

COMPARATIVE MERGERS AND ACQUISITIONS
The University of Mississippi Cambridge Study Abroad Program
2010

Joan M. Heminway
The University of Tennessee College of Law
Room 384
865-974-3813

jheminwa@tennessee.edu

Biographical information available at: <http://www.law.utk.edu/faculty/heminway/index.shtml>

Final Examination Facts – General Instructions

The facts set forth on the succeeding pages are the subject of your final examination. Please review them and identify possible intersections with the material we have read and discussed for this course. Think broadly; imagine variants of the facts (e.g., that one party or another is organized under the law of a different country that we have studied) that enable you to apply material that we have covered in this course. **The examination represents 100% of your final grade in this course.**

Until the examination period begins (9:00 am on Tuesday, July 27), you may discuss these facts and any issues you identify from them with your classmates and me. Once examination booklets have been distributed, no communication between or among you (or between you and anyone outside the class) is permitted.

You may (and in most cases should) bring to the examination these facts, your textbooks, other readings assigned in the course, and your notes. You will be permitted to use your computer to type your responses to the exam questions. It is prudent for you to have a back-up plan, however, in case your computer stops working before or during the exam. **Please note that you are not permitted to cut text from files on your computer and paste it into your exam paper; all of your answers must be typed or handwritten by you during the exam period.**

In some cases, you will want to summarize or otherwise describe an applicable legal rule (statutory or decisional) and/or regulation in supporting your answer to an exam question. If you do, you should indicate where the rule comes from (e.g., the applicable law and/or regulation). Formal citation style is not required, but any citation form used should clearly identify the law or regulation that you intend to reference. Decisional law (*i.e.*, case law) may be cited or referred to by using a simple identifying name (e.g., the *Van Gorkom* case).

You are required to report any observed violations of these general instructions to me or to the program director, John Czarnetsky. A violation of any rule set forth in these general instructions constitutes an academic conduct violation. Professor Czarnetsky notes that the exam is governed by The University of Mississippi Honor Code, which prohibits any student from having outside assistance in taking an exam.

* * * * *

The facts set forth below relate to a proposed business combination transaction between Alimentation Couche-Tard Inc., a corporation incorporated under the laws of the province of Québec, Canada, and Casey's General Stores, Inc., an Iowa corporation. The Offer to Purchase excerpted below is part of a Schedule TO filed by Alimentation Couche-Tard on June 2, 2010. These facts involve an actual, ongoing transaction. Although you can find out additional information about the transactions described here, please note that, on the exam, I only will be asking you questions about the facts presented here and any additional facts that are set forth in the exam itself. **Accordingly, gathering additional facts is unnecessary and may be counterproductive or detrimental.**

* * * * *

Offer to Purchase for Cash
All Outstanding Shares of Common Stock
(Including the Associated Preferred Stock Purchase Rights)
of
CASEY'S GENERAL STORES, INC.
at
\$36.00 Net Per Share
by
ACT ACQUISITION SUB, INC.,
an indirect wholly owned subsidiary of
ALIMENTATION COUCHE-TARD INC.

...

To: All Holders of Shares of Common Stock of Casey's:

ACT Acquisition Sub, Inc., an Iowa corporation ("Purchaser") and an indirect wholly owned subsidiary of Alimentation Couche-Tard Inc., a corporation incorporated under the laws of the province of Québec, Canada ("Couche-Tard"), hereby offers to purchase (1) all issued and outstanding shares of common stock, no par value (the "Shares"), of Casey's General Stores, Inc., an Iowa corporation ("Casey's"), and (2) the associated rights to purchase shares of Series A Serial Preferred Stock, no par value, of Casey's (the "Rights") issued pursuant to the Rights Agreement, dated as of April 16, 2010 (the "Rights Agreement"), between Casey's and Computershare Trust Company, N.A., as Rights Agent,¹ at a price of \$36.00 per Share, net to the seller in cash, without interest and subject to any required withholding of taxes (the "Offer Price"), upon the terms and subject to the conditions set forth in this Offer to Purchase and in the related Letter of Transmittal (which, together with any amendments or supplements thereto, constitute the "Offer"). Unless the context otherwise requires, all references herein to the "Shares" shall be deemed to include the associated Rights, and all references herein to the

¹ Ed. Note: The Rights Agreement is the contract that implements a shareholder rights plan (also known as a "poison pill").

