MERGERS & ACQUISITIONS WITH PROPS & PANTOMIME

William Birdthistle

Good afternoon everybody, my name is William Birdthistle, I teach at Chicago-Kent College of Law, and what I teach is pretty doctrinal. I teach corporate finance sometimes, business organizations usually, and securities regulation often. And one of the big challenges I've had in teaching those courses is conveying to students what transactions actually look like. Usually the topic comes at the end of the course, and I can't tell if they're sort of fatigued by the time we get there or if it's just a little bit too abstract. But they don't really seem to love it. Can I ask if anybody teaches M&A? Oh, okay, good, good, good. Excellent. Then you'll have all the answers.

M&A obviously is a massive topic of theoretical interest. I did a modest amount of M&A before I left practice and went into teaching, but nowhere near enough to get as excited and enthused about it as much of the doctrinal work in our field focuses on the topic. So, there are many papers by Lucian Bebchuk arguing with many papers by Marty Lipton, though it turns out that empirically nobody knows what to do with M&A. We should protect the boards, we shouldn't protect the boards?

But as far as teaching it goes, the problem is still there for us to solve. At least for me, anyway, because I feel like it's a real challenge. Why do you have to be able to teach the deals? What do the actual transactions look like? Well, the good news is, in this room for the next 45 minutes, we won't be teaching any law at all. But in order to get through a semester or a term of actually teaching SecReg or BusOrg, we do eventually have to get to it.

And it's very hard to teach things like entire fairness or any of the fairness analysis, any of the proxy fight material, any of the takeover defenses, which takes up usually the last two weeks of any class that I teach on this, or any of the *Revlon* duties. It's very hard to teach any of that if the students don't understand what's happening when there's a merger or an acquisition; when two businesses come together as one. So, at some point, usually at about the three-quarter mark of the semester, we have to get down into the nuts and bolts of what's actually happening when the two companies try to combine.

So, as far as M&A goes, I find I have to teach the M and I have to teach the A. The M is pretty straightforward. This part actually feels relatively familiar, I think, to students, because you just trot out a little bit of statutory code. Here's section 251 of the Delaware General

Corporation Law, and it basically gives us a roadmap.[1] Form an agreement, the two parties simply sit down and have an agreement, hash out how much of the combined entity they're going to give to either side. It seems kind of law-like, and it seems very civilized, and it seems like the kind of way that business people would do things.

It's the A that they have trouble with, that I have trouble teaching. It's the acquisitions. So, I find we have to get into the weeds there. What about the particular acquisitions? Well, obviously we can have an acquisition in which the buyer, the acquirer, buys just the assets of the company. Buys a couple of pencils or all the pencils or the pencil making equipment or all the equipment or everything. Somewhere along that spectrum we go from just buying stuff to actually acquiring an entity. Talking about the asset acquisition is sort of a big stage.

Obviously, the alternative is to acquire the stock. Rather than buying the bits and pieces of the company, we buy the stuff that controls the company, and then the acquirer gets all the bits and pieces. Those are the two options, and when it comes to payment and consideration, we can pay with cash, obviously, or we can pay with our own stock.

And now we're getting to something that feels theoretical, since it's a two-by-two matrix. Still, the matrix is filled with all sorts of question marks, and people really don't know quite what we've done, at least in my experience. So, I think the traditional way of trying to figure out, or at least conveying to students what's happening here, is you just pick one or you can pick all four.

So, let's start with an asset acquisition for cash. And this is kind of what your case book's going to look like, this is what your white board, well, my white board ends up looking like. When we're doing an asset for cash acquisition, we have ourselves an acquirer, we have ourselves a target; there are going to be assets and liabilities at the target, those are going to be conveyed to the acquirer, and we're doing this for cash, so the acquirer is going to have some cash, and that's going to be conveyed to the target.

This all seems relatively straightforward. After that happens, some component of the acquirer will be diminished by the size of the cash that they've spent, but they'll have acquired the assets and liability, while the target will have the cash. Afterwards the target will then dispose of the cash by sending it to the shareholders, and the target will no longer exist, it will dividend the cash out.

[1] DEL. CODE ANN. tit. 8, § 251 (2018).

