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Q&A With Jones Day's Colleen Laduzinski

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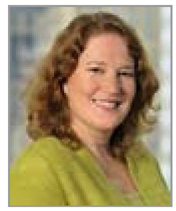

Colleen Laduzinski

Colleen E. Laduzinski is a tax partner in the New York office of Jones Day and has spent her career at Jones Day where she has developed a far-reaching federal tax practice, with experience in bankruptcy tax and debt restructurings, M&A and private equity transactions, financings and capital markets offerings and litigation settlements.

Representative transactions include bankruptcy cases and restructurings involving Chrysler, Dana Corporation, Hostess, Chemtura and Travelport; M&A/private equity deals such as Continental Airlines merger with United, Georgia Gulf's Reverse Morris Trust transaction with PPG Industries and The Carlyle Group and other funds' acquisition of AES Energy's assets; capital markets and financing transactions involving Jefferies and Sprint-Nextel; and Mahindra Satyam's cross border securities class action settlement. Ladunzinski is a coordinator of Jones Day's new lawyer group and is a member of the firm's advisory committee.

Q: What is the most interesting or challenging tax problem you've worked on to date?

A: One of the highlights of my career was a bankruptcy case that involved major tax issues. The corporate debtor client had massive net operating losses that were needed to offset future income of the reorganized enterprise. We sought traditional "first day" protections from the bankruptcy court to protect NOLs, including an equity trading order to prevent an ownership change during the case that would otherwise eliminate the debtor's

NOLs and a claims trading order to preserve the possibility of implementing a plan of reorganization that would qualify for the special bankruptcy provision of section 382(l)(5) of the Internal Revenue Code which would provide no limitation on the debtor's use of the NOLs following its ownership change pursuant to the plan.

After multiple objections from claim holders who did not want trading to be restricted, we were hauled into bankruptcy court to plead our case as to why claims trading restrictions were warranted. This involved our colleague from an accounting firm being aggressively cross examined on the stand by a litigator — while wearing a bow tie — about the intricacies of section 382. The hearing culminated in a heavily negotiated temporary order that permitted limited claims trading with the possibility of holders being forced to sell down their claims in the future. We were also ordered by the judge to produce the first ever L5/L6 report showing there was a reasonable likelihood that the debtor would effectuate a plan of reorganization that would utilize section 382(l)(5) (as opposed to section 382(l)(6)).

(The report was the result of summer months spent in a conference room and contained some beautiful colored graphs in the shape of a cityscape, which one of the associates made into t-shirts for the team as well as a onesie for my daughter whom I was expecting during the case.) We were successful in satisfying the judge with our report and in obtaining a final order.

Q: Currently, what is a pressing tax concern for your clients and how are you addressing it?

A: The lack of clear guidance from the IRS and the courts in certain fact-sensitive areas of the law as well as recent no rule pronouncements by the IRS.

One example our fund clients — and our banker clients who put together deals involving funds — grapple with is the question of whether debt investing or debt restructuring/workout activities cause offshore funds, or non-U.S. or tax-exempt investors in U.S. funds, to be engaged in a lending business in the U.S. and therefore subject to U.S. tax on effectively connected income. Most funds have their own internal guidelines that are quite specific about the types of debt investing they can and cannot engage in and each fund will have its own appetite for risk and its own profile of activity in debt investing.

But it is so facts and circumstances, and apart from one IRS chief counsel memo from 2009 there is very little guidance. So, it becomes a challenge in practice to put deals together for example where multiple funds are investing in or restructuring debt and all of them have different risk profiles on this subject. There are certain practical approaches that can be used to keep loan origination risk away from funds and the key is to work with the funds and the bankers to figure out what the common strategy is to get everyone as comfortable as they can be.

Another example is the IRS' issuance of its 2013 no rule list in the section 355 tax free spinoff area. Without the ability to obtain rulings on questions relevant to leveraged spinoffs, for example, major questions are left open in the section 355 area. Some of these matters will be able to be covered off with tax opinions issued by legal counsel, but those spinoffs (particularly leveraged spinoffs) that are proceeding are proceeding with caution.

Q: What do you anticipate being the biggest regulatory challenge in your practice in the coming year and why?

A: The Foreign Account Tax Compliance Act. For the past few years since FATCA was announced, we have seen in the financing area heated battles in negotiations about whether lenders or borrowers should bear the risk of FATCA withholding taxes should they apply to a particular loan. Over time, market standards for risk sharing developed and became pretty well established, as reflected in the LSTA model credit agreement. All the while, FATCA was a bit of an abstract (albeit huge) future problem particularly because those loan agreements would be grandfathered under the FATCA rules and because the IRS has extended the effective dates a few times. But now we are staring the upcoming July 1 grandfathering and effective date in the face again.

We counsel clients on how to comply with or structure around FATCA, but I am not sure that anyone will truly appreciate the enormity of it all until the effective date arrives and those old financing agreements start being significantly modified or new financing agreements are entered into and it all becomes a reality. It feels like Y2K all over again. Or the ACA effective date — heaven forbid!

Q: Outside of your own firm, who is an attorney in your practice area whom you admire and what is the story of how s/he impressed you?

A: In the area of tax aspects of litigation settlements, I find Robert Wood to be an ever reliable source of knowledge and expertise. He is a prolific author and his publications tend to be spot on, substantive and practical in navigating an area of the law that requires negotiation and judgment on matters such as allocating class action settlement payments between wage and non-wage income.

Todd Maynes is an excellent outside-the-box, creative thinker and someone I work with quite a bit in the bankruptcy tax area. He has worked on a lot of great cases. I also like that he has incorporated our bankruptcy tax publications into his curriculum for the bankruptcy tax class he teaches at Northwestern. And, we once appointed him as a neutral tax arbitrator in a dispute, and he was balanced, fair and provided a favorable resolution for our client.

The late James Eustice was a memorable professor of mine at the NYU LLM program. Sitting in his consolidated returns class hearing his war stories about living through version after version of proposed and final regulations and learning from history was an incredible experience.

When I was a summer associate at Jones Day, former partner Richard Andersen gave me my first tax assignment. After I drafted some case summaries for him, he told me I should consider becoming a tax lawyer — that I had a knack for this. I never would have gone the tax lawyer route had he not pointed that out, but I took his advice and I have never looked back. Along the way, Carl Jenks, now retired, was a great friend and taught me a tremendous amount about bankruptcy tax and restructurings. Because I have spent my professional career, 13 years, at Jones Day, I have been most impressed with the amazing mentors I have had here and I am also very happy that several of my mentors are now my partners.

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