Perhaps discouraged that shareholder voting, the law of fiduciary duties, and even well-constructed executive-pay packages can minimize agency costs, on Wednesday morning we will turn together to our last, best hope for achieving the optimal discipline of corporate management: mergers and acquisitions.

We will begin by considering the regulation of such mergers under American corporate law, particularly Delaware law. Then, we will examine a case study of an actual merger agreement—with an eye toward the considerations that corporate lawyers in the United States assess when planning a merger or acquisition. To prepare for this session, please review:


- For necessary *statutory and regulatory background* on the AKS materials, please also read Delaware General Corporation Law (“DGCL”) § 251 (in connection with AKS 460).

I very much look forward to discussing these materials with you during our morning session on Wednesday.
COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION

THIRD EDITION

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12.1 INTRODUCTION

Among the most important transactions in corporate law are those that pool the assets of separate companies into either a single entity or a dyad of a parent company and a wholly owned subsidiary (which is practically the same thing, only better). There are three legal forms for such transactions: the merger, the purchase (or sale) of all assets, and — in RMBCA jurisdictions — the compulsory share exchange. A merger is a legal event that unites two existing corporations with a public filing of a certificate of merger, usually with shareholder approval. Ordinarily, one of the two companies absorbs the other and is termed the "surviving corporation." This company subsequently owns all of the property and assumes all of the obligations of both parties to the merger. An RMBCA share exchange, as we describe below, closely resembles certain kinds of mergers in its legal effects. Finally, "acquisitions" comprise a generic class of "nonmerger" techniques for combining companies, which generally involve the purchase of the assets or shares of one firm by another. Following an acquisition, the acquiring corporation may or may not assume liability for the obligations of the acquired corporation, as we discuss below.

Mergers and acquisitions by public companies (M&A transactions) are among the most complex of business transactions. They implicate diverse legal questions and, at least potentially, profoundly alter the characteristics of shareholder investments. In this chapter, we first examine economic motives for M&A transactions and then turn to specific protections that the law accords shareholders in these transactions. In particular, M&A transactions provide a useful platform for revisiting two fundamental questions of policy in corporate law: the role of shareholders in checking the board's discretion and the role of fiduciary duty in checking the power of controlling shareholders.

1. A merger in which both parties disappear and are survived by a new third corporation is technically called a consolidation. See, e.g., DGCL §251(a).

2. Even the simplest M&A transaction involving public companies typically raises issues of securities law, tax law, compensation law, and quite possibly competition law, in addition to corporate law, of course. See Martin D. Ginsburg & Jack S. Levin, Mergers, Acquisitions and Buyouts (2006).
12.2 Economic Motives for Mergers

Like other legal forms of enterprise, the corporate form partitions business assets into discrete pools under the management of particular management teams. There is, however, no guarantee that the initial match among assets, managers, and companies is the right one or that it continues to be the right one in an economy subject to continuous change. The law of M&A transactions provides (relatively) quick and inexpensive ways to reform the partitioning and management of corporate assets. We begin by surveying motives, value increasing or not, for combining corporate assets.

12.2.1 Integration as a Source of Value

Gains from integrating corporate assets arise from what economists term economies of "scale," "scope," and "vertical integration." Economies of scale result when a fixed cost of production — such as the investment in a factory — is spread over a larger output, thereby reducing the average fixed cost per unit of output. Consider two companies, each with a widget factory that operates at half capacity. If the companies merge, the "surviving" company might be able to close down one factory and meet the combined demand for its products at a much lower cost. This source of efficiency often explains so-called horizontal mergers between firms in the same industry.

Economies of scope provide a similar source of efficiency gains. Here mergers reduce costs not by increasing the scale of production but instead by spreading costs across a broader range of related business activities. For example, a business might merge with another company that manufactures a product that can be efficiently marketed through the first company's sales force. In theory, at least, even the talents of a company's management team could be a source of economies of scope if a merger could extend its talents to a larger asset base.

Vertical integration, a special form of economies of scope, may sometimes arise by merging a company backward, toward its suppliers, or forward, toward its customers. Buying a component on the market has advantages, but so, too, does buying the factory that makes the component. Contracting through the market can be expensive if the component is highly specialized. Moreover, even if a supplier is found, it may begin to behave

3. See our discussion of asset partitioning in Chapter 3.
4. Thus, a management team with superior "general management" skills could attempt to wring added value from its skills by expanding the asset base over which it exercises its judgment. Something like this idea was a popular rationale for mergers during the "conglomerate merger" movement of the 1960s. Those mergers, however, did not generally prove to be efficient. See, e.g., Ronald W. Melichner & David F. Rush, The Performance of Conglomerate Firms: Recent Risk and Return Experience, 28 J. Fin. 381 (1973); David J. Ravenscraft & F. M. Scherer, Mergers, Sell-Offs and Economic Efficiency (1987). Indeed, many commentators believe that the "bust-up" takeover movement of the 1980s was largely about the unwinding of these inefficient mergers of two decades before. See, e.g., Andrei Shleifer & Robert W. Vishny, The Takeover Wave of the 1980s, 249 Sci. 745 (Aug. 17, 1990).
opportunistically once it determines that its customers are dependent on it. Thus, it may be cheaper to merge with the suppliers than to buy the product.\footnote{See generally F. M. Scherer \& David Ross, Industrial Market Structures and Economic Performance (3d ed. 1990). Professors Brealey and Myers, the finance mavens, offer the following illustration of how integration through ownership can increase efficiency. Suppose that airlines rented their planes on short-term leases but owned their brand names, operated airport gates, advertised, sold tickets, etc. The administrative cost of matching the supply of rented planes with the published schedule of flights would be enormous. Intuitively, any airline that switched to either owning its own planes or leasing them for long periods (which is economically quite similar) could realize huge savings. Thus, we would expect airlines to move to vertical integration—either owning or leasing the vital aircraft input for long periods. Nevertheless, a good thing can be overdone. Professors Brealey and Myers also note that, in the late 1980s, the Polish State Airline owned not only its own planes but also its own hog farms to supply meat to its customers and employees. See Richard A. Brealey \& Stewart C. Myers, Principles of Corporate Finance (7th ed. 2003). Of course, our intuition is that it is cheaper for an airline to buy sausages on the market than to make them itself. At least, we hope that this is true in a developed market economy like our own, even if it might not have been true in socialist Poland.}

