dispose of stock in open market Txs, but subject to quantity limitations in Rule 144.
c. After two-year holding period, the shares may be freely traded w/o limitation.

B. SCOPE OF FEDERAL PROXY RULES

c. After two-year holding period, the shares may be freely traded w/o limitation.

B. SCOPE OF FEDERAL PROXY RULES

1. Trigger

i. Solicitation of SH votes will trigger the federal proxy rules (Sec. 14 of 1934 Act) IF:

a. SH approval is required for a particular acquisition;

b. The company is a "reporting company" (has a class of securities registered under Sec 12 of 1934 Act)

(1) "**Reporting company**" = either

(i) Company whose shares are listed for trading on a national exchange **or**

(ii) Companies that have a class of SHs numbering 500 or more and assets totaling $10M or more (i.e., satisfies the **liquidity test**).

2. Rules

i. No solicitation of SH votes may be made unless the SH is provided w/a written proxy statement that contains the items of info required by Schedule 14A.

a. However, if B proposes to issue securities as acquisition consideration (i.e. a 1933 Act registered Tx), then a From S-4 can be used in lieu of a proxy statement.

b. Typical proxy statement

(1) Cover page (usually a letter to T SHs briefly describing the proposed acquisition);

(2) Formal notice of meeting;

(3) TOC

(4) Proxy statement itself

(i) Plain English Rules

(a) Q&A section;

(b) Summary section of narrative text and financial and stock info;

(c) Risk factor section;

(d) Cautionary statement concerning any forward looking info;

(e) SH meeting details;

(f) Narrative of events and negotiations leading to agreement;

(g) Reasons that support T's BOD approval and recommended SH vote;

(h) Investment banker fairness opinion;

(i) Disclosure of COIs, interests of officers or directors;

(j) Federal income tax consequences;

(k) Pro forma financial info re Tx

(l) Exhibits (merger agreement, etc.)

ii. Liability for any ***materially misleading*** disclosures. [Rule 14a-9)

C. RULE 10b-5 AND THE TIMING OF DISCLOSURE OF ACQUISITION NEGOTIATIONS

1. General Disclosure requirements

i. 10K = annual

ii. 10Q = quarterly

iii. 8K = material changes b/t 10Q filings

2. Only have a Duty to Disclose Material Facts

i. Materiality

a. Whether a *reasonable investor* would consider the info *important* in deciding whether or not to invest.

ii. Materiality of prospective information

a. Balancing test

(1) Probability that the deal will happen v. magnitude of the deal if it goes through.

(i) *Basic v. Levenson*: Fully negotiated Tx b/t B and T w/ongoing negotiations. T got into trouble b/c they denied having discussion, b/c it was so preliminary that they thought it was too speculative. People that sold before the merger were unhappy, sue claiming raud. The issue was whether the the preliminary merger discussions, and the denial of them, was a material fact. Court rejected the ***agreement in principle as to price and structure*** rule as the bright line rule and adopted the balancing test approach to determine the materiality of information.

iii. Obligation Imposed

a. 10b-5 prohibits the misrepresentation or omission of key facts that are necessary to prevent the statement from being misleading

iii. Obligation Imposed

a. 10b-5 prohibits the misrepresentation or omission of key facts that are necessary to prevent the statement from being misleading

b. Generally no duty to speak (unless it is material)--but when you do speak, you must provide **full and adequate disclosure of all material facts.**

VI. TENDER OFFERS AND THE WILLIAMS ACT

A. TENDER OFFERS IN GENERAL

1. Definition

i. A tender offer is an offer to stockholders of a publicly owned corporation to exchange their shares for cash or securities at a price above the quoted market price (i.e., for a premium)

a. Popular in ***hostile takeovers***

(1) Acquisition of a PTC over the opposition of management.

2. Why they work

i. No consent of T's BOD--offer is being made to each of T's SHs individually.

ii. If a majority of T's SHs tender (i.e., sell to B on the proposed terms), then B can take control.

3. How they work

i. B selects a T--typically one who is undervalued.

ii. Next, B typically secretly purchases a small % of T's shares before announcing the TO (limited by Securities regs, see below)

iii. B arranges its financing (usually bank loans and "junk bonds")

iv. B makes a public announcement

a. # of shares, stated minimum, and price.

v. Pressure to tender--this will encourage T SHs to tender

a. Threat of back-end merger (creates a stampede)--i.e., "Saturday Night Special"

(1) Uncertainty as to value that will be received by the minority on the backend, but the cash up front is guaranteed.

vi. Shortly after the TO is announced, much of T's stock ends up in the hands of arbitrageurs--i.e., short term investors (professional risk takers)

4. Types of TOs

i. Any-or-All

a. B offers to purchase all shares.

ii. Two tier

a. B offers to buy a specified amount (usually 51%); then will do a back-end merger to cash out the minority.

5. Possible Defensive Measures

i. White Knight

ii. Poison Pill

B. DISCLOSURE REQUIREMENTS OF SECTION 13(d) OF THE WILLIAMS ACT

1. Purpose of the Williams Act

i. Make takeovers fairer to T's SHs by requiring full disclosure of relevant information to T SHs and reducing the pressure associated with TOs.

ii. Amendment to 1934 Act.

2. Disclosure by 5% Owners: Rule 13(d) Requirements (continual filers)

i. When **any person (or group of persons** acquires more than 5% of any class of **voting equity security** of a reporting company on the open market they need to file a Schedule 13D disclosing that acquisition.

a. Timing of Schedule 13D

(1) Schedule 13D WITH THE SEC must be filed w/in 10 days of crossing threshold.

b. Required Disclosures

(1) Who the purchaser(s) is/are

(2) Exact number of shares purchased;

(3) How many total shares are owned;

b. Required Disclosures

(2) Exact number of shares purchased;
(3) How many total shares are owned;
(4) Source of funds and price paid for shares
(5) When shares were acquired
(6) Purpose for the acquisition and holding of more than 5%
  (i) Must disclose if purpose is to gain control.

