

SYLLABUS

DEALS: THE ECONOMICS OF STRUCTURING TRANSACTIONS (LAW 459-08)

Georgetown University Law Center

Professor Joshua C. Teitelbaum

Spring 2010

Tuesday & Thursday, 1:55 PM – 3:20 PM

Course Description: This course examines how attorneys and other professionals create value through transaction engineering. The course is organized in two parts. The first part of the course studies various barriers to transacting—including collective action problems, information problems, risk and uncertainty, and contracting over time—and a range of responses—including game theory, contract theory, and decision theory. The second part of the course studies a series of real transactions. Students will be divided into work groups, each of which will be responsible for leading the class discussion on one of the transactions and for writing a group paper analyzing its transaction. Grades will be based on class participation, individual problem sets, the group paper, and a take-home final examination.

Professor Information:

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Office Hours: Tuesday & Thursday, 3:30 PM – 4:45 PM

Assistant: Lydia McDaniel, 4NW McDonough Hall, 202-662-9406, mcdaniel@law.georgetown.edu

Courseware Site: There will be a Courseware site for the course. The password for enrolling in the Courseware site is DEALS. The course materials will be available on the Courseware site. In addition, I will post announcements on the Courseware site from time to time, so please check the site routinely.

Course Materials: The materials for the course—including this syllabus, the assigned readings, and the individual problem sets—will be available on the Courseware site for the course.

Class Format: The class format will combine lecture and discussion. Students are expected to attend all class meetings, to prepare for and participate in class discussion on a regular basis, and to complete a series of short problem sets that are designed to provide you with practice working with the main concepts of the course. In addition, students will be divided into work groups, each of which will be responsible for leading the class discussion on one of the transactions we study in the second part of the course and for writing a group paper analyzing its transaction. Further administrative details regarding the work groups will be provided in the first week of the semester.

Grading: Grades will be based on class participation (10%), the individual problem sets (20%), the group paper (30%), and an 8-hour take-home final examination (40%). Administrative details regarding the final examination will be provided at the appropriate time.

Topics and Assignments: The following is a schedule of topics and reading assignments for the course. Links to the readings will be posted on the Courseware site for the course.

Class	Date	Topic	Assignment
1	Jan 19	Introduction	Ronald J. Gilson, <u>Value Creation by Business Lawyers: Legal Skills and Asset Pricing</u> , <i>Yale Law Journal</i> , Vol. 94, No. 2 (Dec. 1984), pp. 239-313.
I. BARRIERS TO TRANSACTING			
A. <i>Collective Action Problems</i>			
2	Jan 21	Holdouts and Free Riders	Llyod Cohen, <u>Holdouts and Free Riders</u> , <i>Journal of Legal Studies</i> , Vol. 20, No. 2 (June 1991), pp. 351-362.
3	Jan 26	Holdouts and Free Riders: Debt Tender Offers	David Brittenham and Peter Loughran, <u>Doing a Debt Tender Offer and Consent Solicitation</u> , <i>Insights: The Corporate & Securities Law Advisor</i> , Vol. 21, No. 12 (Dec. 2007), pp. 9-13. <u>HealthSouth Commences Cash Tender Offer and Consent Solicitation</u> , Nov. 16, 2009. HealthSouth Corporation, <u>Offer to Purchase and Consent Solicitation Statement</u> , Nov. 16, 2009. [Read the front cover, pp. i-v, pp. 1-19, and Annex A.] <u>HealthSouth Announces Completion of Refinancing</u> , Dec. 15, 2009.
4	Jan 28	Holdouts and Free Riders: Equity Tender Offers	Jeffrey B. Golden, <u>Clearing the Short-form Threshold in Negotiated Tender Offers</u> , <i>Insights: the Corporate & Securities Law Advisor</i> , Vol. 16, No. 5 (May 2002), pp. 7-12. <u>Johnson & Johnson Begins Tender Offer to Acquire Cougar Biotechnology</u> , June 5, 2009. Johnson & Johnson, <u>Offer to Purchase for Cash</u> , June 5, 2009. [Read the front cover, pp. i-v, and §§ 1, 2, 4 & 8-16.] <u>Johnson & Johnson Completes Initial Tender Offer for Cougar Biotechnology</u> , July 3, 2009. <u>Johnson & Johnson Completes Acquisition of Cougar Biotechnology</u> , July 10, 2009.