“Rights” shall be deemed to include the benefits that may inure to holders of Rights pursuant to the Rights Agreement.

...

The purpose of the Offer is to enable Couche-Tard to acquire control of, and ultimately acquire the entire equity interest in, Casey’s. The Offer, as the first step in the acquisition of Casey’s, is intended to facilitate the acquisition of all issued and outstanding Shares. Purchaser currently intends, promptly following consummation of the Offer, to seek to have Casey’s consummate a second-step merger or similar business combination with Purchaser (the “Proposed Merger”), pursuant to which each then outstanding Share (other than Shares held by Couche-Tard or its subsidiaries (including, without limitation, Purchaser) and Shares owned by shareholders who properly perfect their appraisal rights under Iowa law) will be converted into the right to receive an amount in cash equal to the highest price paid per Share pursuant to the Offer. Under the Iowa Business Corporation Act (the “IBCA”) as currently in effect, if Purchaser acquires, pursuant to the Offer or otherwise, at least 90% of the total voting power of all outstanding Shares calculated on a fully-diluted basis after the consummation of the Offer, Purchaser believes it would be able to approve the Proposed Merger without a vote of the Board of Directors of Casey’s or the other shareholders of Casey’s. If Purchaser does not acquire such voting power, Purchaser would have to obtain the required approval of the Board of Directors of Casey’s and the shareholders of Casey’s to effect the Proposed Merger.

...

Unless the Board of Directors of Casey’s causes Casey’s to negotiate and enter into a merger agreement with us, Couche-Tard intends to nominate, and solicit proxies for the election of, a slate of directors (the “Nominees”) for election at the 2010 annual meeting of shareholders of Casey’s and to present at such meeting, and solicit proxies for the adoption or approval of, a proposal to repeal any new or amended by-law provisions adopted by the Board of Directors of Casey’s without shareholder approval after June 10, 2009 and prior to a vote on such proposal at the 2010 annual meeting of shareholders of Casey’s (the “Proxy Solicitation”). Couche-Tard plans to deliver to Casey’s notice of its intent to nominate the Nominees and to bring such proposal on the date of this Offer to Purchase or shortly thereafter. We believe that the Nominees, if elected, and subject to their fiduciary duties, will support the Offer and the Proposed Merger and take actions necessary to satisfy the conditions to the Offer, We reserve the right, however, at any time to determine not to commence the Proxy Solicitation (or to terminate the Proxy Solicitation or launch a different proxy solicitation) if we determine it to be in our best interests to do so or if we determine that the Proxy Solicitation is unnecessary.

Neither this Offer to Purchase nor the Offer constitutes a solicitation of proxies in connection with our nomination of a slate of directors for election or any other matter to be considered at the 2010 annual meeting of shareholders of Casey’s. Any such solicitation (including the Proxy Solicitation) will be made only pursuant to separate proxy solicitation materials complying with the requirements of Section 14(a) of the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder (the “Exchange Act”).

Couche-Tard and Purchaser are seeking to negotiate with Casey's the acquisition of Casey's by Purchaser. Couche-Tard and Purchaser reserve the right to amend the Offer (including, without limitation, amending the number of Shares to be purchased and the Offer Price) upon entering into a merger agreement with Casey's, or to negotiate a merger agreement with Casey's not involving a tender offer pursuant to which Purchaser would terminate the Offer and the Shares would, upon consummation of such merger, be converted into the consideration negotiated by Couche-Tard, Purchaser and Casey's.

