

INDEX

- A reorganizations, 180
- Accredited investors:
 - defined, 122
 - limiting sales to, 126–131
- Accretive (acquisitions), 11
- Accrual method of accounting, 2
- Acquisition consideration, 90–115
 - debt, 95–111
 - earnouts, 112–115
 - generally, 90–93
 - stock, 110–112
- Acquisition (sub)sidiary, 84
- Advance notice of board nominations, 285
- Anti-dilution covenants
 - (in preferred stock), 111
- Anti-greenmail statutes, 282–283
- Appraisal rights, 15–16, 82–83, 87–88
- Asset-based lending, 104

- B reorganizations, 181
- Back-end merger, 14
- Bankruptcy:
 - acquisitions out of, 313–322
 - debt payouts in, 106–107
- Basic v. Levinson*, 273 *et seq.*
- Basis step-up, 18–19, 171–173
- Basket, 235–237
- Bear-hug letter, 247
- Beneficial ownership:
 - anti-trust violation, 131–138
 - securities laws, 276
- Beta, 4
- Blank check preferred stock, 285
- Boot, 17, 185
- Borrowing base, 104
- Break-up fee, 250–254, 267. *See also*
 - Deal-protection devices
- Bulk sales laws, 87

- Business combination statutes, 280–289
- Business judgment rule, 253–266
- Business purpose doctrine/test:
 - bankruptcy, 315
 - tax, 183
- Buyer, definition of, xiii

- C reorganization, 181
- Capital asset pricing model, 7
- Caps and collars, 246
- Carryover basis, 18–19, 186
- Cash-out statutes, 281
- Cause (for termination of employment), 151–152
- Classified or staggered board, 284
- Closing agenda, 77
- Collars and caps, 246
- Comparable public company analysis, 34
- Comparable transaction analysis, 34
- Consolidated group (tax), 186–187
- Contingent value rights, 94
- Continuity of business enterprise, 183–184
- Continuity of shareholder interest, 183
- Control share statutes, 280
- Copyrights,
 - due diligence, 76
 - generally, 67–69
- Crown jewels option, 250–251

- Data room, 26–27
- De facto mergers, 116–118
- Deal-protection devices, 228, 248–252, 264–268
- Debt covenants, 104–105
- Debt tiers, 105–107
- Deductible (indemnification), 235–238
- Default (debt), 104–109

324 INDEX

- Deferred closing, 198–199
Demand registration rights, 129–130
Deposits, 206
Director committees, 271–272
Disclosure (of merger negotiations), 272–275
Discounted cash flow analysis, 34–35
Disgorgement statutes, 281–182
Disinterested directors, 253–271
Diversification, 4
Double tax, 18–19
Down round, 155, 256
Due diligence:
 business due diligence, 49–50
 intellectual property due diligence, 75–76
 legal due diligence, 49–64
Duty of care, 252
Duty of loyalty, 252
- Earnings per share, 9–11
Earnouts, 13, 112–115
EBIT, 33–34
EBITDA, 33–34
Eligible accounts receivable, 104
Employment agreements, 30–31, 149–156, 223
Enterprise value, 31
Entire fairness standard, 255–256
EPS, 9–11
Equitable subordination, 106
Equity compensation, 138–149
Equity method, 164–165
Equity value, 31
Escrows, 85–86, 233–235
ESOP transactions, 187–188
Event of default (debt), 104–109
Exchange offer, 14, 244, 277–279
Exclusivity. *See* Deal protection devices
Extraordinary items, 115
- Fair-price statutes, 280–281
Fiduciary duties, 252–254
Fiduciary out, 248–250
Financial engineering, 9–11
Forward triangular merger, 84, 93, 98
Founders' stock, 138
Fraudulent transfers, 305–313
Front-end-loaded tender offer, 289
- Going-concern value, 32
Golden parachute tax,
Good reason (for termination of employment), 47, 191–195
Go-shop clause, 248 *See also* Deal protection devices
- Hostile takeovers, 247
Hybrid transactions (tax), 173
- Incentive stock options, 139, 144–146
Indebtedness. *See* Debt
Indemnification, 45, 85–86, 125, 198, 233–242
Indifference curves, 5–7
Installment sale, 178–180
Internal affairs statutes, 282
Internal rate of return, 3
Intrinsic value, 2
ISOs, 139, 144–146
- Junior debt. *See* Debt
- Knowledge caveats, 217
- LBOs, 295–302
Leveraged buyouts, 295–302
Leveraged recapitalization, 295
Liquidation preference, 111, 200
Lock-up provisions, 28, 248–250, 259–269. *See also* Deal-protection devices
Loss averse (vs. risk averse), 3–4
- Management buyout, 190–191, 295
Market cap(italization), 10–11
Material adverse change/effect clause, 30, 221–222, 232, 240
Materiality exceptions, 218, 235–237, 240