c. Who must file
  (1) Beneficial owner [Rule 13d-3(a)]

d. Group theory of 13(d) liability
  (1) The duty to file also applies to groups, i.e. persons acting in concert.
  (2) The date that a group comes together is the date that the group acquires/beneficially owns the % owned by the sum of the members of the group.
    (i) *GAF Corporation v. Milstein:* Rubberoid merged w/GAF, Milstein was former substantial SH of Rubberoid. Milstein exchanged his Rubberoid stock for 10% convertible preferred GAF stock. Milstein tried to get representation on the board (was unhappy w/board) and caused companies that he had ownership interest in to back off of doing business w/GAF. Milstein filed a derivative suit as a GAF SH against the board for waste and spoliation of corporate assets. The company sues Milstein for violating Section 13(d) of the Securities Echange Act. Milsteins formed a group that together owned more than 10% of preferred stock. *Held*, the group came together after the 1933 Act, so when they came together the group then had more than 5% of voting class and was required to file a Schedule 13(d).

ii. Required Amendments
  a. **Rule 13(d)(2)** requires Schedule 13D to be amended promptly if there is a **material change**, including material increase or decrease in holdings or a change in plans.
    (1) Probably less than 10 days.

iii. Exceptions
  a. **Creeping Acquisitions**
    (1) A person/group who is already a 5% or more owner purchases additional shares which, when combined with the other purchases that person made within the prior 12 month period does not exceed 2%, then there is no need to refile.

3. ***Rule 13(e) Requirements***
  i. Requires issuers that propose to engage in repurchases of their shares during the course of a 3rd party TO (as a defensive measure) to file a Schedule 13E-1. Only applies when the repurchase plan amounts to a self-tender.

4. ***13(g) Filers (annual filers)***
  i. Passive investors
    a. No interest in gaining control
    b. Don't have to file Schedule 13D; but do have to file Schedule 13G once you get to 5%
  ii. Required disclosures
    a. Certification that the securities owned are in the ordinary course and are not held for the purpose of changing control or influencing management of the issuer.
      (1) What is "control" under the meaning of 13(d)?
        (i) Possession, directly or indirectly of the power to direct or cause the direction of management and the policies of a person, whether trhough the ownership of voting securities, by K or otherwise.
    b. If you are a 13G filer and you decide you want to gain control or influence management, you're 13D requirement kicks in.

5. ***Remedy for 13(d) Violations***
  i. Required disclosure? -- YES
    a. *Rondeau v. Mosinee Paper Corporation*: Rondeau starts buying common stock of Mosinee Paper Corp. Management of Mosinee sees stock being bought up, but no Schedule 13D was filed. Management found out it was Rondeau, sent him a letter. Rondeau stopped buying, got a lawyer and filed his 13D. Management sues for injunctive relief—wants Rondeau to return the stock he purchased and damages. *Held*, the statute requires disclosure—

5. ***Remedy for 13(d) Violations***
   i. Required disclosure? -- YES
      a. *Rondeau v. Mosinee Paper Corporation*: Rondeau starts buying common stock of Mosinee Paper Corp. Management of Mosinee sees stock being bought up, but no Schedule 13D was filed. Management found out it was Rondeau, sent him a letter. Rondeau stopped buying, got a lawyer and filed his 13D. Management sues for injunctive relief—wants Rondeau to return the stock he purchased and damages. *Held*, the statute requires disclosure—because Rondeau filed is Schedule 13D, the issue is moot. Court says that damages don't come from 13D—they come from 10b-5, and are available to either the SEC or to any buyer or trader of equity or debtor stock or the company (on behalf of its SHs).
      b. *Chromalloy American Corp v. Sun Chemical*: Sun crossed 5% so has to file a 13D. Filed saying that acquisition was for investment purposes. There is a continuous disclosure obligation meaning that if there is a material change you have an obligation to amend promptly. There is no specific time frame. Sun files an amended 13D on several occasions, by JULY its got almost 10% of Chromalloy stock. Chromalloy sues Sun claiming it violated 13D by not disclosing intent to acquire control in the future. *Held*, Sun violated 13D b/c it clearly intended to control Chromalloy--it was attempting to get members on the board. The only remedy is disclosure--not a cooling off period (standstill) as requested by Chromalloy.
   ii. Private Damage Action? -- Probably NOT.
      a. There is no implied private right of action for damages under Section 13(d).
         (1) So neither continuing SHs nor issuers will have standing to sue for a 13(d) violation.

C. REGULATION OF THIRD PARTY TENDER OFFERS UNDER SECTION 14(d) OF THE WILLIAMS ACT

1. ***Cash Tender Offers Generally***
   i. Don't trigger 1933 Act b/c they are all cash deals
   ii. Don't trigger federal proxy rules b/c SH approval is not required.
2. ***Purpose of 14(d)***
   i. Protect T's SHs
   ii. Inspired by the Saturday Night Specials
      a. B announces TO on first come first serve basis open only a short period of time
      b. Causes flood of SHs to tender their offers so that they don't get screwed on the backend.
      c. T SHs would either have to tender w/o any information as to whether it was a good deal, or risk being left holding the bag on the back end.
      d. Very coercive.
3. ***TO for 5%: Section 14(d)(1) Disclosure obligation***
   i. The Trigger
      a. Any tender offeror who, if his tender offer were successful, would own more than 5% of any class of stock of T, must file a Schedule 14D-1 disclosure.
   ii. Required Disclosures
      a. Identity;
      b. Funding;
      c. Financial condition of B;
      d. Purpose/plans for T if B gains control

ii. Required Disclosures

c. Financial condition of B;

d. Purpose/plans for T if B gains control

iii. Dissemination requirement

a. Schedule 14D-1 must be filed not only with the SEC, but must also be delivered to T, any other Bs, and to any stock exchange where T's stock is listed.

b. B must make **reasonable attempts to notify all of T's stockholders**

(1) Usually can be done in a newspaper advertisement.

4. "Traffic Rules"--Procedural safeguards

i. 20 Day Minimum for Offer

a. TO must be kept open for at least 20 business days. [Rule 14e-1(a)].

b. If B changes offer price/number of shares, must hold offer open for an additional 10 days.

ii. Withdrawal rights

a. A SH who tenders has the right to withdraw at any time while the offer remains open. [Rule 14d-7].

iii. Pro Rata Rule

a. If a TO is over subscribed, B must by in the same proportion from each SH.

iv. Best Price/All Holders Rule [14(d)(7)]

a. If B increases price during offering period, applies to SHs who have already tendered their shares.

v. Section 14(d)

a. Requires T management to file a **Schedule 14D-9** w/SEC 10 business days after B commences its TO.

