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TOP TRANSACTIONS LAWYERS 2011

DEALMAKERS OF THE YEAR

As the nation finally *shook off the recession,* lawyers focused on fixing the damage.

STEPHEN FRAIDIN
Kirkland & Ellis

WILLIAM SORABELLA
Kirkland & Ellis

Photograph By Paul Godwin

PROP STYLING BY JEFF STYLES

IT WAS A YEAR FOR REPAIR—and we're not just talking about Ballard Spahr's role in obtaining upkeep funds for New York City public housing projects. Notable among the year's cleanup projects: the relaunch of General Motors Company and the downsizing of AIG International Group, Inc. Government involvement—whether direct, through stimulus money and bailouts, or indirect, through export credit agencies—played an outsize role in many of the year's most interesting deals.

In M&A work, some of the most impressive showings were on the target side, as lawyers worked to win top dollar for shareholders, despite the tough economy. In the equities world, issuers in developing markets, especially China and Brazil, ordered up complex, multi-exchange offerings that resulted in plenty of work for lawyers. And that gave a boost to another repair project—shoring up firms' bottom lines.

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Deal-hungry private equity firm 3G Capital craved Burger King Holdings and was ready to do what it took to *nail down a whopper of a deal.*

FRIES WITH THAT?

By Amy Kolz

FROM THE BEGINNING, ONE THING WAS CLEAR: 3G Capital really wanted to buy Burger King Holdings, Inc. The private equity firm, represented by Kirkland & Ellis's Stephen Fraidin and William Sorabella, had been pursuing the fast food chain for more than six months, only to see all three of its acquisition proposals rejected without negotiation. So when Burger King's board said in August 2010 that it would consider an acquisition through a tender offer, 3G had a tough choice.

The tender offer had the advantage of speed and certainty for Burger King shareholders, but it could leave 3G stuck with less than total ownership of Burger King, a big obstacle to obtaining bank financing for the deal and a nonstarter for the private equity firm. 3G wanted a traditional single-step merger through a shareholder vote: That arrangement would take longer, but it was more likely to leave the whole company in 3G's hands.

The Kirkland team's solution? Do both. The dual-track structure, originally conceptualized by Fraidin, would allow 3G to launch a tender offer while simultaneously pursuing a traditional, one-step merger, which requires only a simple majority of voted shares. Under the tender-offer method, in contrast, shareholders would have to tender at least 79 percent of Burger King's shares in order for 3G to use a "top-up" option to purchase additional company-issued shares that would allow it to move to 90 percent ownership, the minimum required for a merger without a shareholder vote. Even if Burger King's three original private equity owners—TPG Capital, L.P.; Goldman Sachs Capital Partners; and Bain Capital, LLC—tendered their combined 31 percent stake, the 79 percent threshold seemed artificially high to 3G. Without a backup option, 3G could find itself having to walk away from a transaction that had support from the majority of shareholders, an "ugly result" for both Burger King and 3G, says Fraidin.

The dual-track structure "gave both sides the best of both worlds," says Sorabella. Burger King would get the speed of a tender offer, but if that offer failed, 3G would just acquire Burger King through a traditional merger and shareholder vote, a process that the parties would have already begun. "The parallelism in Steve's idea was a real innovation," says Antonio Weiss, global head of investment banking at Lazard Frères & Co. LLC, which was 3G's banker. "It ensured a fast-track path to completion without sacrificing 3G's ability to complete a [traditional] single-step merger."

DEAL IN BRIEF

BURGER KING BUYOUT

VALUE	$4.0 billion
FIRM'S ROLE	Acquiror's Counsel

Still, working out the mechanics wasn't simple. Burger King wanted to keep the tender offer outstanding as long as possible, and it demanded a go-shop provision, enabling the company to entertain competing bids after the deal announcement. 3G wanted the discretion to suspend an unsuccessful tender offer and switch to the merger option while limiting the uncertainty created by a go-shop. The Kirkland team also wanted to cap 3G's liability if financing fell through.

In late August, Kirkland worked with Burger King's lead counsel at Skadden, Arps, Slate, Meagher & Flom to hammer out some compromises. Burger King would get a 40-day go-shop period, but it would end two days before the tender offer expired. 3G would get a financing condition on the tender offer, but not on the merger option, thus capping its loss in a failed deal to a $175 million reverse termination fee. The tender offer could be extended until late November, when the parties would switch to the single-step merger option, once the Securities and Exchange Commission approved the proxy.

During the final two days of negotiations, Burger King and 3G agreed to a price of $24 per share and announced a $4 billion deal on September 2. By mid-October, almost 94 percent of shareholders tendered their shares, making the backup plan unnecessary, and the transaction closed in just 47 days. Other acquirors took note: Bain Capital's buyout of The Gymboree Corporation and Raytheon Company's acquisition of Applied Signal Technology, Inc., both announced in late 2010, each used the dual-track structure. In the deal world, imitation is the sincerest form of flattery.

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BURGER KING™