

The background of the slide is a reproduction of the painting 'The Starry Night' by J.M.W. Turner. It depicts a night scene with a turbulent, swirling sky filled with bright, glowing stars and a large, luminous moon. In the foreground, a dark, jagged cypress tree stands on the left, and a small village with a prominent church spire is visible in the distance under a dark, stormy sea.

THE *ART* OF **WAR**: ANTITRUST STRATEGIES IN HOSTILE TAKEOVERS

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MERGERS -- FRIENDLY AND NOT SO FRIENDLY

FRIENDLY

- ❖ Most mergers are negotiated by the two firms' top management or boards of directors.

NOT SO FRIENDLY

- ❖ If a negotiated merger appears impossible, the acquiror can instead go over the heads of the target firm's management, and appeal directly to its shareholders in one of two ways
 - Proxy fight - seek support of firm's shareholders at next annual meeting
 - Tender offer - acquiror makes tender offer directly to shareholders; the management may advise shareholders to accept or it may attempt to fight the bid

**“War is a series of catastrophes that end in victory.”
(Georges Clemenceau)**

HOSTILE TENDER OFFERS - BACKGROUND

- ❖ Tender offer battles are very complex. In the United States, the rules are set mostly by the Williams Act of 1968, by state law and by the courts. The problem in setting the rules is that it is unclear, as a matter of good public policy, who requires protection
- ❖ In the early 1980s, the courts tended to give managers the benefit of the doubt and respect their business judgment about whether a takeover should be resisted; but, the courts' attitudes to takeover battles have changed radically. Now the Federal courts are skeptical of defensive measures
- ❖ At the same time, individual state (but not Federal) laws have provided some new defensive weapons.

“Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win.” (Sun Tzu)

REASONS FOR HOSTILE TENDER OFFERS

❖ Why hostile?

- Targets are often poorly run
- ❖ As companies have had difficulty growing their top lines through internal growth, they have increasingly turned to considering the acquisition of *competitors* on a hostile basis. As a result, antitrust issues can be expected to become increasingly important in future takeover battles
- ❖ Because of these factors, several commentators have predicted increasing levels of hostile tender offers

“Hence that general is skillful in attack whose opponent does not know what to defend; and he is skillful in defense whose opponent does not know what to attack.” (Sun Tzu)

WHY ARE HOSTILES DIFFERENT?

- ❖ In a friendly deal, each side negotiates. In a hostile deal, the other side does not negotiate at all. Areas of disagreement are not just marginal – they are total
- ❖ The environment is far more regulated both by discipline (securities, antitrust, pensions) and geography (US, EU, Japan), which requires greater lawyer, rather than investment banker, input into tactics and strategy
- ❖ The risks are far greater for both raider and target – every action highly scrutinized
- ❖ Far more variables must be taken into consideration
- ❖ The target is now in play

“I shall proceed from the simple to the complex. But in war more than in any other subject we must begin by looking at the nature of the whole; for here more than elsewhere the part and the whole must always be thought of together.” (Carl von Clausewitz)

WHICH COMPANIES ARE VULNERABLE TO HOSTILES?

❖ Characteristics of vulnerability to take over:

- Firm undervalued
- Low Q-ratio - low stock price in relation to replacement cost of assets or potential earning power
- Highly liquid balance sheet with large amounts of excess cash, valuable securities portfolio and significant unused debt capacity
- Low P/EPS ratio - good cash flow relative to current stock prices
- Assets that could be sold off without significantly impairing cash flow
- Management controls relatively few shares
- Combinations of these factors can simultaneously make a firm an attractive investment and facilitate its financing

“In peace, as a wise man, he should make suitable preparation for war.” (Horace)

HOSTILE TAKEOVERS: THE TECHNIQUE

Increasing degree of hostility:

- ❖ Casual pass
 - informal first contact to target company to test reactions
 - could alert target
- ❖ Toehold
 - initial accumulation of shares
 - reduces number of target shares that must be purchased at a costly premium
- ❖ Bear hug
 - sometimes accompanied by public announcement
- ❖ Proxy fight
 - as noted, expensive and not often successful
- ❖ Tender offer

“Strategy without tactics is the slowest route to victory. Tactics without strategy is the noise before defeat.” (Sun Tzu)



PRE-BID DEFENSES

- ❖ Pre takeover defenses are far more effective than post-bid defenses
 - putting defenses in place or, at least, before there is any hint of a takeover attempt minimizes shareholder objections
 - staggered board – a predator cannot obtain control immediately
 - super majority - increases number of shares needed to obtain control
 - fair price - supermajority waived if bidder pays all stockholders the same price - prevents two tiered takeover offers
 - poison pill - make a hostile prohibitively expensive
 - dual class recapitalization - distributes new class of stock with superior voting rights, thus allowing incumbent managers to obtain control without a majority of stock