\subsection{Other Sources of Value in Acquisitions: Tax, Agency Costs, and Diversification}

Apart from integration gains, M&A transactions are often said to generate value for at least three other reasons, relating to tax, agency costs, and diversification. Consider tax first. Corporations with tax losses (i.e., deductible expenses greater than income during the tax year) may set those losses off against income in subsequent years for up to twenty years. This ability to carry a net operating loss (NOL) forward is itself a valuable asset—but only if its owner has sufficient taxable income to absorb it. Since an NOL cannot be sold directly, a corporation that lacks sufficient income might prefer to find a wealthy merger partner rather than waste its NOL. In this transaction, the shareholders of the NOL’s owner and its merger partner would implicitly share the NOL’s present value.\footnote{See Gitnburg \& Levitin, supra note 2, at ch. 12. The Internal Revenue Service not only bars the sale of NOLs but also disallows their deduction if the merger appears to have been structured solely to capture their value. Thus, the surviving company in a tax-driven merger must generally continue to operate the assets acquired from the NOL’s owner, at least for a period.}

A very different economic motive for M&A transactions is the replacement of an underperforming management team that has depressed the company’s stock price. As a company’s stock price declines because the market anticipates that its incumbent managers will mismanage in the future, it becomes more likely that an outside buyer can profit by purchasing a controlling block of stock and replacing the incumbent managers.\footnote{See Reiner Kraakman, Taking Discounts Seriously: The Implications of “Discounted” Share Prices as an Acquisition Motive, 98 Colum. L. Rev. 891 (2008).} Of course, acquiring a controlling block of stock, by means of a tender offer or otherwise, is usually enough to displace the target company’s managers. The point is not merely to depose bad managers, however, but also to realize the maximum economic returns from doing so. Realizing maximum
returns will generally require that the target company merge with a subsidiary of the acquiring company.

In the 1980s, most transactions to displace underperforming managers appear to have been hostile. As we discuss in Chapter 12, an acquirer would first bid for a controlling block of stock in a public tender offer and then, when successful, would arrange for a merger to cash out minority shareholders. Once in control, the acquirer would be free to discipline or fire management. Although hostile takeovers have been less common in recent years, the desire to improve management may also motivate friendly acquisitions. Why would poorly performing managers leave if they were not forced to do so? The answer is money, of course. As a matter of fact, poor managers (or good managers) can be bought off as part of the premium that a new investor must pay to acquire the corporation’s assets. One device for sharing takeover premia with managers is the “golden parachute” contract, which provides senior managers with a generous payment upon certain triggering events, typically a change in the ownership of a controlling interest in the corporation or a change in the membership of its board. A second compensation technique is a stock option plan, which allows options that would otherwise vest over a four- to six-year period to become immediately exercisable upon a change in control.

Yet a third way in which M&A transactions are sometimes said to increase corporate value is by diversifying a company’s business projects, thus smoothing corporate earnings over the business cycle. For example, the managers of an air conditioner company might wish to merge with a snowblower company to ensure stable year-round earnings. Just why this sort of merger should increase the value of corporate assets is unclear, since investors can “smooth” corporate earnings at less cost merely by diversifying their own investment portfolios. Nevertheless, such “smoothing” is frequently offered as a rationale for mergers. The reason may be that such mergers simply make life more comfortable for managers, or it may be that they actually can increase company value for some reason as yet undiscovered by financial economists. 8

12.2.3 Suspect Motives for Mergers

The discussion thus far has emphasized positive or neutral motives for mergers that increase the value of corporate assets without making anyone else worse off (except the government in tax-driven deals). There are,


9. See Ronald J. Gilson & Bernard S. Black, The Law and Finance of Corporate Acquisitions 312-357 (2d ed. 1995). Wholly apart from smoothing earnings, product diversification can add efficiency by combining complementary assets, as when an acquirer can use its distribution channels to sell a target’s products. A merger between a snowblower company and an air conditioner company makes good sense if the combined firm can use shared physical facilities or the same trained workers. Economies of scope such as these do increase the real value of the target’s assets, and thus the value of the surviving corporation’s stock.
however, also opportunistic motives to enter mergers that increase shareholder value or management compensation at the expense of another corporate constituency. One example is a squeeze-out merger, in which a controlling shareholder acquires all of a company’s assets at a low price, at the expense of its minority shareholders. Another form of opportunistic merger is one that creates market power in a particular product market, and thus allows the postmerger entity to charge monopoly prices for its output. (Of course, the government also attempts to block anticompetitive mergers under the elaborate federal framework of antitrust statutes. 

Finally, in addition to opportunistic M&A transactions, there is a last class of mergers that destroy value, perhaps even more so than opportunistic mergers. These are “mistaken” mergers that occur because their planners misjudge the difficulties of realizing merger economies. Common errors of judgment include underestimating the costs of overcoming disparate firm cultures; neglecting intangible costs, such as the labor difficulties that might follow wholesale layoffs; and failing to anticipate the added coordination costs that result merely from increasing the size of a business organization. 

