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Q&A With Arnold & Porter's Kevin Lavin

Law360, New York (December 15, 2011, 4:32 PM ET) -- Kevin J. Lavin is a partner in the Washington, D.C., office of Arnold & Porter LLP, where his practice focuses on representing private equity funds and their portfolio companies, corporate mergers and acquisitions, and public securities offerings. He has represented companies at all stages of development, from early stage venture backed companies to Fortune 500 corporations, private equity sponsors, and venture capital funds in numerous public and private mergers and acquisitions and securities offerings. He has particular experience in the government contracting, information technology services and software sectors. He regularly counsels boards of directors concerning fiduciary duties and compliance matters.

Q: What is the most challenging transaction you have worked on and what made it challenging?

A: The merger of US Airways and America West. US Airways was in bankruptcy. Our litigators were able to score significant victories in the bankruptcy court that allowed US Airways to become a potentially attractive acquisition target, but the deal needed to happen fast. We entered into negotiations with America West, while at the same time negotiating numerous equity investments from third-party investors. At the same time, our bankruptcy team was doing complicated creditor and vendor negotiations to allow US Airways to emerge from bankruptcy.

The transaction involved many legal issues of first impression and an enormous amount of coordination from multiple practice groups within our firm and among numerous law firms representing interested parties. The complexity made it fun.

Q: What aspects of your practice area are in need of reform and why?

A: There are several regulatory and tax-related areas that could be substantially simpler. Tax issues in transaction structuring, in particular with pass-through entities like S corps, are archaic. In public company M&A, the U.S. Securities and Exchange Commission process has become too cumbersome. In all deals, the plaintiff's lawyers have become a toll booth where you have to pass through and pay a fee, not a private market enforcement tool. The excessive regulation, complex tax code and unwieldy plaintiff's bar add needless cost and complexity.

Q: What is an important deal or issue relevant to your practice area and why?

A: For middle-market M&A, especially with financial buyers, the transaction costs are too high relative to the deal size. As a transactional lawyer, I have benefited from this problem, but long term, it is not good for the market. There isn't an obvious solution, but the due diligence costs are higher than they are for a public company, because the smaller companies tend to have less controls in place and relatively small issues can become material problems. And with the recent financial crisis, lenders are overreacting and requiring more information and documentation than is sensible. The result is that deals in the sub-$200 million range incur very high transaction costs relative to the transaction size.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Jay Clayton at Sullivan & Cromwell. He is intelligent, creative, hard-working and practical. I had a somewhat unusual experience of going in-house for a three-year period. I hired Jay to represent my company on our financings. The thing about Jay that was most impressive is that he was proactively thinking about my company. He would contact me unsolicited and ask: “Have you thought about [X]?” And then we would discuss [X] and he would have creative solutions, which I could then pass along to my management team.

Jay made me appear to my management as being on top of things in a way that would not have happened without his input. When I went back into private practice, I took that lesson from Jay and have tried to apply the same diligence and creativity in helping my clients.

Q: What is a mistake you made early in your career and what did you learn from it?

A: I was a third-year associate when a partner asked me to read and interpret a preferred stock provision in a company’s articles of incorporation. The partner had given me a sense of what he expected me to find, but he hadn’t read the document. When I read the provision, I thought it said something other than what the partner told me to expect, so I figured I must be wrong and wrote a memo that interpreted the provision incorrectly.

In hindsight, it was obvious I was wrong, and the partner, when he read the memo and the provision, called me and chewed me out. I feebly explained that I thought what I had written was what he told me to expect to find in the document, which only made him more angry. The lesson was learned: trust your instincts and abilities. Tell the partner (or the client or the opposing counsel) what you believe is the correct answer, even if you know that is not what they want to hear. But per my answer to the previous question, it is also a good idea to have thought through solutions and present them as well when otherwise identifying a problem.