POST-BID DEFENSES

- ❖ Targeted repurchase
- ❖ Standstill agreement
- ❖ Litigation
- ❖ National security review
- ❖ Other regulatory reviews
- ❖ Asset restructuring
- ❖ Liability restructuring
- ❖ White knight
- ❖ PacMan

“Thus, what is of supreme importance in war is to attack the enemy's strategy.” (Sun Tzu)

THE ROLE OF ANTITRUST IN HOSTILE TENDER OFFERS

❖ *How Does Antitrust Fit in to Overall Tender offer strategy:*

for target:

- to stop deal...or not; maybe just to get a better price
- to slow deal down

for predator:

- to counter target's actions to delay or kill deal

for competing bidder/white knight/white squire:

- to slow it down
- to stop deal
- to make it too expensive for predator, e.g., undertakings

Antitrust Techniques include private action and obtaining the support of the various regulatory agencies

- antitrust private suits outnumber government ones 9-1
- incentives for private action are not guided by consumer welfare
- antitrust laws can be used to harass, harm or extort
- *Is the use of antitrust for the purposes of buying time an abuse of competition laws?* (see Preston McAfee)

“The art of war teaches us to rely not on the likelihood of the enemy's not coming, but on our own readiness to receive him; not on the chance of his not attacking, but rather on the fact that we have made our position unassailable.” (Sun Tzu)

ANTITRUST & HOSTILES - PECULIAR LACK OF INFORMATION

A painting of a man and a woman in front of a house. The man is on the right, wearing a dark suit, white shirt, and glasses. The woman is on the left, wearing a dark dress with a white collar. They are standing in front of a large, light-colored house with a gabled roof and a window with a decorative frame. The background shows a green lawn and trees.

- ❖ In a friendly deal, the parties ordinarily exchange information through due diligence
 - allows antitrust lawyers to fully prepare for regulatory review
- ❖ In a hostile deal, information is severely limited
 - creates significant difficulty in developing supportive arguments relating to the significance of the competitive overlap

“War is the province of chance. In no other sphere of human activity must such a margin be left for this intruder. It increases the uncertainty of every circumstance and deranges the course of events.” (Carl von Clausewitz)

ANTITRUST - WHAT CAN THE TARGET DO? WHAT SHOULD IT NOT DO?

❖ IF STOPPING THE DEAL IS PARAMOUNT

- Do everything possible to marshal evidence that deal is anticompetitive
 - If not:
 - enter predator markets -creating horizontality
 - buy competitor of predator - creating horizontality
 - create evidence for regulatory agency/court, including creating potential competition problems
 - complaints to agency re HSR violations in buying stock before filing

❖ IF GETTING A BETTER PRICE IS PARAMOUNT - SLOW THINGS DOWN

- Get the regulatory agencies interested but ...
 - do not let ego get in the way of increasing value for shareholders
 - do not play the antitrust card too early – deal may become friendly. You cannot take back harmful white paper or deposition admissions

“The general who wins the battle makes many calculations before the battle is fought. The general who loses makes but few calculations beforehand.” (Sun Tzu)

ACHIEVING SUCCESS AT THE REGULATORY AGENCIES

Follow my ten commandments of getting the deal done. This time you have an active, equally knowledgeable and perhaps even more motivated opponent -- the target -- who will (if they are in this room) use the commandments themselves, so advocacy plays an even more important role than in a friendly deal

THE TEN (now 13) COMMANDMENTS:³

- prepare early
- do everything to avoid a second request/second phase
- know and use your own documents
- get the customers on your side
- maintain your credibility
- find an articulate corporate spokesperson
- join issue early and often
- coordinate worldwide filings – remember its a world war not a national one
- retain the right experts
- use the latest econometric tools to sustain your arguments
- never give the government a reason to focus on collateral matters
- if a settlement is required make it at the staff level and make it early
- there's more to getting your deal approved than the antitrust approvals

³ *The Ten Commandments of Getting Your Deal Through (includes Commandments 11, 12 and 13)*, Steven Newborn and Ginger Snider, 2008, Global Competition Review, The Antitrust Review of the Americas 2008.

“All delays are dangerous in war.” (John Dryden)

ANTITRUST: IT'S A WORLD WAR NOT A NATIONAL ONE

- ❖ A growing number of mergers implicate more than one jurisdiction. Unfortunately, at the present time, there is neither procedural nor substantive commonality. You must coordinate the timing and the substance of the filing so that the transaction has its best chance of success, at the optimal time, and with minimal undertakings
- ❖ The parties' coordination is made more critical because antitrust regulators are increasingly coordinating their work, exchanging information and views on each transaction both formally and informally

“He who knows when he can fight and when he cannot, will be victorious.” (Sun Tzu)