Class	Date	Topic	Assignment
5	Feb 2	Holdouts and Free Riders: M&A Deal Protection Devices	<p>Mark J. Kelson and David M. Grinberg, <u>Will Your Defensive Line Be Too Strong? Designing M&A Defensive Strategies</u>, <i>Insights: The Corporate & Securities Law Advisor</i>, Vol. 19, No. 12 (Dec. 2005), pp. 2-12.</p> <p>Ian Ayres, <u>Analyzing Stock Lock-Ups: Do Target Treasury Sales Foreclose or Facilitate Takeover Auctions?</u> <i>Columbia Law Review</i>, Vol. 90, No. 3 (Apr. 1990), pp. 682-718.</p>
6	Feb 4	Holdouts and Free Riders: M&A Deal Protection Devices	<p>The Stanley Works, <u>Agreement and Plan of Merger</u>, Nov. 2, 2009. [Read the preamble, Arts I, II, §§ 5.02, 5.03, 6.01 & 6.06, and Art. VIII. Please skim the rest.]</p> <p>Pfizer, Inc., <u>Agreement and Plan of Merger</u>, Jan. 25, 2009. [Read the preamble, Art. I (skip § 1.9), §§ 6.1 & 6.4, and Art. VIII. Please skim the rest.]</p>
<i>B. Information Problems</i>			
	Feb 9	No class – snow emergency	
	Feb 11	No class – snow emergency	
7	Feb 16 (Make-up for Feb 9)	Moral Hazard	<p>Mark V. Pauly, <u>The Economics of Moral Hazard: Comment</u>, <i>American Economic Review</i>, Vol. 58, No. 3, Part 1 (June 1968), pp. 531-537.</p>
	Feb 18	No class – statutory Monday	
8	Feb 23	Moral Hazard: Covenants in Debt Contracts	<p><u>Netflix Commences Exchange Offer for its 8.50% Senior Notes due 2017</u>, Dec. 22, 2009.</p> <p>Netflix, Inc., <u>Offer to Exchange</u>, Dec. 21, 2009. [Read the front cover, the Summary, and the Description of Notes. Please skim the rest.]</p> <p>Netflix Inc., <u>Indenture</u>, Nov. 6, 2009. [Just skim this document. It is summarized by the Description of Notes in the Offer to Exchange.]</p>

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9	Feb 25	Moral Hazard: Financial Services Contracts	Christine Hurt, <u>Moral Hazard and the Initial Public Offering</u> , <i>Cardozo Law Review</i> , Vol. 26, No. 2 (Jan. 2005), pp. 711-790. Ancestry.com Inc., <u>Prospectus</u> , Nov. 4, 2009. [Read the front cover and pp. 121-123. Please skim the rest.] Ancestry.com Inc., <u>Underwriting Agreement</u> , Nov. 4, 2009. [Read the preamble and ¶¶ 3 & 8. Please skim the rest.] Packaged Ice, Inc., <u>Dealer Manager and Consent Solicitation Agreement</u> , July 2, 2003. [Read ¶¶ 1, 2, 5 & 6. Please skim the rest.]
10	Mar 2	Moral Hazard: Covenants and Conditions in M&A Contracts	Ronald J. Gilson and Alan Schwartz, <u>Understanding MACs: Moral Hazard in Acquisitions</u> , <i>Journal of Law, Economics, & Organization</i> , Vol. 21, No. 2 (Oct. 2005), pp. 330-358. [Read §§ 1 & 2.] The Stanley Works, <u>Agreement and Plan of Merger</u> , Nov. 2, 2009. [Read Arts III & IV, §§ 5.01, 6.02, 6.03, 6.08 & 6.11, and Art. VII. Please skim the rest.] Pzifer, Inc., <u>Agreement and Plan of Merger</u> , Jan. 25, 2009. [Read Arts. III, IV & V, §§ 6.2, 6.3 & 6.8, and Art. VII. Please skim the rest.]
11	Mar 4	Adverse Selection	George A. Akerlof, <u>The Market for “Lemons”: Quality Uncertainty and the Market Mechanism</u> , <i>Quarterly Journal of Economics</i> , Vol. 84, No. 3 (Aug. 1970), pp. 488-500.
	Mar 9	No class – spring break	
	Mar 11	No class – spring break	
12	Mar 16	Adverse Selection: Representations, Warranties, and Indemnification in M&A Transactions	Ronald J. Gilson, <u>Value Creation by Business Lawyers: Legal Skills and Asset Pricing</u> , <i>Yale Law Journal</i> , Vol. 94, No. 2 (Dec. 1984), pp. 239-313. [Re-read § III.D (pp. 267-293).] Stanley, Inc., <u>Agreement and Plan of Merger</u> , June 10, 2008.