Okay, that's the standard way of conveying this transaction, and I have done it many times. And that's what the standard drawings look like also. Professors either do it on PowerPoint or scribble all over the whiteboard, and those are the diagrams students see. And then when you ask for recall from the students of what's actually happening here, you get something that suggests maybe there was an acquirer, a target, a random banana perhaps, but it's very difficult to actually get them to understand what has happened. So, I have an alternative. And the bad news is, I'm going to need some volunteers.

Now the good news for you is that, usually you can check your roster, and some of these classes are relatively big, because a class like Business Organizations is almost required. You might have 80, 90, or 100 students in there. So, I will first find the student whose name begins with A. (You can raise your hand at any time if you're one of these people.)

So, I'll call for an acquirer, and I'll call for a target. And then I'll call for some S's. Always plenty of S's, lots of names start with S, and I'll get several of those as well. So, I'm going to push my chances here with such a small crowd, but I would like to try, if anyone is willing to help me out. And I know I've got a T. She was my student. So, can I get six people to come join me up here? Thank you, please come on up. Okay, so let's put the first two people up front, and the last four people behind, just for the time being. You're a T, so you're the target. And you are an A, so you're the Acquirer.

Okay, so as the Acquirer, you're going to have this handy little purse, and as the target, you're going to have this redweld filled with peculiar objects. And now I need to establish the relationships of the business. Since you are each a business, you're going to have stockholders. So this is our business enterprise. Here is our Acquirer. It's somebody who's got a wallet, and who has stockholders of its own. This string connects the stockholders to the enterprise. And now the same will be true here on the Target side.

If they look like reins, that's a good thing, because I think that conveys a little bit of the idea here, that these shareholders are holding the reins, and have a certain amount of control over their enterprises. So now, let's do all four of our transactions, but most of the energy will go into the first one.

So, we're going to do the same transaction we just saw, it's going to be an asset for cash transaction. And what I hope this pantomime achieves, is not just actually conveying the information, but it gives you an opportunity to answer a lot of the questions that will come up along the way. And I think what I really try to get out of it is the fact that the beginning picture is going to look different from the final picture. We're going to start with an asset acquisition. You're the Acquirer. Now, what is it that's in this portfolio that this Target has?

Acquirer: A lot of good fruit.

W. Birdthistle: What kinds of fruits? What's in this redweld?

Acquirer: You got several apples and you got a couple of lemons.

W. Birdthistle: All right. What are those apples?

Acquirer: They are green apples.

W. Birdthistle: I'm reaching for metaphor now. What are the apples? Those are the assets, of course.

Acquirer: Oh, the assets, yes. And the lemons are the liabilities.

W. Birdthistle: Yes. And the good news is, there's more assets in this redweld than liabilities.

Let me ask you this then. Since you're the Acquirer, and you've kicked off this transaction, why is it that you've chosen to focus your attentions here on the assets, rather than up here on the stock? What kinds of considerations are there? If you've got this war chest here in your hand, why would you go in here to management rather than going up to here to these shareholders to buy what they have?

Acquirer: Well, because maybe one of them, that's maybe a 25% shareholder, doesn't think this is going to be a very good idea, and I'm not going to be able to do it that way.

W. Birdthistle: So you might have some recalcitrance. What's appealing about the redweld?

Acquirer: I can pick and choose.

W. Birdthistle: Exactly. What you don't see is that these apples, which I purchased last night at the supermarket before I got on the plane, were originally bagged in sort of a net bag. One of the key things though about buying the assets and liabilities of course, is that you can choose.

Acquirer: I can choose which ones.

W. Birdthistle: You can choose which ones. You can choose which ones. And presumably, you can also choose not to buy any of the . . .

Acquirer: I can leave the lemons.

W. Birdthistle: You can leave the lemons entirely.

One of the things that this, I hope, shows, is that if you're an Acquirer dealing here at the Target level with Target management and Target assets and liabilities, you have a lot of control over the transaction. You get to pick which particular assets, maybe you leave some assets, you can certainly leave liabilities if you want, but you get a lot of control over the choice.

Just like shopping at the supermarket, when you ask someone, why don't they buy the onions in the net bag? Part of it is quality control, but what's the trade off? What happens when you avoid the bag and you go for the particular items? What do you lose?

Acquirer: What do I lose?

W. Birdthistle: What's the cost? What's the trade off?

Acquirer: Well, I get the amount I want if I-

W. Birdthistle: You do, that's the upside, but what's the downside?

Acquirer: Price. Right.