12.2.4 Do Mergers Create Value?

There is a vast empirical literature on the wealth effects of mergers. While the magnitude of the result varies widely from study to study, the general weight of the evidence indicates that, measured by immediate stock market price reaction to the merger’s announcement, on average, mergers do create value. In one frequently cited study, Professors Gregor Andrade, Mark Mitchell, and Erik Stafford examine 3,688 deals over the period 1973–1998 and find an increase in combined (target and acquirer) wealth of 1.8 percent in the window around the announcement of


11. While there are often advantages to a larger scale, there is also a special burden that large-scale organizations must bear. That burden is reflected in many part by the costs of determining transfer prices within large firms and, in a more important way, by the imperfections in these transfer prices. The firm loses market discipline by assigning internal costs that differ from true market prices. This problem is small where the input has a comparable market price, in which case internal pricing can be based on an actual price. But as the organization grows large and its inputs become specialized, the costs assigned to them grow unreliable. As a result, the firm comes to lack critical information about the relative efficiency of different aspects of its operations. See Ludwig von Mises, Human Action: A Treatise on Economics (1949); and Socialism: An Economic and Sociological Analysis (1922) (J. Kahane trans., 1951). In addition, large-scale organizations typically require complex compensation schemes to encourage team cooperation and motivate individual performance. Such plans grow increasingly difficult to design and operate as the scale and complexity of the firm increase. Correlatively, smaller firms are better able to monitor worker productivity and create functional incentives.

12. For a comprehensive recent survey of the empirical evidence, see Robert F. Bruner, Applied Mergers and Acquisitions 47-49 (2004) (summarizing the results from twenty-four studies and concluding that “M&A does pay the investors in the combined buyer and target firms”).
the deal. \(^{13}\) This value, however, is not evenly distributed: Studies find that
targets generally win, while acquirers break even, or lose on average.
Andrade, Mitchell, and Stafford, for example, report that targets in their
sample experienced positive abnormal returns of 16.0 percent, on average,
while acquirers experienced negative abnormal returns of 0.7 percent.\(^{14}\)
(The combined effect is only modestly positive because acquirers are
generally much larger than targets.)

Using a more recent M&A sample and employing the same market
price methodology, Professors Sara Moeller, Frederick Schlingemann, and
Rene Stulz report an acceleration in acquirers' losses from acquisition:
Between 1998 and 2001 acquiring firm shareholders lost 12 cents at deal
announcement for every dollar spent, for a total loss of $240 billion during
this period, compared to a loss of just 1.6 cents per dollar spent, or a total
loss of $1 billion, during all of the 1980s.\(^{15}\) The authors note that their
results for the 1998-2001 period are driven by a small number of acquisi-
tion announcements with extremely large losses. In addition, these and all
other empirical studies of the question must be interpreted with caution
because we do not have the counter-factual—what would have happened
to acquirers if they had not engaged in acquisition activity? If acquisitions
are effective in mitigating losses, then we cannot conclude that acquisition
activity, on average, destroys value for acquirers.

12.3 THE EVOLUTION OF THE U.S. CORPORATE LAW
OF Mergers

The history of U.S. merger law is one of constantly loosening constraints,
driven by dynamic markets and technological change. It begins in a world
without any mergers at all and ends in a world in which mergers can force
shareholders to divest all of their stock in a company. The fundamental
move in this evolution occurred when the law became willing to treat
equity investors as a class of interests that could, except where fiduciaries
duties were triggered, be adequately protected by majority vote and a right
to a statutory appraisal of fair value. For convenience, we can divide the
history of merger law into two periods.

12.3.1 When Mergers Were Rare

The first period is the era when mergers were rare, which covers
the history of U.S. corporate law until roughly 1890. Until about 1840,

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\(^{13}\) Gregor Andrade, Mark Mitchell & Erik Stafford, New Evidence and Perspectives on
Mergers, 15 J. Econ. Persp. 103, 110 (Table 3) (2001).

\(^{14}\) See id.

\(^{15}\) Sara B. Moeller, Frederick P. Schlingemann & Rene M. Stulz, Wealth Destruction
757 (2005).
compulsory share exchange is yet another example of the malleability of share interests in modern corporate law.

Delaware has no compulsory share exchange statute. Nevertheless, corporate lawyers have developed a perfectly serviceable hybrid acquisition form under Delaware law that produces almost the same result as the compulsory share exchange. This is the "two-step" merger, in which the boards of the target and the acquirer negotiate two linked transactions in a single package. The first transaction is a tender offer for most or all of the target’s shares at an agreed-upon price, which the target board promises to recommend to its shareholders. The second transaction is a merger between the target and a subsidiary of the acquirer, which is to follow the tender offer and remove minority shareholders who failed to tender their shares (often at the same price as the tender offer). Sometimes the second step consideration will be cash, in which case this step is called a "cash-out" merger. Occasionally, this two step merger is accomplished through the triangular merger form described below. But before exploring triangular mergers, we first discuss mergers more generally as an acquisition technique.

12.5.3 Mergers

A merger legally collapses one corporation into another; the corporation that survives with its legal identity intact is, not surprisingly, termed the "surviving corporation." A management team that wishes to acquire another company in a merger typically investigates the target and initiates negotiations over the terms of a merger itself. A merger requires the approval of the board, too, of course. But just when a CEO raises a proposed merger with the board and how involved the board will be are not dictated by law. Good practice dictates, however, that outside directors should be involved earlier and more intensively when the merger transaction is significant relative to the assets of the corporation. In all events, the management teams of the corporations, aided by lawyers and often by investment bankers, prepare a merger agreement for board approval. (We provide an excerpted example below.) After the board formally authorizes the execution of this agreement, the board will in most instances call a shareholders’ meeting to obtain shareholder approval of the merger.

In most states, a valid merger requires a majority vote by the outstanding stock of each constituent corporation that is entitled to vote. The

31. A less common transaction, a "consolidation," collapses two corporations into a new legal entity, the "resulting corporation." In most respects, corporation statutes treat mergers and consolidations identically.

