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Takeovers: A Review of Bidders & Targets: Mergers and Acquisitions in the U.S.

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Bidders & Targets: Mergers and Acquisitions in the U.S. By Leo Herzel and Richard W. Shepro. Basil Blackwell, 1990. Pp. x, 523.

David T. Brown*

Bidders & Targets: Mergers and Acquisitions in the U.S. is an exhaustive treatment of both the law and economics of takeovers. Its self-contained text and technical appendixes make it accessible to both beginners and experts. Additionally, the book is extremely current. For example, it contains a lengthy discussion of the Time-Warner agreement which was not completed until late 1989.

The authors, who have worked extensively as legal counsel in takeover contests, divide the book into three parts. Part one describes the current takeover market and how it evolved into its present state, beginning by explaining the legal rights and the economic incentives of directors, shareholders and CEO's. The authors argue that the key role of the directors of the target company is to increase the bargaining power of shareholders. Disorganized shareholders cannot effectively bargain with the bidder especially when faced with a coercive two-tier bid. The author's also discuss the role of anti-takeover charter amendments in overcoming the problems which diffuse shareholders face. Unfortunately, managers may claim to fight an offer because it is inadequate when they actually are attempting to save their own jobs. Traditionally, there has been little legal recourse against target directors. However, in *Smith v. Van Gorkom*,¹ referred to as the "Trans Union" case, the Delaware courts took large steps toward weakening the business judgment rule. The authors provide a lengthy discussion of the implications of this landmark case.

The authors argue in favor of increased scrutiny by institutional investors, and rules which are designed to give shareholders more power over directors. For example, they argue that shareholders of acquiring firms should be required to approve cash and stock offers. Currently, exchange rules only require shareholder approval for stock offers.

Part one continues with a discussion of state and federal takeover laws providing a thoughtful discussion of the (1) legislative intent of

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1. 488 A.2d 858 (Del. 1985).

the laws, (2) political forces that shape the evolving legal climate and (3) potential impact the Reagan appointees to the Supreme Court may have on future litigation over state anti-takeover laws. The authors argue that state takeover statutes tip the legal playing field in favor of targets. Since the takeover boom in the 1960s, many states have acted to protect firms incorporated in their state from hostile takeovers. The authors state that the "first generation" anti-takeover statutes typically required state approval of hostile acquisitions. These laws were held unconstitutional in *Edgar v. Mite Corp.*,² on the grounds that they unreasonably interfered with federal tender offer regulation and interstate commerce.

The resulting "second generation" statutes have mandated strict modifications of the required majorities for approval of acquisitions of companies in particular states. These laws were recently upheld in *CTS v. Dynamics Corp. of America*.³ While these laws clearly violate the spirit of Federal laws, in particular the Williams Act⁴ which governs tender offers, the authors argue that the second generation statutes are quite safe given the unwillingness of the current Supreme Court to interfere with state takeover legislation.

The authors see very little recent change in federal corporate takeover law. The only recent change in the role of the federal government has been a realization of the antitrust standards for approval of horizontal mergers. Part one ends with a complete discussion of various strategies available in corporate control battles including lock-ups, poison pills, squeeze-outs and leveraged buyouts.

The first part of the book is outstanding. The authors distill many complex economic arguments about the incentives of shareholders and managers into an understandable form. Further, they provide a complete discussion of the scientific evidence on these issues gathered by economists. The authors highlight their arguments by a discussion of the applicable law, theoretical economics, scientific evidence and examples from specific transactions.

Part two of the book is titled "Advice for Bidders and Targets." In the introduction, the authors describe this section as "strategic and advisory." The strategies discussed are well developed extensions of the concepts discussed in part one. As a result, this section is both advisory to executives and valuable to other readers. The questions

2. 457 U.S. 624 (1982).

3. 481 U.S. 69 (1987).

4. The Securities Exchange Act of 1934, §§ 13(d)(1) & 14(d)(1, 5-7), (e) as amended 15 U.S.C. §§ 78m(d)(1), 78n(d)(1, 5-7), (e).

that are discussed in this section include “friendly deals, what good is a contract?, should I make a hostile bid?” and “how should we defend against a hostile bid?”

The authors identify the key issue for takeover bidders as avoiding competition from other bidders. Competitive auctions typically result in the bidder paying an inflated price for the target, and thus, the key to avoiding competition is to move quickly when making a bid. Further, the authors point out that the winning bidder in a competitive contest should be aware of the “winner’s curse,” that is the tendency for the highest bidder in any auction to pay more than the object is really worth. In the authors words, “[a] successful bidder may be a loser.”⁵

Part three includes a detailed discussion of the Time-Warner deal. This transaction is rich enough to demonstrate many of the concepts developed earlier in the book. The authors incorporate nearly all of the documents filed during this acquisition, thus giving the reader a good feel for many of the legal technicalities that are critical to a successful outcome.

Finally, the book contains a one hundred page appendix that details the federal securities laws and Delaware and New York state laws that pertain to acquisitions.

5. LEO HERZEL & RICHARD W. SHEPRO, *BIDDERS AND TARGETS: MERGERS AND ACQUISITIONS IN THE U.S.* 119 (1990).

