Q&A With Carlton Fields' Stephen Opler

Law360, New York (October 05, 2011, 3:20 PM ET) -- Stephen Opler is a shareholder in the Atlanta office of Carlton Fields, where his practice includes the representation of both public and private companies in sophisticated corporate finance transactions, including mergers, acquisitions, divestitures, and public and private securities offerings. He represents a wide variety of clients, including private equity firms, public and private corporations, and investment banking firms.

Opler has been engaged in many restructuring and troubled company transactions, including acquisitions both in and out of bankruptcy proceedings. Prior to joining Carlton Fields, Opler served as general counsel of a private equity firm, an investment banker, a founder of One Georgia Bank and a partner with an international law firm.

Q: What is the most challenging transaction you have worked on and what made it challenging?

A: Somehow every transaction feels like the most challenging transaction you have ever worked on when you are in the middle of it. However, commencing, negotiating, documenting and closing a deal in just four days, is really challenging.

Several years ago, I represented a private equity firm in its sale of a portfolio company to a newly public company buyer. Despite the strong interest in consummating a transaction, the parties were not able to commence the transaction until after the buyer's post-initial public offering quiet period. To make matters more interesting, the buyer had to release its quarterly earnings one week after the expiration of the quiet period. As if somehow an entire week was enough time to negotiate, document and close the acquisition, no one would start work until Tuesday due to the Memorial Day holiday falling on that Monday.

Four days (and three nights) later, we closed the sale of the business, and the buyer was able to include its announcement of the transaction in its quarterly earnings release.

Another challenge that arose from this transaction was learning the importance of the subtle differences in the language we lawyers often use. The CEO of the target company was to receive approximately 20 percent of the proceeds of the sale personally. After the second time I approached him to report that we had a "problem," he impatiently informed me that while we might have a legal issue or even a business issue, we had no problem and that this transaction would close on time. I have never used the word "problem" again.

Q: What aspects of your practice area are in need of reform and why?

A: Middle-market clients, including private equity firms, increasingly view expert legal skills and knowledge as necessary but insufficient. We are hearing from clients with greater frequency that they expect their counsel to be very effective project managers and to be increasingly able to deliver transaction advice with reduced and more predictable fees. To deliver this result, law firms are going to have to continue to embrace alternative staffing models, knowledge management tools and nontraditional project management expertise.

Q: What is an important deal or issue relevant to your practice area and why?

A: Over the last decade, the Delaware Chancery Court (and at least one other state's court) has ruled in a number of cases on the enforceability of the material adverse change ("MAC") clause in acquisition agreements. Strikingly, none of these cases has found that a MAC has occurred. The MAC is a critical tool enabling the parties to allocate pre-closing adverse change risk.

However, with the unanimously pro-seller judicial decisions interpreting the long-standard MAC clause formulations, a private equity buyer should consider very specifically the pre-closing risks that it intends to allocate to the seller. The mechanisms for this risk allocation can include allocating the burden of proof, including prospects and a forward-looking standard, eliminating or limiting pro--seller carve-outs, specifically including short-term effects as a trigger and adding specific financial milestones. The private equity buyer should also consider adding specific financial and nonfinancial milestone closing conditions to the acquisition agreement.

The private equity buyer often becomes the successful buyer by highlighting the certainty of closure. The specific focus on pre--closing risk allocation may undermine the aura of certainty and be challenging to negotiate. Seller's counsel is also likely to go unwillingly into the necessarily unfamiliar territory of bespoke MAC clauses.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Wayne Bradley, a senior partner and head of the corporate practice at McKenna Long & Aldridge, is an amazing lawyer, senior advisor and professional. I first met Wayne many years ago when I was on the other side of a difficult transaction. Everything about that transaction seemed challenging, from the legal issues to the personalities of those involved to the cross-border nature of the transaction. Wayne was a master at maintaining his professionalism and finding ways to facilitate solutions. Wayne's involvement elevated everyone who participated in that transaction, including me.

Since then, but prior to joining Carlton Fields, I was a general counsel of a private equity firm, and Wayne became my go-to lawyer. Now, while working at Carlton Fields, Wayne and I still collaborate. He brings together a rare combination of first-rate legal skills, keen business savvy, insight and efficiency.

Q: What is a mistake you made early in your career and what did you learn from it?

A: Early on I allowed my sense of zealous representation and my passion for my clients' positions and business objectives to overtake the healthy, detached perspective that my clients also needed. While passion is good and can lead to high client service, I learned that it must be tempered with the ability to offer unemotional counsel and the ability to help the client understand the context in which the issue has arisen and how others have resolved similar issues. Too much passion can lead a client to become intransigent in its own views and, unintentionally, help thwart the client's opportunity to achieve its overarching business goals.