Note that civil law jurisdictions generally have not only a merger transaction but also its statutory inverse, a statutory "separation" transaction, in which a portion of the assets and liabilities of a single large company are assigned to a new corporate entity. In the United States, separation is generally accomplished by dropping a portion of a company’s assets into a subsidiary and distributing the shares of this subsidiary to the original company’s shareholders.

32. See, e.g., DGCL §251(e).
default rule is that all classes of stock vote on a merger unless the certificate of incorporation expressly states otherwise. Oddly, the Delaware merger statute, DGCL §251, does not also protect preferred stock with the right to a class vote in most circumstances. Of course, the Delaware statute does give class-voting rights to preferred stock if their rights are adversely affected by a charter amendment. See DGCL §242(b)(2). But this narrow right is triggered only when a charter amendment alters the formal rights of the preferred stock, not when it reduces the economic value of the stock. Thus, under Delaware law, the most important source of preferred voting rights on a merger is the charter itself.

The voting common stock of the "target" or collapsed corporation always have voting rights. The voting stock of the surviving corporation is generally afforded statutory voting rights on a merger except when three conditions are met: (1) The surviving corporation's charter is not modified, (2) the security held by the surviving corporation's shareholders will not be exchanged or modified, and (3) the surviving corporation's outstanding common stock will not be increased by more than 20 percent. The rationale for this exemption from the usual requirement that shareholders of both companies approve a merger is that mergers satisfying these conditions have too little impact on the surviving corporation's shareholders to justify the delay and the expense of a shareholder vote.

Of course, higher or special voting requirements for mergers may also be established by the corporate charter or by state takeover statutes (e.g., DGCL §203). Moreover, the stock exchanges and the NASDAQ require a listed corporation to hold a shareholder vote on any transaction or series of related transactions that result in the issuance of common stock (or convertible preferred stock) sufficient to increase outstanding shares by 20 percent. Unlike corporate statutes, the stock exchange rules require approval of 50 percent of shares voting on the matter (a "simple majority"), as opposed to 50 percent of outstanding shares (an "absolute majority"). Thus, if the acquisition contemplates the issuance of more than 20 percent of the acquirer's common stock, shareholders of the acquirer, as

33. E.g., DGCL §212(a). Generally, all common stock votes, although nonvoting common is possible. The voting rights of preferred stock are typically more limited. Most commonly, preferred has no right to vote at all except in stated circumstances (e.g., when a preferred dividend has been skipped). But when preferred stock has a right to vote, it is generally the right to a class vote, since preferred votes would otherwise ordinarily be swamped by the votes of common stock if they voted together.

34. Compare RMBCA §§11.03, 11.04. Thus, under Delaware law, preferred stockholders are heavily dependent on the terms of their security for their protection and receive scant help from Delaware corporate law. There is interesting history here for the specialist. See Federal United Corp. v. Havender, 11 A.2d 331 (Del. 1940).


36. By contrast, the RMBCA creates parallel class-voting tests for charter amendments and mergers. Under these provisions, any special effect on a class of security holders (even stock that is made expressly nonvoting in the charter) will give that class of security holders a right to vote as a class. See RMBCA §§10.04, 11.04(f). Other statutes, including the California and Connecticut codes, give nonvoting preferred stock the right to vote on a merger even if the merger does not affect the legal rights of the holders.

37. See, e.g., DGCL §251(f); RMBCA §12.03; Cal. Corp. Code §1201 (b), (d).
well as those of the target, must approve the transaction, regardless of how it is structured. 38

Following an affirmative shareholder vote, a merger is effectuated by filing a certificate of merger with the appropriate state office. The governance structure of the surviving corporation may be restructured in the merger through the adoption of an amended certificate of incorporation (or articles of incorporation) and bylaws, which will have been approved by the shareholders as part of the merger vote. Shareholders who disapprove of the terms of the merger must dissent from it in order to seek, as an alternative, a judicial appraisal of the fair value of their shares. (Generally, if they have no right to vote on the merger, they will not have appraisal rights for similar reasons.)

12.5.4 Triangular Mergers

As we have noted, the surviving corporation in a merger assumes the liabilities of both constituent corporations by operation of law. But to expose the acquirer's assets to the (imperfectly known) liabilities of a new acquisition is inevitably a risky step. Thus, the acquirer has a strong incentive to preserve the liability shield that the target's separate incorporation confers. This can easily be done by merging the target into a wholly owned subsidiary of the acquirer (or reversing this, by merging the subsidiary into the target). And this is precisely what is done. Preserving the liability protection that separate incorporation provides to the acquirer is almost always a highly desirable business goal. Most mergers are accomplished in a way that permits two separate corporate entities to survive the merger.

This maintenance of the liability shield is the premise for the triangular merger form. In this structure, the acquirer (A) forms a wholly owned subsidiary (call it NewCo). Imagine that A transfers the merger consideration to NewCo in exchange for all of NewCo's stock. Then Target will merge into NewCo (or NewCo will merge into Target). In either event, at the time of the merger, the merger consideration will be distributed to Target shareholders, and their Target stock will be canceled. The stock of A in Target, if it owned any, will also be canceled. Thus, after the merger, A will own all of the outstanding stock of NewCo, which, in turn, will own all of Target's assets and liabilities. If NewCo is the surviving corporation, the merger is referred to as a "forward triangular merger." If Target is the surviving corporation (its shareholders nevertheless having their shares converted into the merger consideration), the merger is said to be a "reverse triangular merger." Of course, if NewCo is the surviving company,

it can immediately change its name to Target, Inc., after the merger and thus preserve the value of Target's brands and goodwill. But no matter which company—NewCo or Target—is the survivor, its charter can be restated (and typically is restated) at the merger to include the governance terms and capital structure that the parties deem desirable. The merger agreement will be entered into by all three parties—A, Target, and NewCo. In practice, the merger consideration—cash or shares of A typically—will not be transferred first to NewCo, as in our example, but will be distributed at the closing of the transaction directly from A to the holders of Target shares in consideration of the cancellation of those shares.

