EIGHT IS ENOUGH

8 PRACTICAL WAYS LITIGATORS CAN ADD VALUE

Working closely with corporate attorneys before the deal is signed helps clients avoid future problems

Business executives tend to view litigators as the legal equivalent of the Grim Reaper – a necessary evil whom they hope won't visit them personally or prematurely. All too often clients fail to seek litigation advice until it is too late, and then they devote all of their resources defeating the claims on any available grounds. This is a bit like waiting until your fever hits 103° before getting the flu shot. On the other hand, litigators regularly feel like Emergency Room trauma teams being called in to stop the bleeding. All too often the refrain from our litigation colleagues is, "if only you had consulted me earlier". Corporate lawyers are stuck in the middle.

While winning litigation is a victory, the real victory is avoiding the conflict altogether. We have long believed that it is best to involve our litigation colleagues early and often. A short brainstorming session including litigators at the outset of a deal can yield creative solutions that reduce the client's ultimate exposure. Here are eight practical ways in which you can work with your corporate colleagues and their clients to help analyze, structure and execute corporate transactions and add real value before any dispute even arises.

1 Talk the Talk. Ultimately the client makes the business decisions, but legal advisors need to provide clear, practical business advice regarding the risks associated with available options. Unfortunately, lawyers in general, and litigators in particular, tend to speak in legal jargon. We have our own language of motions, covenants, procedures and remedies. At the first sound of legal terminology, most business people simply tune out. It is essential that a litigator involved in a corporate deal understand her audience and adapt her presentation accordingly. A CEO or CFO who is fully conversant with the most minor business issue, may not be familiar with legal terminology or litigation-related issues. When called upon to advise a corporate client, be sure to avoid using legal jargon or terminology. Remember, lawyers are most effective when they speak in terms which business people understand.

2 Do Your Diligence. In almost any deal of significance, the parties will investigate (or "perform due diligence on") the assets or securities they will be receiving. Balance sheet liabilities can be taken into account in calculating a purchase price and, in many public company deals, are part of the mix of information that is reflected in a company's market price. In contrast, off-balance sheet liabilities are difficult to factor into the client's "go/no go" decision or the purchase price. Litigators can play a vital role in analyzing the potential risk of unknown or contingent litigation-related liabilities, particularly:

- threatened and pending litigation;
- future potential litigation , such as the risks inherent with doing business in industries that are frequent targets of litigation; and
- regulatory investigations.

Although often difficult, it is always helpful when a litigator can describe her views in terms of "dollars" or "probabilities" which then can be factored into the financial model. In our experience, the following considerations tend to be most relevant to clients when they are seeking to quantify unknown and contingent liabilities:

- the availability of punitive or consequential damages or equitable relief;
- the extent and collectability of insurance coverage;
- the availability of recourse against third parties in relation to a litigation liability, such as indemnities and expense reimbursement provisions;
- the availability of econometric consultants who can analyze settlement values in recurring types of deal-related litigation; and
- the procedural posture of pending litigation matters and estimates of time to completion and associated costs.

Of course, not all risks and benefits can be reduced to numbers. When issues are complex and multi-faceted, as they are in many situations, a litigator should focus her presentation on their impact on the most critical elements of the deal, such as

- price and form of consideration;
- certainty of completion;
- transaction timing; and
- reputational and regulatory risk.

3 "Worst Case Scenario" Planning. Most deals can be structured in a variety of different ways to achieve the client's desired business or financial objective. Often, tax considerations are a primary factor in developing the transaction structure. However, the transaction structure can also have a material impact on such as regulatory approval requirements and litigation or other contingent liability risks. At the outset of a transaction, a litigator should help to identify whether a particular transaction structure is more or less likely to require regulatory notifications or approvals (or subject the parties to greater regulatory scrutiny). In some cases a litigator may even be able to suggest ways to minimize the associated timing, completion and other risks. Often in large M&A deals antitrust litigators advising on the Hart-Scott-Rodino clearance process are instrumental in helping the client assess the risk of a second request and in making recommendations about whether a "fix it first" or other strategy is appropriate.

