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Introduction to Workshop on Emerging Issues in Mergers & Acquisitions and Tribute to Joseph Flom

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In celebration of the new millennium, the University of Miami's Fourth Annual Institute on Mergers and Acquisitions added a special *Workshop on Emerging Issues in Mergers & Acquisitions and Tribute to Joseph Flom*. The Institute, which was held in February 2000, is co-chaired by Harvey A. Goldman, of Steel Hector & Davis, Dennis Hersch, the head of the Mergers and Acquisition Department at Davis Polk & Wardwell, and myself. We decided that this workshop, which was added as a bonus third day to our traditional two-day program, would have an academic orientation, and we enlisted the assistance of Professor John Coffee, the Adolf A. Berle Professor of Law at the Columbia University Law School, and one of the Nation's leading professors of corporate and securities law, in structuring the program.

This special issue of the University of Miami Law Review contains the papers presented at the workshop. I thank the Law Review, and particularly Guillermo Levy, the Project Editor, for undertaking this project.

In structuring the workshop, we wanted both to honor Joseph H. Flom, a senior partner at Skadden, Arps, Slate, Meagher & Flom, for his many years of cutting edge practice in the mergers and acquisitions area and to have him actively participate in the program. Flom, who is described by Bruce Wasserstein in his book *Big Deal* as "more than a distinguished lawyer; . . . a business prophet,"¹ agreed to participate provided the program was properly "shaped." He made it clear from the start that he would only be associated with a substantive program; he

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1. BRUCE WASSERSTEIN, *BIG DEAL* 460 (1998).

quickly suggested that one of the sessions focus on ethical issues in mergers and acquisitions; and he indicated that he wanted to participate in the ethics session.

His suggestion led to a lively panel discussion at the workshop focusing on a series of hypothetical situations presenting ethical issues commonly faced by both lawyers and investment bankers active in the mergers and acquisitions area. The panel, which was moderated by Louis Kaden of Davis Polk & Wardwell, consisted of the following leading mergers and acquisitions deal lawyers, litigators, and ethics experts: Barry S. Alberts, Schiff, Hardin & Waite; Professor Anthony V. Alfieri, Director, Center for Ethics and Public Service, University of Miami School of Law; Chancellor William T. Allen, Professor of Law and Business, New York University, and Wachtell, Lipton, Rosen & Katz (of counsel); Arthur Fleischer, Jr., Fried, Frank, Harris, Shrive & Jacobson; Joseph Flom, Skadden, Arps, Slate, Meagher & Flom, LLP; James Freund, Skadden, Arps, Slate, Meagher & Flom, LLP (of counsel); Edward Labaton, Goodkind Labaton Rudoff & Suchanow LLP; The Honorable Andrew Moore, Wasserstein & Perella; and Robert H. Mundheim, Shearman & Sterling (of counsel).

The ethics hypotheticals and the panel discussion are analyzed in an article in this special issue entitled *Ethical Issues Faced by Lawyers and Investment Bankers in Mergers and Acquisitions: A Problem Approach and Report of Panel Discussion*,² which is written by Barry S. Alberts and myself.

Joe Flom also agreed to present at the workshop his views on the past, present and future of mergers and acquisitions. His outstanding presentation, which is reflected in his article in this issue entitled *Mergers and Acquisitions: The Decade in Review*,³ was commented on by the following preeminent mergers and acquisitions scholars, practitioners, and investment bankers: Chancellor William T. Allen; Professor Bernard Black, Stanford Law School; Chancellor Williams B. Chandler III, Delaware Court of Chancery; H. Rodgin Cohen, Sullivan & Cromwell; Arthur Fleischer Jr.; James Freund; and The Honorable Andrew Moore. Professor Black's comment, *The First International Wave (and the Fifth and Last U.S. Wave)*,⁴ on Flom's presentation is included in this issue.