12.6 Structuring the M&A Transaction

To choose the right structure for an M&A transaction, the lawyer, banker, and client must consider the interaction of many variables. Costs, speed, liabilities, information known and unknown, accounting treatment, regulatory hurdles, and threats from alternative acquirers are the more obvious considerations bearing on this choice. In this section, we briefly address a number of the concerns that are faced by lawyers structuring and documenting an M&A transaction. These topics are, in several instances, treated at greater length elsewhere. In particular, tax is dealt with separately in Section 12.7.

Since merger and other acquisition agreements are commercial contracts, they contain the customary provisions found in such contracts. As in all such contracts, issues of timing, cost, and risk will affect the choice of the deal structure. There will also be terms identifying the property subject to the contract, specifying obligations, setting forth the nature and times of performance, and making whatever representations, warranties, and covenants the parties may require. In addition, however, merger agreements may contain specialized provisions not found elsewhere. Two types of provisions are particularly important: (1) "lock-up" provisions, which are designed to protect friendly deals from hostile interlopers, and (2) "fiduciary out" provisions. There may also be standstill agreements, which bar hostile activity before the agreement is closed, as well as confidentiality provisions. We explore these provisions further in Chapter 13. In this section, we address a range of the concerns that will face a lawyer selecting a transaction structure and drafting an appropriate contract for an M&A transaction.

12.6.1 Timing

Consider first timing. Speed is almost always desirable in acquisition transactions. In dynamic markets, the conditions that make an agreement advantageous may suddenly change. Since each side wants the deal to occur on present information and since neither can predict future market movements, it is rational, once a deal is reached, for business people to be impatient to close it.
business organization and intangible assets of the target will contribute value to it, the survivor will record this excess as an intangible asset, "goodwill." Under current rules, the value of this goodwill need not be amortized against earnings so long as it continues to represent this economic value. This asset must, however, be periodically evaluated to ensure that the goodwill account continues to be a reasonable approximation of the intangible value embedded in the firm. If it is not, then the goodwill account will be reduced by taking a charge against earnings (a noncash expense) in the amount of its impairment.

12.6.7 A Case Study: Excerpt from Timberjack Agreement and Plan of Merger

AGREEMENT AND PLAN OF MERGER ("Agreement") dated as of this 13th day of April, 1989, by and among RAUMA-REPOLA OY ("Parent"); a corporation organized under the laws of Finland; RAUMA ACQUISITION CORPORATION ("Purchaser"); a Delaware corporation and a direct, wholly owned subsidiary of Parent; and TIMBERJACK CORPORATION ("Company"); a Delaware corporation.

WITNESSETH

WHEREAS, the respective Boards of Directors of Parent, Purchaser, and the Company have approved the acquisition of the Company by Purchaser pursuant to the terms and subject to the conditions set forth in this Agreement;

WHEREAS, as an integral part of such acquisition, Purchaser will make a cash tender offer for all shares of the issued and outstanding common stock, par value $0.01 per share, of the Company (the "Common Stock"), upon the terms and subject to the conditions set forth in this Agreement;

WHEREAS, the Board of Directors of the Company has approved the Offer and has recommended that the stockholders of the Company tender their shares of Common Stock pursuant to the Offer;

WHEREAS, in order to induce Parent and Purchaser to enter into this Agreement, the Company has entered into a Cancellation Fee Agreement with Parent and Purchaser, dated as of an even date herewith (the "Fee Agreement");

NOW, THEREFORE, in consideration of the premises and the representations, warranties, covenants and agreements contained herein and in the Fee Agreement, and intending to be legally bound hereby, Parent, Purchaser and the Company hereby agree as follows:

ARTICLE I
THE OFFER

1.01. The Offer. Provided this Agreement has not been terminated pursuant to Section 6.01 hereof, Purchaser shall, as soon as practicable
after the date hereof, and in any event within five (5) business days after the
date on which Purchaser's intention to make the Offer is first publicly
announced, commence a tender offer to acquire any and all issued and
outstanding shares of the Common Stock, at a price of $25.00 per share net
to the seller in cash (the "Offer"). Subject to the conditions to the Offer set
forth in Annex I hereto, including the condition that a minimum amount of
at least 70% of the issued and outstanding shares of Common Stock be
tendered and available for acquisition (the "Minimum Amount"), Pur-
chaser (a) shall not extend the Offer beyond midnight, New York City
time, on the twentieth business day from the date of commencement of
the Offer and (b) shall purchase by accepting for payment, and shall pay for,
all Common Stock validly tendered and not withdrawn promptly after
expiration of the Offer; provided, however, that (i) if, as of the then-
scheduled expiration of the Offer, in excess of 50%, but less than 90% of
the Common Stock have been validly tendered and not withdrawn, Pur-
chaser may, at its sole option, extend the Offer for a period not to extend
beyond an additional ten business days in order to qualify for a "short-form
merger" in accordance with Section 253 of the Delaware General Corpora-
tion Law (the "Delaware Law"), (ii) Purchaser may, at its sole option,
extend the Offer with the consent of the Company, (iii) Purchaser may, at
its sole option, extend and reextend the Offer for reasonable periods of
time, not to exceed ten business days in any instance, in order to allow a
condition to the Offer specified in Annex I to be satisfied that is reasonably
likely to be satisfied within the period of such extension and (iv) Purchaser,
at its sole option, reserves the right to waive any condition to the Offer set
out in Annex I, to purchase fewer than the Minimum Amount and to
increase the price per share pursuant to the Offer.