W. Birdthistle: Price. So, one thing is price. You get that net bag because it's usually a little bit cheaper. But also, this is true in both shopping and corporate transactions, it's also usually . . .

Acquirer: More efficient.

W. Birdthistle: Faster.

Acquirer: Faster.

W. Birdthistle: It's faster. Is there a premium on closing these transactions quickly?

Acquirer: Absolutely.

W. Birdthistle: Of course. Why? What's the risk if you let it drag out?

Acquirer: Deal fatigue.

W. Birdthistle: Deal fatigue.

Tira: Somebody else is going to come and buy. Somebody else is going to come and bid.

W. Birdthistle: Yes. You'll attract another bidder; your price will go up. In this particular transaction, we've decided that quality of the particular assets trumps speed. How much are you going to pay for those? All right, you've got two crude choices. Let's imagine that each of those is worth a unit of currency, what would you pay for that redweld?

Acquirer: Well, I'd probably . . .

W. Birdthistle: It contains five assets, and two liabilities.

Acquirer: Maybe I would pay three.

W. Birdthistle: Maybe you'd pay three. And of course, what you're assuming is that you would take everything in the company.

Acquirer: Yeah.

W. Birdthistle: Right, you are going to take everything. So, five assets, minus the two liabilities, you'd pay three for it, and you'd get the entire entity.

Acquirer: The whole thing.

W. Birdthistle: But what's the alternative? What's the alternative?

Acquirer: To pay just for the assets-

W. Birdthistle: And how much would you have to pay for that?

Acquirer: I'd probably have to pay five.

W. Birdthistle: Five. So, it's more expensive to pick and choose just the good stuff and to leave the garbage.

Acquirer: Right.

W. Birdthistle: We'll do both, but let's start with your first option, you'll just hand over the three dollars, and you'll take the whole redweld.

W. Birdthistle: So now you get the whole redweld.

W. Birdthistle: Let's focus on you, the Acquirer, for a second. The transaction is consummated from your perspective, as far as you see. Are you going to hang on to those liabilities, or what else might you do with them?

Acquirer: Well, I might pay them off.

W. Birdthistle: You might, right? And since you paid two less than you would have otherwise for all of them, you actually have some money at hand.

Acquirer: That's right, I've got the money to pay the liabilities off.

W. Birdthistle: So, you could retire the liabilities using your own assets. Now that's what your business looks like. You've gained a whole new portfolio, you've lost a little bit of money, but obviously you think that's an economically good deal, and you have the choice of discharging the liabilities or not.

Acquirer: Well, I've lost a little bit of money, but I've gained assets that I believe replace that money, if I paid properly.

W. Birdthistle: You have. Let's modify this slightly. Let's say you did exactly what you just did, but you left the lemons. You had to pay a little bit more for that, didn't you? So, two more dollars for just the assets. Now your transaction is done, and your shareholders are basically unchanged.

Acquirer: Right.

W. Birdthistle: Their wealth proposition in the future should go up, but otherwise there's no real change here.

Acquirer: Right.

W. Birdthistle: Pretty clean and tidy transaction. Did you need their permission?

Acquirer: No, I did not.

W. Birdthistle: Probably not, right? Probably not. In an asset acquisition, you, the Acquirer, had the resources at hand, and you chose to do it. Now, in the first permutation where you, the Target, are left with nothing, that's obviously an easy state, we'll get there in a second. But if you've been given five, and you still have the two lemons, what do you have to do now?

Tira: I need to take care of these.

W. Birdthistle: You need to retire them, right? We're dancing a little bit around the idea of successor liability, but you do need to retire those liabilities. Usually, when we talked about the Acquirer retiring them, we talked about paying money for it. So, can you think of a way to get rid of those two lemons right out of the gate?

Use some of the money you've been given in the deal? So, let's just make it very easy, take the two, you're down two now, but these liabilities are gone. Now when we look at this company, this company has been converted into a business that is no longer a going concern, right? You were making apples, lemons, or pencils, or whatever you did. At this point though, what are you?

Tira: A shell.

W. Birdthistle: You're just sort of a shell sitting with this cash. Now, you're not nothing—you are a business, but you're sitting on this cash. And I ask students, what could possibly happen at this stage? Sometimes they get pretty inventive, and they'll be like, "Well, maybe you can become an investment fund, right?" And that's a pretty radical change from a fruit costermonger or pencil maker. I guess it's possible, but we know that when these transactions are done, targets are virtually on death's door, right? But there is a final stage to it though, which is, if you're nothing but a shell of cash, what do you need to do?