4 Emails, Shredders and Such. While most clients are well aware that litigation begets discovery, many have no concept of what a document production looks like in a major litigation or how they can be grilled for hours in depositions regarding their hastily jotted notes or long forgotten conversations. Litigators can nip issues in the bud by giving some quick advice at the outset of a deal on the risks of poorly worded informal emails or other written materials. They can back up their admonishments by providing some real-world perspective on modern electronic document production techniques. A litigator can also provide helpful guidelines about the availability of legal privileges and the

desirability of entering into joint defense agreements with third parties. The privilege issue arises regularly in deals where the client's financial advisor is actively involved in strategic discussions in which legal advice is relevant.

5 Putting Pen to Paper. It is extremely helpful to receive meaningful input from a litigator on various provisions in the definitive transaction agreements and disclosure documents. In particular, litigators can provide helpful advice on:

- The dispute resolution procedure, governing law, submission to jurisdiction and forum selection provisions of transaction agreements. For example, a litigator can confirm whether the selected court would have jurisdiction over the parties and the subject matter of a dispute and make practical suggestions about a particular court's expertise with the types of issues that are likely to arise.
- The conduct of claims procedures. These provisions could include restrictions on a party's ability to settle litigation and provisions regarding control of the defense of claims and settlement negotiations in the context of an indemnification provision.
- SEC filings. In public company M&A deals, for example, a litigator can point out areas in the "background" and "reasons" sections of the target's proxy statement where additional disclosure may help to reduce the settlement value of (the virtually inevitable) class action plaintiff's disclosure violations claim.

6 Takeover Offense/Defense. Litigation is a main course on the menu of options available to hostile bidders and targets alike. The most common types of hostile deal litigation relate to claims that directors breached their fiduciary duties in approving defensive measures or disclosure claims. Interlopers making unsolicited "topping bids" in regulated industries also regularly seek to intervene in regulatory hearings relating to the approval of the original transaction. At the outset of a potentially hostile deal, a litigator can advise the client about:

- the timing impact of prospective litigation on the overall transaction (even if litigation could be successful, will it be resolved in time to make a difference in the outcome of the transaction?);
- costs of prospective litigation in relation to other alternatives the client may be considering; and
- the availability of different types of remedies.

7 Dealing with Regulators. Litigators can be the grease that gets a deal through regulatory and self-regulatory organization review. Among other things, litigators can:

- act as advocates for the deal at informal meetings with the regulators;
- work with the client's economists or other relevant consultants to develop arguments to challenge the regulator's analysis of market shares or other pertinent facts, if necessary;
- work with the rest of the deal team to draft the strongest arguments in briefs, filings and regulatory submissions;
- represent clients at hearings on regulatory approvals; and
- draft and review consent decrees and/or settlement documents as needed to ensure they properly reflect the outcome of a regulatory challenge to a transaction.

8 Not All Breaches are Bad Breaches. While no one wants to admit it when the contract is being negotiated, under certain circumstances it may make business and financial sense for a party to breach the contract. As a public policy matter, the legal system has developed a menu of remedies designed to permit parties to breach contracts if the breach would be an "efficient breach" – i.e., if the breach would result in greater aggregate value creation and so long as the breaching party makes its counterparty whole. Clients are often amazed to discover that it may actually be less expensive for them to exit a soured relationship via an anticipatory breach than to try to work through their difficulties.

However, in order to make an informed choice between breaching a contract, renegotiating it or continuing to live under its terms, the client will need to understand the likely consequences of such a willful breach. For example, could it be liable for punitive damages? Could the other party obtain an injunction (whether against the breach itself or against future competitive activities)? Armed with this knowledge, a client may take a different view of the pricing of a deal that requires the business to exit an existing contractual relationship in order to capture synergies, or may feel empowered with greater leverage in contract negotiations.

In almost all deals it is good practice for corporate lawyers to involve their litigation colleagues early and often. Unfortunately, corporate lawyers are frequently reluctant to interject litigators into the process for fear of slowing down the deal or alienating the client. While this reluctance may be understandable, it is often counterproductive and probably not in the client's long term best interests. When corporate and litigation lawyers work together, understanding a client's needs and objectives, the client will ultimately achieve the best possible outcome. Following these suggestions, litigators will not merely be tolerated by corporate clients, but hopefully will be viewed as the valued advisors that they are.

By Frank Aquila & Melissa Sawyer