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Dealmakers Q&A: Seward & Kissel's Craig Sklar

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Craig Sklar

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As a participant in Law360's Q&A series with dealmaking movers and shakers, Craig Sklar shared his perspective on five questions:

Q: What’s the most challenging deal you’ve worked on, and why?

A: In November 2012, Rentech Nitrogen Partners (NYSE: RNF) announced its acquisition of Seward & Kissel client Agrifos Fertilizer for a price consisting of $138 million in cash, $20 million in RNF common equity units and a complex earnout of up to $50 million. Sale of the Agrifos business presented many unusual challenges, including a negotiation process that lasted more than six months. The plant site had ongoing environmental remediation issues, which were being addressed by original facility operator ExxonMobil under government consent decrees and contractual obligations to Agrifos. A number of separate, interrelated escrows of both cash and RNF units were negotiated for potential RNF indemnification claims for general representations and warranties, environmental and tax exposures.

The purchase price of cash, RNF units and a multiyear earnout required negotiation of complex contract provisions with detailed calculation, valuation and accounting principles. RNF's financing for the deal included expansion of its senior debt facility to $300 million, making its lead banker a party to the negotiations. With RNF's debt commitment expiring, the parties pressed to close immediately after Hurricane Sandy, despite the storm knocking out power in Seward & Kissel’s Manhattan office and my

home. After the deal closed, Law360 accurately reported that Seward & Kissel's Craig Sklar “spent Tuesday and Wednesday downloading documents on his wife's iPhone and calling in changes when he could get a signal. He marked up loan documents at a local Barnes & Noble and made final changes to the purchase agreement from the kitchen table of a friend in Westchester County.”

With other deal participants in Texas, Florida, Tennessee and California not impacted by Hurricane Sandy, I found myself saying, after reading Dr. Seuss to my children:

“I will close this deal, with the other parties out of town,
I will close this deal, though my office is shut down.
I will close this deal, even with no home power,
I will close this deal, even if I can't shower.
I will close this deal, though displaced from my home,
I will close this deal, using my wife's iPhone.
I will close this deal, the storm be damned,
I will close this deal, Sklar I am.”

The deal closed on Nov. 1, 2012; somehow my team and I got it done.

Q: What aspects of regulation affecting your practice are in need of reform, and why?

A: Seward & Kissel works on many investment management industry M&A transactions, and during the course of negotiations there is frequently discussion and debate over whether there is a change of control or deemed assignment of the investment advisory contracts under the Investment Advisers Act of 1940, as amended, and if so, the type of investor consent required to consummate the transaction. Unless parties are willing to obtain investor consent and risk a loss of business, deals are often structured to stay below a 25 percent change in ownership (a threshold the U.S. Securities & Exchange Commission has indicated is a rebuttable presumption of control) even though the transaction may involve a truly passive buyer acquiring less than 50 percent, no change in investment decision-making and no change in day-to-day operations.

There is also frequently a discussion as to the proper method for obtaining consent, with parties sometimes debating the legality of affirmative vs. negative consent (actual written client consent versus the failure to object after being properly informed). As so many of these deals occur every year, I believe it would be useful to have more legal and regulatory clarity on these issues.

Q: What upcoming trends or under-the-radar areas of deal activity do you anticipate, and why?

A: Although I work on M&A deals in all industries, Seward & Kissel is particularly well known for its work in the investment management and maritime transportation industries. I believe both of these areas will have significant deal activity in the near future.

With respect to the investment management industry, a number of factors support this belief, including banks and other financial institutions looking to divest themselves of noncore businesses, substantially increased government regulation of the industry resulting in increased costs of doing business, capital-raising becoming significantly more difficult, resulting in investment managers looking to join larger platforms with greater resources and distribution capabilities, and other investment managers continuing to look for ways to plan for eventual management succession and achieve some amount of personal liquidity and diversification for the owners.

In the shipping sector, you have a cyclical industry, which many believe is currently near the bottom of the cycle, with low asset values and charter rates, and an oversupply of vessels in the face of low demand. Stock prices of many shipping companies are at all-time low levels and they are seeking to merge or consolidate with other shipping companies to cushion themselves from the current crisis, to lower costs and to improve access to capital. In addition, there are a number of private equity firms that have invested in shipping over the last few years as they have tried to capitalize on the market bottoming, and due to the finite lives of investments made by these private equity funds, they will need to find exits in the near future, and this should give rise to additional deal activity.

Q: What advice would you give an aspiring dealmaker?

A: Understand and appreciate your role on a transaction. Your client has sought your legal counsel because they want to do a deal. Taking a constructive role requires an understanding of your client's objectives and where they fit in relation to the law and the bargaining situation with transaction counterparties, so a course can be charted to close a deal that achieves the client's real business objectives. Be commercial and practical in your approach and focus on the really important issues. Explain the practical legal risks to your client, not the theoretical ones, and allow your client to make informed, educated business decisions. And when issues arise (and trust me, they will), don't stand on ceremony, cite precedent or say, "this is how it is always done," but instead try to offer creative solutions that address each party's concerns. Although you need to zealously advocate for your client and protect your client's interests, at the end of the day, you should be a deal facilitator, not a deal impediment.

Q: Outside your firm, name a dealmaker who has impressed you, and tell us why.

A: Gary Horowitz of Simpson Thacher & Bartlett. I have worked opposite Gary on a number of M&A deals in the investment management industry, and he possesses the traits mentioned above. He is a true professional, focuses on the important issues that matter to his client, takes a practical approach to solving problems and is a deal facilitator.

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