Tira: I need to go to shareholders.

W. Birdthistle: Yes. How do you get that cash to your shareholders?

Tira: A dividend.

W. Birdthistle: You declare a dividend, exactly. So, you dividend out all the assets that you have left, right? And you pass them up to your shareholders. And, in exchange, you're going to retire their stock. So, you're going to give the stock back to the company.

Tira: Oh, okay.

W. Birdthistle: Right. So, now you are done; you've sort of evaporated from the shelves of the Secretary of State of Delaware, and you are enriched?

Tira: Rich.

W. Birdthistle: Here's the important part, which we'll contrast in a second, what's your connection to this company now? Nothing. Your connection to the Acquirer? Nothing. So, cash creates a very string-free transaction.

So, that's our first iteration of this deal. Does anybody have any questions about how we trot this out? You are obviously all experts, so the questions get answered much more briskly.

Tira: Oh, here's a question.

W. Birdthistle: Yes, go ahead.

Speaker 6: So, as you said, she could dissolve, so how do you illustrate dissolution? Dissolution?

W. Birdthistle: Usually, a step back sort of conveys the idea and so does the shareholders' walking away with cash.

Speaker 8: She could sit down?

W. Birdthistle: Yes, go ahead, what are your questions?

Speaker 9: Like, she has the stock back and can she resell the stocks?

W. Birdthistle: She could. And when she had the cash, it's not inconceivable that she'd get out of one business line and become an investment company. That could happen, but it's a bit of a stretch; usually in a transaction like this that's all set up to go, it's just a stage of getting to dissolution.

What I like about doing this though, as opposed to the charts, is it is very easy for the students to see that they've got cash and the shareholders are not tied to anybody. And, they get to see some of the considerations that go on. Now, we're going to reset and do the other three . . .

Speaker 10: You didn't ask them, was permission needed on this side?

W. Birdthistle: Oh, yes. Very good, exactly. That's going to come up a lot when we change the consideration but exactly. Do you need to be willing to participate in this? Absolutely. A fundamental transaction that's dissolving the entity? And also, just buy-in, right? You're accepting the dividend and giving back the stock. Absolutely.

Speaker 10: Selling substantially all of the assets.

W. Birdthistle: Exactly. You need much more permission.

Acquirer: Not 100% consent. You wouldn't need a unanimous consent.

W. Birdthistle: We'll focus a lot on that when we change the consideration, too. Do you mind resetting to where you were a second ago? Now, let's change the transaction a little bit. We're going to stay with an asset transaction, but we're going to change the consideration.

We've already answered the set of questions as to why the Acquirer is looking at the company instead of the shareholders, and it's going to be the same now, because it's still an asset transaction. So, we're not going to focus much on that part of the transaction. Again, you've got the choices of buying just the apples or the apples and the lemons. If you, the Acquirer, get the lemons, you'll have to decide how to retire them; if you, the Target, keep the lemons, you'll have to decide how you retire them. What's different this time around, of course, is what you're paying with.

So, first question is, why would you choose not to pay with cash if you had it?

Acquirer: Because I might want to keep it, or I might want to use it for other purposes.

W. Birdthistle: Okay, definitely, if you have other business intentions in mind for the cash. What are your considerations when it comes to whether you want to use your stock?

Acquirer: Well, do I want to just do what I want, or do they want me to dilute them?

W. Birdthistle: All right, well, first though, you need to check. Do you have any stock in there?

Acquirer: I guess I have to see whether or not I have authorized stock in my . . .

W. Birdthistle: Of course. These are your articles of incorporation.

Acquirer: Okay.

W. Birdthistle: All right. And, the first thing, right? The first thing, if it comes to the decision of whether or not you want to use stock as your consideration, you have to check your articles of . . .

Acquirer: I have it, yes.

W. Birdthistle: Do you have it? Do you have some cap between issued and authorized?

Acquirer: Or could I amend to create it?

W. Birdthistle: Exactly, and that gets us to the permission issue. Now, why would we need the shareholders' permission? If you didn't have the room, why do we build this into the articles of incorporation?

Why do we need your permission to use stock as the consideration of a transaction?

Speaker 8: You're going to be issuing new stock.

W. Birdthistle: Yes. What's that going to do to you?

Speaker 8: It's going to dilute.