2. Barry S. Alberts & Samuel C. Thompson, Jr., *Ethical Issues Faced by Lawyers and Investment Bankers in Mergers and Acquisitions: A Problem Approach and Report of Panel Discussion*, 54 U. MIAMI L. REV. 687 (2000).

3. Joseph Flom, *Mergers and Acquisitions: The Decade in Review*, 54 U. MIAMI L. REV. 753 (2000).

4. Bernard Black, *The First International Wave (and the Fifth and Last U.S. Wave)*, 54 U. MIAMI L. REV. 799 (2000) [hereinafter Black, *International Wave*].

Flom also concurred in Professor Coffee's recommendation that we invite Professor John Coates of the Harvard Law School to present a paper focusing on his continuing research into defensive tactics. Fortunately, Professor Coates agreed, and he made a thought-provoking presentation on his views concerning the efficacy of defensive tactics. The following nationally-recognized mergers and acquisitions academics, practitioners and jurist commented on Professor Coates's paper: R. Franklin Balotti, Richards, Layton & Finger; Professor Ronald J. Gilson, Stanford Law School & Columbia Law School; Professor Jeffrey N. Gordon, Columbia Law School; Vice Chancellor Jack B. Jacobs, Delaware Court of Chancery; and Professor Roberta Romano, Yale Law School. Professor Coffee moderated the session.

Professor Coates's presentation is reflected in his article in this issue entitled *Empirical Evidence on Structural Takeover Defenses: Where Do We Stand?*⁵ This issue also contains the following comments on Professor Coates's article: *Professor Coates is Right. Now Please Study Stockholder Voting*, by Frank Balotti and Travis Laster;⁶ *Poison Pills and the European Case* by Jeffrey Gordon;⁷ and *Comments on Contestability*, by Vice Chancellor Jack Jacobs.⁸ The final article in this special workshop issue is Jim Freund's *Dinner Tribute to Joe Flom*,⁹ which Freund, a long-time partner of Flom's, delivered at a workshop dinner honoring Flom.

The balance of this introduction contains brief observations on each of the articles in this issue.

Coates, *Where Do We Stand?* In this article, Professor Coates challenges the findings of both "event studies," which many academics have relied on in concluding that defensive tactics such as poison pills harm a target's shareholders, and "premium studies," which many practitioners have relied on as support for the proposition that poison pills benefit a target's shareholders. He explains that his "critique shows that, contrary to the views of either camp, such studies do not provide strong support either for opposing or supporting takeover defenses."¹⁰

He explains that one of the reasons that the pill adoption or announcement date, which has been the focus of most event studies is

5. John C. Coates IV, *Empirical Evidence on Structural Takeover Defenses: Where Do We Stand?*, 54 U. MIAMI L. REV. 783 (2000) [hereinafter Coates, *Where Do We Stand?*].

6. R. Franklin Balotti & J. Travis Laster, *Professor Coates is Right. Now Please Study Stockholder Voting*, 54 U. MIAMI L. REV. 819 (2000).

7. Jeffrey N. Gordon, *Poison Pills and the European Case*, 54 U. MIAMI L. REV. 839 (2000).

8. Jack Jacobs, *Comments on Contestability*, 54 U. MIAMI L. REV. 847 (2000).

9. James Freund, *Dinner Tribute to Joe Flom*, 54 U. MIAMI L. REV. 853 (2000).

10. Coates, *supra* note 5, at 785.

not important is that virtually "all Delaware firms . . . have a 'shadow pill' in place, written or not, and takeovers of such firms have been restrained by a set of 'shadow restrictions' . . . on transfer of control to a hostile bidder."¹¹ He further points out that because of the interaction among various defenses it may be difficult to study a single defense, such as the adoption of a pill. In analyzing the premium studies, he acknowledges that the studies demonstrate that there is a correlation between pills and deal premiums but he goes on to say that this might be a classic example of "correlation not proving causation."¹² He adds that "[n]one of the [premium] studies offers any explanation of the mechanism by which pills cause higher premiums."¹³

