Dealmakers Q&A: Taft's James Strain

Law360, New York (October 02, 2014, 10:33 AM ET) -- James A. Strain is co-chairman of Taft Stettinius & Hollister LLP's business and finance practice and primarily practices in the areas of securities law, mergers and acquisitions, and corporate governance. He was one of the architects of the Indiana Business Corporation Law and successfully defended its Control Shares Acquisition chapter before the United States Supreme Court in CTS Corp. v. Dynamics Corp. of America.

James Strain

Strain has been recognized in the top tier of leading corporate/M&A lawyers in Indiana in Chambers USA: America's Leading Lawyers for Business since it began its U.S. publication. The Best Lawyers of America named him the "Indianapolis Corporate Governance Law Lawyer of the Year" for 2012. He has been listed in The Best Lawyers in America for 30 years and has been named to the Indiana Super Lawyers list by Law & Politics magazine. In 2014, he was recognized by the Indiana Lawyer as a Distinguished Barrister.

As a participant in Law360's Q&A series with dealmaking movers and shakers, James Strain shared his perspective on five questions:

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

A: In 1986, the "General Utilities" doctrine in the tax law was set to expire at the end of the year. I was lead lawyer for a management group that wanted to do a leveraged buyout of a public company. Unfortunately, the group did not come to that conclusion until early fall and the tax consequences of completing the deal after year-end were horrendous. In addition, one my partners with whom I did a lot of deals had to take time off because of a death in his family, and missed the whole thing.

Between mid-September and year-end, we managed to line up an equity partner that did not require control of the board, put in place subdebt and senior debt financing, structure a tender offer followed by a freeze-out merger, and engage in "mirror subsidiary" transactions to get the best tax treatment for the overall deal. As if that were not bad enough, for the timing to work, we needed the tender offer to be so successful that we would be able to do a short-form merger, instead of going through a proxy statement process. Ultimately, we did it and everything closed by or on Dec. 31, 1986.

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

A: Because of the vast move of publicly held stocks into the hands of institutions instead of moms-and-pops, the power of proxy advisory services, such as Institutional Shareholder Services (ISS), has become an increasing problem. The institutions, likely because of manpower issues,

do not take the time to exercise their own fiduciary duties and evaluate transactions. Instead they rely on ISS to make a recommendation, putting ISS and others of its ilk in the position of substantively affecting deal outcomes by recommending "no" votes. That means, on both sides of the table, regardless of the trade-offs necessary to get to a negotiated transaction, there is another person who comes to the party late and substantively changes the deal.

ISS ignores state law with respect to its recommendation, relying instead on its internally generated "idealized" vision of what a deal should be and what governance should look like. At this point in time, there is utterly no regulation of ISS and its ilk, and there should be.

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

A: My sense is that there is still a lot of money on the sidelines and that many private equity funds are caught in the position of either having to do deals or give money back to investors. It is also my sense that it remains a better economic option to grow via acquisition rather than through research and development for large companies. If my sense is correct on both accounts, then prices will go up as PE firms and strategic buyers compete with each other to buy startups and heavy research and development companies.

Q: What advice would you give an aspiring dealmaker?

A: Be a good listener and seek common ground! Whether it is a matter of understanding one's clients wants and desires, or sitting at the table and trying to bridge negotiating gaps, the key to a successful negotiation is having as good of an understanding as possible of the positions of your client and the opposing party and having the ability to find the compromises.

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

A: Larry Lederman. When I was a relatively young and impressionable partner, I represented a special committee of the board of directors of an Indiana public company. Management had started a management buyout of the company, and was on its way in the proxy solicitation to getting the requisite votes. The deal got jumped, and we suddenly had to change to auction mode.

In the auction, each of the bidders put on the table a crown jewel transaction for a product called "Gatorade." Other parts of the business had to be sold separately. All of the bids came in after the close of the market on Friday afternoon, and we needed to announce before the opening of the market on Monday morning. Over that weekend, Larry conducted three separate negotiations on three separate aspects of the business, predicted how the arbitrageurs would attempt to cheat the system (and managed to short-circuit that). As the crowning blow, after we had successfully negotiated the three deals, Larry ordered in the product of the jumper for the working group to celebrate our defeating it! I thought at the time, when I grow up, I want to be as skilled as Larry. That is not to demean other greats with whom I have worked (and whom I have admired greatly), including Larry's former partner, Marty Lipton, a truly fabulous lawyer. But at the time, when I was still young and impressionable, watching Larry's work was astounding.

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