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Dealmakers Q&A: Seward & Kissel's Nick Katsanos

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Nick Katsanos

Nick Katsanos serves as counsel at New York-based Seward & Kissel LLP. He represents the firm's clients in connection with a variety of business transactions and other general corporate matters, including mergers and acquisitions, private equity and venture capital transactions, joint ventures, strategic alliances and private investments in public equity (PIPEs).

Katsanos is recognized as an up-and-coming "Leading Individual" for corporate/M&A by Chambers USA, a "Recommended Attorney" for middle-market M&A by The Legal 500 and a "Rising Star" by New York Super Lawyers. He was previously selected by The M&A Advisor as a winner of its 40 under 40 M&A Advisor Recognition Awards, which honors the top M&A, financing and turnaround professionals aged under 40. Prior to joining Seward & Kissel, Nick worked at a London-based global media company, where he evaluated, negotiated, structured and completed acquisitions, divestitures, investments, joint ventures and strategic alliances, and provided corporate development services and legal counsel to its professional media, news distribution, events and market research divisions.

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

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

A: A number of deals come to mind, although the common denominator with all of them was a seller with little to no bargaining power that was absolutely set on selling, for whatever reason. As you may have guessed, I was on the sell side of those deals.

One particularly challenging deal involved a client spinning off one of its divisions through an auction process. As many M&A practitioners know, a corporate spinoff is challenging enough in and of itself. In this instance, there were a number of other factors working against us.

First, many prospective buyers only wanted to present offers for particular business units within the division being sold, and not for the entirety of the division. This complicated the sale process and led to delay. Second, the revenue growth at this division unexpectedly started to decline as the sale process lagged, resulting in multiple downward adjustments to the division's financial projections and a negative impact on the purchase price offered. The sale process dragged on for months, and as the purchase

price continued to drop, we understandably came under immense pressure from the client to consummate a sale as quickly as possible.

To add to the degree of difficulty, as we got closer to signing the purchase agreement, the division's management team could see the writing on the wall and (given they would be imminently working for the buyer) started openly siding with the buyer on various remaining deal points. Other than the unrealistic option of walking away from the sale, our bargaining power was close to nonexistent.

We ultimately closed the transaction almost a year after the sale process had commenced, but not without a lot of hard work and tense moments. Maintaining deal momentum (while still trying to somehow protect our client's interests) was critical — any hiccup and the deal would have cratered. Was it a fun deal? No way. However, it taught me a valuable lesson — whenever you are representing a seller, a sense of urgency is needed. Time is not your friend, and the longer a deal takes to close, the more time a prospective buyer has to find a reason to lower the purchase price, reconsider the transaction and/or to walk away entirely. Maintaining the momentum and pace of a deal is critical for all parties looking to consummate a transaction.

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

A: While most clients are aware of the requirements of the Hart-Scott-Rodino Antitrust Act in connection with M&A transactions, they are surprised to learn that the notification requirements of the act can apply to routine investments in securities as well. This is particularly relevant to investment funds and their managers who may trigger a notification requirement if, for example, a fund proposes to simply acquire voting securities of a public company that will result in the fund holding more than $75.9 million of that company's securities. The filing fee is not insignificant, and once reported to the relevant antitrust authorities, the parties to the acquisition must then wait a specified period (as long as 30 days) before they may complete the transaction.

While various exemptions exist (including for investment-only acquisitions if, as a result of the acquisition, the acquirer will not hold more than 10 percent of the outstanding voting securities of the issuer), many of these transactions which clearly have no effect on competition get caught up by these requirements. It would be useful to consider alleviating the requirements of the HSR Act for investment funds making passive investments.

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

A: Anti-corruption due diligence is becoming more and more commonplace in M&A cross-border transactions due to the increasing enforcement of anti-corruption laws such as the U.S. Foreign Corrupt Practices Act and the U.K. Bribery Act, especially where the target company does business in high-risk jurisdictions or industries. Failure to conduct appropriate anti-corruption due diligence can result in significant legal, financial and reputational damage to buyers.

I am also seeing an increasing interest in representations and warranties insurance, which protects buyers and sellers against liabilities arising from breaches or inaccuracies of representations and warranties in M&A purchase agreements. Buyers are interested because obtaining this insurance can make their offers more attractive to sellers and bridge gaps between the parties' negotiating positions; sellers are interested because it can reduce or eliminate their post-closing risk of liability for indemnification. A driving factor appears to be private equity firms, who see such insurance as a means to achieve cleaner exits from their investments and allow them to return sale proceeds to their investors

without worrying about residual indemnification obligations.

Q: What advice would you give an aspiring dealmaker?

A: Finding a mentor that you can consult with, emulate and learn from is very important. I have been fortunate to have a few mentors in my career, and it can make a world of difference to both the development of your legal skills and success in your firm or company.

I would also advise paying attention and listening to the lawyers you interact with from other firms and companies. I am still learning new things every day, and often it's from opposing counsel. Whether it be a new legal argument, a better way to draft a provision, or a unique negotiating style, you can always learn from your colleagues and peers.

Along the same lines, seek as much exposure as you can to the other parties involved in the transaction, such as senior management, accountants and investment bankers. Remember that there is more to getting a deal done than just the legal aspects — there are accounting, tax, commercial and other considerations that you must understand in order to effectively represent your client. Read the financial due diligence report; ask the tax adviser what the 338(h)(10) election means; read the confidential information memorandum for the target company; don't be afraid to ask questions and try to understand all aspects of the transaction.

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

A: Scott Mozarsky of Bloomberg BNA. Scott is a former colleague and mentor with whom I worked on dozens of deals while in-house. Scott has a unique ability to find creative solutions to "bridge the gap" in negotiations and facilitate transactions. He taught me the importance of having a constructive and practical approach, adding value by understanding and getting involved in the business and commercial aspects of a transaction, and maintaining momentum in order to drive deals to completion.

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