



Wood Group



Merger and Acquisition Transactions

Overview of Basic Transaction Structures

- **If one corporation (“Buyer”) wishes to acquire the business of another (“Seller” / “Target”), there are essentially three different methods which could be used:**
 - ❖ An asset purchase;
 - ❖ A stock purchase; and
 - ❖ A merger under state law

Asset Purchase

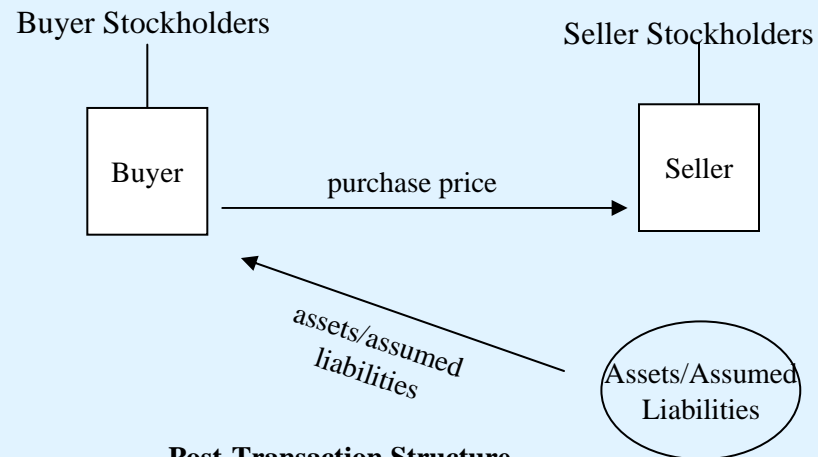


- **Typical method for acquiring selected assets or a division; also used for acquiring all or substantially all of the assets of an entity**
- **Definition of assets and liabilities is key, and therefore due diligence in this regard is important**
- **The purchase price may consist of cash, stock, notes and/or other property**
- **Seller's existence continues following the transaction**
- **The principal transaction document typically is an asset purchase agreement**
- **An asset purchase differs from a stock purchase in two important respects:**
 - ❖ Seller is still owned by its prior stockholders; it has not become a subsidiary of Buyer
 - ❖ The purchase price is paid to Seller, not to Seller's stockholders

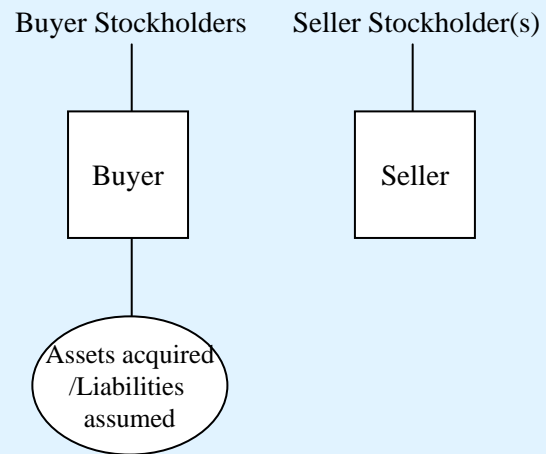
Asset Purchase



Transaction



Post-Transaction Structure



Stock Purchase

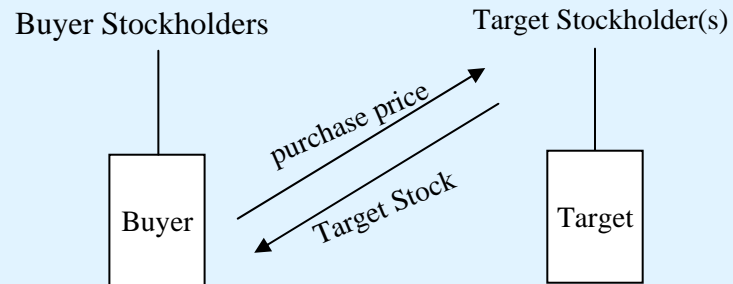


- **The stock purchase is the simplest method of acquisition**
- **Typical method for acquiring all or part of the stock of a private company or division of a private company whose business is conducted through one or more subsidiaries**
- **Buyer purchases stock directly from Target's stockholder(s)**
- **To acquire all of Target's stock, each Target stockholder needs to be a party to the purchase agreement**
- **Target's existence continues following the transaction – only its stockholders change**
- **Assets and liabilities remain within the legal entity**
- **The purchase price may consist of cash, stock, notes and/or other property and is paid directly to Target's stockholders**
- **The principal transaction document typically is a stock purchase agreement**