Professor Coates reaches the following policy conclusions: (1) "Institutional shareholders should be aware of the fact that half the traditional academic case (at least) against defenses stands on shaky ground . . .,"¹⁴ (2) "Boards . . . should not be permitted to rely without caveat on pill premium studies to support a decision to adopt or not adopt a pill at a given point in time,"¹⁵ and (3) "Delaware courts . . . should take some comfort from the fact that they resisted strong academic arguments . . . to push them to dramatically repudiate pills and other structural defenses."¹⁶

Balotti and Laster, *Coates is Right*. In this article, the authors agree with Professor Coates that "as a practical matter all Delaware corporations effectively have poison pills . . ."¹⁷ They also question whether it is possible for event studies to draw "meaningful conclusions about poison pills because it is not clear that the market, including market professionals, understands fully the evolving standards that govern the use of pills and other defensive measures under Delaware law."¹⁸ Section Three of this article contains an excellent review of the leading cases bearing on the use of defensive tactics. This review demonstrates some of the nuances that permeate this very complex area of the law and fairly supports the authors' proposition that the market is not informationally efficient when it comes to assessing the likely outcome of cases brought by bidders or stockholders that seek to compel a target board of directors to redeem a defensive measure such as a pill in support of a

11. *Id.* at 791.

12. *Id.* at 795.

13. *Id.*

14. *Id.* at 797.

15. *Id.*

16. *Id.*

17. Balotti & Lester, *supra* note 6, at 820.

18. *Id.* at 823.

takeover attempt.¹⁹ The authors conclude that pills are here to stay and that since “[s]tockholder voting is the central issue in today’s takeover battles,”²⁰ scholars should turn their efforts to studying voting behavior.

Gordon, *The European Case*. Professor Gordon, who agrees with Professor Coates’s position regarding “shadow pills,” reasoned that “as pills became commonplace so that all firms had one, actual or virtual, the announcement of pill adoption was merely a signal, often ambiguous, of managerial intentions, rather than an event that changed the target’s vulnerability to takeover.”²¹ Professor Gordon also points out that if the European Union’s proposed Thirteenth Directive on Takeover Bids is adopted along the lines of the UK model, “many troublesome bidder tactics”²² that the pill is designed to prevent would not be possible. He adds that “[i]n particular, [the Thirteenth Directive] would substitute a mandatory bid for the pill’s protection against creeping tender offers and partial bids.”²³ Pursuant to the mandatory bid concept, a bidder that crosses a particular threshold of stock ownership in a target, such as thirty percent, is required to extend a bid for all of the target’s shares at the highest price paid for the shares within a certain time period. Professor Gordon also points out that the Thirteenth Directive “would prohibit all non-shareholder approved post-bid defensive measures, which substitute for the pill’s appeal as non-destructive.”²⁴ By non-destructive, he means that pills, unlike defenses such as the sale of a target’s crown jewels, do not destroy the value of a target’s assets.

Jacobs, *Comments*. In his comment, Vice Chancellor Jacobs discusses the potential impact of “scientific evidence” concerning the economic effect of pills on two recent pill cases he presided over in Delaware: *Carmody v. Toll Brothers*²⁵ and *Mentor Graphics v. Quickturn Design Systems, Inc.*²⁶ Toll Brothers dealt with a dead hand pill and *Quickturn* addressed a delayed redemption pill, which is a more limited form of dead hand pill. Both pills had the effect of tying the hands of any new board that might be seated as a result of a successful proxy contest or consent solicitation.

In *Toll Brothers*, he denied a motion to dismiss a challenge to the pill and in *Quickturn*, he held that the delayed redemption feature was a

19. *Id.*

20. *Id.* at 837.

21. Gordon, *supra* note 7, at 841.

22. *Id.* at 842.

23. *Id.*

24. *Id.*

25. 723 A.2d 1180 (Del. Ch. 1998).