(1) T management must send a statement to SHs recommending acceptance, rejection or no opinion and must explain their recommendation.

(i) Can issue "Stop, Look and Listen"--usually on first day, notifying T SHs that T's management was caught off guard, but to hold onto their shares and given them 10 days.

5. Private Actions Under 14(e)

i. Section 14(e) makes it unlawful to make **untrue statement of a material fact** or **omit to state** a material fact..., or to engage in any **fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer**...or any **solicitation** of SHs.

a. Applies regardless of whether B or T is a reporting company.

ii. Remedy for 14(e) violation

a. General view = implied private right of action for damages or injunctive relief **if π can show**:

(1) That the misrepresentation/nondisclosure was **material**, **and**

(2) Probably that Δ made it w/scienter; **and**

(3) That π relied on the misrepresentation.

iii. Standing

a. No requirement that π be either a buyer or seller of stock (unlike 10b-5 violations). So, π can presumably be either:

(1) Target if trying to get an injunction;

(2) Bidder to get an injunction against T or another B (but no right for damages);

(3) Non-tendering SHs;

(4) Buying or tendering SHs

iv. "Materiality"

a. An omitted or misstated fact is material if it ***would have assumed actual significance in a reasonable SH's deliberations about whether to tender.***--similar to "materiality" for 10b-5 violations).

iv. "Materiality"

a. An omitted or misstated fact is material if it ***would have assumed actual significance in a reasonable SH's deliberations about whether to tender.***--similar to "materiality" for 10b-5 violations).

6. ***Is it a Tender Offer?***

i. Consequences

a. If not a TO, B only has to abide by 13d(d) filing requirement.

ii. Wellman Factors Test

a. Active and widespread solicitation of public SHs
b. Solicitation for a substantial % of the shares;
c. Premium over prevailing market price;
d. Terms of offer are firm rather than negotiable;
e. Offer contingent on tender of fixed minimum number of shares, often subject to a fixed max number of shares to be purchased;
f. Offer only open for a limited period of time;
g. Offeree subjected to pressure to sell his stock;
h. Public announcements of a purchasing program concerning the T precede or accompany rapid accumulation of a large amount of T's stock.

(1) *SEC v. Carter Hawley Hale:* B = Limited, T = Carter. Prior to TO stock is trading at $23/$24; TO = $30/share. B files, discloses that it intends to do a two tier bid--will merge out T on the backend. This is inherently coercive —either take cash, or risk getting B's stock on the backend. Triggers obligation for T management to disclose it's opinion to SHs w/in 10 days. T's stock goes up to $29—market thinks $30 is a good deal. Management finally responds by filing 14(d)(9) saying the bid is grossly undervaluing T. T management goes out and gets a white knight and initiated a stock repurchase plan--announced they were willing to by back up to 15 million shares (spending at most $500 million). This has the effect of reducing T's balance sheet by $500 million on the cash side, and also reducing SH equity by the same amount. This discourages B, because now the company is $500 million less valuable--have to get a loan to make the purchase—high interest PLUS security interest in assests. B sues, claiming that T made a self TO and did not satisfy the filing requirements. *Held*, under the Wellman test, this was not a self-TO, so Section 13(e)(4) does not apply (only [Section 13(e)(1)].

iii. Ralston Test (according to Maynard, same result as Wellman Test)

a. The filing requirements are triggered depending on whether or not the Seller's of T's stock needed the protection of the Williams Act.

(1) *Hanson Trust PLC v. SCM Corp*: Hanson = B, SCM= T. B makes cash TO to T SHs at $60/share. T thinks it's a low-ball offer, gets a White Knight—Merril Lynch. ML is not a strategic investor—it's a financial investor, so T doesn't have to worry about ML trying to shake things up. ML most likely likes the way T is currently, and thinks infusing capital is all the help T needs. ML makes any or all offer at $70. T adopts poison pill provision--if someone besides ML purchased 33%, then ML had the right to buy the most profitable divisions of T. B terminated its cash tender offer and then made private purchases of about 25%--don't want to get to 33%, but by acquiring 25%, you can put yourself into a blocking position of T's plan (called a ***street sweep***). B made privately negotiated transactions w/SHs who own big blocks of stock. T sued B claiming this was a TO, brings motion for injunction. *Held*, under the Ralston Test, the seller's did not need protection of the Williams Act because they were all sophisticated sellers.

T's argument that this was a de facto continuation of the original TO loses because T terminated the TO, returned all shares, filed the proper documents w/SEC, and there is no requirement of a cooling off period.

7. ***Tender Offers are Regulated by Contract Law***
   i. *Gilbert v. El Paso Co.*: Burlington launches unsolicited tender offer to acquire 49.1% of El Paso, which will give them combined holdings of 50.1%. Reserved the right to w/draw offer if 1 of 6 things happened. In their filing, the indicate that they don't know what they're going to do w/ the minority SHs—this creates a stampede. T's BOD advises SHs to reject the bid as inadequate. T adopts defense measures: (1) Golden parachutes (change in control = crazy compensation for execs). B and T come to an agreement—B terminates TO, and instead will purchase authorized but unissued shares. However, B doesn't want to pay more than $600 million —they have decided that is the cap they can spend w/o violating their fiduciary duty to their SHs.$100 million to the company, $500 million to the SHs. Paying same amount, but only acquiring $500 million in shares, not $600 million. The ones who tendered their shares in the original tender offer are the ones who get screwed, because there is less money in the TO, which means that less of their shares are being bought pro-rataless money in their bank of account. Those T SHs sue alleging breach of K, breach of covenant of good faith and fair dealing, and breach of fiduciary duty. Held, there was no breach because B specifically and clearly reserved the right on the happening of certain conditions to walk away from the offer, and B acted properly when they terminated their agreement