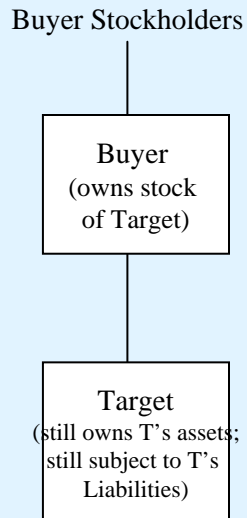
Stock Purchase



Transaction



Post-Transaction Structure



Mergers



- **Mergers are creatures of state corporate law, with requirements that vary from state to state (including the criteria to effect a short-form merger, voting requirements and the treatment of dissenting stockholders)**
 - ❖ California: Cal. Corp. Code § 1100
 - ❖ Delaware: 8 Del. Code Ann. § 251
 - ❖ Florida: Fla. Stat. Ann. § 607.1100
 - ❖ New York: N.Y. Bus. Corp. L. § 901
 - ❖ Texas: Tex. Corp. Law Title 1 Ch. 10

- **A merger of Target into Buyer results, as a matter of statutory definition, in Buyer automatically succeeding to all of Target's assets and all of Target's liabilities**

- **A merger is the typical acquisition method for acquiring a public company, either in a one-step transaction or as the second step following a tender or exchange offer**

Mergers cont.



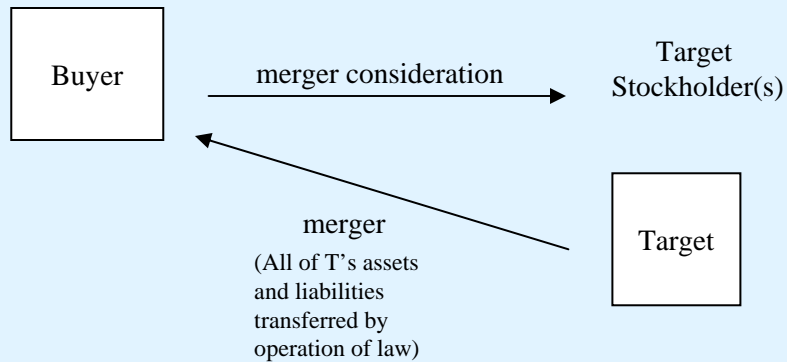
- **Also used for acquiring private companies, especially those with a large number of stockholders**
- **The merger consideration may consist of cash, stock, notes and/or other property**
- **The principal transaction document typically is a merger agreement**

Direct Merger



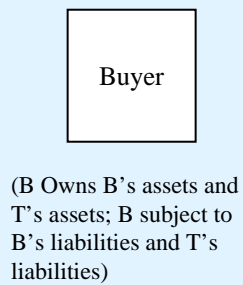
Transaction (direct merger)

Buyer Stockholders



Post-Transaction Structure

Buyer Stockholders



Direct Merger cont.



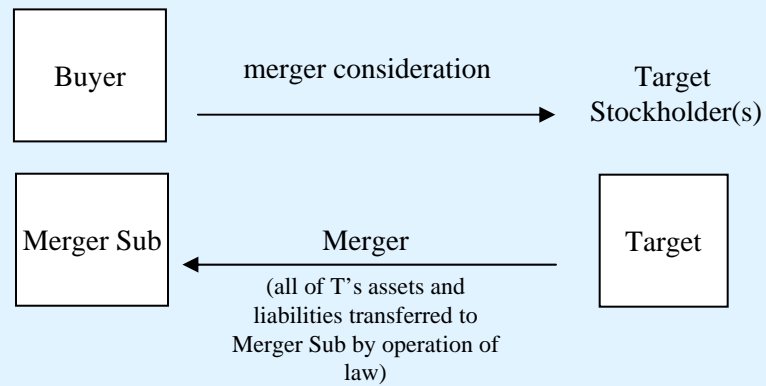
- **In a direct merger, as a result of applicable corporate statute, Target disappears into Buyer**
- **The Target stock held by the Target Stockholders is converted, as a result of the operation of the applicable state statute, into the consideration to be paid by Buyer (either Buyer stock, cash or other property)**
- **The two companies merging, often referred to as “constituent corporations” are both parties to the merger agreement**