The Offer is subject to the fulfillment of certain conditions, including, without limitation, the following:

The Minimum Tender Condition. Consummation of the Offer is conditioned upon there having been validly tendered in the Offer and not properly withdrawn prior to the Expiration Date (as defined in Section 1 — “Terms of the Offer; Expiration Date”) that number of Shares that, together with the Shares then owned by Couche-Tard and its subsidiaries (including, without limitation, Purchaser), would represent at least a majority of the total voting power of all outstanding Shares calculated on a fully-diluted basis after consummation of the Offer, which shall mean, as of any time, the number of Shares outstanding, together with all Shares which Casey's would be required or permitted to issue in satisfaction of the terms of any then-outstanding warrants, options, benefit plans or obligations, securities or instruments convertible or exchangeable into, or rights exercisable for, Shares under which the right to convert or exchange into or exercise for Shares has or will have accrued, assuming consummation of the Offer and the Proposed Merger (the “Minimum Tender Condition”).

...

The Rights Condition. Consummation of the Offer is conditioned upon the Board of Directors of Casey's redeeming the Rights or Purchaser being satisfied, in its sole discretion, that the Rights have been invalidated or are otherwise inapplicable to the Offer and the Proposed Merger, or any other business combination involving Couche-Tard or any of its subsidiaries (including, without limitation, Purchaser) and Casey's (the “Rights Condition”). . . .

The Rights are described in the Current Report on Form 8-K of Casey's, filed with the Securities and Exchange Commission (the “SEC”) on April 16, 2010 (the “Casey's 8-K”), which description is incorporated by reference in the Registration Statement on Form 8-A of Casey's, filed with the SEC on April 16, 2010. The terms of the Rights are set forth in the Rights Agreement. According to the Casey's 8-K, the Board of Directors of Casey's declared a dividend, payable to shareholders of Casey's of record on April 26, 2010 of one Right per each outstanding Share (and for each Share that becomes outstanding between such date and prior to the earliest of the redemption of the Rights, the Distribution Date (as defined in Section 15 — “Certain Legal Matters; Antitrust; State Takeover Statutes; State Registration Requirements; the Rights Condition; Appraisal Rights; “Going-Private” Transactions”) and the Rights Expiration Date (defined below)). Each Right entitles the registered holder to purchase from Casey's one one-thousandth of a share of Casey's Series A Serial Preferred Stock (the “Preferred Shares”), at a price of \$95.00 per Share (as the same may be adjusted, the “Preferred Share Purchase Price”).

The Rights are transferable only with the Shares until the Distribution Date. The Rights will not become exercisable until the Distribution Date and will expire on April 15, 2011 (the “Rights Expiration Date”), unless earlier redeemed or exchanged by Casey’s, as discussed in Section 15 — “Certain Legal Matters; Antitrust; State Takeover Statutes; State Registration Requirements; the Rights Condition; Appraisal Rights; “Going-Private” Transactions”.

Subject to certain exceptions and adjustments, in the event that any person or group of affiliated or associated persons acquires, or has the right to acquire, beneficial ownership of more than 15% of the Shares (an “Acquiring Person”), each holder of a Right (other than Rights beneficially owned by the Acquiring Person which will thereupon become void), will have the right to receive upon exercise of a Right and payment of the Preferred Share Purchase Price, that number of one one-thousandth of a share of the Preferred Shares equal to the result obtained by multiplying the Preferred Share Purchase Price by a fraction, the numerator of which is the number of one-one thousandth of a Preferred Share for which such Right is exercisable and the denominator of which is 50% of the market value of shares of common stock of Casey’s on the date on which such person became an Acquiring Person. In addition, in the event that, among other similar events, Casey’s is acquired in a merger or other business combination by an Acquiring Person, or 50% or more of the assets of Casey’s are sold to an Acquiring Person, each holder of a Right (other than Rights beneficially owned by an Acquiring Person, which will have become void) will have the right to receive upon exercise of a Right and payment of the Preferred Share Purchase Price, such number of common shares in the surviving entity having an aggregate value equal to the result obtained by multiplying the Preferred Share Purchase Price by two.

