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Dealmakers Q&A: WilmerHale's Stuart Falber

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Stuart Falber

Stuart Falber is a partner in Wilmer Cutler Pickering Hale and Dorr LLP's Boston office, where he is co-chairman of the firm's life sciences practice group, and a partner in the firm's corporate practice group and emerging company group. For more than 20 years, Falber has served as counsel for a broad range of life sciences clients, ranging from startup private companies to mature public companies, investment banks and venture capital funds.

Falber's practice focuses on corporate and securities law, with an emphasis on private and public company counseling; representation of issuers, investment banks and investors in venture capital transactions and public offerings of securities; mergers and acquisitions, including public and private company acquisitions and dispositions, asset acquisitions and sales, and public and private company spinoffs; and corporate collaborations and licensing transactions.

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

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

A: I have been involved in a number of deals that have been challenging for a whole host of reasons: the structure of the transaction was complicated, there was extreme time pressure to get the transaction done, the parties on the other side of the transaction were difficult (whether it be the counterparties or their counsel) and/or my client was difficult.

However, the transaction that I think was one of my most challenging deals was the sale of Transkaryotic Therapies to Shire. We had represented TKT for a number of years prior to the sale through both significant ups and downs. At the time of the sale, the company was on the upswing and was awaiting pivotal trial results for one of its compounds. As a result, the decision to sell the company to Shire was controversial. During the course of the transaction, the CEO of TKT resigned in opposition to the transaction, a second director voted in opposition to the transaction, the company and its directors were sued, nearly 28 percent of the shares were voted against the sale and stockholders representing more than 30 percent of the shares sought appraisal rights in Delaware. A public company-

public company merger transaction is always a challenging transaction. These dynamics brought it to another level.

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

A: As a corporate lawyer who represents life sciences companies, much of my last 18 months have been spent working with clients on their initial public offerings and advising other clients on the decision whether to move forward with an IPO and on the preparation for conducting an IPO. Whether coincident or not, the open market for life sciences IPOs has coincided with the adoption of the Jumpstart Our Business Startups (JOBS) Act and the IPO on-ramp provided for under the JOBS Act.

Interestingly, while the adoption of other provisions of the JOBS Act was subject to rulemaking by the U.S. Securities and Exchange Commission, the IPO on-ramp provisions went into effect immediately. The immediate effectiveness of these provisions benefited the companies looking to take advantage of the open market, allowing them, among other things, to conduct their "testing the waters" meetings, confidentially submit their registrations statements and take advantage of the scaled disclosure requirements.

At the same time, the immediate effectiveness has left some uncertainty as to the IPO on-ramp provisions, which has resulted in different players playing by different rules. For instance, in the various IPOs on which I have worked, I have witnessed contradictory positions taken by investment banks and their internal counsels, underwriters counsel and even the IR/PR firms with respect to the timing and form of "testing the waters" communications. Advice that I provided in one IPO that was viewed as conservative was too aggressive for another investment bank in another transaction. Market practice continues to evolve in these areas, but I do think that further word from the SEC in these areas could be useful.

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

A: The opening of the markets to life sciences companies has brought money back in to the life sciences ecosystem and created opportunities for dealmakers. Companies with healthy balance sheets and access to more financing have seen and begun to exploit opportunities to grow their businesses through M&A. As a result, big pharma is not the only game in town for companies looking for an M&A exit — creating competition and higher valuations for exits.
At the same time, companies that might have seen M&A as their only option due to their inability to continue to finance their business now can access capital and fund their business. With their businesses (and trials) funded, these companies can explore a variety of deal structures which would allow them to retain some rights in their products and the opportunity for a greater return.

We have seen these deals take shape in the form of territorial deals — where rights are granted for specific territories with the licensor retaining the rights, for instance, in the United States: in the form of broader deals — where rights may be granted on a worldwide basis or to certain territories with the licensor retaining rights in the licensed territories in the form of co-promotion or other similar rights; and in the form of co-development deals — where the licensor agrees to contribute financially to the development of the product in return for a greater share of the return. Importantly, there is the opportunity for innovative dealmaking.

Q: What advice would you give an aspiring dealmaker?

A: The best advice I can give would be to understand your client's business. That means speaking to the client from time to time outside of any legal matter, attending board meetings, reading analyst reports and paying attention to what your client's competitors are doing and what kind of deals are being done in your client's space.

A few years ago, a client discussed with me some issues that he had had with an attorney with whom he had been working. The client told me that he thought that the attorney was very smart and noted that the attorney explained the legal issues very well. When I asked the client was his issue then was, he said that the attorney couldn't answer the question "what do you think I should do?" The attorney could explain what the law provided, how a provision in a contract would be interpreted and whether a provision was customary or not, but the client wanted more and he was right.

An attorney who, in speaking to a client or reviewing a deal, can raise questions, challenge approaches and offer alternatives is an attorney that provides value to his client. And an attorney cannot effectively do this without understanding the client's business and strategy and the consequences of taking or not taking different actions.

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

A: Two attorneys who have always impressed me are Rick Alexander of Morris Nichols and Bill Haubert of Richards Layton & Finger. These two attorneys are Delaware lawyers with a tremendous knowledge of Delaware corporate law. On numerous occasions, they have assisted my clients and their directors in various transactions and in difficult issues involving fiduciary duties and other corporate matters. In each case, they were able to quickly grasp the facts and circumstances of the matters and, citing Delaware law and precedents, to offer practical and creative solutions to sometimes sticky problems.

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