- Mezzanine debt, 109
Mills Acquisition v. MacMillan, 262
et seq.
- Net debt, 37, 212
 Net operating loss carryovers, 80, 172
 Net present value method, 3
 NOLs, 80, 172
 Noncompetition agreements, 30, 71,
 156–157, 223, 229
 Nonqualified stock options, 139,
 143–144
 Nonrecourse debt, 98–99
 Normalize (accounting results), 32
 No-shop agreements. *See*
 Deal-protection devices and
 Lockup provisions
 NQSOs, 139, 143–144
- Omnicare v. NCS Healthcare*, 268
et seq.
- One-line consolidation, 164–165
- Parachute payments, 47, 156, 159,
 191–195
- Paramount v. Time*, 258 *et seq.*
- Pari passu (debt), 103
 Participating preferred stock, 200
 Patents:
 due diligence, 75–76
 generally, 65–67
 Payment blockages, 107–108
 Payment-in-kind (PIK), 96, 110, 185
 P/E ratio, 9–11
 Phantom stock, 141
 Piggyback registration rights, 129–130
 Pooling-of-interests, 160–161, 231
 Preclusive lock-ups. *See* Deal-protection
 devices
 Price anti-dilution, 111
 Price-to-earnings ratio, 9–11
 Priority in liquidation (debt), 107–109
 Procedural and substantive fairness. *See*
 Entire fairness
 Proxy rules, 119, 244, 275–277
- Proxy statement, 29, 77, 83, 244. *See*
also Proxy rules
 Pull the plug (right to), 107–109
 Purchase accounting, 160–163
 Purchase price adjustment, 210–214
 Purchase price per share, 199–203
 Push down accounting, 163
- Ranking of debt. *See* Subordination
 Rate of return, 3
 Recapitalization accounting,
 165–166
 Regulation M-A, 277–278
 Relative valuation, 32–33
 Remedy bars, 107–109
 Representations and warranties,
 214–226
 Restricted stock, 138–140, 146–149,
 240
 Reverse triangular merger, 20, 84–85
Revlon v. MacAndrews & Forbes, 257
et seq.
- Risk averse, 3–4
 Rule 10b-5, 119–120, 273
 Rule 145, 126–128
 Rule 162, 279
 Rules 425 and 165, 278
- Sarbanes-Oxley Act, 279–280
 SARs, 141
 Schedules 13D and 13G, 275–277
 Section 203 (Delaware), 286–289
 Section 306 preferred stock, 186
 Section 338 election, 19, 177
 Section 351 transactions, 182–186,
 189–191
 Section 363. *See* Bankruptcy
 Section 409A, 141, 195
 Section 83(b) election, 147–149
 Securities Act of 1933, 118–119
 Securities Exchange Act of 1934,
 119–120
 Senior debt. *See* Debt
 Severance arrangements, 150–157
 Shelf registration, 130, 240

326 INDEX

- Short-swing profits, 276
Simultaneous signing and closing,
82–83, 203, 232
Smith v. VanGorkom, 254 *et seq.*
Squeeze-out merger, 14, 81–83
Staggered board of directors,
282–284
State anti-takeover laws, 280–283
Stay bonuses, 46–48
Step transaction doctrine, 184
Step-up (in tax basis), 18–19,
171–173
Stock appreciation rights. *See* SARs
Straight (non-participating) preferred
stock, 111
Structural subordination. *See*
Subordination
Subordination, 103–109
complete, 108
deep, 108
structural, 100, 105–106
Subsidiary guarantee, 100–102, 106,
310–312,
Substantially all assets, 16, 88–89
Substantive fairness. *See* Entire fairness
Success fee, 36
Superior debt. *See* Debt
Survival (of representations and
warranties), 233
Surviving corporation, 13–15, 20
Sweat equity, 139
Tails (in investment bank engagement
letters), 38–39
Target, xiii
Tax-free rollover, 190–191
Tender offer rules, 119, 244, 275–277
Threshold, 235–237
Topping fee, 250. *See also*
Deal-protection devices
Trade secrets:
due diligence, 76
generally, 69–72
Trademarks:
due diligence, 76
generally, 72–75
Troubled businesses (acquisitions of),
302–305
Two-step acquisition, 14–15, 83
Unocal v. Mesa Petroleum, 260 *et seq.*
Vesting, 138–140
Virtual data room, 26–27
Weinberger v. UOP, 255 *et seq.*
Window-shop clause, 267. *See also*
Deal-protection devices
Works of authorship, 67
Yield, 3
Zero coupon debt, 96