D. STATE ANTI-TAKEOVER STATUTES

1. ***Generally***
   i. Federal regulation of TOs is basically even handed in that it does not favor either the hostile bidder or T's incumbent management--it only requires disclosures to make sure the TO is free from coercion.
   ii. State regulation of TOs is NOT even handed--it favors protecting incumbent management, especially those TOs made by out of state Bs.
      a. Out of state Bs risk moving operatinos out of state.
2. ***Disclosure and Fairness Statutes***
   i. *Edgar v. Mite:* IL statute allowed T to require hearing w/state official who could post-pone the TO if he chose to. Also had pre-commencement delay, which was specifically rejected by Congress. Mite was the B and Chicago was the T. Edgar was secretary of state charged w/administering the Act. When B made its offer for T, T went to state court to enforce the anti-takeover statute. As soon as he did the B went to federal courts to seek an injunction declaring the IL Act unconstitutional saying it violates the commerce clause and preemption. **Preemption:** There are two types of preemption—express (Congress expressly reserves the area for federal regulation) and implied (state's law frustrates Congress's attempt to regulate). Π argues the pre-effective filing requirement of the IL act frustrated the Williams Act because it shifted the scales too much in favor of T, and the Williams Act is designed to be even handed, and the hearing requirement frustrated the Williams Act because there is no time period in which the hearing must be held, and the Williams act was designed to streamline a min/max of 20/60 days. *Held*, the IL act is unconstitutional because it violates the **commerce clause**—the burden on the outside states outweighs the benefit to IL. As long as the statute has a legitimate purpose it can have an incidental affect on interstate commerce, so long as burden

on the outside state does not significantly outweigh the benefit to the regulating state

3. ***Control Share and Fair Price Statutes***
   i. What they do
      a. Control share/fair price statutes set out thresholds for share ownership. If you reach a certain threshold, it triggers a SH vote to decide whether the shares acquired in the threshold crossing acquisition will be vested with voting power.
      b. The shares acquired in the threshold crossing Tx won't participate in the vote.
         (1) *CTS Corp v. Dynamics Corp*: Indiana control share statute is triggered at 20%, 33 1/3%, or 50% and applies to any corporation incorporated in Indiana after the act unless they opt out, or any Indiana corp that incorporated before the act that opts in. B can request a special SH vote to approve the shares which must be held within 50 days after the request. B is required to pay for the special SHs meeting if he wants to obtain approval by disinterested SHs; if the SHs refuse to grant voting rights, T may (but is not required to) redeem the non-voting shares (meaning B could be left with shares that have no voting rights). π argues **preemption** (b/c the statute frustrates the Williams Act by delaying the TO process by requiring 50 day delay for SH vote to approve voting rights) and **commerce clause** b/c it unreasonable burdens interstate commerce. *Held*, this statute does not frustrate the Williams Act—the 50 day limit is w/in the 60 day max of the Williams Act, and the possible 30 day difference is not enough to establish a true conflict--B should just condition offer on getting the appropriate outcome at the meeting. Although the statute does impact interstate commerce because it chills offers for Indiana companies, there is a high state interest in its ability to regulate internal affairs of its corporations.
   ii. Bottom line
      a. Will probably be upheld so long as:
         (1) The statute applies only to corporations **chartered** by the state **and**
         (2) It only regulates those things that fall w/in the traditional internal affairs doctrine (voting rights, SH meetings, SH approval etc) rather than by blocking actual transfer of ownership.
   iii. Public Policy arguments
      a. State's authority to regulate internal affairs
         (1) States can freely impose supermajority voting requirements; so control share requirements aren't anything radical.

         vs

         (2) These statutes will chill offers for companies b/c Bs will be worried about not being able to get voting power.
         (3) When these statutes aren't in place, management of T is under pressure to maximize the value of T and therefore maximize SH wealth.

4. ***Business Combination Statutes***
   i. **DGCL 203 -** Prohibits a "business combination" (any merger, significant asset sale, and any other Tx b/t T and an interested SH that confers a benefit on the interested SH) w/an interested SH (defined to be an owner of 15% or more of shares of DE corp) for a period of 3 years.
   ii. Significance
      a. Prevents B from doing a back-end cash-out merger unless one of the exceptions applies.
      b. Unless an exception applies, B can't use T's assets as security for the loan that finances the share acquisition, and won't be able to use T's earnings and cash flow to pay off its debt.
   iii. Exceptions
      a. The combination has been approved by T's BOD that was in place **prior** to the interested SH's acquisition of 15% **or**

iii. Exceptions

a. The combination has been approved by T's BOD that was in place **prior** to the interested SH's acquisition of 15% **or**

(1) Gives T BOD seat at negotiating table

b. The interested SH acquired at least 85% of the shares when it makes the tender offer **or**

(1) Must be offering enough of a premium to entice 85% to sell shares--even if management doesn't talk to you, T SHs have spoken

c. The Tx is approved by the BOD **and** at least 2/3 of uninterested SHs.

iv. Constitutionality is unclear, but lower court cases have upheld it.

a. *Amanda Acquisition Corp v. Universal Foods Corp*: WI statute very similar to DGCL 203. T = Universal, B = Amanda Acquisition Corp (merger sub of High Voltage)—i.e., triangular merger. High Voltage is going to put in some equity, but the bulk of acquisition consideration = money borrowed by Amanda. Bank will agree to loan, but will evaluate how much Universal stock is worth. The bank's ability to recover will depend on the collateral —i.e., what is inside Universal. This is a LBO where a portion of the acquisition consideration is provided by B and B's acquisition sub—So for the lender to be protected, High Voltage has to give the lender not only a promise to repay the funds but a security in the interest of Universal's assets. In order for a B to give a security in the interest of T's assets, B must OWN those assets—owning those assets depends on getting 100% of the stock. Two step—tender offer for 75%, then on do a cash out merger on the backend. Conditions required for tender offer to close: must get 75%, declaration that poison pill is void, and judicial declaration that WI statute is unconstitutional. Needed the statute to be unconstitutional because didn't want to wait 3 years to do backend merger. If the WI statute applies, then the only way to do the backend merger (which is necessary to get the loan) is to get T board approval BEFORE crossing the 10% threshold. *Held*, the WI statute is not prempted, because states can regulate mergers, and the moratorium on backend mergers does not frustrate the Williams Act, because there is nothing in the WI statute that impedes disclosures. The WI statute does not place an undue burden on interstate commerce because it applies to T (WI corps), does not discriminate against out of state businesses (treats them the samae as in state businesses—statute only regulates internal affairs).

v. Public Policy arguments

a. State interest in internal affairs = HIGH

(1) Burden on interstate commerce = INCIDENTAL

VS

(2) Hinders market for corporate control b/c Bs don't want to invest and have to wait 3 years before they can do anything.