...

Unless the Rights Condition is satisfied, shareholders will be required to tender one Right for each Share tendered in order to effect a valid tender of Shares in accordance with the procedures set forth in Section 3 — “Procedures for Accepting the Offer and Tendering Shares.” If no Distribution Date occurs, a tender of Shares will also constitute a tender of the associated Rights.

Purchaser believes that under the circumstances of the Offer, the Board of Directors of Casey’s has a fiduciary obligation to redeem the Rights (or amend the Rights Agreement to make the Rights inapplicable to the Offer and the Proposed Merger, or any other business combination involving Couche-Tard or any of its subsidiaries (including, without limitation, Purchaser) and Casey’s), and Purchaser hereby requests that the Board of Directors of Casey’s do so. However, there can be no assurance that the Board of Directors of Casey’s will redeem the Rights or so amend the Rights Agreement.

...

The Section 490.1110 Condition. Consummation of the Offer is conditioned upon Purchaser being satisfied, in its sole discretion, that the restrictions on business combinations with interested shareholders set forth in Section 490.1110 of the IBCA will be inapplicable to the Offer or the Proposed Merger, or any other business combination involving Couche-Tard or any of its subsidiaries (including, without limitation, Purchaser) and Casey’s (the “Section 490.1110

Condition”). Section 490.1110 of the IBCA prohibits an Iowa corporation from engaging in certain business combinations with specified interested shareholders for a period of three years unless certain conditions are satisfied. . . .

The Impairment Condition. Consummation of the Offer is conditioned upon Casey’s not having entered into or effectuated any agreement or transaction with any person or entity having the effect of impairing Couche-Tard’s or Purchaser’s ability to acquire Casey’s or otherwise diminishing the expected value to Couche-Tard of the acquisition of Casey’s (the “Impairment Condition”).

The Financing Condition. Consummation of the Offer is conditioned upon Couche-Tard having available to it proceeds of financings on terms and conditions satisfactory to it that are sufficient, together with cash on hand, to consummate the Offer and the Proposed Merger, and to refinance all debt of Casey’s and Couche-Tard that is or could be required to be repurchased or becomes, or could be declared, due and payable as a result of the Offer or the Proposed Merger or the financing thereof, and to pay all related fees and expenses (the “Financing Condition”). . . .

The HSR Condition. Consummation of the Offer is conditioned upon the expiration or termination of all waiting periods imposed by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the regulations thereunder (the “HSR Act” and such condition, the “HSR Condition”). Under the HSR Act, certain acquisition transactions, such as the Offer and the Proposed Merger, may not be consummated until certain Antitrust Division of the Department of Justice and the Federal Trade Commission and certain waiting period requirements have been satisfied. . . .

Certain other conditions to the consummation of the Offer are discussed in Section 14 — “Conditions to the Offer.” Purchaser reserves the right (subject to the applicable rules and regulations of the SEC) to amend or waive any one or more of the terms and conditions of the Offer, including, without limitation, the Minimum Tender Condition. See Section 1 — “Terms of the Offer; Expiration Date” and Section 14 — “Conditions to the Offer.”
Material U.S. federal income tax consequences of the sale of Shares pursuant to the Offer and the conversion of Shares pursuant to the Proposed Merger are discussed in Section 5 — “Material U.S. Federal Income Tax Consequences.”

. . .

* * * * *





...

CASEY'S GENERAL STORES ADVISES SHAREHOLDERS NOT TO TAKE ANY ACTION REGARDING COUCHE-TARD TENDER OFFER

ANKENY, IOWA – June 2, 2010 – Casey's General Stores, Inc. ("Casey's") (NASDAQ: CASY) today advised its shareholders not to take any action regarding a tender offer commenced today by Alimentation Couche-Tard Inc. ("Couche-Tard") (TSX: ATD.A, ATD.B) to acquire all of the outstanding shares of Casey's for \$36.00 per share in cash. Consistent with its fiduciary duties, and in consultation with its financial and legal advisors, Casey's Board will review the tender offer and make a recommendation to shareholders within 10 business days. The Company will advise shareholders of the reasons for the Board's recommendation by making available to shareholders and filing with the Securities and Exchange Commission a solicitation/recommendation statement on Schedule 14D-9.

