Q&A

Wachtell's Benjamin Roth on Patent M&A and a New Round of Hostile Bids

The deleveraging of U.S. corporations and the re-birth of hostile activity may help determine the dealmaking environment ahead, says **Benjamin M. Roth**, a partner at **Wachtell, Lipton, Rosen & Katz**. Roth advised **Kellogg Co.** on its $2.7 billion acquisition of Pringles potato chips from **Procter & Gamble Co.** in May, and he represented **Walgreen Co.** on its purchase of a 45 percent stake in pharmacy chain and distributor **Alliance Boots GmbH** this month. Roth also helped **Clorox Co.** reject an unsolicited takeover bid from activist investor **Carl Icahn** last year and advised **Temple-Inland Inc.** on its $4.3 billion sale in February to **International Paper Co.**, which began hostile and became friendly. He spoke with Will Robinson.

Q: Walgreen CEO Greg Wasson said buying Boots outright would have been too risky right now and Bloomberg News reported that Walgreen was comfortable with the initial investment because Boots is primarily in Britain, which it saw as a safer region. What are your clients telling you about M&A in Europe right now?

A: There are tremendous opportunities for those strong companies that are willing to perhaps buck the trend a little bit and invest in Europe when others may be shying away. I think it really is company-specific. And hopefully the economic situation in Europe and especially southern Europe will stabilize in the near future.

Q: You represented Walgreen on its Duane Reade and Option Care acquisitions, its second and third largest after the Boots deal. What made the deal work unique on this one?

A: The transaction structure is somewhat unique and designed for this particular transaction. Obviously for all the reasons the Walgreen senior executives have said publicly, this is a structure that they believe is in the strategic best interest of Walgreen's and it makes a lot of sense for both companies. It is a unique structure. I'm not sure every deal will lend itself, or frankly maybe no other deals will lend themselves, to a structure like this, but certainly in this case it makes sense for the two companies.

Q: You worked with Google on its stalking horse bid for Nortel's patents last year before those ended up being sold to a group that included Apple and Microsoft. What were the key takeaways from that experience for you?

A: Even for the extremely large, most successful tech companies – Apple, Google, Microsoft and all of the iconic, largest, most successful tech companies – it's interesting that the patent portfolio of those companies really is critical, not only for the developments of some of the next generation of their products, but just to defend themselves in the dog-eat-dog world of patent litigation. We've seen a number of large patent sales over the last two years and the price for patents in those sales has never been higher.

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Q: Bloomberg had a story on the trend of patents moving into the mainstream of dealmaking after previously being seen by M&A bankers as niche assets. Is that something you've seen?

A: That's quite true. I don't know that 10 years ago there was ever a deal that was based primarily on patents like you've seen with Nortel or AOL, and similar situations. It is a unique phenomenon that has only arisen in perhaps the last five years or so.

Q: You also worked on two deals that were hostile or unsolicited last year. How would you compare the experience of working with Temple-Inland, which ended up being bought, and the work you did for Clorox, which remains independent?

A: In the last four or five years there has definitely been an increase, or perhaps a re-birth if you will, of hostile activity, both by strategic acquirers and financial ones. Temple-Inland is a classic example of a large strategic acquirer seeing an opportunity in a smaller, well-run solid competitor and seeking out a transaction on an unsolicited basis. In Temple-Inland's case they wound up deciding that selling to International Paper made sense to the company at the time for a lot of reasons that are in the disclosure documents.

It contrasts with Clorox, which again is another one of these iconic American brands, very well run and solid, being approached by an activist investor, Carl Icahn, who has a long and storied career making acquisition attempts at companies. In the case of Carl Icahn, unlike a strategic acquirer, there really wasn't a great case to be made as to why Clorox could be sold. It was a very well-performing company. It has performed well since Carl Icahn went away and there's no real compelling reason for shareholders to sell the company at that stage in its life when it's got a bright future and it's doing very well. It's just a very different kind of context than a strategic acquirer that can put synergies to work and perhaps make the combined pot greater than the individual pieces.

Q: What's different about hostile activity since its re-birth?

A: I don't know that there's that much different about it. Obviously it's been around for decades, but it seems to me and when you look at the numbers there's definitely a trend upwards and I think perhaps that's associated with more and more sort of activist-type investors, activity financial investors. Perhaps the loss of the stigma associated with an acquirer approaching a target on an unsolicited basis, whereas once upon a time that may have been frowned upon by businesspeople, the stigma that I think once was associated with that, perhaps is not gone, but is less so and investors are perhaps more willing to entertain unsolicited bids than they were 15 or 20 years ago.