Class	Date	Topic	Assignment
13	Mar 18	Adverse Selection: Loan Guarantees; Third-Party Verification in M&A Transactions	<p>Ronald J. Mann, <u>Verification Institutions in Financing Transactions</u>, <i>Georgetown Law Journal</i>, Vol. 87, No. 7 (July 1999), pp. 2225-2272. [Read the Introduction and §§ I & III.]</p> <p>Avery Weiner Katz, <u>An Economic Analysis of the Guaranty Contract</u>, <i>University of Chicago Law Review</i>, Vol. 66, No. 1 (Winter 1999), pp. 47-116. [Read pp. 47-52 and 62-86.]</p> <p>Gilead Sciences, Inc., <u>Parent Guarantee Agreement</u>, Dec. 18, 2007.</p> <p>Robert J. Giuffra, Jr., <u>Investment Bankers' Fairness Opinions in Corporate Control Transactions</u>, <i>Yale Law Journal</i>, Vol. 96, No. 1 (Nov. 1986), pp. 119-141.</p> <p>Wyeth, <u>Schedule 14A</u>, June 17, 2009. [Read "Opinions of Wyeth's Financial Advisors" on pp. 72-92, as well as the opinions of Morgan Stanley (Annex B) and Evercore Group (Annex C).]</p>
14	Mar 23	Adverse Selection: Third-Party Verification in Securities Offerings	<p>Ronald J. Gilson and Reinier H. Kraakman, <u>The Mechanisms of Market Efficiency</u>, <i>Virginia Law Review</i>, Vol. 70, No. 4, (May 1984), pp. 549-644. [Read the introduction and pp. 609-621.]</p> <p>Ancestry.com Inc., <u>Prospectus</u>, Nov. 4, 2009. [Read the front cover, pp. 126 & F-2.]</p> <p>Ancestry.com Inc., <u>Underwriting Agreement</u>, Nov. 4, 2009. [Read ¶ 6 (pp. 16-18).]</p> <p>A. Sidney Holderness and Brooke Wunnicke, <u>Legal Opinion Letters Formbook</u> (2d ed. 2009). [Read § 14.01 and §§ 14.06-14.10.]</p> <p>AICPA, <u>SAS No. 72: Letters for Underwriters and Certain Other Requesting Parties</u>. [Read pp. 795-804 and Examples A, C & P in the Appendix.]</p>