Casey's also noted Couche-Tard's announcement of its intention to nominate a slate of candidates to stand for election to Casey's Board of Directors at the Company's 2010 Annual Meeting. If and when Couche-Tard nominates directors, the Board will evaluate the submission and candidates consistent with the Company's bylaws.

Goldman, Sachs & Co. is acting as financial advisor to Casey's, and Cravath, Swaine & Moore LLP and Ahlers & Cooney, PC are providing legal advice.

* * * * *

In a Schedule 14D-9 filed on June 8, 2010, the Board of Directors of Casey's made the following recommendation to its shareholders on the Alimentation Couche-Tard Offer to Purchase:

ITEM 4. *THE SOLICITATION OR RECOMMENDATION*

Solicitation or Recommendation

After careful consideration, including a thorough review of the terms and conditions of the Offer in consultation with Casey's financial and legal advisors, the Board, at a meeting held on June 6, 2010, determined, by the affirmative vote of all those present, that the Offer is not in the best interests of Casey's and its shareholders and other constituencies.

* * * * *

JUNE 9, 2010, 5:07 PM

Why Casey's General Stores Loves Iowa

Alimentation Couche-Tard's hostile offer for Casey's General Stores, a rival convenience store operator, would appear at first glance to be a plain vanilla hostile offer. Casey's does not have a staggered board, so all of its directors are up for election this year. This provides Couche-Tard with a standard route for any hostile bid: it can begin a tender offer and combine it with the nomination of a slate of directors to bring the target to the table.

In fact, this is what Couche-Tard has done. As we saw recently in the battle between Astellas Pharma and OSI Pharmaceuticals, this strategy can be quite effective, provided the price is compelling or competing bidders are absent.

But there is a significant quirk here that allows Casey's much more latitude to defend itself than would be normal. According to Factset Sharkrepellent, Casey's is one of the 12 public companies incorporated in Iowa. This changes everything.

First off, unlike Delaware, Iowa has a constituency statute. This statute allows the Casey's board to consider the following community interest factors when confronted with a takeover offer:

- a. The effects of the action on the corporation's employees, suppliers, creditors, and customers.
- b. The effects of the action on the communities in which the corporation operates.
- c. The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.

Constituency statutes like these were enacted in many states after the 1980s Supreme Court decision in *CTS v. Dynamics Corp.*, which validated second-generation antitakeover statutes. These statutes generally allow a board of directors to consider interests other than shareholders when deciding how to respond to a hostile takeover offer. The Iowa statute also provides that:

If on the basis of the community interest factors described [above], the board of directors determines that a proposal or offer to acquire or merge the corporation is not in the best interests of the corporation, it may reject the proposal or offer. If the board of directors determines to reject any such proposal or offer, the board of directors has no obligation to facilitate, to remove any barriers to, or to refrain from impeding, the proposal or offer.

This provision appears to provide Casey's board with wide latitude to adopt takeover defenses and avoid the normal judicial scrutiny that would apply if it were incorporated in Delaware. . . .

Casey's is certainly aware of its fortunate latitude. In its rejection of the Couche-Tard bid, Casey's specifically set itself up to take such a position, stating that the Couche-Tard bid, if consummated:

would have an adverse impact on Casey's other constituencies, including employees, suppliers, creditors, customers and the communities in which Casey's operates.

So what could Casey's do? Well, it certainly could take more standard 1980s-style defensive measures like a leveraged recapitalization. Couche-Tard has a financing condition in its bid, and this would work to fend Couche-Tard's bid off. But you could also see a more aggressive stance like the adoption of a no-hand or dead-hand poison pill.² These formulations would prevent Couche-Tard from seizing control even after it replaces the board. In the case of a no-hand poison pill, the pill remains in place for a set period of time thereafter; while the dead-hand poison pill is more aggressive and keeps the poison pill in place until its expiration, possibly years away.