26. 728 A.2d 25 (Del. Ch. 1998), *aff’d sub. nom.*, *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281 (Del. Super. Ct. 1998).

violation of the directors' fiduciary duties. The Delaware Supreme Court affirmed his decision in *Quickturn*, but on the grounds that the delayed redemption feature was fundamentally inconsistent with the directors' statutory obligation to manage the firm.

Judge Jacobs points out that, in *Quickturn*, he was required to take "expert testimony about the likely deterrent effect of the 'no hand' poison pill and 'delayed redemption' by-law on the public shareholders' reaction to a hostile takeover bid that offered a modest premium."²⁷ He goes on to say: "How useful it would have been if the cause and effect relationship, i.e., the deterrent force of the pill, could be determined with scientific accuracy, and thereby avoid the uncertainties of conventional fact-finding in a specialized area in which most judges have no personal expertise."²⁸ He further laments that although Professor Coates "faults the methodologies used in the prior studies as flawed in their design, he does not . . . propose a methodology that avoids those flaws."²⁹

Alberts and Thompson, *Ethical Issues*. This article focuses on fourteen ethical issues arising out of a hypothetical fact pattern involving first, the acquisition of the stock of a closely held corporation; second, a merger of equals involving two publicly held corporations; and finally, a hostile tender offer for one of the merging companies. The article reviews the basic authorities bearing on the particular issues and attempts to capture the refined and nuanced views expressed by the panelists on the various issues. The hypotheticals demonstrate that there can be a large overlap between issues involving ethics and issues involving common law and securities fraud. As the authors conclude, a "mis-step can lead not only to sanctions for violation of ethical standards but also to liability for breach of fiduciary or statutory duties."³⁰

Flom, *Decade in Review*. In this article, Joe Flom not only reviews the mergers and acquisitions scene during the 1990's, but also makes insightful observations about each of the past merger waves and sets forth predictions about the future of mergers and acquisitions. One of his most interesting observations about the growth of mergers and acquisitions in the 1990's is that while the "growth in the total value of transactions [was] dramatic,"³¹ there was also a similar dramatic growth in the market capitalization of traded companies. He also makes the observation that a "common element of each [of the four previous merger waves] was that it waxed during periods of high liquidity and waned

27. Jacobs, *supra* note 8, at 850-851.

28. *Id.* at 851.

29. *Id.*

30. Alberts & Thompson, *supra* note 2, at 752.

31. Flom, *supra* note 3, at 754.

with a fall-off in the stock market and illiquidity in the financing market.”³² In predicting the future of mergers and acquisitions, he sets out numerous factors that “presage . . . even stronger growth in mergers and acquisitions activity.”³³

Black, *International Wave*. Professor Black persuasively argues that the current merger wave, which is the fifth U.S. merger wave, is the first international merger wave. He points out that a “growing percentage of takeovers are cross-border, major stock markets are increasingly linked, and U.S. takeover activity is under 45% of the worldwide total.”³⁴ He goes on to say that the “international flavor of the current merger wave will almost surely be even more prominent in the next wave, whenever that may be.”³⁵ And, he argues that when the next wave arrives “it will no longer make any sense to talk about American merger waves at all. Instead, we will come to see the current wave as the first international merger wave, and its predecessor (the fourth wave) as the last distinctively American merger wave.”³⁶

Freund, *Dinner Tribute*. Jim Freund’s dinner tribute to Joe Flom shows not only Joe’s greatness as a lawyer and his obvious entrepreneurial spirit, but demonstrates his unswerving commitment to the ethical practice of the law. In emphasizing this point, Jim says: “It wasn’t accidental that our firm went through all the craziness of the ‘80’s — smack in the center of the action, with demanding clients and questionable proposals abounding — without a single mark against our name. Joe’s ethics were absolutely beyond reproach.”³⁷

Thank you Joe Flom for making this workshop truly special.

32. *Id.* at 776.

33. *Id.* at 794.

34. Black, *supra* note 4, at 799.

35. *Id.* at 801.

36. *Id.*

37. Freund, *supra* note 10, at 856.