W. Birdthistle: It's going to dilute you, of course. The more new strings we pump out, the less control you have of this enterprise.

W. Birdthistle: So, if the choice of stock is consideration, it leads immediately to dilution. Sometimes, I get into the question of why it is so common for acquirers' stock prices to fall when they announce a stock acquisition. Does anybody have any theories on that?

Speaker 10: They do bad deals. They overpay.

Speaker 10: That's not a joke.

W. Birdthistle: Well, that's a tricky . . . that runs into certain difficulties with efficient capital markets. The idea that every acquisition is a bad one?

Speaker 10: Not every, but most.

W. Birdthistle: Anything else? Anybody else? I mean, I don't think there's a set answer to this, but there is one that I've seen often. Any other reasons why the stock price for the acquirers might go down when they announce that they're purchasing with stock?

Acquirer: The arbiters will question whether the deal is really going to go through and in anticipation that they might make some money by . . .

W. Birdthistle: Squeezing it?

Acquirer: Squeezing it, yeah.

W. Birdthistle: Yes, that's right. You definitely get a lot of that coming in. I don't know how persuasive this is, but it’s one argument I've seen that sort of speaks to me a little bit—certainly at the start up stages. Your choice to use stock rather than cash, especially if you have cash on hand, is a vote of no confidence in your stock price, right? If you ask a

Zuckerberg in his dorm room, would you rather pay people 50 bucks, or would you rather give them stock? The answer's always going to be, "I'd rather give them loans, IOUs, I'll give them anything other than the stock." Why? Because I assume the stock is going to be worth billions soon.

If I choose to use the stock, I'm implicitly saying, "I don't think its trajectory is upwards." Now, that's a conversation you can have with students. What is in the acquirer's head when there are always these two choices?

And, sometimes you can get cute and say, "Well, why not just issue new stock, sell it, and then use that cash as your consideration?" Sometimes people say, "I used stock because I didn't have any cash," and you could say, "well, but you could make your own cash." Answers to that? How long does it take to do an issuance of stock?

Acquirer: You have issues where you've got a company that's got liquidity issues or concerns like, "I'm going to need cash, but I've got an opportunity to do an acquisition. I've got stock, it's highly valued right now, people want it."

W. Birdthistle: Yes. But, even in S-3, to pump out shares is just not that quick—it's time consuming. It can take you off the track of the transaction, so there are a lot of those kinds of considerations. Sorry?

Speaker 6: It's expensive.

W. Birdthistle: And, yes, it's very expensive to do that. So, we're choosing this time, though, to do it with the stock. So now, let's keep it tidy. You've got your portfolio: what do you need to give to her? We're not using cash this time. Yes, you're going to give her some stock; let's give her two.

Acquirer: By the way, are they on my board?

W. Birdthistle: I don't know. We could make them there if you want to.

Acquirer: Because if they're on my board, and they're also my stockholders, they do have a vote.

W. Birdthistle: Yes.

Speaker 8: Okay.

W. Birdthistle: At this point in the transaction, you've been paid in stock. Which is to say, you're a stockholder of this corporation. But, of course, if that's your only point of existence, just kind of like we saw before, that's not what you were there for, and that's not what your business is for; it's sort of a temporary way station before you're evaporated. So, what are you going to do again at this point? Just like you did last time?

Tira: Dividend.

W. Birdthistle: Dividend them up, and in exchange, you're going to get their stock back from you. And once again, like last time, you'll be dissolved. You could put her behind a sheet or she could step back or sit down.

But now, what we see at the final stage is something very different than we saw when we paid with cash. What is your relationship now? You are stockholders of the Acquirer. So, your relationship is much closer to the Acquirer than it was with cash. It doesn't have to be that way, because you can sell your stock right after the transaction, obviously. So, it can be something of a temporary stage, but I think it conveys very much the difference between paying with stock and paying with cash.

Now, let's just do the final two versions. We've got most of the ideas and concepts out of the way already, but we'll just do the final two just so that we can see them in action.

First, switching to a stock acquisition. This is something we haven't really talked about before. You have both of your war chests, and you have all of the assets and liabilities. But now, we're talking about a circumstance in which you're not buying the assets and liabilities; instead, you're buying the stock. Who is he buying the stock from? From the Target's stockholders.

What do we call a transaction when the stock is being purchased rather than the assets and liabilities? It's going to be a-

Speaker 6: Stock purchase?