HOSTILES: ALLIES AND ENEMIES

FTC/DOJ/State AG/EC/ other National Authorities

- ❖ How regulatory authorities feel about hostile takeovers
 - they believe the vast majority of mergers are either beneficial or competitively neutral
 - generally, antitrust agencies oppose laws making it more difficult for targets to defend on non antitrust grounds

Customers/Suppliers— can be influenced – you must have a customer plan

- ❖ Where customers do have a concern, it is possible in many of those cases to neutralize those concerns or even make those customers supportive of the transaction. Explaining the benefits of the transaction requires developing a customer contact plan, implementing it early in the process and using the right people on both ends of the communications

“Coalitions though successful have always found this – that their triumph has been brief.” (Benjamin Disraeli)

HOSTILES: ALLIES AND ENEMIES - 2

Competitors – Do they really matter? How the government feels: US antitrust authorities are skeptical of competitors' concerns

- ❖ When competitors are concerned about a deal, it is likely to be procompetitive
- ❖ When competitors are supportive, it is likely to be anticompetitive
- ❖ In any event, competitors can provide critical information to the agencies
- ❖ When competitors are really smart, they lobby customers to lobby for them
 - competitors also need to think of the ramifications of taking certain positions

How and by Whom to Get Your Message Across

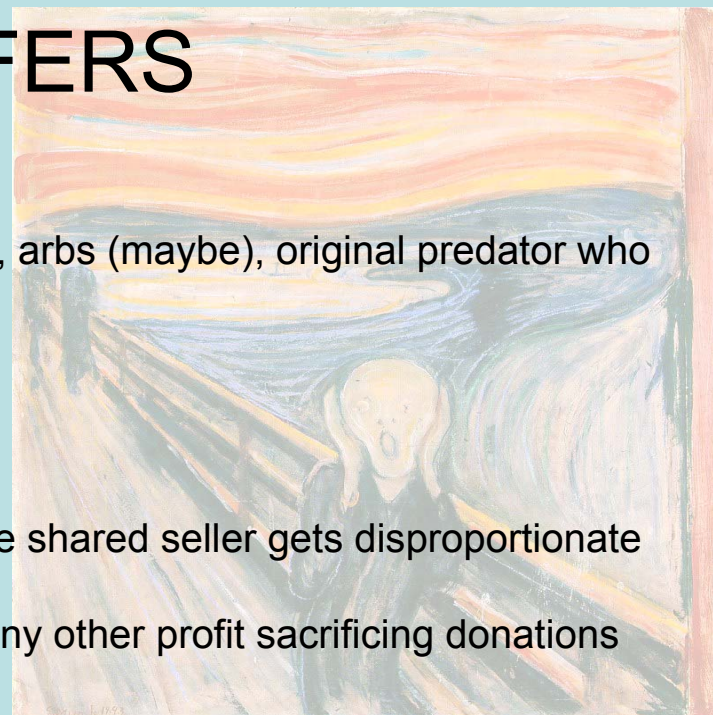
- lawyers
- economists/accountants/industry experts
- business people
- allies
- consider public relations/lobbying firms
- op-ed pieces
- advocacy groups
- political figures

“We have met the enemy, and he is us.” (Walt Kelly)

WINNERS AND LOSERS IN HOSTILE TENDER OFFERS

Who are the winners and losers in these epic battles:

- ❖ winners: seller firm, lawyers, accountants, bankers, arbs (maybe), original predator who sells shares it bought for a profit
- ❖ losers: buyers (premium too much because) --
 - competitive bidding – among strategic buyers
 - winner's curse ⁵
 - seller usually much smaller, and if synergies are shared seller gets disproportionate share
 - arbs (maybe), social causes (environment) or any other profit sacrificing donations (e.g., charities) ⁶
- ❖ hostile tender offers bring out the high end of the profession who can further enhance their reputation:
 - corporate
 - antitrust
- ❖ as a result, hostile and contested takeovers are welcomed by advisors as being complex, lucrative and “make or break” for clients



⁵ “The winning bidder’s estimate of the value of the prize is, by definition, higher than any of his competitors and therefore likely to be an overestimate of the object’s true value.” (Editor), Lawrence Wu. Economics of Antitrust Complex Issues in a Dynamic Economy. Detroit: National Economic Research Associates, Inc., 2007. 81.

⁶ See Einer Elhauge NYU Law Review “sacrificing corporate profits in the public interest” volume 80, number 3, June 2005.

CONCLUSION

- ❖ Hostile tender offers may very well increase dramatically within the next few years. These mergers differ from friendly ones both in strategy and tactics. It is incumbent on the practitioner to know those differences and to walk what is often a tightrope between opposition and eventual acceptance of the hostile bid
- ❖ The reality is that a hostile takeover leaves a great deal of damage in its wake. Opponents may become enemies for life. But, if everyone acts professionally, how wonderful would it be for these epic battles to end something like this:

**“It is well that war is so terrible; else we would grow too fond of it.”
(Robert E. Lee)**



Wave Sound