Class	Date	Topic	Assignment
<i>C. Risk, Uncertainty, and Time</i>			
15	Mar 25	Risk Aversion and Ambiguity Aversion	<p>David A. Cather, <u>A Gentle Introduction to Risk Aversion and Utility Theory</u>, <i>Risk Management and Insurance Review</i>, Vol. 13, No. 1, pp. 127-145. [Read pp. 127-142.]</p> <p>Terrence R. Chorvat, <u>Ambiguity and Income Taxation</u>, <i>Cardozo Law Review</i>, Vol. 23, No. 2 (Jan. 2002), pp. 617-651. [Read the introduction and part I (pp. 617-629).]</p> <p>Optional (advanced) reading for interested students: Mark J. Machina, <u>Choice Under Uncertainty: Problems Solved and Unsolved</u>, <i>Journal of Economic Perspectives</i>, Vol. 1, No. 1 (Summer 1987), pp. 121-154.</p>
16	Mar 30	Commercial Contracts	<p>Steven N. S. Cheung, <u>Transaction Costs, Risk Aversion, and the Choice of Contractual Arrangements</u>, <i>Journal of Law and Economics</i>, Vol. 12, No. 1 (Apr. 1969), pp. 23-42.</p> <p>PNK (Lake Charles), L.L.C., <u>Vessel Construction Contract</u>, Aug. 27, 2003.</p> <p>A&P, <u>Supply Agreement</u>, June 27, 2005.</p> <p>Georgetown University, <u>Exclusive License Agreement</u>, Mar. 1, 2000.</p>
17	Apr 1	M&A Contracts: Earnouts and Collars	<p>Ronald J. Gilson, <u>Value Creation by Business Lawyers: Legal Skills and Asset Pricing</u>, <i>Yale Law Journal</i>, Vol. 94, No. 2 (Dec. 1984), pp. 239-313. [Re-read §§ III.B & III.C (pp. 262-267).]</p> <p>Steven B. Fuerst, Nicholas San Filippo IV, and Steven H. Ornstein, <u>Earn-Outs: Bridge the Gap, With Caution</u>, <i>Mergers & Acquisitions Law Report</i>, June 16, 2009.</p> <p>Ben Bodamer and Ron Landen, <u>Is Your Earnout Headed For A Burnout?</u>, <i>Weil Gotshal Private Equity Alert</i>, Feb. 2010.</p> <p>Victor I. Lewkow and Sarah G. Koss, <u>Another Look at Allocating Market Risk in Stock Acquisitions</u>, <i>Insights: the Corporate &</i></p>

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			<p data-bbox="824 186 1403 254"><i>Securities Law Advisor</i>, Vol. 17, No. 8 (Aug. 2003), pp. 6-13.</p> <p data-bbox="824 296 1430 438">Clifford E. Neimeth, <u>Addressing Value and Dilution Certainty in Business Combinations, Insights; the Corporate & Securities Law Advisor</u>, Vol. 20, No. 4 (Apr. 2006), pp. 12-16.</p> <p data-bbox="824 480 1406 548">Mach One Corporation, <u>Earn-out Agreement</u>, Feb. 2009.</p> <p data-bbox="824 590 1446 657">Asante Technologies, Inc., <u>Earn-out Agreement</u>, Feb. 25, 2005.</p> <p data-bbox="824 699 1455 766">ClearOne Communications, Inc., <u>Agreement and Plan of Merger</u>, Nov. 3, 2009. [Read Article II.]</p> <p data-bbox="824 808 1468 913">Polaris Acquisition Corp., <u>Second Amended and Restated Agreement and Plan of Merger</u>, Mar. 12, 2009. [Read Article II.]</p> <p data-bbox="824 955 1386 1022">CytRx Corporation, <u>Agreement and Plan of Merger</u>, June 6, 2008. [Read Article III.]</p> <p data-bbox="824 1064 1468 1207">Denbury Resources, Inc., <u>Form 8-K</u>, Nov. 5, 2009. [Read the Form 8-K and Section 2.1(a) of the Agreement and Plan of Merger (Exhibit 2.1 to the Form 8-K).]</p> <p data-bbox="824 1249 1446 1354">ViaSat, Inc., <u>Form 8-K</u>, Oct. 2, 2009. [Read the Form 8-K and Section 3.4 of the Agreement and Plan of Merger (Exhibit 2.1 to the Form 8-K).]</p> <p data-bbox="824 1396 1468 1539">Sykes Enterprises, Incorporated, <u>Form 8-K</u>, Oct. 5, 2009. [Read the Form 8-K and Section 1.8 of the Agreement and Plan of Merger (Exhibit 2.1 to the Form 8-K).]</p>

