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Dealmakers Q&A: Stradley Ronon's Alycia Vivona

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Alycia Vivona

Alycia M. Vivona is co-chairwoman of the mergers and acquisitions practice atStradley Ronon Stevens & Young LLP. She has broad experience handling complex mergers and acquisitions, corporate restructurings, intellectual property licensing and other transactional matters and a growing knowledge of health care law.

For more than two decades, she has represented foreign and domestic clients in cross-border transactions involving numerous countries, including China, Egypt, France, Germany, Japan, the Netherlands, Nigeria, Spain, Sweden and Thailand. Based on these experiences, she advises her clients on the effective and efficient implementation of a variety of legal structures, including asset and stock purchases, mergers, joint ventures, perpetual and shorter-term licensing arrangements, distribution and supply agreements, and other commercial arrangements.

As a participant in Law360's Q&A series with dealmaking movers and shakers, Alycia Vivona shared her perspective on five questions:

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

A: Surprisingly, the most challenging deal I have worked on in my more than 20 years of practice was a client's acquisition of a 30 percent minority interest in a golf and tennis resort. The purchase price was only $5 million, making this one of the smaller deals I have ever worked on, and the client was a large multinational corporation with over €7 billion in annual sales, so the entire investment amounted to little more than a rounding error on its financial statements. But the sellers were a group of family-owned businesses led by a patriarch who, for the first time, would be allowing an outside entity to participate in the management of a resort he had spent nearly 30 years building.

While this alone would have been enough to complicate the negotiations, what made the deal even more challenging was the fact that the seller engaged his trusts and estates counsel to advise on the deal, and he even required that his counsel prepare the initial drafts of all deal documents. These documents ultimately included not only the longest limited liability company operating agreement that I have ever negotiated (80 pages, not including the table of contents and attachments), but also a purchase agreement, a business development agreement, a real property lease, a support services

agreement and four separate agreements governing the jointly owned entity's use of the resort's tennis courts, fitness center and other facilities. (When a last-minute question arose as to which of two seller entities actually owned a portion of the resort's parking lot, I had to insist that the ambiguity be resolved by combining the agreements relating to use of the parking facilities, rather than by preparing a third agreement with respect to this small portion of the parking lot.) More than any other transaction I have worked on, this transaction proved that deal challenges often have more to do with the identities of those across the table than with the size, or even the nature, of the underlying transaction.

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

A: In April 2014, the House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Administrative Law held hearings with respect to the proposed "Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act of 2014" which would prohibit the U.S. Federal Trade Commission from pursuing administrative enforcement actions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. As described by Deborah Garza, former chairwoman of the Antitrust Modernization Commission in her testimony to the House subcommittee, the SMARTER Act is intended to level the playing field so that parties will face the same regulatory hurdles whether their proposed transactions are reviewed for antitrust compliance by either the FTC or the U.S. Department of Justice.

Because the DOJ typically agrees to consolidate proceedings for preliminary and permanent injunctions, a DOJ proceeding generally entitles parties to a full hearing on the merits in which the DOJ must prove its case by a preponderance of the evidence. By contrast, the FTC generally elects to seek only a preliminary injunction and to continue with its administrative proceedings. Under Section 13(b) of the FTC Act, a preliminary injunction is to be granted "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of success, such action would be in the public interest."

Because most parties will terminate their transaction rather than take the time required to challenge a preliminary injunction, the FTC essentially wins once it has met this lower threshold. Based on my review of the applicable legislative testimony, I believe that adoption of the SMARTER Act would represent an appropriate reform of the U.S. antitrust laws.

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

A: While the health care reforms mandated by the Patient Protection and Affordable Care Act have been — and are being — discussed at length in the media, there has been relatively little discussion of the ripple effects these reforms will have on the broader U.S. economy. According to the World Bank, the U.S. spends almost 18 percent of its gross domestic product on health care, so it is to be expected that the sweeping changes being implemented under the Affordable Care Act will impact other aspects of our economy.

One example is the growing area of health care information technology. Electronic medical records systems, bundled payments programs, gain-sharing programs and other health care innovations depend on health care providers' ability to manage, access and exchange large quantities of medical data both securely and reliably. While the ultimate goal of these innovations is the improved quality of patient care, the resources needed to achieve that goal will include computer hardware and software, as well as many hours of software developer time. As a result, health care reform should also prompt many exciting opportunities for dealmaking in the information technology sector.

Q: What advice would you give an aspiring dealmaker?

A: Do not lose sight of either the forest or the trees. Knowledge of the client's overall goals for a transaction as well as an awareness of the general business risks associated with a deal are important for any legal representation. Similarly, counsel should be familiar with various deal structures and alternative approaches to resolving common issues. This broad perspective provides general direction and informs many of the decisions that must be made during the course of a transaction.

But counsel is also responsible for ensuring that the parties' agreements are accurately reflected in deal documents that often comprise hundreds of pages. Ambiguous wording, inconsistency within or across documents, sloppy use of defined terms and other lapses in drafting will undermine the efforts you make on behalf of your client. And the many hours spent on due diligence — not to mention the legal fees associated with those hours -— will be wasted unless the issues that are uncovered are brought to the attention of the client's decision makers and appropriately addressed in the deal documents. While counsel may pride themselves being good at either the "big picture" or the details, only counsel who can focus on both will truly excel.

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

A: Thomas Jefferson was the driving force behind one of the most significant deals in our nation's history — the Louisiana Purchase. As we all learned in elementary school, in 1803, the United States agreed to pay France $15 million for approximately 827,000 square miles (530 million acres) of land west of the Mississippi River, including all or part of what are now 15 states. While it is impressive that Jefferson was able to double the size of the United States for mere pennies per acre, it is not the economics of the Louisiana Purchase that I find most striking. Rather, I am impressed by the boldness and foresight evidenced by Jefferson's actions in making a deal that he himself believed — at least initially — was unconstitutional.

Although Jefferson initially sought only to ensure continued American access to the important port of Louisiana, Jefferson seized on Napoleon's offer to sell all of France's territories in America in order to secure control of the entire Mississippi River. As Jefferson so eloquently described the transaction in a letter to John C. Breckinridge dated Aug. 12, 1803:

The Executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution. The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify & pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it. It is the case of a guardian, investing the money of his ward in purchasing an important adjacent territory; & saying to him when of age, I did this for your good; I pretend to no right to bind you: you may disavow me, and I must get out of the scrape as I can: I thought it my duty to risk myself for you.

(Available at http://etext.virginia.edu/etcbin/ot2www-singleauthor?specfile=/web/data/jefferson/texts/jefall.o2w&act=text&offset=6224382&textreg=1&query=Louisiana)

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