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Recap - M&A Speaker Series: The View from New York

By Lida Ramsey, J.D. Candidate 2017 | January 27, 2015

On January 22, expert M&A attorneys from Cleary Gottlieb Steen & Hamilton LLP shared their perspectives on M&A practice and reviewed some of the newest developments in the field. The following is a recap of their discussion, which was co-sponsored by the Berkeley Center for Law, Business, and the Economy (BCLBE) and Weil, Gotshal & Manges LLP.

Panelists:

- Ethan Klingsberg -*Speaking on shareholder activism and current trends*
- Kathleen Bradish, Jeremy Calsyn, and Brian Byrne - *Speaking on the role of an antitrust attorney in DC*
- Suneela Jain - *Speaking on the evolving role of shareholders within corporations*
- Manoj Nair - *Speaking on Kindred Healthcare's hostile-turned-friendly takeover of Gentiva Healthcare Systems*

Trends in the M&A Market

With widespread interest rates lower than ever for an extended period of time, it has been difficult to secure returns on investments. In the face of the recession, corporations attempted various endeavors to satisfy the hunger for returns, including finding ways to cut costs and investing in overseas markets. As these strategies proved insufficient, however, hedge fund activists entered the picture and began urging companies to increase their value by refocusing resources. The activists sought companies with healthy balance sheets and pushed them to borrow heavily to refocus their investments. Though low interest rates made this borrowing cheap and easy, such tactics readily transformed healthy balance sheets into unhealthy ones.

The Change in Corporations

(1) "Deconglomeration"

Many companies have particular divisions with tremendous growth prospects and it has become clear that investors have developed a greater interest in many such divisions, often to the exclusion of their parent entities. With this trend came the "deconglomeration of America." For example, to those looking to invest in coal, a steel and coal company would not look as desirable as a company that solely focuses on coal.

(2) Company Transformation

Hedge fund activists began to approach companies with ample room for improvement, motivating them to transform their brand. For example, Family Dollar was continuously lagging behind Dollar General. Criticizing Family Dollar's current model, activists inspired them to

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"fancy-up." Moreover, hedge fund activists encouraged JC Penny to revamp its stores, pushing them towards the sleek appearance of an Apple store. But in the end, limitations arise in the expertise of those on Wall Street, who may not be skilled authorities on changing the operations of a particular business.

(3) Corporations Becoming the New Banks

Financially booming companies have found a creative way to gain higher returns on stagnant money gaining little interest. While venture capitalists tend to fund start-ups for a limited amount of time (3-5 years), prosperous companies like Google and Apple can afford to invest in start-ups for an extended period of time. This trend isn't limited to leading tech companies; while Intel used to lead in new company investment, Home Depot has also grown a substantial "venture capitalist arm." In addition, where funding comes from can make a tremendous impact on the value of a company, as seen from Google's acquisition of the Waze navigation application, which was originally funded by Microsoft. The growing participation of these major corporate players clearly has tremendous implications for the world of M&A.

The Evolving Role of Shareholders

With the rapid deconglomeration of corporations in America comes the difficulty of striking a balance between seeking maximum value for shareholders and seeking maximum value for the corporation, two notions that often conflict. The current trends push companies to focus energies on reaching maximum value irrespective of shareholder interest. However, with pension funds and proxy advisory firms, shareholders can still maintain control as stewards of the company. But while this "democratization of shareholders" can drive corporate policy to protect shareholders, it can also form a hurdle for CEOs.

An example of this can be seen in Kindred Healthcare's hostile-turned-friendly takeover of Gentiva Healthcare Systems. Kindred's CEO wished to expand into the hospice care space by acquiring Gentiva. Unfortunately for Kindred, Gentiva was initially uninterested. In response, Kindred attempted to capitalize on the "democratization of shareholders," making the intention to acquire public and appealing to the shareholders' interests. However, many of Gentiva's shareholders were employees in the hospice care industry. While average shareholders might be interested in the positive financial impact of the acquisition, such a change in the hospice industry could appear worrisome to those whose jobs may be affected. Thus, appealing to shareholders required a careful juggling of these potentially divergent interests.

The Role of an Antitrust Lawyer

Amidst the evolving M&A field, the antitrust lawyer plays three roles: the gatherer of knowledge, the supplier of tools for M&A lawyers, and the executor of a strategic plan from the beginning of the deal to the regulator's closing. Above all, the antitrust lawyer must know the industry; he or she must be aware of the current trends and regulation interests in order to know

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what deals are and aren't possible. In addition to providing this understanding, the antitrust lawyer must know exactly what the buyer and seller must do to close the deal. In a world where timing is everything, the antitrust lawyer's job is vital.