Class	Date	Topic	Assignment
18	Apr 6	Underwriting Contracts	<p>Gershon Mandelker and Arthur Raviv, <u>Investment Banking: An Economic Analysis of Optimal Underwriting Contracts</u>, <i>Journal of Finance</i>, Vol. 32, No. 3 (June 1977), pp. 683-694.</p> <p>Ronald J. Gilson and Reinier H. Kraakman, <u>The Mechanisms of Market Efficiency</u>, <i>Virginia Law Review</i>, Vol. 70, No. 4, (May 1984), pp. 549-644. [Re-read pp. 613-618.]</p> <p>Ancestry.com Inc., <u>Prospectus</u>, Nov. 4, 2009. [Re-read the front cover and pp. 121-123.]</p> <p>Ancestry.com Inc., <u>Underwriting Agreement</u>, Nov. 4, 2009. [Re-read the preamble and ¶¶ 3, 4 & 5.]</p> <p>H&R Block, Inc., <u>Prospectus Supplement</u>, Oct. 28, 2008. [Read the front cover and the "Plan of Distribution" on p. S-3.]</p> <p>H&R Block, Inc., <u>Placement Agent Agreement</u>, Oct. 28, 2008. [Read ¶¶ 1 & 2.]</p>
19	Apr 8	Convertible Securities: Anti-Dilution Protections	<p>Michael A. Woronoff and Jonathan A. Rosen, <u>Understanding Anti-Dilution Provisions in Convertible Securities</u>, <i>Fordham Law Review</i>, Vol. 75, No. 1 (Oct. 2005), pp. 129-162.</p> <p>Validus Holdings, <u>Form of Warrant</u>, Sept. 2007.</p> <p>Signature Exploration & Production Corp., <u>Convertible Promissory Note</u>, Feb. 10, 2010.</p> <p>Signature Exploration & Production Corp., <u>Common Stock Purchase Warrant</u>, Feb. 10, 2010.</p> <p>Environmental Tectonics Corporation, <u>Common Stock Warrant</u>, Feb. 20, 2009.</p> <p>Environmental Tectonics Corporation, <u>Series E Convertible Preferred Stock</u>, July 2009.</p> <p>Intellect Neurosciences, Inc., <u>Form of Warrant to Purchase Common Stock</u>, Aug. 2009.</p> <p>A&P, <u>8% Cumulative Convertible Preferred Stock Series A-T, A-Y, B-T and B-Y</u>, Aug. 2009.</p>

Class	Date	Topic	Assignment
20	Apr 9 (Make-up for Feb 11)	Overflow and catch-up	
PART II: GROUP PRESENTATIONS			
21	Apr 13	Group 1: SightSpeed (fka QVIK Technologies, Inc.) Series A-1 round (June 20, 2003)	Group 1 reading materials.
22	Apr 15	Group 2: Google Inc. initial public offering (Aug. 18, 2004)	Group 2 reading materials.
23	Apr 20	Group 3: Louisiana-Pacific Corporation units offering (Mar. 10, 2009)	Group 3 reading materials.
24	Apr 22	Group 4: Churchill Downs Incorporated credit facility (Dec. 22, 2009)	Group 4 reading materials.
25	Apr 27	Group 5: DaimlerChrysler Corporation/Metaldyne Corporation joint venture (Dec. 8, 2002)	Group 5 reading materials.
26	Apr 29	Group 6: The Walt Disney Company acquisition of Marvel Entertainment, Inc. (Aug. 31, 2009)	Group 6 reading materials.

GROUP WORK MEMORANDUM

DEALS: THE ECONOMICS OF STRUCTURING TRANSACTIONS (LAW 459-08)

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Group Assignments: Students will be divided into work groups, each of which will be responsible for leading a class discussion on one real transaction and for writing a group paper analyzing its transaction. Group assignments will be made in late January.

Deal Assignments: Each group will be assigned a deal. Deal assignments will be made in late January.