(i) A free and unfettered market -->incentivizes T's management to put T's assets to the best possible use b/c otherwise someone will come in and takeover.

vi. Effect of these statutes being constitutional

a. Management can negotiate a better price

b. If back-end moratorium applies, then B has to put up with 3 years of satisfying entire fairness.

(1) Self-cleansing (shifts burden to SH)

(i) Independent negotiating committee

(a) Disinterested board members (i.e., no personal financial interest in the Tx);

b. If back-end moratorium applies, then B has to put up with 3 years of satisfying entire fairness.

(1) ***Self-cleansing*** (shifts burden to SH)

(i) Independent negotiating committee

(a) Disinterested board members (i.e., no personal financial interest in the Tx);

(b) Independent board members (i.e., entirely trust worthy to make decisions based on the company's best interests--no structural bias)

(ii) SH approval

(a) Majority of minority SHs

VII. FIDUCIARY DUTIES

A. TWO TYPES OF FIDUCIARY DUTIES

1. Duty of Care

i. A director/officer must, in handling the corporation's affairs, behave w/the level of care that a **reasonable person** in **similar circumstances** would use.

2. Duty of Loyalty

i. The fiduciary duty of a director to take and approve only those actions the director believes to be in the corporation's best interest.

ii. Insider's accused of self-dealing have the burden of proving that the Tx meets the **entire fairness** test.

3. Public Policy Behind This Area

i. Who should decide when and on what terms the company is in play, the board, management, or SHs???

B. BUSINESS JUDGMENT RULE (defense to claim of breach of duty of care)

1. BJR Presumption

i. The BOD is charged with managing the business affairs of the corporation (corporate norm). BJR is the presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interest in the company and the SHs.

2. Overcoming the BJR Presumption

i. SH must prove that the directors did not fully and adequately inform themselves of all material information reasonably available to them before making a decision

a. *Smith v. Van Gorkom*: Class action brought by SHs of Δ corp., seeking of a cash-out merger. CEO/board member Van Gorkom negotiated the deal, and only one of the other directors was involved in the negotiation. The other directors were not even aware of the negotiations until they attended a special meeting of the board of directors and were asked to approve the sell (a two hour meeting). *Held*, the board's decision to approve the proposed cash-out merger was not the product of an informed business judgment--it was based on a 20 minute oral presentation by Van Gorkom, there were no documents present, and no report was available.

b. Questions to ask

(1) Consultation w/outside financial advisors?

(2) Consultation w/senior execs of the co and/or other personnel?

(3) Careful reading of entire agreement?

(4) Thorough review of proxy statements?

(5) Receipt of fairness opinion from independent 3rd party?

c. "Highly Contextual"

(1) Meaning, fact sensitive, no bright line.

3. Raincoat Provision - [DGCL 102(b)(7)]

i. Provision that can be placed in the certificate that limits or even eliminates the BOD's perosnal liability in money damages for conduct constituting breach of fiduciary duties.

a. Exception:

(1) Breach of duty of loyalty **or**

(2) Actions made in bad faith (including intentional, knowing violations of law)

C. SELF-DEALING TRANSACTIONS

1. When the Tx is Tainted by COI

C. SELF-DEALING TRANSACTIONS

1. *When the Tx is Tainted by COI*

i. If there is a COI (i.e., majority is receiving benefit to the exclusion of the minority), appraisal rights will NOT be the sole remedy. the appraisal price will not be invalidated so long as it meets the **entire fairness test**:

2. *Entire Fairness Test*

i. Fair price

a. Factors include the economic and financial considerations of the proposed merger, including assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of the company's stock.

ii. Fair dealing

a. Factors include when the Tx was timed, how it was initiated, structured, negotiated, disclosed to directors, and how the approval of the directors and the SHs was obtained.

(1) *Weinberger v. UOP, Inc.*: Two step Tx. First step = Signal acquires 50.5% of UOP (being able to obtain 50.5% is a condition on the deal). Essentially a stock purchase for cash. Signal bought some shares from UOP at $21/share, allowing Signal to pump money into the company it was acquiring, and also infused UOP w/operating capital (benefits UOP and the 49.5% minority SHs that don't get bought out.) Second step = Signal acquires 49.5% of UOP it doesn't own--doesn't want to do a merger, b/c UOP will disappear by operation of law--so it gets structured as a reverse triangular merger. Board decided that $21/share was fair price (using proprietary info from UOP). There was an interlocking board--members of Signal and old UOP management. Signal members give the proprietary info to Signal--UOP did not expect them to do this. UOP SHs sue for fair price. Held, entire fairness doctrine applies b/c Signal (majority SH) is receiving benefit to the exclusion of UOP's minority SHs, and UOP failed on the fair dealing prong by not appointing an **independent negotiating committee**.

3. *Self Cleansing*

i. [**DGCL 144** and **CCC 310]**

a. BJR will apply **IF:**

(1) All material facts re conflict disclosed to SHs and majority of disinterested SHs approve; **or**

(2) All material facts re conflict disclosed to BOD and disinterested BOD approves (vote of interested directors don't count) and the Tx is fair to the company.

b. Otherwise, the self-dealing BOD has the burden of showing:

(1) Tx was fair to the corporation vis a vis **entire fairness/*Weinberger*).**

D. FIDUCIARY DUTY OF CANDOR

1. *Old Rule: Board has duty to make full and adequate disclosures to SHs when soliciting SH approval*

i. *Lynch v. Vickers Energy Corp*: BOD was seeking SH approval of a particular Tx that triggered the federal proxy rules. BOD failed to disclose two important facts in connection with the Tx. *Held*, the board violated its duty to give full and adequate disclosure.

2. *New Rule: Board has a duty to be truthful and honest to SHs in ALL communications, not just solicitations.*

i. *Malone v. Brincat*: BOD overstated earnings when completing their filings (10k, 10q etc). Misstatements in those filings will allow a SH who sold their stock to bring a 10b-5 claim under federal law. π's here did not sell stock. *Held*, BOD has duty to be truthful and honest even though it wasn't soliciting SH approval.

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E. DEFENSIVE TACTICS TO THWART UNSOLICITED OFFERS

1. *White-Knights*

i. When there is a hostile TO, T may find another B who will be more friendly to T's current management.

ii. Typically will have to offer a price at least as good as the one the hostile B is offering in the TO.

