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Texas – Law Firms

Texas Again Leads The Way

The Editor interviews J. Kenneth Menges, Jr., Co-Head of the corporate practice at Akin Gump Strauss Hauer & Feld LLP.

Editor: Texas seems to have weathered the economic storm better than most other states. To what do you attribute that?

Menges: Based on my experience as a business lawyer in Texas for more than 25 years and as a member of the board of the Dallas Regional Chamber of Commerce, I believe that there are several reasons why Texas's performance has been more positive than most of the rest of the country. First, Texas has all the fundamentals for businesses to thrive: low costs, especially in terms of labor; low business taxes; and no personal income tax. Second, housing prices didn't inflate as much here compared to other regions, so the recent decrease has been minimal. Third, consumer spending has been more stable in Texas, in part because we have a lower unemployment rate than elsewhere. Finally, Texas continues to lead the country in terms of dollar volume of exports. Exports are not tied to any one industry, and include manufacturing, agriculture, tech, medical devices and some energy.

Editor: That's certainly a change from the difficulties you experienced in the 1980s.

Menges: That was a double whammy of declining energy and real estate prices. The Texas economy was not as diversified then as it is now.

Editor: Are Texas financial institutions lending, or have they pulled back and become more selective?

Menges: Banks, for the most part, continue to sit on the sidelines. Underwriting standards for new loans and refinancing continue to be very tight. The large national banks, all

of which have strong presences here in Texas, are just not lending at the same pace as they were. But the stronger regional banks are stepping up to fill part of that void.



J. Kenneth Menges

Editor: You mentioned the impressive exports sector. Is there any one particular sector that has turned Texas into an international player?

Menges: There are many factors that contribute to the increasing international focus of Texas. Dallas-Fort Worth is home to a number of defense contractors. The logistics in Texas are among the best in the country in terms of multimodal ports for inbound and outbound cargo. The Alliance Airport is devoted solely to components inbound for assembly and then shipped out. There are many different factors, but no one industry dominates.

Editor: What developments are you seeing in M&A activity nationally? Have private equity, venture capital or hedge funds picked up the slack, or are they also being cautious?

Menges: The M&A sector is still very soft in general, but there are a couple of exceptions, including the banking sector. There is a fairly active M&A market in the Southwest in general involving the acquisition of financial institutions. Banks are buying market share by acquiring smaller banks. Hedge funds are creating distress funds for investment in enterprises they believe can be bought at a significant discount.

Editor: Is this also true for debtor in possession (DIP) financing?

Menges: The traditional lenders of DIP financing were just as paralyzed as the rest of the commercial banking sector for most of the last 12 months, but there has been some loosening of the purse strings.

Editor: You co-chair your firm's national M&A practice. Please tell our readers what geographic and practice areas may be showing signs of recovery outside of Texas.

Menges: There is opportunity in distress situations – not just bankruptcies, but in facilitating companies as they transition from one lender to another, or recapitalize. There is a lot of activity for our firm nationwide. There is a noticeable uptick in the number of companies considering initial public offerings. There is a desire by investment bankers to get in line at the SEC, so that when, in their marketing judgment, a company can be taken public, the issuer can quickly move.

Editor: How do you see the Obama Administration's regulatory stance with respect to your practice? I'm thinking not just of the SEC but also antitrust and the other regulatory hands on the economic tiller.

Menges: The Obama Administration has advanced a number of different programs affecting how markets are regulated, how companies operate and how financial institutions function. The ink is not yet dry, but a few of these initiatives include the SEC's increased attention to executive compensation and shareholder access to the proxy statement process and the announced intention to apply a much higher level of scrutiny to acquisitions on antitrust grounds. We have not seen many tangible effects of this yet, but the Administration is using its bully pulpit to warn companies. Also, the actions that have been taken in connection with the financial

services sector, namely the bailout of AIG, TARP, the government cash infusion into General Motors and Chrysler, all of those have unknown impacts on how we do business as corporate lawyers. We are looking at the government's role in the bankruptcies of General Motors and Chrysler, where the companies were required to maintain certain manufacturing plants in states where they are currently located. Texas is watching to see whether government support for distressed enterprises will have an adverse impact on the ability of companies to move here.

Editor: Given Texas's reputation as a business-friendly state, there may be some ambivalence about how new regulatory requirements might be applied nationwide, preempting state law.

Menges: Texas has been very aggressive in attracting companies to move here. Incentives are in several forms. Texas is not the only state to do so, but we think we are among the more successful, and have a remarkable number of companies moving here, and even more telling, very few companies leaving.

Editor: I understand that there's a high-tech corridor in the air between Silicon Valley and Austin these days.