Casey's could also adopt other types of poison, like contractual commitments to maintain operations and workers, that would hamper Couche-Tard in obtaining cost-savings in any acquisition. The lawyers can become quite creative — provided Casey's board is willing — all in the name of the community. Given that Casey's has mostly a retail shareholder base, the board may be more willing than usual since there is no strong shareholder force to oppose it.

Still, there is one possible defense not available to the company. Casey's cannot expand its board to dilute any Couche-Tard elected directors, since it is already at the maximum of nine directors allowed under its certificate of incorporation.

In the meantime, Casey's can also delay. Unlike Delaware, which requires the annual meeting to occur within 13 months of the last annual meeting, Iowa requires that this meeting occur the earlier of six months after the end of Casey's fiscal year or 15 months after its last annual meeting. Casey's fiscal year ended April 30, so Casey's can move back its annual meeting (currently scheduled for the third Friday in September) to as far as the end of October without risk of judicial challenge. And if it is willing to litigate, Casey's can probably buy a month or two more.

Iowa has also enacted a state registration requirement for tender offers (i) that seek to acquire greater than 10 percent of a company (ii) where at least 20 percent of such equity securities are held beneficially by residents of Iowa and (iii) where the target company has substantial assets in Iowa. Section 502.321B of the Iowa Uniform Securities Act requires the filing of a registration statement in such circumstances with the administrator of the Securities Bureau of the Insurance Division of the Iowa Commerce Department. If the disclosure in the registration statement is not sufficient, the administrator can suspend the tender offer and call a hearing on the matter.

The timetable for this process — from suspension to a disposition at a hearing — is set in the statute to be 21 days from the filing of the tender offer registration statement. Moreover, any case must be brought by the administrator and cannot be brought by Casey's.

² Ed. Note: As noted above, Casey's adopted a poison pill in April 2010.

It is unclear if the statute applies — Couche-Tard did not say whether it did — but we will likely know in a few days whether this registration requirement is set off. I would not be surprised that if it is set off, Casey's would claim that Couche-Tard's disclosure is incomplete and lobby hard for the administrator to bring a case. Casey's may also sue in federal court on the same issues to bring to bear such pressure.

The Iowa disclosure requirements are not a deal breaker, but they could certainly tie up Couche-Tard. In defense, Couche-Tard will argue that this statute is pre-empted by the federal takeover laws, although a similar Minnesota law was upheld by the Eighth Circuit in *Cardiff Acquisitions, Inc. v. Hatch* back in the 1980s.

On April 9, Couche-Tard sold most of its pre-announcement position in Casey's, netting at least a \$10 million profit. *The Wall Street Journal* reported Wednesday that this move showed a lack of commitment by Couche-Tard's. But we saw similar trading in the battle between CF Industries Holdings and Terra Industries. The amounts here are so small that no doubt Couche-Tard is simply pocketing money to finance its bid. The more cynical argument is that it announced the bid to make this money — which may have truth — but it seems a bit much for such a small profit. To the extent this type of trading activity encourages bids, it may not be a net loss for shareholders.

Couche-Tard will ultimately need staying power as well as a compelling price. Depending upon how far Casey's board is willing to go, it can erect substantial barriers to Couche-Tard's offer. However, those arguments about other constituencies are likely to fade away if Couche-Tard is willing to pay. But in the near future, expect Casey's to delay the holding of its annual meeting; it will likely take more aggressive defense steps in the fall only if it comes to that.

This is perhaps yet another anecdotal illustration of the defensive benefits of incorporating outside of Delaware, benefits that may come at the expense of shareholders.

– *Steven M. Davidoff*

Copyright 2010 The New York Times Company
Privacy Policy
NYTimes.com 620 Eighth Avenue New York, NY 10018