2. *Leveraged Acquisition by T*

i. T can make a leveraged acquisition, borrowing heavily to fund a large acquisition, in hopes that its new highly-leveraged status will make it less attractive.

3. *Paying Greenmail to B*

i. T buys back the partial stake that B has already acquired by paying him a significant premium (usually justified as it is a control block)

a. Typically accompanied by a stand-still agreement.

4. *The Poison Pill Defense (SH Rights Defense)*

i. Mechanics of the Pill

a. *Authority for the Pill*

(1) Comes from Blank Check Preferred

(2) Typically does not require SH approval (so can be put into place on the fly), b/c the company is simply distributing a call or put right to each SH pro rata.

b. *Attachment of Rights*

(1) Rights of blank-check preferred shares are issued as a dividend; at time of distribution, rights are attached to the underlying stock--thus the rights follow shares.

(i) The rights entitle the holder to buy a certain portion of a share of preferred stock (see 1/100 below)

(ii) Typically **priced out of the money**

(iii) Right is only exercisable once triggering event occurs.

c. *Redemption Option by BOD*

(1) Usually for nominal fee (see $.50/share below)

(2) Redemption window will close at some point.

(3) Can be waived by the BOD to allow the Tx

d. *Triggering Event*

(1) Someone acquires a certain %--probably 20% (but not less than 5%--see 13(d))

e. *Flip Over Provision--**KEY FEATURE***

(1) Once the right has "flipped over" b/c of the triggering event, usually three things happen:

(i) The rights become separately tradeable;

(ii) The rights are no longer redeemable by T management;

(iii) If B gets control and effects a merger, then the right entitles its holder to acquire shares of the combined entity at a discount price.

(a) *Moran v. Household Int'l*: Household adopts the pill: If there is an announcement of a TO to acquire 30% of Household's stock, then the right to purchase 1/100 of a share of preferred stock for $100 becomes immediately exercisable, and can be redeemed for $.50/right (no way 1 share preferred is worth $10k = priced out of the money). If someone acquires 20%, then the rihts are issued and become non-redeemeable and exercisable to purchase 1/100 share. Flip over = If the rights are not exercised, and there is a backend merger, then the holders of the rights get the consolidated companies stock at half price. Moran sues for breach of fiduciary duty. *Held*, the pill is valid b/c the BOD reasonably identified a threat (undervalued industry,

lots of LBOs) and the response was proportionate--just gets BOD a seat at the table--it does not deter all Bs. **Court rejects passivity theory**.

(b) However, the 20% trigger can occur and then the person does not do the back end merger, so the poison isn't released--this person can then influence the board and possible start a proxy fight--500 lbs Gorilla.

f. *Flip In Provision*
  (1) Once the triggering event occurs, the right is no longer redeemable by T and allows T SHs to buy shares of T at a discounted price, even if there is no back-end merger.
    (i) Dilutes the value of T, making it a less desirable target.
    (ii) Designed to prevent the creeping acquisition.

g. *"Put" Plan*
  (1) Calculates the price that T's BOD thinks is fair for T's shares.
  (2) If B buys some but not all of T's shares, the put gives each T SH the right to sell back his remaining shares in T at the fair price.
  (3) Effective against Two-tier front loaded TOs b/c it relieves T's SHs of the fear that if they don't tender, they'll receive an unfavorable deal on the back-end.

ii. Rationale behind the pill
  a. The cousin of **anti-destruction provisions**
    (1) Built into convertible preferred stock, bargained for at the time you make your investment.
    (2) Valid b/c its bargained for upfront.
    (3) Existed to protect senior securities to convert into common stock
      (i) Allowed the conversion right to remain even if there was a merer.
  b. Pill does not preclude B from making offers
    (1) But it does increase Tx costs
    (2) Would make the purchase of T prohibitively dilutive.
    (3) Gets T's board a seat at the negotiating table.
      (i) B can make offer conditioned on Pill being waived (see *Revlon*)
  c. Issuance of the rights (to buy 1/100 of a share) look like a capital raising Tx
    (1) Court will not look at substance over form.

iii. Triggers *Unocal*, Not BJR
  a. By making it harder for B to do the two step, it allows the current BOD to become entrenched.
  b. EXA: 3% flip trigger would not be a balanced response.
    (1) Plus, can argue that it is frustrating the Williams Act (5% threshold)
  c. ***Look to whether the directors making the decision re pill are interested or not.

5. *No Shop Provisions*
  i. Subject to exception to allow shopping if required by fiduciary duties.

6. *Lock up Provisions*
  i. Most common form of lock-up = **crown jewel option**
    a. T gives a White Knight the option to buy one or more of T's best businesses at a very low price if the White Knight's bid is eventually topped by the hostile bidder.
      (1) Probably valid only if there is one hostile bidder, and T needs to offer crown jewel option to get another B to join the party--i.e., if the crown jewel is required to create an auction.

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-i) But if used to end an auction, then probably invalid.

ii. **Not per se illegal**, so long as they are used to expand competition, not destroy it.

a. A lock up may be the only way to induce a B to enter the competition--could thus be value maximizing.

iii. Competing interests

a. B's interests

(1) Doesn't want T to shop around offer and lose all the $ B invested into deal;

(2) Often necessary just to get B to the table.

b. Don't want lock up option to preclude another B from coming along and making superior offer.

(1) This would harm SHs.

7. *Termination Fees*

i. Usually okay if reasonable, i.e. don't preclude T from getting a better offer and don't coerce SHs from voting to approve.

a. EXA: Too high a termination fee may preclude a better offer, b/c any offer will be inferior after the fee is paid out; also, can coerce b/c SHs don't want corp. to have to pay all that money out.

ii. Analyzing validity of termination fees

a. Liquidated Damages Analysis

(1) Must demonstrate the uncertainty as to how to figure the damages

-i) Usually established, b/c typically hard to figure what a co's actual damages are.

(2) The agreed to amount must be reasonable.

