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Dealmakers Q&A: Baker Botts' John Martin

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John Martin

John W. Martin is a corporate partner with Baker Botts LLP and serves as the partner-in-charge of the firm's Palo Alto, California, office. He also serves on the firm's executive committee and as the firmwide technology sector chairman. Martin has a diverse transactional practice with significant experience in mergers and acquisitions, capital markets, corporate governance, joint ventures, and sourcing transactions. His clients are concentrated in the technology, energy and manufacturing sectors.

Martin has extensive experience in representing both purchasers and sellers in complex M&A transactions involving both public and private companies. He also has substantial experience with private equity and venture capital transactions and regularly counsels clients regarding corporate governance and federal securities law. He regularly speaks about M&A issues and has been recognized in Chambers USA, Chambers Global, The Legal 500, The Best Lawyers in America, Who's Who in American Law, and Northern California Super Lawyer.

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

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

A: Every deal has its challenges. Some of the most difficult challenges can include multiple constituencies with competing interests, unique regulatory or other problems requiring creative solutions, and demanding time constraints. I have found that the most challenging deals often are not the largest by deal value. Two particularly challenging types of transactions are carveout transactions and spinoffs because of the interdependencies between the businesses that must be identified and untangled. However, acquisitions can often involve unique challenges.

Recently, we represented a global enterprise software company in a significant acquisition of technology target. During diligence, our client naturally wanted to confirm that the target owned its core technology and software assets without material risk of adverse claims.

Acquirors of software companies often have heightened concerns with the target's employees or consultants claiming ownership of code and with the incorporation of open-source code or third-party tools. Use of open-source and third-party software has become prevalent in software development today. Unfortunately, unintentional license and copyright violations often result from a lack of understanding of the related restrictions and inadequate internal controls.

As a result of these concerns and as part of its M&A diligence, our client regularly uses source code reviews to identify the existence of third-party or open-source code within a target's software code base. The sophistication of source code scanning tools has grown dramatically.

In our recent deal, the scan results for the target's principal software program revealed not only the existence of third-party code but also the systematic deletion of copyright notices attributable to incorporated, third-party code. Not surprisingly, this revelation raised a number of uncomfortable questions for the target's management and development team and created a number of valuation and risk allocation challenges for our client.

When scan results reveal problems, we and our IP colleagues work with our clients to design and implement a risk mitigation strategy that can include (1) requiring the target to obtain the requisite licenses, (2) requiring that the target replace or rewrite the problematic code, (3) renegotiating the purchase price, (4) altering the deal structure, or (5) addressing the issue in the purchase agreement's indemnity and other risk allocation provisions. In these circumstances, we typically develop a bespoke solution for our client to address the deal's specific challenges.

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

A: I am encouraged to see continuing reform efforts in federal securities laws and state corporate statutes to provide parties with increased flexibility and more efficient means of achieving desired business objectives.
For example, the April 2012 enactment of the Jumpstart Our Business Startups (JOBS) Act to streamline certain aspects of the registration process under federal securities laws was helpful. This year, technology company IPOs are forecast to reach their highest level in over 10 years.

Another recent example was the amendment enacted last year to the Delaware merger statute. This new provision can be used to streamline a two-step merger transaction involving the acquisition of a public company by eliminating, in certain circumstances, the stockholder approval requirement of the back-end merger. This improvement allows certain going-private transactions in Delaware to be accomplished faster and more efficiently and without the need for a target to issue a "top-up option" to a friendly bidder. Delaware remains the preferred state in which to incorporate, in part, because of the high priority the state Legislature places on maintaining the relevance and currency of its corporate statutes.

Of course, with all the current discussion regarding inversion transactions and the perceived need by some to prohibit them, one of the areas needing to be reformed is the U.S. tax laws. The U.S. tax disincentives created by having one of the highest corporate tax rates in the developed world and taxing the repatriation of foreign earnings puts many U.S. companies at a competitive disadvantage in the global economy.

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

A: One factor significantly influencing M&A deals — both in terms of deal type and structure — is the increasing desire to monetize intellectual property and the recognition of patents as a separate asset class. I expect this trend to continue as our economy continues to evolve into a knowledge-based economy. Over the last 20 years, the number of patents granted in the U.S. has almost tripled. Over that same period, the number of patent litigation cases filed has increased five-fold. These trends reflect the increasing importance of (1) identifying, perfecting and protecting IP, and (2) using patents for offensive and defensive purposes in disputes. Not surprisingly, more M&A deals are focused on the acquisition of patents and other intellectual property rights.

Another hot topic for acquirors today is the heightened scrutiny regarding the existence and effectiveness of a target's compliance programs. Acquirors are concerned about absorbing a business that requires significant investment to remediate legacy compliance problems. Specific "hot button" areas include (1) data security and privacy, (2) anti-corruption, (3) anti-money laundering, (4) legal compliance of a target's utilization of cloud computing solutions, (5) underfunded pension plans, and (6) the existence of other contingent liabilities.

Q: What advice would you give an aspiring dealmaker?

A: There are two pieces of advice I would give to young lawyers aspiring to become M&A lawyers.

The first is the same advice that I received 30 years ago from Moulton Goodrum, who was then chair of Baker Botts' corporate department. During my first week at the firm, Moulton took all of the new corporate associates to lunch and told us, "To succeed at the firm, you will need to create a demand for your services." At the time, I had no idea what he was talking about. I do now. Creating both internal and external demand for one's services — performing in such a manner to make others want to work with you — is critical to success. This maxim incorporates so many different attributes, including professional excellence, integrity, responsiveness, value-added services, cost-effectiveness and mutual respect.

The second piece of advice would be to differentiate yourself by understanding your client's business and deal objectives. Sustaining a high level of intellectual curiosity and staying ahead of the knowledge curve — knowing your clients' businesses and the industries in which they operate — helps a lawyer not only to keep his clients' interests first but also to provide a competitive edge.

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

A: During my career, I have had the privilege to work with many talented M&A lawyers. As I reflect back, a real standout has been Laurent Lutz, executive vice president and general counsel for Sallie Mae. I have worked with Laurent for many years. He has a tireless work ethic and utilizes a hands-on approach. He is able to absorb and analyze a myriad of seemingly conflicting legal and operational challenges and to craft a creative solution. He also is vigilant about looking "over the horizon" to anticipate his client's needs. He is a talented lawyer who gets deals done.

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