W. Birdthistle: Yes, and it would probably be constructed as a tender offer from you to the stockholders. Now, this allows us to bring up a whole separate conversation, which is, why might an acquirer prefer to speak to the stockholders rather than management?

Tira: Management doesn't want to sell.

W. Birdthistle: Yes, maybe management is entrenched, has personal egotistical reasons for not wanting to give up the portfolio, or likes being in control of the portfolio. If you're able to go over management's head to the direct shareholders, maybe you could cut out some of that egotism. But, what would the price be? Would it be more expensive or less expensive to deal with the stockholders rather than management?

Speaker 6: Probably more.

W. Birdthistle: Depends a little bit on your view of efficient capital markets, right? If you think the markets are efficient, the answer should be the same. It would be irrational for you to take the more expensive option, right?

Acquirer: You have to footnote for people, I guess, there's tax.

W. Birdthistle: Oh yes, always. Yes. Plenty of tax considerations as well.

Acquirer: Tax differences between buying the assets and stock.

W. Birdthistle: Yes, no question.

W. Birdthistle: This is another opportunity to sort of talk about some of the personal dynamics that come with board entrenchment, management entrenchment, and some of the dynamics about tender offers.

W. Birdthistle: Now, earlier I asked, when you were thinking about doing your transaction, why might you not want to go for stock, and you said there might be holdouts, right? Yes, that's definitely true. If you do a tender offer, how much do you have to get? Do you have to get every single share to tender? Obviously not, what's the-

Speaker 6: Controlling interest. Whatever the controlling interest is.

Acquirer: It depends where you're going. You know, it depends what your ultimate play is.

Speaker 8: 90%?

W. Birdthistle: If you want more than a controlling interest, if you want everything, get to 90%, and then you can do the short form cash out.

W. Birdthistle: This is, again, a nice opportunity to talk about why you're not looking at the assets and why you're dealing with the stockholders themselves. It also allows us to reprise this conversation: if you do buy from the shareholders, what say do you have over the assets and liabilities you get?

Acquirer: Oh, you're getting the whole thing.

W. Birdthistle: You get everything.

Acquirer: And that lets you also explore back again whether you want the whole thing, want to take the risk of the whole thing, or cherry pick an asset.

W. Birdthistle: Exactly. Right, because right back to the grocery store, when you do buy the bag of onions and it's cheaper and it's faster, it's also virtually certain that two or three of those onions are garbage.

Acquirer: Yeah.

W. Birdthistle: Yes, absolutely, no question. And I don't quite do it here, because it's too complicated, but we could talk about it a little at the end. It's also a way of introducing the concept of using a triangular merger, with a sub. You put the sub in there so that you can insulate whatever garbage you get, so that it doesn't go into the mother ship. You want the airlock between your sub and your management, because you don't know what's inside the chest of whatever you've just purchased, and whether it will be popping out, unfortunately, later.

This time now, your choice is whether to give cash to the stockholders, or your stock to the stockholders. Let's start with the easy one. Let's say you give them the cash, all right?

Speaker 6: We'll just take it all.

W. Birdthistle: You can if you want. So, if you're getting the whole package, instead of just picking out the assets, transaction should be just three dollars instead of the five, since you're getting the bad as well, but in this case it's going to be shared out pro rata to the . . .

Acquirer: So, they have to divide it.

W. Birdthistle: They have to divide it. I don't have coins, I'll trust you. And yes, what do you give now? All right, so now you give the stock in exchange. Okay, now you have cash, so what's your relationship to the ongoing enterprise? Totally divorced from it. So if you just step aside a second, and we rearrange the structure just a slightly little bit now, now we see what you get when you buy stock. You have shareholders of the acquirer that control the acquirer, and you have the acquirer as a shareholder of the target, controlling the target. And so, we have three stages of shareholder here.

And that I think, again, illustrates the very different relationship, and because you're the sole shareholder of all these, you control everything down here in the redweld, even the lemons, even the bad stuff. Let's just reset that final stage, and instead of using cash, right? We'll use the string.

Here again, in order to use the stock, you need to make sure that you have it, and if you don't have it, you need to get your shareholders' approval to raise the authorized stock. But when it comes time to paying out, just like we did before, you're not dealing with management, you're bypassing management, although they may need to recommend the transaction.