-i) *Brazen v. Bell Atlantic*: Fully negotiated merger between 9X and Bell Atlantic. **Reciprocal termination fees** because both were in the industry and both were vulnerable to topping bid. First stage = $200M fee if topping bid came along and then there was either (1) failure to get SH approval OR (2) BOD decides to terminate merger agreement in order to enter deal w/topping bid; Second stage = $350M fee paid if a competing deal gets made w/in 18 months of 9X/Bell deal. Provide that termination fee is to be treated as liquidated damages (K damages, not a penalty) and that nothing shall relieve either party from liability for a willful breach of the agreement. Π SH sues claiming the fee was coercive on the SHs because its was so high. Lower court applied BJR, said the fee was valid. *Held*, fee is valid, but under the **traditional K liquidated damages analysis.** Here, the amount was reasonable taking into account Tx costs, lost opportunity costs, etc.

(a) Note: BJR analysis probably comes out the same way; and if you do *Unocal*, same analysis when determining whether the response was balanced and proportionate.

8. *Stock Option*

i. When T grants an option to the acquirer to buy stock in T, whether it will be upheld as valid depends on whether the option will have a chilling effect on new Bs coming to the table.

F. FIDUCIARY DUTIES WITH RESPECT TO DEFENSIVE MEASURES

1. *Traditional Perspective*

i. In a pure duty of care claim, π has the burden of proof to establish that BOD messed up.

ii. With defensive tactics, the BOD has the initial burden to show (1) good faith (they reasonably believed there was a threat to the corporation) and (2) they did reasonable investigation in order to obtain protections of BJR.

a. *Cheff v. Mathes:* T = Holland, B = Maremont. T has controlling SH (Cheff). T starts seeing their trade volume increase, but don't know why. (today—13(d) would kick in). Hired a PI (gumshoe) and figure it out. B identifies itself as a raider, intends to bust up the enterprise to collect on the spread. T's BOD responds by deciding to buy back 155k shares that B had acquired in the open market (i.e., they decided to make **greenmail**

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2. *Application of Williams Act to Defensive Tactics*

i. *Schreiber v. Burlington Northern, Inc.*: B makes unosolicited TO for T. BOD adopted Golden Parachutes, bought them time and allowed them to enter negotiations w/B. B was a strategic buyer. As a result of negotiations, B w/drew its TO, and instead made new TO reducing the # shares they would accept, and put money into T. π = T SH claiming 14(e) violation (failure to disclose the golden parachutes). *Held*, this is not a 14(e) case—**the term "manipulative" in 14(e) requires a misrepresentation or nondisclosure**; there was no failure to disclose w/ regard to the TOs, so no 14(e) violation. The Williams Act is about disclosure—court will not impose it to regulate the undertaking of these defensive measures—its whole purpose is to make sure there is full and adequate disclosure of all material facts. Π's harm, at all, came from the withdrawal of the first Tx; the failure to disclose the golden parachutes was part of the 2nd Tx, so the claimed harm was not caused by the nondisclosure.

3. *Intermediate Scrutiny:* Unocal -- applies when looks like COI and entrenchment.

i. <u>The Test</u>

a. *BOD has burden of showing they had reasonable grounds for believing there was a threat to the corporate enterprise **and***

(1) Designed to show that the BOD had a good faith desire to protect the corporation, not merely to protect their own jobs.

(i) Example of Reasonable Threats

(a) Change of business practices;

(b) Coercive tactics of TO;

(c) Excessive debt.

b. *The BOD's response was balanced and proportionate in response to the threat posed.*

(1) Cannot be preclusive or coercive (i.e., cannot prevent B from succeeding in its TO no matter what).

(2) Also requires that the measure adopted somehow benefits the SHs in some way--even if the primary benefit is to other constituencies.

(3) Also places the burden on the BOD to adequately investigate the proposed measure before adoption.

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ii. Consequences

a. If BOD can't meet the two requirements, must prove the Tx meets **entire fairness**.

b. If BOD meets this burden, then the burden shifts to π to overcome BJR.

c. Board is allowed to take into account interests other than the SHs (note holders, etc), b/c the main concern is protecting the enterprise.

(1) Must demonstrate that protecting those interests is rationally related to the long term wealth maximization of SHs.

d. *Unocal Corporation v. Mesa Petroleum Co.*: T Boone Pickens' investment vehicle = Mesa Petroleum. Unocal found out that Pickens had submitted an unsolicited TO. It was a 2 tiered tender offer. First tier = buying 37% (which will give him 50.1% total, because he acquired 13% already) at $54/share. This triggers T's BOD's obligation to file 14(d)(9) w/in 10 days to allow a fully informed SH vote. BOD met for 9.5 hours and conclude that $54 is woefully inadequate—haven't come to a conclusion as to what fair value is, only that fair price was something in excess of $60. Second Tier = If T Boone gets control, then he's going to offer junk bonds in the backend taking out the 49% he doesn't own--instead of getting $54/share, they get securities worth $54/share. T challenges T Boone because he didn't disclose that. T Boone amended 14(d) disclosure to say that the equity will be highly subordinate to other creditors, but with a high yield (senior to SHs). T adopts defensive self tender offer—i.e., **defensive recapitalization.** T offers $72/share (what it believes = fair value)—borrowed the apx $6Bcreates stub equity (equity owned by SH, but it is not as valuable as it was before the company leveraged its balance sheet). If management is right in its valuation, then T Boone stands to gain (because he has so many shares). T wants to exclude T Boone from the self TO so that he doesn't displace the minority SHs T's BOD wants to protect. Unocal sues claiming the Mesa exclusion was not valid for breach of fiduciary duty for singling out Mesa (who is a valid SH of T). Held, there was a reasonable perceived threat—after investigating, the board determined there was an inadequate price offered, inherently coercive, and threat of greenmail, and the exclusion was proportionate because the threat to the enterprise was created by the move made by T Boone himself—the decision to exclude him was okay because he was the threat

(1) ***NOTE, this exclusion no longer valid after Rule 14d-10 (all holders rule)

e. Public Policy

(1) Protects minority SHs on back-end. In this situation, appraisal rights aren't enough protection, b/c where there is a two tiered bid they minority or dissenting SHs may get left holding an empty bag.

4. Enhanced Scrutiny: Revlon Duty to Auction the Firm--Auction Mode Duties

i. Once the company goes from defending against a take-over to being in play (i.e., they've made the decision to sell), *Unocal* standard no longer applies; rather BOD must maximize SH wealth in the short term.

a. This means obtain the highest price for the SHs--need a **level playing field** treating all Bs equally.

b. Sole duty is to the common SHs.