ARTICLE II
THE MERGER

2.01 The Merger.
(a) Subject to the terms and conditions hereof, at the Effective Date
(as such term is defined in Section 2.01(b)), Purchaser will be merged
with and into the Company (the "Merger") in accordance with Delaware
Law, the separate existence of Purchaser (except as may be continued by
operation of law) shall cease and the Company shall continue as the
surviving corporation in the Merger ("the Surviving Corporation").
(b) As soon as practicable after satisfaction or waiver of the
conditions set forth in Article V, the parties hereto shall cause the Merger
to be consummated by filing with the Secretary of State of Delaware
appropriate articles of merger (the "Articles of Merger") in such form as is
required by, and executed in accordance with, the relevant provisions of
Delaware law, and with this Agreement (the date and time of such filing
being referred to herein as the "Effective Date").

2.02 Conversion of Shares. Subject to the terms and conditions of
this Agreement, at the Effective Date, by virtue of the Merger and
without any action on the part of the Purchaser, the Company or the
holder of any of the following securities:
(a) Each share of Common Stock then issued and outstanding, other than (i) shares then held, directly or indirectly, by Parent, Purchaser or any direct or indirect subsidiary of Parent, or (ii) shares held in the Company's treasury, or (iii) Dissenting Shares (as such term is defined in Section 2.03), shall be converted into and represent the right to receive (as provided in Section 2.04) $25.00 net in cash, without any interest thereon (such amount of cash or such higher amount as shall be paid pursuant to the Offer, being referred to herein as the "Merger Consideration"), subject only to reduction for any applicable federal backup withholding or stock transfer taxes which shall be payable by the holder of such Common Stock.

(b) Each share of Common Stock then held, directly or indirectly, by Parent, Purchaser or any direct or indirect subsidiary of Parent shall be canceled and retired without payment of any consideration therefor.

(c) Each share of Common Stock held in the Company's treasury shall be canceled and retired without payment of any consideration therefor.

(d) Each issued and outstanding share of common stock, par value $1.00 per share, of Purchaser shall be converted into and become one validly issued, fully paid and nonassessable share of common stock of the Surviving Corporation.

2.07 Certificate of Incorporation. The Restated Articles of Incorporation of the Company in effect immediately prior to the Effective Date (except as such Restated Articles of Incorporation may be amended pursuant to the Articles of Merger) shall be the Articles of Incorporation of the Surviving Corporation until thereafter amended as provided therein and under Delaware Law.

2.08 By-laws. The By-laws of the Purchaser, as in effect immediately prior to the Effective Date, shall be the By-laws of the Surviving Corporation until thereafter amended as provided therein and under Delaware Law.

2.09 Directors. The directors of Purchaser immediately prior to the Effective Date shall be the initial directors of the Surviving Corporation and will hold office from the Effective Date until their successors are duly elected or appointed and qualified in the manner provided in the Certificate of Incorporation and the By-laws of the Surviving Corporation, or as otherwise provided by law.

2.10 Officers. The officers of the Company immediately prior to the Effective Date shall be the initial officers of the Surviving Corporation and will hold office from the Effective Date until their successors are duly elected or appointed and qualified in the manner provided in the Certificate of Incorporation and the By-laws of the Surviving Corporation, or as otherwise provided by law.

ARTICLE III
REPRESENTATIONS AND WARRANTIES

3.02 Representations and Warranties of the Company. The Company hereby represents and warrants to Parent and Purchaser that:

(a) Organization. The Company and each of its Subsidiaries (as such term is defined in Section 3.02(c)) is a corporation duly organized,
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Harvard Law School
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Harvard Business School

Wolters Kluwer
by the shares being purchased or redeemed, or any capital that has not been allocated to any particular class of its capital stock;

(3) By applying to an otherwise authorized conversion or exchange of outstanding shares of its capital stock some or all of the capital represented by the shares being converted or exchanged, or some or all of any capital that has not been allocated to any particular class of its capital stock, or both, to the extent that such capital in the aggregate exceeds the total aggregate par value or the stated capital of any previously unissued shares issuable upon such conversion or exchange; or

(4) By transferring to surplus (i) some or all of the capital not represented by any particular class of its capital stock; (ii) some or all of the capital represented by issued shares of its par value capital stock, which capital is in excess of the aggregate par value of such shares; or (iii) some of the capital represented by issued shares of its capital stock without par value.

(b) Notwithstanding the other provisions of this section, no reduction of capital shall be made or effected unless the assets of the corporation remaining after such reduction shall be sufficient to pay any debts of the corporation for which payment has not been otherwise provided. No reduction of capital shall release any liability of any stockholder whose shares have not been fully paid.

Subchapter IX. Merger, Consolidation or Conversion

§251. Merger or Consolidation of Domestic Corporations and Limited Liability Company

(a) Any 2 or more corporations existing under the laws of this State may merge into a single corporation, which may be any 1 of the constituent corporations or may consolidate into a new corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.

(b) The board of directors of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation and declaring its advisability. The agreement shall state:

1. The terms and conditions of the merger or consolidation;
2. The mode of carrying the same into effect;
3. In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger, or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation; and in the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement;
4. The manner, if any, of converting the shares of each of the constituent corporations into shares or other securities of the corporation surviving or resulting from the merger or consolidation, or
of cancelling some or all of such shares, and, if any shares of any of the constituent corporations are not to remain outstanding, to be converted solely into shares or other securities of the surviving or resulting corporation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such shares are to receive in exchange for, or upon conversion of such shares and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of shares or other securities of the surviving or resulting corporation; and (6) such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, interests or rights, or for any other arrangement with respect thereto, consistent with §155 of this title. The agreement so adopted shall be executed and acknowledged in accordance with §103 of this title. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term “facts,” as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(c) The agreement required by subsection (b) of this section shall be submitted to the stockholders of each constituent corporation at an annual or special meeting for the purpose of acting on the agreement. Due notice of the time, place and purpose of the meeting shall be mailed to each holder of stock, whether voting or nonvoting, of the corporation as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. The notice shall contain a copy of the agreement or a brief summary thereof, as the directors shall deem advisable. At the meeting, the agreement shall be considered and a vote taken for its adoption or rejection. If a majority of the outstanding stock of the corporation entitled to vote thereon shall be voted for the adoption of the agreement, that fact shall be certified on the agreement by the secretary or assistant secretary of the corporation. If the agreement shall be so adopted and certified by each constituent corporation, it shall then be filed and shall become effective, in accordance with §103 of this title. In lieu of filing the agreement of merger or consolidation required by this section, the surviving or resulting corporation may file a certificate of merger or consolidation, executed in accordance with §103 of this title, which states:

(1) The name and state of incorporation of each of the constituent corporations;

(2) That an agreement of merger or consolidation has been approved, adopted, certified, executed and acknowledged by each of the constituent corporations in accordance with this section;
(3) The name of the surviving or resulting corporation;
(4) In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger, or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;
(5) In the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as set forth in an attachment to the certificate;
(6) That the executed agreement of consolidation or merger is on file at an office of the surviving corporation, stating the address thereof; and
(7) That a copy of the agreement of consolidation or merger will be furnished by the surviving corporation, on request and without cost, to any stockholder of any constituent corporation.

(d) Any agreement of merger or consolidation may contain a provision that at any time prior to the time that the agreement (or a certificate in lieu thereof) filed with the Secretary of State becomes effective in accordance with §103 of this title, the agreement may be terminated by the board of directors of any constituent corporation notwithstanding approval of the agreement by the stockholders of all or any of the constituent corporations; in the event the agreement of merger or consolidation is terminated after the filing of the agreement (or a certificate in lieu thereof) with the Secretary of State but before the agreement (or a certificate in lieu thereof) has become effective, a certificate of termination or merger or consolidation shall be filed in accordance with §103 of this title. Any agreement of merger or consolidation may contain a provision that the boards of directors of the constituent corporations may amend the agreement at any time prior to the time that the agreement (or a certificate in lieu thereof) filed with the Secretary of State becomes effective in accordance with §103 of this title, provided that an amendment made subsequent to the adoption of the agreement by the stockholders of any constituent corporation shall not:

(1) Alter or change the amount or kind of shares, securities, cash, property and/or rights to be received in exchange for or on conversion of all or any of the shares of any class or series thereof of such constituent corporation;
(2) Alter or change any term of the certificate of incorporation of the surviving corporation to be effected by the merger or consolidation, or
(3) Alter or change any of the terms and conditions of the agreement if such alteration or change would adversely affect the holders of any class or series thereof of such constituent corporation; in the event the agreement of merger or consolidation is amended after the filing thereof with the Secretary of State but before the agreement has become effective, a certificate of amendment of merger or consolidation shall be filed in accordance with §103 of this title.

(e) In the case of a merger, the certificate of incorporation of the surviving corporation shall automatically be amended to the extent, if
any, that changes in the certificate of incorporation are set forth in the agreement of merger.

(f) Notwithstanding the requirements of subsection (c) of this section, unless required by its certificate of incorporation, no vote of stockholders of a constituent corporation surviving a merger shall be necessary to authorize a merger if (1) the agreement of merger does not amend in any respect the certificate of incorporation of such constituent corporation, (2) each share of stock of such constituent corporation outstanding immediately prior to the effective date of the merger is to be an identical outstanding or treasury share of the surviving corporation after the effective date of the merger, and (3) either: (a) shares of common stock of the surviving corporation and/or shares, securities or obligations convertible into such stock are to be issued or delivered under the plan of merger, or the authorized unissued shares or the treasury shares of common stock of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under such plan do not exceed 90% of the shares of common stock of such constituent corporation outstanding immediately prior to the effective date of the merger. No vote of stockholders of a constituent corporation shall be necessary to authorize a merger or consolidation if no shares of the stock of such corporation shall have been issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation. If an agreement of merger is adopted by the constituent corporation surviving the merger, by action of its board of directors and without any vote of its stockholders pursuant to this subsection, the secretary or assistant secretary of that corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and, (1) if it has been adopted pursuant to the first sentence of this subsection, that the conditions specified in that sentence have been satisfied, or (2) if it has been adopted pursuant to the second sentence of this subsection, that no shares of stock of such corporation were issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation. The agreement so adopted and certified shall then be filed and shall become effective, in accordance with §103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

