

## COMMENTARY TO WHAT IS A MERGER ANYWAY?

*Dixon Babb\**

I would like to start by thanking all of you for being here today and listening to my comments regarding mergers. I also want to thank Professor Heminway, Professor Leatherman, and Professor Plank for their discussion. I have had the privilege of taking each of these professors' classes and can say I have learned a great deal about tax, business associations, and secured transactions after each class was over. Today was no exception. I learned that I really don't know anything about mergers. I have to be honest—I had never taken a business class and didn't really know what a merger was before I came to law school. After two years of taking businesses classes, I thought I had a better idea of what a merger was, but I was wrong. Regardless, each professor brought up some interesting points that made me truly realize the complexity of a merger and provided an enlightening new look into the intricacies that are involved in business combination transactions.

When I consider what I know about mergers, which by my own admission is not a lot, the last word that comes to mind is magic. When I think of magic, I usually just picture Harry Potter waiving his wand around in the air and saying some weird words and then all of a sudden something happens. But, as I sit here and think about it, it really does make sense that mergers are, in a way, "statutory magic." Essentially, if you follow the statute, two entities will become one. If you make the appropriate filings and follow the rules that are listed, the merger is complete. I think this is adequately illustrated by Delaware General Corporation Law Section 251(a). This section states:

Any 2 or more corporations of this State may merge into a single surviving corporation, which may be any 1 of the constituent corporations or may consolidate into a new resulting corporation formed by the consolidation, pursuant to

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an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.<sup>1</sup>

Subsection (b) goes on to lay out the criteria that are required to be put into the merger agreement.<sup>2</sup> By following the steps listed in the statute, a merger will be properly effected, at least from a corporate finance perspective. It sounds very similar to what Harry Potter does. He does things in a certain order waives his wand and then something happens. Seems simple enough.

But if there is anything that I have learned from this discussion, it is that there is no one way to characterize a business combination transaction. As we have just witnessed, lawyers in practice areas outside of the corporate finance space are unlikely to find that characterizing a merger as “statutory magic” is adequate. I do see their point. As Professor Plank said, the merger statutes purport to make an effective transfer, but fail to mention anything about perfection. Sure, the merger is complete because they followed the statutory guidelines, but the policy behind property law is to give notice to the world that you own something, and you need perfection to do that. The whole point of property law is the right to exclude, which is why notice is so important. This requires consultation of several other sources such as the UCC in order to ensure that the new entity is able to adequately put the world on notice that it owns the newly acquired assets.

Even beyond perfection, an attorney must still ask: “What do I have to do to follow all property-related laws?” In order to do this, you have to make sure that there has been proper identification of all of the transferred assets. Such things as intellectual property, real estate, certificate of title, and other personal property are all very important from a property attorney’s standpoint. Another important consideration that must be taken into account is whether the transaction is a cross-border transaction or a domestic transaction. In a domestic transaction, the lawyer must make sure the asset use remains unrestricted. In a cross-border transaction, the attorney must worry about relabeling the intellectual property rights. If the name of the corporation changes, you may need to worry about licensing issues. With all of the different assets that any given corporation may have, it is vital to almost any merger that there be an attorney who is adequately trained and capable of handling the different

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<sup>1</sup> DEL. Code tit. 8, § 251 (2019).

<sup>2</sup> *Id.*

legal issues that may arise. While a merger on its face may be properly characterized as “statutory magic,” much more is required to affect a proper transfer than just following the statutory requirements.

While all of this is important to property attorneys, from a tax standpoint, tax attorneys are not as concerned with perfection. Rather, tax attorneys are concerned with how assets got from A to B. If there is a corporate law merger, the target and acquiring corporation merge. The target is deemed to transfer its assets in exchange for the consideration and the acquiring company is deemed to have liquidated the target. Mergers can be viewed as an asset by asset purchase or a statutory merger. The advantage of a statutory merger is that all of the assets transfer. The disadvantage is that it is not possible to eliminate liabilities whether stated or unstated. The tax consequences of the merger depend primarily on the quality of the consideration received by the shareholders. There has to be an explanation for how the target stockholders got their consideration. From what I understand, everything from a tax standpoint would be much simpler if the acquiring corporation acquired the target’s stock and then the target liquidated into the acquiring corporation.<sup>3</sup>

Another area that warrants separate consideration for how to properly classify a merger is in the bankruptcy context. During Chapter 11 bankruptcy proceedings, a lawyer may encounter a merger in the plan of reorganization.<sup>4</sup> The bankruptcy lawyer may encounter mergers “as a means of addressing payments to certain creditors or reallocating equity among the bankruptcy debtor’s various stakeholders.”<sup>5</sup> An important thing to note is that mergers in the bankruptcy context are not required to comply with the state statutes governing mergers.<sup>6</sup> Rather, the approval of a merger transaction is governed by the court-approved plan of reorganization,<sup>7</sup> and yet again, a different type of attorney with a different way of categorizing a merger.

For smaller scale mergers, one attorney can likely handle all of the legal issues that may arise because smaller scale mergers are less likely to implicate as many issues. For larger scale mergers, however, it is probable

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<sup>3</sup> The statements in this paragraph came from a discussion I had with Professor Leatherman the day before the panel discussion. He explained his thoughts and I tried to capture his thoughts in my analysis of mergers from a tax attorney’s standpoint.

<sup>4</sup> Joan MacLeod Heminway et al., *What is a Merger Anyway?*, 21 TENN. J. BUS. L. 321, 334–38 (2019).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

that more than one attorney is going to be needed. For instance, the BB&T Corporation and SunTrust Banks, Inc. announced a planned merger in February of 2019.<sup>8</sup> This merger has a value of 66 billion dollars and is the largest merger since the financial crisis of 2008.<sup>9</sup> Together, the surviving entity will have 442 billion dollars in assets along with 301 billion dollars in loans from customers served worldwide.<sup>10</sup> This type of merger has likely required the use of several attorneys across all different practice areas. While following the appropriate statute would lead to an effective merger, the property rights in all of the assets such as intellectual property and actual real estate are going to need to be dealt with adequately. Further concerns such as ERISA compliance and tax consideration regarding the stock held by the shareholders will also need to be addressed. This type of deal requires extensive knowledge of several practice areas that would be too much to handle for just one attorney.

There were several enlightening moments during this panel, but I think the biggest takeaway from this discussion is that there is really no right way to characterize what a merger is. There are several considerations that need to take place before a merger is complete and, in larger deals in particular, it seems like more than one lawyer is necessary to make this process go smoothly. Beyond the corporate finance, property, and tax considerations, there are also others areas of law that are implicated as well such as ERISA, environmental, and insurance law to name a few. From a student's perspective, this panel of professors did an excellent job of really demonstrating how complex a merger transaction is. I had not considered all of the different areas of law that are implicated during a merger. Thank you all for coming today and thank you to Professor Heminway, Professor Plank, and Professor Leatherman for the enlightening discussion.

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<sup>8</sup>10 *Biggest US Mergers and Acquisitions Announced So Far in 2019*, ALPHASTREET (June 11, 2019), <https://news.alphastreet.com/10-biggest-us-mergers-acquisitions-2019/>.

<sup>9</sup>Jessica Guerin, *BB&T buying SunTrust in Largest Megabank Merger Since the Financial Crisis*, HOUSINGWIRE (Feb. 7, 2019, 10:43 AM), <https://www.housingwire.com/articles/48125-bbt-buying-suntrust-in-largest-megabank-merger-since-the-financial-crisis/>.

<sup>10</sup>*Id.*