(1) *Revlon v. MacAndrews & Forbes*: PP made a hostile TO for Revlon at $45/share. Revlon rejected the offer, adopted a poison pill, and announced a share repurchase plan. Revlon also began looking for a White Knight, and

b. Sole duty is to the common SHs.

found one in Forstmann. Forstmann and PP did a series of topping bids, and Revlon finally approved Forstmann's slightly superior offer. However, Revlon also gave Forstmann several concessions that effectively ended the auction: (1) **crown jewel** option to buy 2 Revlon subsidiaries apx. $150M below market value if another acquirer got 40% of Revlon's shares; (2) **no shop** provision preventing Revlon from dealing with any other would-be acquirer; (3) **termination fee** of $25M, and gave them proprietary info not given to PP. Revlon said one reason for preferring Forstmann was that they would better protect holders of certain notes issued by Revlon, who had indicated that if they did not receive special protection they might sue Revlon and its directors. *Held*, the Forstmann deal was enjoined b/c the poison pill and stock repurchase were valid under *Unocal* (since Revlon perceived a threat of PP's use of junk bonds and potential bust up), but the BOD's duties changed once they started looking for a White Knight (and were thus in play). The BOD then was charged with getting the best price for the SHs. By choosing Forstmann b/c it would protect the noteholders, Revlon messed up--they had to protect the SHs first--this looked like the BOD was self-interested in protecting themselves from being sued by the noteholders.

ii. Trigger for *Revlon* duties

a. Put yourself up for sale;
b. Decide to effect a business reorganization that will break up the company
c. In response to B's offer, T abandons long term plan and seek short term alternatives that could break up company.
d. **Change in corporate control or break up of company**.
   (1) *Paramount v. QVC Network*: Paramount enters into fully negotiated deal w/ Viacom. Adopted 3 defensive measures: No shop provision, termination fee, and stock-option. **No shop provision**: Paramount wouldn't be able to shop, solicit, encourage, discuss etc w/any other Bs unless (a) someone made unsolicited written bonafide offer, and (b) board was required to entertain deal to fulfill their fiduciary duties; **Termination fee**: $100M would be paid to Viacom by Paramount if they terminated the merger agreement to enter a competing agreement, or if the SHs didn't approve the merger; **Lock-up Stock-Option**: Viacom can buy 19.9% shares of Paramount at the offer price if anything triggered the termination fee—stock option had note feature and put feature. *Note feature* = Viacom could exercise stock option w/o cash--i.e. could use a note of questionable marketability (not really an issue); *Put feature* = allowed Viacom to have Paramount pay them cash for the difference between exercise and market price at any time (open ended how much Paramount would have to pay Viacom—no cap). QVC makes unsolicited cash TO at $80/share conditioned on the stock option being either contractually eliminated or judicially declared invalid—backend merger would be using QVC stock (not junk bonds). Paramount board decides that increased $90 bid from QVC is not in the best interests of Paramount because it is too conditional and they like the strategic synergies w/Viacaom (i.e., just say no defense). *Held*, *Revlon* duties apply because this was a sell of control of the company, and they were breached because the Put Feature precluded a topping bid from coming in and being approved, because there was no cap as to how much Paramount might have to pay Viacom.
e. **But not just any action that would attract a hostile B will be sufficient-Board's Right to Just Say No.**

Held, *Revlon* duties apply because this was a sell of control of the company, and they were breached because the Put Feature precluded a topping bid from coming in and being approved, because there was no cap as to how much Paramount might have to pay Viacom.

e. **But not just any action that would attract a hostile B will be sufficient- Board's Right to Just Say No.**

(1) *Paramount Communications, Inc. v. Time, Inc.*—Time merging w/ Warner Bros; Paramount announces competing offer for Time; Time trading at $126, Paramount offers $175/share; Time BOD decided Paramount bid inadequate b/c Time carefully did bid w/ Warner, in long-run Warner merger better biz combo for future profits and Time culture; Time BOD takes certain steps to facilitate deal w/ Warner and fend off Paramount; Time issued all cash deal for 51% of Warner stock; Warner BOD approved friendly tender offer; after merger Warner will own 62% of Time-Warner; This was a stock-for-stock deal originally, but now issue debt to purchase Warner shares; Paramount increases offer to $200/share all cash, any and all offer; Time BOD says bid still inadequate, Time better off w/ Warner. Paramount sues to enjoin Time's tender offer for Warner; Paramount has shares and this gives it standing to sue for an injunction; Paramount argues Time is breaching *Revlon* and *Unocal*. Paramount claims Time entered Revlon mode when it agreed to merge w/ Warner, b/c Warner was going to own 62%; Paramount argued this is a change of control. *Held*, this was not a change of control because Time BOD wanted to protect Time's culture and co not really up for sale b/c of how carefully they structured the deal-- Time negotiated for a strategic business combo and this does not mean that Time put itself up for sale; both will still have directors on BOD, etc. *Unoal* applies, and response was proportionate to reasonable threat.

(i) Just Say No Defense

(ii) RATIONALE: If court accepted Paramount's argument, then anytime a B made an offer above fair price, T would have to abandon all long term plans and seek to maximize SH wealth in the short term--that's not how products get better.

5. Deal Protection Devices

i. <u>Must have carve out for fiduciary duties</u>

a. *OmniCare v. NCS Healthcare*: NCS was insolvent. BOD looked for strategic alternatives for 2 years. Got offer from Omnicare and superior proposal from Genesis. Negotiated Tx is between NCS and Genesis (triangular merger). While in negotiations, Omnicare comes along w/ another offer that was superior financially, but a lot of conditions. Main condition: **due diligence** (basically says B is going to investigate to make sure they are getting what they think they are buying—T would have to give B a lot of proprietary info). BOD decides to go w/Genesis—Genesis didn't want to be a **stalking horse,** and NCS doesn't think improvement offered by Omnicare is worth losing Genesis. Deal protection measures: **Force The Vote Provision** (Even if board decides to withdraw its recommendations, it still has to take the deal to the SHs and have them vote on it); **Voting Agreement**: Required 2 inside directors (owning 95% voting stock) to vote in favor of the deal (because they cross 15%, this triggered DGCL §203—but they try to invoke exception by getting board approval before agreements are signed). *Held*, there was no carve out allowing termination of deal if fiduciary duties required it, so NCS breached its fiduciary duties.Bottom line

b. Rationale

(1) Cannot contract away your fiduciary duties