



PRACTICE SPOTLIGHT

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Charles Nathan

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Latham & Watkins' Charles Nathan recently spoke with Business Law Currents about developing trends in M&A, the impact of shareholder activism, and how investment banking made him a better lawyer.

Business Law Currents: Tell us a little bit about your background – where you grew up, where you went to law school, and how you ended up practicing at Latham.

CN: I went to Yale Law School. After clerking for the Federal Circuit Court of Appeals in D.C. for a year, I came to New York wanting to practice corporate law. I joined Cleary, Gottlieb, Steen and Hamilton where I specialized in M&A and was a partner for eleven years.

Then in 1984, in a bout of mid-life crisis, I decided to become an investment banker in M&A. So I went off to do investment banking for Merrill Lynch and then Solomon Brothers, where I became domestic head of industrial M&A. From there I went to Smith Barney, where I became head of financial institutions M&A.

After ten or eleven years of investment banking, I decided I wanted to try law again. I joined Fried Frank as a partner in 1995 and came to Latham in 2001. I was co-head of the global M&A practice at Latham until I retired as a partner at the end of 2009 and became Of Counsel.

Over the years I've also done a lot of corporate governance work, and I still focus on it today as co-chair of the Latham corporate governance task force.

Business Law Currents: Did being on the other side of the table help you be a better lawyer once you got back into law?

CN: I think it did. I had a much greater appreciation of the business side of deals, and I think that's what business people were looking for from lawyers. I became a little less academic and a little more practical. My detour also helped me understand the need for business people to get information in plain English and not long, dense legal memos.

Business Law Currents: What have you seen in terms of trends as we come out of this recession, particularly with regard to M&A activity?

CN: Well, the problem right now is not that people don't want to do M&A. The problem for the last year has been that the uncertainty in Europe has bled most of the confidence out of the public company M&A market.

It's ironic because some of the fundamentals are still good, but there's still enough uncertainty in both the foreign and domestic markets to scale back huge ambitions.

Now, there are still big deals that get announced and get done, but they're not nearly as many as there would be if there was a greater degree of confidence throughout the marketplace.

I think that may start to stabilize now that Greece has been put to one side. I don't think anybody believes the Greece issue has been solved, but it has been put to one side. Maybe things will start looking better.

Business Law Currents: One of the interesting things about your career is that you had experience in the M&A environment, and then you became an expert in corporate governance. How did that transition happen?

CN: I don't think it was a transition in many ways. Corporate governance and M&A have gone hand in hand for a very long time. Both are driven by the same basic body of law in Delaware – judicially created law – and with the growth of corporate governance activism, you find that many M&A lawyers become corporate governance specialists because they follow their clients.

As a generality, M&A lawyers tend to deal with the senior management groups and, as you know, in many companies it's the CEO who cares the most about governance and who drives the governance train, or the chairman of the board if it's a separate chairman. I think if you go to any group of M&A lawyers and you ask them if they do corporate governance, they'll say yes.

Business Law Currents: What trends are you picking up on within the corporate governance landscape?

CN: One of the real central issue in recent years has been the need to find good directors. A change from the pre-Sarbanes-Oxley era is that you now see professional directors with different qualifications. Every company is looking for a good, competent director who can really be additive in a value-creation way. You can always find a check-the-box director, but that's sort of like an empty seat.

It's more challenging to find a professional director who doesn't over-board and can bring something concrete to the table in terms of knowledge and understanding. That's a very valuable commodity.

Business Law Currents: What's the impact of shareholder activism on governance?

CN: In some cases, the investors know what they want but they have no way of knowing how to get it. They're not portfolio analysts. They don't understand – and don't pretend to understand – what makes companies good, bad or indifferent. They don't have a view on value or value creation.

They want diversity on the board because it sounds good, and they want good board members who are representative of everything. It's a nice aspiration, but sometimes there's a difference between what they say they want and the reality of the candidates they would choose.

It's hard to look at a board, by reading the proxy material, and say who's a good director and who's a bad director. You can't tell. The whole notion that somehow a proxy statement is going to reveal the inner quality of the board is fatuous, and it leads to a check-the-box mentality where supposedly good corporate governance is based on a matrix of theoretical board skill sets.

Business Law Currents: What's your sense of where the debate about CEO compensation is going to end up?

CN: One problem with all of this discussion is that measuring pay is elusive. Today's proxy statements don't really tell you what people are paid for a number of reasons, including that the valuation of options and other stock incentive plans are entirely theoretical and don't explain what the stock or other award was worth if and when cashed in. Now, there is a movement that's picking up steam to talk about realizable pay or realized pay as opposed to the pay opportunities that are the focus of the current proxy statement disclosure rules.

There are different ways of measuring the real economic benefit of an option, but let's say the option vests ratably over time, for example the next 5 years and that once vested can be exercised at any time within the following 10 years. At the moment in time the option vests and first becomes exercisable, you can determine factually the spread, if any, between the stock price and the exercise price. We tote that the positive spreads at each vesting date and say the person could have pulled the trigger on each vesting date and realized a given amount. That's what we will call realizable pay.

But if the executive doesn't exercise the option when it first becomes exercisable, then, as time goes on, that person's now betting on the stock market. His pay has ended and now he's got an investment in the form of an exercisable option.

If he chooses to exercise it when the spread is wide and dramatically over what it was the day the option first vested, is he being paid that money as compensation or is he just a wise investor? So the realizable pay theory is, let's try to figure out what people really could make when the option vests and you can actually turn it into cash, not when it is exercised or granted. That's the real measure of what the company contributed versus what the market contributed.

Business Law Currents: The net effect is that you want to align the CEO and the management to the shareholders interests to encourage growth, correct?

CN: Exactly. Realizable pay or realized pay arguably is a much better measure of what the guy is worth.

This interview was conducted by Christopher Longley, a Senior Relationship Director at Thomson Reuters.

ABOUT THE AUTHOR

Charles M. Nathan is a member of the corporate department in [Latham & Watkins'](#) New York office, is Co-chair of the firm's Corporate Governance Task Force, and is former Global Co-chair of the firm's Mergers and Acquisitions Group. His practice focuses on mergers and acquisitions, corporate counseling and corporate governance. Mr. Nathan represents companies and financial advisors in significant, high profile mergers and acquisitions. He has worked on some of the largest domestic and global M&A transactions in the last few years, including Roche's \$45 billion acquisition of the public's minority stake in Genentech, InBev's \$52 billion acquisition of Anheuser-Busch and LiveNation's \$2.5 billion merger of equals with Ticketmaster Entertainment.

Mr. Nathan has authored various articles on M&A topics and is a frequent contributor to various legal publications. He is recognized among a small group of "personalities and institutions that shape the governance establishment" by *The Deal*. He is also ranked as a leading mergers and acquisitions attorney in the 2010 Chambers US legal guide.

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