Menges: Yes, but it's not limited to Austin-to-San Jose; the growth of air traffic routes that originate from Texas has been among the highest in the country. We are very fortunate to have the corporate headquarters of American Airlines and Southwest Airlines in Dallas and Continental in Houston.

Editor: Over time the whole business complexion of Texas seems to have changed. Please talk about that change in terms of the plaintiff bar.

Menges: In the '80s and early '90s, Texas was viewed as a plaintiff-friendly state for all manner of lawsuits, but beginning in the mid-'90s the Texas legislature began to limit punitive damages. Those steps improved the business climate, but there continued to be concerns about abuse of the judicial process, particularly as related to medical malpractice cases. Texas in the '90s continued to experience a decline in the number of physicians, especially with certain specialties such as ob-gyn. So in 2003 the Texas legislature enacted a broader package of reforms that have had a dramatic impact. Those include: a cap on non-economic damages; higher standards for class action lawsuits, allowing interim appeals to the Texas Supreme Court to challenge the certification of various classes; and presumptions created in product liability

cases in favor of defendants whose products complied with federal safety guidelines at the time they were manufactured. Reforms were also aided by a conservative approach by the Texas Supreme Court. I heard recently that since 2003 over 50 Texas counties have actually attracted ob-gyn doctors where they had none before. This is no coincidence – it reflects the reform of that aspect of litigation.

Editor: Is this effort at legal reform coordinated by the Chamber or the Bar?

Menges: There are different business coalitions that pursue certain aspects of reform that matter to them most, but no single driver. Also, to be fair about the current state of litigation in Texas, it must be noted that at the same time there has been a dramatic decrease in tort litigation, the Eastern District of Texas has become one of the centers in the country for intellectual property litigation, with an accelerated docket process as well as very knowledgeable judges, and that attracts a lot of IP litigation, which often tends to be company against company.

Editor: Tell us how some hot button issues, such as the Employee Free Choice Act, the Medical Rights and Reform Act and immigration are perceived in Texas. Is there some consensus, or is there a dispersion of attitudes?

Menges: Texas is a very large, diverse state, so you would not find a consensus on many issues, but Texas has historically been a business-friendly state. It is a right-to-work state, so there is less organized labor than in other states. We have a strong energy base, so we have people who follow very closely the proposals on global warming, particularly the cap-and-trade proposals. But for every business concerned about negative impacts of cap and trade, there are businesses looking to take advantage of opportunities, such as wind-generated electricity. Texas is home to some of the largest manufacturers of wind turbines and the largest number of wind farms in the U.S.

Editor: And Texas is home to T. Boone Pickens.

Menges: He is a remarkable entrepreneur in areas ranging from old-style energy such as oil and gas, to new-style energy such as wind farms, to other natural resources such as water. Texas, as a growing state in the Southwest, is concerned about water availability in the future, and T. Boone Pickens is in the middle of that as well.

Editor: As the leading exporting state, tell

us about your Latin American and Asian practices.

Menges: Our firm is very active in all of Central and South America, and Texas is Mexico's neighbor. Likewise, it is impossible to be in the stream of commerce in the 21st century without being in Asia. The opportunities are simply remarkable and frankly unique in the world. We have a significant international trade practice, including representing foreign enterprises and sovereigns, and we think we have a pretty good feel for what companies or governments dealing with the United States and its companies can and should be doing. Over the past number of years, the fees from half of the top ten clients of the firm received in any given year are from non-U.S. companies.

Editor: You've strengthened your international commercial arbitration capabilities. How do you see that progressing over the next five to ten years?

Menges: We note that there are an increasing number of transactions that are between companies from different jurisdictions, many that don't have any dominant tie or base in the United States. The resolution of disputes between those enterprises typically goes to one of just a handful of forums and we need to be able to serve our clients in those matters.

There are significantly more initial public offerings done in non-U.S. markets over the past couple years than in U.S. capital markets. This is not simply a rejection of Sarbanes-Oxley by foreign issuers; it's an acknowledgment that companies in Hong Kong or in London feel they can get the right valuations in those cities, as opposed to coming to the U.S.

Editor: How do you see the future of the profession?

Menges: The honest answer is we don't know if the traditional business model will be permanently changed as a result of the global economic calamity. It seems clear that it is unlikely that we will wake up from a dream, like that famous scene in the old *Dallas* television series where a character awakens to find that the last year has been simply a dream. Clients are probably permanently sensitized to costs and need to have very, very efficient service providers. The Obama Administration and the new Congress will be changing the landscape, as any new administration and new Congress does, which will further increase the need for knowledgeable, sophisticated advice, but the crystal ball is still very cloudy in terms of exactly where we will find ourselves in a few years.