MERGERS & ACQUISITIONS

THE OFFICIAL PUBLICATION OF ACG

JUNE 2011

The Deal Tacticians

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The death of Osama Bin Laden, in the first week of May, promises to be a milestone moment in which most Americans will instantly recollect where they were when they heard the news. Considering President Barack Obama didn't address the nation until after 11:00PM that Sunday night, many of those on Eastern Standard Time probably woke up to the headlines. David Fox, a leading member of Kirkland & Ellis's corporate M&A practice and member of the firm's worldwide management executive committee,

Photographs by JohnCalabresePhotography.com

"We don't have clients; clients have lawyers."

received the dispatch at the office. He was wrapping up Teva's acquisition of Cephalon -- the $6.9 billion deal whose announcement the following morning managed to generate its own headlines.

Late Sundays are nothing new to Kirkland's corporate M&A practice, which has taken off since the firm brought in Fox and Daniel Wolf to much fanfare in 2009. The pair, fresh off of a landmark effort advising BHP Billiton on its $150 billion attempted Rio Tinto takeover, arrived from Skadden, Arps, Slate, Meagher & Flom with a mandate to augment and help build the firm's fledgling corporate practice. The appeal, remembers Wolf, was the opportunity to come into a firm with a surrounding infrastructure already in place and put a fingerprint on a corporate M&A practice that hadn't yet matched Kirkland's offerings in other areas. "Kirkland had a stellar reputation and a great client list; what attracted us was the opportunity to really build a corporate practice from the ground up and create an M&A group unencumbered from a lot of history."

David Fox

With Fox, 53, Kirkland was getting a sagacious veteran, who spent over two decades at Skadden, where he was named a partner in 1990. In Wolf, Kirkland was able to nab one of the true rising stars in the business, who -- eight years ago -- was one of the youngest ever to be named a partner at Skadden at the age of 30. To say the pair arrived with high expectations would be understating it, but to conclude that they've so far lived up to their promise doesn't do justice to the impact they've had.

According to Bloomberg's M&A Advisory League Tables, Kirkland & Ellis climbed from 13 to No. 5 from 2009 to 2010 for domestic deals serving as counsel to principals. Kirkland had a deal count of 117 transactions. This year, as of the first quarter, the firm moved even higher, and was resting at No. 2 in the same category, having advised on 40 deals. The Q1 rankings, of course, don't include what has been a busy April and start to May. In one seven-day span, ending with the Teva deal on May 2, Kirkland advised on Constellation Energy's $7.9 billion sale to Exelon; the acquisition of Bigpoint by Summit Partners and TA Associates; Golden Gate Capital's $2 billion taking private of Lawson Software; and Solera Holdings' $520 million purchase of Altegrity's Explore Information Services business. In three of the five deals, it's worth noting, Kirkland faced off against Skadden.

It speaks not only to the additions of Fox and Wolf, but also to the team that was in place ahead of their arrival, as Stephen Oetgen, William Sorabella, Stephen Fraidin, George Stamas, Jeffrey Symons, and many others, have all played critical roles in Kirkland's recent ascension. By building out its corporate presence, Kirkland has essentially created synergies with its other top-flight practices, including its core restructuring, commercial litigation and IP groups. The private equity practice of the Chicago-headquartered firm was also already renowned, but still benefits from more depth in handling strategic deals.

Kirkland has also continued to recruit, welcoming back James Sprayregan, who returned after a stint with Goldman Sachs around the same time Fox and Wolf arrived. More recently, the firm bolstered its antitrust practice with the addition of Tim Muris, who was the former chairman of the Federal Trade Commission. Christine Wilson, Muris' chief of staff at the FTC, arrived with him, as did Bilal Sayyed and Ian Conner, veterans of the FTC and Department of Justice, respectively.

Some have attributed the firm's growth to the book of business that traveled with Fox and Wolf from Skadden, to which Fox replies: "We don't have clients; clients have lawyers."

It is a fundamental view that also reflects the perspective from which Fox and Wolf approach their roles.

"One of the things we try to do well is to take our egos out of it," describes Wolf. "We play the role the client needs us to play. It can be hard either inserting or extracting ourselves from a situation, but we're always sensitive to the fact that we're in a service business."

But more than just reacting to client needs, Wolf and Fox live the roles they've established. One story Wolf likes to recite revolves around his daughter, who is in the fifth grade. When her school played the stock market game earlier this year, she naturally solicited him for some 'tips.' He refused, and she lost, but still came away from it with an unceremonious lesson about ethics. It's a lesson, against the backdrop of the Galleon trial, that ultimately can be traced back to ego, or lack thereof.

If there is a characterization that can be applied to the work of Fox and Wolf, it's an attraction toward the complex. And their affinity for a challenge comes through in the way they look back on deals past.

Wolf, for instance, calls his effort on behalf of BHP his most challenging deal -- identifying that it was essentially an attempt at a four-way hostile merger. BHP and Rio Tinto, while managed and run as single entities, thanks to past consolidation are considered dual-listed companies, each with two separate legal entities, separate share listings and separate share registers.