Forward Subsidiary Merger



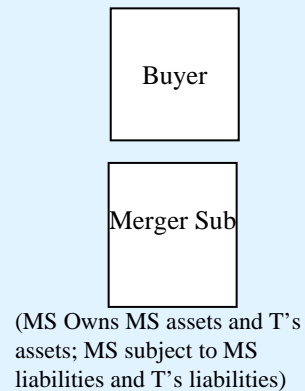
Transaction (forward subsidiary merger)

Buyer Stockholders



Post-Transaction Structure

Buyer Stockholders



Forward Subsidiary Merger cont.



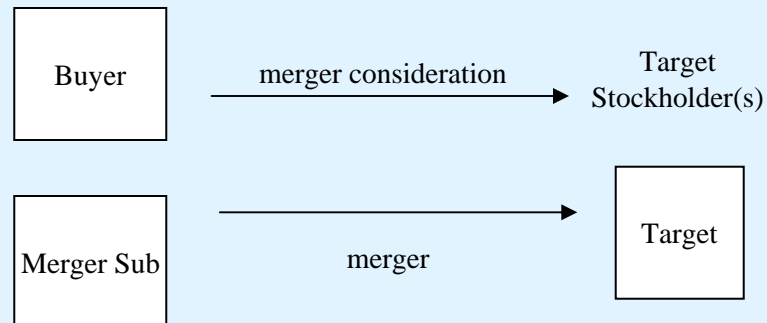
- **Rather than merging Target into Buyer as in a Direct Merger, Target merges into a wholly-owned subsidiary of Buyer**
- **Merger Sub succeeds to all of Target's assets and liabilities**
- **Target ceases to exist**
- **Main structural difference between a Direct Merger and a Forward Subsidiary Merger is that, following consummation, the assets and liabilities of Target are assumed by Merger Sub and not Buyer**

Reverse Subsidiary Merger



Transaction (reverse subsidiary merger)

Buyer Stockholders



Post-Transaction Structure

Buyer Stockholders



(Target owns T assets and MS assets; Target subject to T liabilities and MS liabilities)

Reverse Subsidiary Merger cont.



- **Merger Sub merges into Target, and Merger Sub ceases to exist**
- **Typically, Merger Sub is a newly created shell corporation with no assets or liabilities**
- **Target, post-merger, is the same entity, practically and legally, as Target, pre-merger**
- **The outstanding shares of common stock of Merger Sub is converted into shares of common stock of Target, and Target becomes a wholly-owned subsidiary of Buyer**

Structural Pros and Cons



➤ **Asset deal**

- ❖ **Allows the Buyer to get precisely what Buyer wants**

- ❖ **Often requires more consents**

- ❖ Asset acquisitions by definition involves the assignment of assets between Seller and Buyer

- Commercial agreements that Buyer is expecting to assume must be reviewed carefully in order to confirm whether such agreements require consent to assign.

- ❖ **Exhaustive schedules to transfer documents**

➤ **Stock/merger**

- ❖ **Typically requires fewer consents**

- ❖ Forward subsidiary mergers result in Target merging out of existence into Merger Sub, which may trigger the need for third party consents

- ❖ Reverse subsidiary mergers and stock purchase transactions are not likely to trigger anti-assignment provisions because Target continues in existence. Only the ownership of Target changes

- Diligence is important to determine if consents are required due to a change of control or change of ownership contractual provisions

- ❖ **Easier to implement if assets/liabilities are in correct entity**

Structural Pros and Cons cont.



