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2013 Practice Group of the Year

M&A

The combination of creative minds working at Kirkland & Ellis LLP helped it close a series of complicated deals in 2013, including 3G Capital Management LLC's $28 billion acquisition of H.J. Heinz Co. and Clearwire Corp.'s $3.6 billion sale to Sprint Nextel Corp., landing the firm among *Law360*'s M&A Practice Groups of the Year.

Kirkland & Ellis partner David Fox told *Law360* that by thinking outside the box and not being weighed down by following market precedents in 2013, the firm was able to get creative and help guide a host of complex deals.

"Creativity and innovation gets rewarded in this marketplace," Fox said. "Each one of these deals involved some innovative and creative aspect that distinguishes us. The marketplace is looking for that type of energy."

In February, the firm helped negotiate the largest acquisition in the history of the food industry — 3G Capital and Berkshire Hathaway Inc.'s massive $28 billion purchase of Heinz. The all-cash deal included what came to be known as "the ketchup clause." The clever, catchy title was for a fallback provision that gave the buyers a four-month grace period to shore up financing before allowing Heinz to collect a $1.4 billion reverse breakup fee. Kirkland & Ellis partner Stephen Fraidin told *Law360* in November that the unprecedented provision came about due to the firm's unwavering focus on delivering what the client wants. Fox described the deal as "very unique."

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And while the provision didn't end up being used, the availability of the fallback gave the involved companies a sense of comfort, helping to nudge them towards getting the deal done.

A month after the closing of the Heinz deal, Kirkland & Ellis represented Clearwire in its sale to its largest shareholder, Sprint, for $3.6 billion. The long-contested deal was unique in that Clearwire and Sprint signed a merger agreement in 2012 with an original acquisition price of $2.97 per share. When the deal finally closed in July 2013, the acquisition price had almost doubled, at $5 per share.

In the eight months between those two prices, things got complicated. Dish Network Corp. emerged as a bidder for both Clearwire and Sprint. Clearwire's board succeeded in getting DISH to commence a tender offer which created leverage to cause Sprint — a controlling shareholder of Clearwire — to bump the price to $5.00.

After about eight months of negotiations, the final proposal of $5 per share came with a Kirkland & Ellis-negotiated requirement that Clearwire stop all talks with Dish. Because Sprint was buying only the 48 percent of Clearwire that it didn't already own, the $3.6 billion doesn't properly value Clearwire as a whole. When all was said and done, the company overall came out to be valued at around $14 billion.

"Clearwire was fascinating," Fox said. "It required the very careful threading of a needle. It was our job to try and get the best possible price for stockholders, and through a very complicated series of agreements we ended up with a very successful result."'

Even in a deal that didn't completely work out, Kirkland & Ellis showed how it has continued to differentiate itself from other firms, representing The Blackstone Group LP in its $26 billion competing bid for Dell Inc.

Blackstone eventually withdrew in April due to concerns over the company's financial outlook as well as declines in sales, but Kirkland & Ellis made a splash with its $25 million expense reimbursement condition, which ensured that Blackstone didn't have to pay out of pocket.

"That's one of the main inhibitors in deals like these," Fox said. "Had they not had the expense reimbursement condition they would have been paying out of pocket in a significant way."

In May, a Kirkland & Ellis team helped send the publicly traded BMC Software Inc. into the hands of Bain Capital LLC and Golden Gate Capital for almost $7 billion. Partner Sarkis Jebejian, who led the Kirkland & Ellis team, told *Law360* in November that his group used an innovative "modified go-shop" that was tailored to BMC's specific circumstances as part of the merger agreement with Bain and Golden Gate that had been announced in May. He said it helped to move forward an attractive package in what ended up being one of the largest leveraged buyouts of the year.

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"That was a creative solution to solving an issue in the transaction," Jebejian told *Law360* in November. "In every public company you have the push and pull of the acquirer wanting as much certainty as possible that if the deal is signed, it will actually be theirs."

The billion-dollar deals that Kirkland & Ellis helped navigate in 2013 just kept on coming. The firm represented the board of directors and the transaction committee of the board of directors of Office Depot Inc. in connection with the company's agreement to buy OfficeMax Inc. for about $1.2 billion, a deal that closed in February. In addition, in July the firm represented Hess Corp. for the first time in its agreement with Centrica PLC subsidiary Direct Energy to sell its energy marketing business for more than $1 billion.

Fox said that his takeaway from 2013 is the drive to continue to develop "cutting-edge" techniques, saying that in order to separate itself from the pack, Kirkland & Ellis must continue to strive to come up with new and exciting ideas.

"We get the importance of not just doing cookie cutter stuff," Fox said. "We had a great year, we're very fortunate. We're very proud of what we did."