

Q&A With Sheppard Mullin's David Sands

Law360, New York (December 13, 2011, 4:28 PM ET) -- David Sands is a partner in the Los Angeles office of Sheppard Mullin Richter & Hampton LLP in the firm's corporate practice group. He concentrates on the representation of technology and other companies involved in the media industry and companies involved in the creation and distribution of financial products and financial services in a wide variety of transactions, including formation and initial capitalization, executive compensation and regulatory compliance matters, Internet and e-commerce arrangements (including co-branding, licensing and other strategic transactions), and venture capital transactions and other forms of equity and debt offerings (public and private), strategic alliances and partnerships, and mergers and acquisitions.

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

A: The most challenging transaction on which I worked was also one of the most recent transactions I handled; the take-private of Playboy Enterprises.

This transaction, which stretched over a period approaching two years, included all of the usual issues associated with any take-private transaction, including addressing U.S. Securities and Exchange Commission and Delaware statutory provisions and case law precedent associated with a take-private, developing a capital structure and collateral package that would be attractive to the debt syndicate in an uncertain economic climate (especially given the dearth of bank financing and the somewhat "off center" aspects of the company's noncore adult businesses), addressing shareholder class action claims and ensuring the commitment of the key PEI management members to the deal.

What made the deal unique was the opportunity to work with one of the legends in American media, Hugh Hefner, who had significant impact on social dialogue in the second half of the 20th century. Given that his ongoing involvement was viewed as critical to the transaction and the brand, it fell to the deal makers to cut a deal structure that provided an appropriate framework for his continued involvement, while also satisfying all of the customary demands and needs of a take-private.

This required a fresh approach to considering the economic and contractual issues associated with a founder/control shareholder take-private, and meshing those issues into a transaction that provided appropriate deal protections for Playboy's shareholders.

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

A: There are a variety of areas in need of reform, including having more clarity around proposed SEC registration requirements for investment funds, taxation of carried interests, Foreign Corrupt Practices Act compliance and the like. However, the aspects that have caused the most consternation and probably in most need of reform in the current economic climate are the bank ownership limitations imposed under the Bank Holding Company Act and Federal Deposit Insurance Corp. change of ownership rules.

The ongoing instability in the U.S. banking system and the lack of access to capital sources that can provide significant capital support to these institutions (the need for which will become more acute as the Basel III accords on capital and liquidity are implemented) provide an odd and troubling situation; we have a class of sophisticated investors who are ready, willing and able to provide stability and support to the U.S. banking system, but who are shut out of the system by somewhat arcane legal ownership limitations arising from concerns about whether financial investors might somehow misuse the assets of a bank to the disadvantage of the insurance fund.

By shutting funds out of having control of insured depositories, the number of investors that are able to gain control of a troubled depository becomes relatively small, which simply drives down the potential value those depositories can achieve in a sale (and correspondingly, drives up the potential exposure to the insurance fund due to losses at these troubled institutions). Given the country's experience in the last three or four years, it is perplexing that institutional private equity funds have been and continue to be singled out.

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

A: Interestingly, the most important issue to my PE practice has been the elevation of Travis Laster to the Delaware chancery court. For many of us who practice in PE, Travis (now known as Justice Laster) was our "go to" guy on Delaware law issues, especially those involving take-private transactions. He was intimately familiar with our issues, concerns and deal structures, and had an extremely practical and sensible, no-nonsense approach to helping non-Delaware lawyers reach resolution on key deal issues.

His has brought his intimate knowledge of these issues and no-nonsense approach to the court, and has already laid his imprint on how deal lawyers advise their clients (e.g., few attorneys (if any) will suggest to their clients that a financial advisor to a target or a special committee should be permitted to provide stapled financing to a target after the Del Monte/Barclay decision).

Given Justice Laster's relative youth, it appears that he will have a significant impact on the practice of law for years, if not decades, to come, and could become one of the most influential justices that Delaware has seen in some time.

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

A: Rob Knauss of Munger Tolles. Rob and I worked together on the Playboy take-private, with Rob representing Mr. Hefner and I representing Rizvi Traverse. Rob's job was to explain the structure and approach of the transaction to Mr. Hefner, requiring him to distill relatively complex legal and business concepts into something Mr. Hefner could digest and understand, while at the same time ensuring the transaction included provisions that were critical to Mr. Hefner.

This required quite a balancing act to satisfy the needs of the capital markets (during a period when the debt markets were shifting very quickly) and the requirements of Mr. Hefner. Rob approached the task in a simple, practical and constructive manner, handled negotiations in a straightforward and no-nonsense manner and was a key reason the transaction was completed. Note that Rob has an excellent track record representing boards and committees in take-privates, as well as a variety of investors and issuers in private equity transactions, which is a testament to his approach and skills.

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

A: As a third-year associate, I had expected that simply billing a lot of hours was what would make you a great lawyer. And as a third-year, I did; billing about the most hours in the firm that year. But at the end of the year, I received one of the smallest bonuses of all associates. In my review, I was told by one of my mentors, Dennis Hill (who was also one of the best legal minds I ever encountered), that simply working hard and "checking all the boxes" does not make one a good lawyer; you also need to always think outside of the box and, perhaps most importantly, learn as much as you can about what the person on the other side of the table is thinking.

That one review (and relatively small bonus check) stuck with me my whole career and changed how I approach the practice of law. Transactional law is not a "one size fits all" practice, but requires careful preparation to understand and further not only your client's interests, but also what is important to the person sitting on the other side of the table. If your client wants a square peg and the person on the other side table only has a round hole, you better do more than try to jam that peg into the round hole; rather, you need to consider how you the two sides can develop a common approach that addresses issues critical to each.