But in this particular case, your stock is going to go up to the stockholders. They will give that to you in exchange, and if you just step forward a little bit, okay, we have the same arrangement that we had a second ago, in which case the target is now a subsidiary of the acquirer.

So again, we see that the choice of stock as a currency is the one that keeps you in connection with the enterprise, and that you have an entire entity down here, good, bad, or otherwise.

So that is how I pantomime out the four variations of a transaction like this. Thank you all very much.

Acquirer: How much time, how much class time do you devote to this?

W. Birdthistle: It would take about an hour to do this in a class. All of you knew the answers right away, so we were able to do it in about half the time. Some of it is just this logistical stuff. The other thing that I can do with it is, you can do things like a spin-offs? So, if you teach a case like Datronic's, using spin-offs to skirt IPOs, you can use the same arrangement, and the students will be familiar with it, and it allows you to get to a much more complicated deal that way.

Acquirer: I'm sorry, I walked in a minute late. What class is this?

W. Birdthistle: I use it in as many as three different classes. It's definitely part of Securities Regulation, if you're doing any M&A in that. It's absolutely part of my BusOrg classes, corporations, business, associations, when you're talking about M&A. And I've even dabbled with it a little bit in corporate finance.

I just find that this transaction is kind of central, the M&A transaction is central to a lot of those classes, and as I said a little bit at the top, none of what we just talked about is really legal. There were some legal elements to it. You raising authorized stock limitations and things like that, but most of this is what students, I've found, have the least exposure to. Which is, why do businesses do transactions, and how do they do them?

But it's really essential to getting a sense of what the relationships are, and the incentives and the motivations, so that later on when you're doing topics like takeover defenses, they have a sense of what's at stake, and whether the acquirer is talking to management or bypassing management? It allows you to . . . allows me, anyway, to flesh out a lot of those kinds of subjects.

I find that I use it in all of my major doctrinal classes. I also teach something on investment funds, and I use it there all the time as well, because what we haven't really talked about here, but which is obviously true in real life, is you're talking about a lot of leveraged buyouts, private equity funds are using these kinds of transactions. So, I find that it plugs into almost every business class that I teach.

It does take a little bit of time just to do the back and forth, the pantomiming, but like I said, I've contrasted that against doing a million versions of these charts, and they just don't stick. They just, they're too abstract, they're very tidy, they're very clean, and they have no humans involved with them whatsoever. There's no board up there, there's no management, there's no shareholders.

And that's in every teaching manual I've seen in so many classes on it, on everything that you look at online, it's all about the diagrams. And I understand, I'm sympathetic to it. I've tried talking about it, I've tried using the diagrams, but it was only when I actually started using humans that they started thinking about it and remembering it. Also, because it allows you geographically to say, stockholders are going away, our stockholders are still in privity, those kinds of things.

Speaker 3: So, I don't teach M&A per say, but M&A transactions come up, and I, at least my own mind, found the M part to be more challenging.

W. Birdthistle: Really?

Speaker 3: Because . . .

Speaker 10: The what? Sorry?

W. Birdthistle: The M, the merger.

Speaker 10: Oh.

Speaker 3: Because you've got these two companies, and who's merging into whom, and then sometimes you've brought in a sub, and who's merging with whom, and [inaudible 00:34:05].

Speaker 6: [crosstalk 00:34:04] Imagine having a merger process, all [inaudible 00:34:07].

Speaker 3: And then who votes, and how come he was . . . and so, to me, talking about this, I think it's very confusing to [inaudible 00:34:16].

W. Birdthistle: Yes.

Speaker 3: What do you do there?

W. Birdthistle: I have to confess that I don't spend a ton of time on just the straight 251 merger. I know that there's some voodoo in there, but that actually, I feel like that absolves me a little bit of the need. The two parties just get together, agree on the chunks of the company that they're going to be getting out after the fact, they file the merger of agreement, and the moment of the filing is when we have our magical consummation.

I know it's way more complicated than that, obviously, it is. But at least that one, I think most of the students I've had deal with that, I think it's because of their heavy law bias. I think they're prepared to appreciate a transaction that involves people sitting down at a table, writing a common agreement, and sort of coming up with a, sort of, a chunk of the surviving entity.

It's these transactions that they just don't, they just can't get their head around, because we may be introducing the concept of a tender offer to them for the first time. You may be introducing the concept of a valuation, how are you going to value this thing, what are the liabilities baked into it. So, I have so much more trouble with that, which is why I've come up with this.

