In this chapter and Chapter 3, I turn to the legal aspects of mergers and acquisitions. I will cover rights and responsibilities of successors, creditors, shareholders, boards, controlling parties and employees. I will also look at particular statutory regulatory schemes, as well as employee, antitakeover, securities, antitrust and industry-specific rules.

Successors—General, Environment and Sales Taxes

Under English common law, claims against and by a company disappeared on dissolution. Any assets had to be given over to the King. In the United States, the rule was changed. On dissolution, the company’s assets became a trust fund for claims by creditors and shareholders. If the assets had been distributed, creditors could bring claims against former directors and shareholders on the ground that the assets were subject to a lien by creditors. Such claims were subject to the statute of limitations, which required that claims be brought within a fixed time period.

Most present state statutes are based on the 1979 Model Business Corporation Act, which provides that the dissolution of a company does not cancel claims against the company or its directors, officers and shareholders that existed prior to dissolution. Such actions must be brought within two years of dissolution.

Since the 1979 Act only addresses predissolution claims, there is considerable confusion about what remedies should be available for claims arising after dissolution. Courts will apply the same two-year limitation, unless they find some reason that would cause it to be unfair. An example is self-dealing by target’s directors before dissolution.

This provision was clarified in the 1985 Revised Model Business Corporation Act, which established a longer period of five years and created different rules for claims known at dissolution and for those not known. However, many state statutes remain based on the 1979 Act.
**General Liability**

Acquirer’s responsibility for target’s debts and liabilities depends on the structure of the deal and the agreements. If acquirer merges or combines with target, it becomes liable for target’s debts and responsibilities. By law, the rights and obligations of target pass to acquirer “as a matter of law.” For instance, under California Corporations Code, the surviving corporation will be liable for the debts of the disappearing corporation in a merger, and all liens on property of either company will continue. Similarly, any action or proceeding pending against the disappearing corporation can be prosecuted against the surviving company. Punitive damages can even be recovered against the surviving corporation.

If acquirer purchases target’s stock, it does not become directly liable for target’s liabilities. Target survives and remains liable for its own debts. Indirectly, acquirer does become liable since it is the owner of target, and the value of that ownership is reduced by target’s liabilities. Those liabilities have presumably been reflected in the purchase price.

If acquirer only purchases target’s assets, it is not responsible for target’s liabilities and debts. If it contracted to assume only certain liabilities, it is not responsible for other liabilities and debts of target. There are certain exceptions to this principle of being only subject to what is agreed in asset acquisitions, which I will discuss below.

**Perfected Security Interests**
The first exception is if the assets are taken subject to recorded or perfected security interests. Even if acquirer did not agree, it takes subject to any perfected interests that have been properly recorded.

**Assumption**
The second exception is if acquirer impliedly agreed to assume the liabilities. The implication could arise from conduct or statements. It is important, therefore, that asset purchase agreements expressly exclude any liabilities other than those specifically listed.

**Consolidation, Merger, Continuation or Alter Ego**
The third exception is if the net effect of the transaction is a consolidation, merger or acquirer continuing target’s business.

The courts have found a de facto consolidation if acquirer purchases all of target’s assets without adequate consideration to pay off target’s debts, and soon afterwards target ceases to do business.

Similarly, courts have found a de facto merger if the consideration paid is solely in acquirer’s or a subsidiary’s stock, all of target’s shareholders become shareholders of acquirer, acquirer assumes only liabilities necessary to carry on target’s business, and target liquidates after the acquisition.