(g) Notwithstanding the requirements of subsection (c) of this section, unless expressly required by its certificate of incorporation, no vote of stockholders of a constituent corporation shall be necessary to authorize a merger with or into a single direct or indirect wholly-owned subsidiary of such constituent corporation if: (1) such constituent corporation and the direct or indirect wholly-owned subsidiary of such constituent corporation are the only constituent entities to the merger; (2) each share or fraction of a share of the capital stock of the constituent corporation outstanding
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immediately prior to the effective time of the merger is converted in the
merger into a share or equal fraction of share of capital stock of a holding
company having the same designations, rights, powers and preferences,
and the qualifications, limitations and restrictions thereof, as the share of
stock of the constituent corporation being converted in the merger; (3) the
holding company and the constituent corporation are corporations of this
State and the direct or indirect wholly-owned subsidiary that is the other
constituent entity to the merger is a corporation or limited liability com-
pany of this State; (4) the certificate of incorporation and by-laws of the
holding company immediately following the effective time of the merger
contain provisions identical to the certificate of incorporation and by-laws
of the constituent corporation immediately prior to the effective time of
the merger; (5) if any, regarding the incorporator or
incorporators of the constituent corporation, the corporate name, the
registered office and agent, the initial board of directors and the initial
subscribers for shares and such
provisions contained in any amendment to the certificate of incorporation
as were necessary to effect a change, exchange, reclassification, subdivi-
sion, combination or cancellation of stock, if such change, exchange,
reclassification, subdivision, combination, or cancellation has become
effective; (5) as a result of the merger the constituent corporation or its
successor becomes or remains a direct or indirect wholly-owned subsidiary
of the holding company; (6) the directors of the constituent corporation
become or remain the directors of the holding company upon the effective
time of the merger; (7) the organizational documents of the surviving
entity immediately following the effective time of the merger contain pro-
visions identical to the certificate of incorporation of the constituent
corporation immediately prior to the effective time of the merger (other
than provisions, if any, regarding the incorporator or incorporators, the
corporate or entity name, the registered office and agent, the initial board
of directors and the initial subscribers for shares, references to members
rather than stockholders or shareholders, references to interests, units
or the like rather than stock or shares, references to managers, managing
members or other members of the governing body rather than directors
and such provisions contained in any amendment to the certificate of
incorporation as were necessary to effect a change, exchange, reclassi-
fication, subdivision, combination or cancellation of stock, if such change,
exchange, reclassification, subdivision, combination or cancellation has
become effective); provided, however, that (i) if the organizational docu-
ments of the surviving entity do not contain the following provisions, they
shall be amended in the merger to contain provisions requiring that (A)
any act or transaction by or involving the surviving entity, other than the
election or removal of directors or managers, managing members or other
members of the governing body of the surviving entity, that requires for
its adoption under this chapter or its organizational documents the
approval of the stockholders or members of the surviving entity shall, by
specific reference to this subsection, require, in addition, the approval of
the stockholders of the holding company (or any successor by merger), by the same vote as is required by this chapter and/or by the organizational documents of the surviving entity; provided, however, that for purposes of this clause (i)(A), any surviving entity that is not a corporation shall include in such amendment a requirement that the approval of the stockholders of the holding company be obtained for any act or transaction by or involving the surviving entity, other than the election or removal of directors or managers, managing members or other members of the governing body of the surviving entity, which would require the approval of the stockholders of the surviving entity if the surviving entity were a corporation subject to this chapter; (B) any amendment of the organizational documents of a surviving entity that is not a corporation, which amendment would, if adopted by a corporation subject to this chapter, be required to be included in the certificate of incorporation of such corporation, shall, by specific reference to this subsection, require, in addition, the approval of the stockholders of the holding company (or any successor by merger), by the same vote as is required by this chapter and/or by the organizational documents of the surviving entity; and (C) the business and affairs of a surviving entity that is not a corporation shall be managed by or under the direction of a board of directors, board of managers or other governing body consisting of individuals who are subject to the same fiduciary duties applicable to, and who are liable for breach of such duties to the same extent as, directors of a corporation subject to this chapter, and (ii) the organizational documents of the surviving entity may be amended in the merger (A) to reduce the number of classes and shares of capital stock or other equity interests or units that the surviving entity is authorized to issue and (B) to eliminate any provision authorized by subsection (d) of §141 of this title; and (8) the stockholders of the constituent corporation do not recognize gain or loss for United States federal income tax purposes as determined by the board of directors of the constituent corporation. Neither subdivision (g)(7)(i) of this section nor any provision of a surviving entity’s organizational documents required by subdivision (g)(7)(i) shall be deemed or construed to require approval of the stockholders of the holding company to elect or remove directors or managers, managing members or other members of the governing body of the surviving entity. The term “organizational documents”, as used in subdivision (g)(7) and in the preceding sentence, shall, when used in reference to a corporation, mean the certificate of incorporation of such corporation, and when used in reference to a limited liability company, mean the limited liability company agreement of such limited liability company.

As used in this subsection only, the term “holding company” means a corporation which, from its incorporation until consummation of a merger governed by this subsection, was at all times a direct or indirect wholly-owned subsidiary of the constituent corporation and whose capital stock is issued in such merger. From and after the effective time of a merger adopted by a constituent corporation by action of its board of directors
and without any vote of stockholders pursuant to this subsection: (i) to the extent the restrictions of §203 of this title applied to the constituent corporation and its stockholders at the effective time of the merger, such restrictions shall apply to the holding company and its stockholders immediately after the effective time of the merger as though it were the constituent corporation, and all shares of stock of the holding company acquired in the merger shall for purposes of §203 of this title be deemed to have been acquired at the time that the shares of stock of the constituent corporation converted in the merger were acquired, and provided further that any stockholder who immediately prior to the effective time of the merger was not an interested stockholder within the meaning of §203 of this title shall not solely by reason of the merger become an interested stockholder of the holding company; (ii) if the corporate name of the holding company immediately following the effective time of the merger is the same as the corporate name of the constituent corporation immediately prior to the effective time of the merger, the shares of capital stock of the holding company into which the shares of capital stock of the constituent corporation are converted in the merger shall be represented by the stock certificates that previously represented shares of capital stock of the constituent corporation capital stock of the constituent corporation and (iii) to the extent a stockholder of the constituent corporation immediately prior to the merger had standing to institute or maintain derivative litigation on behalf of the constituent corporation, nothing in this section shall be deemed to limit or extinguish such standing. If an agreement of merger is adopted by a constituent corporation by action of its board of directors and without any vote of stockholders pursuant to this subsection, the secretary or assistant secretary of the constituent corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and that the conditions specified in the first sentence of this subsection have been satisfied. The agreement so adopted and certified shall then be filed and become effective, in accordance with §103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

§252. Merger or Consolidation of Domestic and Foreign Corporations; Service of Process Upon Surviving or Resulting Corporation

(a) Any 1 or more corporations of this State may merge or consolidate with 1 or more other corporations of any other State or States of the United States, or of the District of Columbia if the laws of the other State or States, or of the District permit a corporation of such jurisdiction to merge or consolidate with a corporation of another jurisdiction. The constituent corporations may merge into a single corporation, which may be any 1