But I still, yes, I finesse the M a fair amount. Probably more than is worthwhile, but mainly because I've had so many more questions on the A. Yes.

Speaker 8: Do you [inaudible 00:35:32] transactions? I mean, I'm thinking like, this seems brilliant to illustrate rights, like tag along and drive along, right?

W. Birdthistle: Yes. I haven't, I haven't. Because I feel like you get one chance to pull students out of their chairs, and this is the one I use. And at the second time you do it, there's a let down.

And so, I just use the T's, the A's, and the S's, and I sort of insist they come on up. And I think you get one shot . . . I get one shot at it. One time I tried to do it twice because the spin-offs material was separated by two classes from the regular M&A, and I tried to do it twice. And it was amazing, just like the level of interest, enthusiasm, and revelation. The good eureka moment with this the first time. There's a definite sense of, okay, I did the reading, or I looked at the diagrams, it meant nothing. Now I get a sense of what's going on. But the trajectory of diminishing returns is just like, straight off the cliff.

But I agree, there's plenty more you could do. If you have a more generous student body, a more enthusiastic, dramatic, you know, artistically inclined student body, you could spend the whole semester up here with them. But I find that the most bang for the buck that I get out of it is to do M&A with it.

And then if you can do subsequent transactions, sale-and-leasebacks, or spin-offs. If you do those afterwards, you can at least gesture to . . . you can say, this is a lot like the first components of the string and apples.

Yes?

Tira: Have you done . . . I remember your class, just having so much material. So, this might be beyond the scope, but when I was thinking about this scenario in practice, it usually came in when I was drafting. And depending on the form of the deal, would shape significantly how long representations and warranty section was? So that's where the learning really happened for me. But I don't know, have you ever heard from other students that you've had?

W. Birdthistle: I've heard from my, in my own experience, I actually had the misfortune of trying to participate in M&A before I had taken securities regulation. And that's a terrible, terrible way to learn.

There's no substitute for actually doing it in a practice. To be honest, in a class like securities regulation, or business organizations, I don't get very much into the contractual surrounding, though I do a separate day where basically I teach an LBO as a house acquisition.

Every class I've ever taught, I ask students, “Has anybody done an LBO?” And nobody has done an

LBO, and then my next question is, "Who's bought a house?" And there's always, always, at least one person in the room who's bought a house. And then I say, "So we do have an LBO," and that's always been true except for one instance where the person said, "No, I bought in cash." What are you doing here? You do not need a new degree.

If you structure the house purchase as an LBO, or vice versa, it's a good opportunity to say, what are the consequences of the financing out, the inspection out. So, the financing out is exactly the same for an LBO, the inspection out is just due diligence. There's a lot of helpful, helpful parallels there, and it's much more salient to them. Because even if they haven't bought a house, perhaps they've seen their parents do so, and they get the concept a lot faster.

Acquirer: You know, there are a couple of themes that, running through here, are consistent with experiences I've had. And you can talk about whether the envelope for doing it is an M&A class, or deals class, or a commercial finance class, the envelope on it doesn't matter. The challenges, I find, are almost always that the students just don't have a clue what the doctrinal subject matter has to do with anything.

W. Birdthistle: Yes.

Acquirer: So, they got nothing to attach the learning to. And almost anything you do that makes them relate your transaction to some every day sort of experience like buying a car, or buying a house, or leasing their apartment, or forcing them to get up and playact, and I . . . you're pretty sophisticated. Some of the things I have them do are really silly. But anything that gets them to actually connect the law to some activity that is not just reading a page or looking at a screen, does seem to connect.

W. Birdthistle: Yes, I agree with that. It's funny, you know, I saw this big *Atlantic* piece, Debunking Learning Styles. Right? So, there is no such thing as a visual learner, an auditory learner. I don't know what to think about that, but what I do know is that this material, which I've always had the hardest challenge with, I don't want to say it's become the easiest, by any means, but it's become the most successful.

Because of the fact that it's the only day of the year that they get out here and they do it, and they're sort of empathizing or mocking their classmates that are up here, actually becomes very easy, subsequently, to be like, "Okay, listen. You remember who our acquirer was. What are their motivations?" And then, as you say, doctrinally they're obliged to get shareholder approval if they want to use stock. It becomes, yes, way easier to refer to a particular moment in class that we did.

All right, thanks very much, especially the volunteers.