- **Three-party merger transactions allows Buyer to acquire the assets of Target by operation of law and gain control of Target without incurring separate liability for Target's debts/obligations**
- **Three-party merger transactions circumvent the need for Buyer stockholder approval, because Buyer is the only stockholder of Merger Sub capable of voting/dissenting on the transaction. Buyer's stockholders have no voice in a three- party merger transaction.**
- **Three-party merger transactions are favorable over an asset acquisition if there are numerous deeds, contract assignments, required third-party consents, etc. A transfer by operation of law via a merger may be a practical necessity if the other deal forms are more cumbersome to execute.**
- **Note: In absence of a specific provision in a contract explicitly defining a stock purchase or merger as an assignment for purposes of the contract, state law generally provides that an assignment of the agreement has not taken place**

Acquisitions of Partnerships and Limited Partnership



- **Partnerships can be acquired using similar techniques**
- **Asset Sales by general or limited partnerships are the most similar to the corporate model**
 - ❖ Partnerships can sell some or all of their assets
 - ❖ Buyer may assume some or all of Sellers' liabilities
 - ❖ The Selling Partnership remains in existence, continues to own any retained assets and liabilities and is paid the purchase price
- **Partnership Interest Sales are analogous to stock transactions**
 - ❖ The Partnership continues to own its assets, liabilities and business without change; it simply has a new owner
- **Limited Partnerships can also be constituents to merger transactions in certain jurisdictions**
 - ❖ Statutes set forth the partner approval requirements, the effects of the merger, the requisite procedural steps which must be taken to effectuate the merger, and provisions relating to appraisal rights

Leadership Opportunities for Paralegals in M&A Transactions



➤ Due Diligence

- ❖ **Sellers should conduct pre-transaction due diligence**
- ❖ **Sellers should take care to provide well organized documents to Buyers/Bidders in connection with the due diligence process**
- ❖ **Sellers should take care to provide complete documents to Buyers/Bidders (redacted as needed)**
 - ❖ Coordinate with operations to confirm that most current versions of documents are being provided
 - ❖ Ensure that all documents related to the assets to be sold to and liabilities to be assumed by Buyer are current
 - ❖ Ensure that all corporate records are up to date with respect to stock transactions (i.e. minute books, share certificates, share register, shareholders agreements, etc.)
- ❖ **Coordinate initial due diligence requests and supplemental diligence requests to avoid duplicative requests for information**
- ❖ **Maintain records of materials/information requested and materials/information received**
- ❖ **Confirm the filing requirements for the various SOS offices that may be involved and pre-clear documents to be filed in those SOS offices that will pre-clear**

Leadership Opportunities for Paralegals in M&A Transactions cont.



➤ **Governmental Approvals**

- ❖ **Sellers and Buyers should coordinate this effort as much as possible as the need for governmental approvals in certain regulated industries (broadcasting and cable, aviation, railroad, banking, insurance, and other regulated industries) can increase the time required before closing**

- ❖ **With respect to large transactions, Sellers and Buyers should coordinate securing third party consents or waivers**
 - ❖ Determine who will be responsible for requesting the consent/waiver from the third party
 - ❖ Determine who will keep track of consents/waivers received and consents/waivers still outstanding

- ❖ **With respect to mergers across state lines, and some intrastate mergers, it may be necessary to obtain state tax certificate**
 - ❖ California
 - ❖ New York

➤ Closing Checklist and Closing Documents

- ❖ Prepare the closing checklist / accountability checklist as soon as possible
- ❖ Prepare closing documents (resolutions, secretary's certificates, officer's certificates, merger documents) as soon as possible
- ❖ Coordinate signature pages – stand alone/break away signature pages are best
 - ❖ Label the footer (i.e. *Signature page to Asset Purchase Agreement between Buyer and Seller*); do not include page number on signature page
 - ❖ Be prepared to coordinate securing all required signatures and allow plenty of lead time for those persons located internationally or with hectic travel schedules