Class Presentations: Each group is responsible for presenting its assigned deal to the class on the date indicated on the course syllabus. The presentation should be cohesive and is graded on an overall basis rather than on an individual basis. In that regard, each group member need not participate in the actual class presentation. The presentation may take any form that your group determines will best relay the information relevant to your transaction. Please do not spend significant amounts of time adding bells and whistles to your presentation (although if someone in your group already has a relevant skill set, you should feel free to use it). Ultimately, the presentation will be evaluated on the basis of its content, and any extra time your group has should be spent on the actual substance of your presentation. If you have slides or other similar materials which you will be using for your presentation (not the reading materials discussed below), please email them to Professor Teitelbaum on the day of the presentation.

Class Reading Materials: In advance of your class presentation, each group should assemble approximately two hours of reading materials for the class, which will help them prepare for and understand your presentation and transaction. For example, relevant readings may include selected transaction documents, industry background, news articles, and transaction charts. The compiled readings should be emailed to Professor Teitelbaum one week prior to your presentation date. Professor Teitelbaum will post the readings on the Courseware site.

Group Papers: Each group is responsible for writing a comprehensive paper on its transaction. The group paper should provide an in-depth analysis of the transaction, using the concepts and analytical tools that you have studied in class. To the extent relevant, the group paper generally should attempt to answer questions such as:

- What is the contextual background of the transaction (e.g., the relevant industry background or regulatory landscape)?
- What factors are driving the parties in the transaction?
- What problems/barriers are the parties likely facing?
- How have the parties attempted to address these problems (e.g., through deal structure or contractual provisions)? Do these solutions work or are there limitations?

Papers should be limited to 3,000 words, or approximately 12 pages. Papers must be typed in 12-point font, double-spaced, and have one-inch margins all around.

First Draft: The first draft of your group paper is due on the date of your class presentation. You should send the draft via email to Professor Teitelbaum. Written comments on your initial draft will be provided to you (hopefully within a week or so) by the group with secondary responsibility (see below). Obviously, the more complete the draft is, the more helpful and in-depth the comments will be. Although the first draft will not be graded, it is an opportunity for your group to get feedback that will help in completing the final draft.

Final Draft: The final draft is due at 5:00 PM on Monday, May 3, 2010 and should be sent via email to Professor Teitelbaum. While it is not expected that the first draft will be in perfect form, the final draft should be. That is, the final draft should read as if a single hand wrote it, even though different group members may have been responsible for the initial drafting. Please do not underestimate the amount of time that this will take, and factor this in when dividing up the responsibilities for the project. Typically, this final editing process will fall on the shoulders of one individual. Certain steps can be taken up front to alleviate some of this final editing work by implementing drafting rules for group members (e.g., consistent tenses, person, defined terms, etc.) and/or having a detailed outline to prevent overlapping. Ultimately, however, a lot of editing work will typically need to be done.

Secondary Group Responsibilities: In addition to your primary group responsibilities, you also have secondary responsibility for another deal. Secondary responsibility entails providing written comments on the primary group's first draft and being prepared with questions when the primary group makes its class presentation (i.e., make sure that you thoroughly read all of the class materials prepared by the primary group and are prepared to ask questions during the class presentation). Secondary group assignments will be made concurrently with the group assignments.

Intra-Group Participation Evaluations: I am relying on you to be able to work effectively in a group setting (as this will often be the environment in the real world). In that regard, you are responsible for dividing up the various responsibilities in whatever manner your group sees fit. As a partial check and balance, however, each group member's participation will be evaluated by the other group members in the following manner:

Each group member will allocate among its other group members a number of points equal to the number of other members in the group times 10 (e.g., if there are three people in your group, you will have 20 points to allocate among the other two members of your group).

If everyone pulls their weight, the obvious allocation is 10 points to each member, in which event this element of the evaluation will effectively disappear. If, however, the other group members believe that a particular member has not participated fully, or has carried more than his or her proportional share of the work, then a different allocation may be made and Professor Teitelbaum will take that assessment into account in determining grades.

Please email your point allocation to Professor Teitelbaum by 5:00 PM on Tuesday, May 4, 2010.