"You had these two companies, each with two heads, that altogether listed seven different securities. We had to figure out how to mash the whole thing together. At the same time, we had to deal with the various takeover regimes of three different jurisdictions, with direct contradictions in the various rule-making bodies. The sheer amount of capital required, in amounts never seen before, added another degree of complexity. And Rio Tinto refused to engage with BHP, so we had to try to plan all of this out without any cooperation from the target... It was a challenging thing."

Wolf notes that during the engagement, four and five times a week he would set aside the hours between 2:00AM and 4:00AM EST for a conference call with the various teams working in Australia and the UK. A lot of lawyers would probably consider it a hellish assignment. Wolf, whose wife had given birth to their third child at the time, rationalizes, "We had a baby in the house, so it worked out just fine."

(Skadden served as co-counsel to BHP alongside Slaughter & May and Blake Dawson.)

Fox, meanwhile, calls Cendant his most challenging deal. Of course, Cendant's breakup required several transactions, as Realogy Corp. was spun off and sold to Apollo Management; Wyndham Worldwide was also spun off; and Travelport was sold to The Blackstone Group through a $4.1 billion deal. The proceeds from Travelport were then distributed between Realogy, Wyndham and Cendant's remaining business, subsequently renamed Avis Budget Group.

If a rationale exists that explains why Fox and Wolf seem to be drawn to the challenging deals, it could go back to the late Joseph Flom, Skadden's legendary partner who passed away this past February. Fox, a protege, says that among the key takeaways from Flom was a demeaner of "total honesty" and "not being cute." He also credits: "Joe was an innovator, and always encouraged me think outside the box. Many ideas won't work out, but you'll occasionally hit on something interesting that hasn't been done before."

Daniel Wolf

Kirkland's M&A department, of course, has made a name for itself recently as a trailblazer. Partners Stephen Fraidin and William Sorabella, for instance, established what has become the template for the dual-track approach to public deals. It involves a tender

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offer, with a legally binding ‘top up’ obligation, backstopped by a traditional long-form merger. The structure, used in Burger King’s sale to PE firm 3G Capital, has since been mimicked by other buyers seeking the speed and protection offered.

Beyond innovation, Fox and Wolf have helped Kirkland distinguish itself in a number of areas that seem to be tailor made for today’s market.

Their experience with hostile transactions, for example, was evident in not only the Teva deal, which topped an earlier unsolicited bid for Celaphon from Valeant, but also advisory work serving seafood chain McCormick & Schmick’s, the object of Tilman Fertitta’s unsolicited affections.

Their cross-border experience has come in handy too. Wolf served as counsel to ABB Ltd. in the Swiss industrial giant’s $4 billion acquisition of Baldor Electric Co., completed in the last week of January. Fox, meanwhile, says he’s never traveled as much has he has in the past two years -- logging 14 trips to London in the past three months, and three trips to China since December.

If Kirkland has made a name for itself recently, it has been the firm’s ability to move quickly. Wolf cites Kirkland’s first deal working with Bristol Myers Squibb, the acquisition of ZymoGenetics, Inc. last year. The deal was executed through a tender offer. “It closed 31 days after announcement; it was one of the fastest closings of a tender in history,” Wolf states.

If there is a transaction that brings it all together, it’s Kirkland’s work on behalf of Avis Budget Group, which against all odds inserted itself into the negotiations for Dollar Thrifty, while blocking a seemingly sure deal between Hertz and the target. By now, of course, anyone who evenly passively follows the M&A market knows the story. Dollar Thrifty agreed to a deal with Avis rival Hertz Corp., an agreement that included a no-shop provision and – by some estimations – an exorbitant breakup fee. Dollar Thrifty’s board favored the Hertz transaction on the auspices that it wouldn’t face antitrust challenges. For a deal of this magnitude, it also wasn’t a small advantage to Hertz that it had such an early headstart.

Kirkland, however, countered by submitting a US antitrust filing before the company had even put together a formal offer. Once it fashioned the actual deal, Avis came through with a topping bid of $1.52 billion, but still couldn’t convince the board or proxy advisory firm ISS. Kirkland took it to the stockholders, and a day before the shareholder meeting was scheduled to commence, added a sweetener that took the form of a $20 million reverse termination fee. Shareholders voted down the deal with Hertz. Avis, in turn, was able to pursue antitrust clearance, with cooperation from Dollar Thrifty, and is no longer subject to that $50 million break-up fee, should the deal receive clearance and proceed. Wolf describes that in the last few days of the negotiations the team was huddled together, reacting in real time -- “minute by minute” -- to the moves of their counterparts.

While bankers focus on price, for lawyers, it’s all about the terms. As Wolf notes, the terms set the stage for the bidding. “In a vacuum, if someone is willing to pay more, they will win, but the terms influence what cards can be played and how value is deployed. That’s where the chess match begins,” he says.

It’s the chess match where deals are won and lost. And that, in the end, is the only consideration when clients like Avis choose their lawyers. M&A