



Practice Spotlight: Kerry E. Berchem

Partner, Akin Gump Strauss Hauer & Feld

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Akin Gump Strauss Hauer & Feld partner Kerry E. Berchem recently spoke with *Currents* about emerging private equity trends, how companies are reacting to the current regulatory environment and Dodd-Frank in particular, and how law firms can position themselves for success.

Business Law Currents: Tell us how you got started as a transactional lawyer.

KB: During law school, I was very interested in tax, but in practice, it did not seem right for me. I also considered litigation because I am somebody who does like to argue — but at the same time, I do not like to lose. After a bit of soul searching, I decided to become a corporate transactional lawyer; I can lose on one point but win on the ultimately more important points for my clients.

During my initial years of practice I was involved in an insurance corporate group and was able to participate in a variety of transactions, albeit with a specific industry focus. So I have capital markets experience, M&A experience, as well as regulatory experience — and I really enjoyed that. I was able to get a comprehensive general corporate background, which, frankly, has served me very well in the recent and current environment.

I moved to Akin Gump in 1997, when the New York office was fairly new and principally represented private equity and hedge funds. I was seeking a different client base and different experience. But as it turned out, my move was quite prescient: A couple of years later, private equity got very interested in reinsurance and insurance investments and I was one of the few at Akin who understood the industry and spoke the language. A career was born.

Business Law Currents: What is your practice mix like today?

KB: I work with both issuers and investors but have a soft spot working with companies and their boards. Many of my clients originally were sponsored by Akin fund clients, or acquired by Akin clients either as a portfolio company or via a corporate reorganization where equity changes hands. Among my top clients, each for many many years, are Alterra Capital Holdings Limited (formerly Max Capital Group Ltd.), Greenlight Capital Re Ltd. and Anchor Glass Container Corp.

Business Law Currents: In the current economic environment, many companies have had to get creative in structuring deals. Any stories from the field?

KB: I have worked with a number of privately held companies recently that have had to weigh many options. Investors are looking for liquidity events and yet in many instances buyers and sellers are not in the same ballpark when it comes to valuations. So I have seen auctions almost go the distance, but where the seller ultimately pulls the plug and then considers modified Dutch auctions, leveraged recaps or an IPO. Sometimes all three.

Business Law Currents: We have discussed in *Currents* that there is a huge amount of PE money that needs to be put to work right now. We have also noticed a lot of funds looking to exit investments as the market warms up. How has it been from your perspective?

KB: From my perspective, there seems to be a lot of talk but intermittent action. Some industries and certain markets seem to be hot, retail and technology being two of them. But I think a lot of folks assumed that Q1 of 2011 would be active for the masses. And I don't think that is the case. Activity seems to be lumpy, with PE funds poking around but not necessarily making a decision to pull the trigger unless they see a truly compelling opportunity.

Business Law Currents: The private equity side of business is often driven by macroeconomic factors or even regulation, for example, last year when the tax laws appeared like they were going to change and then they did not. From the issuer's perspective, what is driving financing activity right now?

KB: Management's job is to maximize value for their constituencies. Financing markets are generally attractive for a lot of issuers right now. And, in some cases, obtaining financing and doing a tender, participating in share repurchase or making extraordinary dividends via a leveraged recap may be the most attractive and accessible option to return value to shareholder for the foreseeable future.

I think that in the last few years, boards and managements of companies are in many ways like a household on a budget: you have to prioritize paying the bills, figure out which "honey do" list items really need to get done, have a little fun and invest in a few key items, but continue to forge ahead without becoming stale or unmotivated. You always have to strive to do better than you did yesterday.

Business Law Currents: Do your client boards look to you to advise on the business?

KB: I have never formally been a board member but I do not hesitate to speak up if I have an idea or question that I believe is relevant to the conversation. As a trusted advisor to a number of boards and senior management, I am regularly asked advice from a legal perspective, but also from a business perspective. I really feel fortunate to be able to participate in those types of discussions. Being involved in business is a key reason I became a corporate lawyer. I very much enjoy understanding the strategy and strategic direction of my company clients. I think this experience also has aided me in my own current management roles at Akin Gump.

Business Law Currents: What are boards most anxious about this year with the rapidly changing regulatory environment in the U.S.?

KB: I think that's a question that is going to have a different answer in any given month. Boards can't address everything at once, and neither can the SEC. During proxy season it was say-on-pay, say-when-on-pay. A number of boards are turning their attention to whistleblower and clawback policies in anticipation of the SEC rules that are yet to be promulgated.

What I have seen more recently are regular and sustained conversations about the company's overall governance policy. Boards are really focused on governance, giving themselves a scorecard, thinking about what the proxy advisors are saying and, sometimes, even voluntarily taking previously unheard-of steps — like voluntarily declassifying staggered boards.

Business Law Currents: With hindsight, many politicians are second-guessing Dodd Frank and whether we needed to go so far with legislation. Do you think the pendulum will swing back?

KB: I suspect it will. I am in the midst of re-reading Ayn Rand's Atlas Shrugged. Can we sustain ourselves in our economy and our country with constant regulation? I don't know. And certainly, there has been backlash from a number of very prominent dissenters. How do you incentivize and allow U.S. businesses to grow and thrive with that amount of regulation? Does Dodd-Frank make the playing field level or skewed in favor with those that have political connections?

Business Law Currents: What has Akin Gump done to stay competitive throughout the economic downturn?

KB: Akin's corporate practice, knock on wood, has been very busy for the last couple of years. We have been active with long-sustaining clients that have opportunistically capitalized on M&A and finance opportunities.

We are very focused on working with and for our clients and strive to be integral members of their teams. We try to make our clients' lives easier, not harder, whether that is creatively solving a problem or opening a door. Our network is their network; our resources are their resources.

We put on a number of "boot camps" and other educational programs for business, as well as legal, people. For example, we did one for a client that had recently gone public and wanted their senior management to understand what it meant to be a public company, including a basic understanding of reporting requirements and Reg FD issues. We also provided another client with a program on the core principles in doing an M&A transaction. Providing these value-add initiatives gets the client's mid-to-senior-level people up to speed on the basics and acclimated to the legal world of doing corporate deals, while allowing us to strengthen our relationships.

Business Law Currents: Law firms are less leveraged than they ever were. How do you develop competence in such an environment even when regulatory change is increasing?

KB: No client wants to pay someone to learn on the job. On certain issues, law firms need to designate certain people to become the experts. You need to have both generalists and specialists. In baseball, not everyone can be a starting pitcher; you have to have a closer. That is how we run our practice here at Akin Gump. We have some really, really talented and focused closers! And our starting pitchers know when to call in relief.

Business Law Currents: What are the main challenges you have faced since coming on board as co-chair of Akin Gump's corporate practice?

KB: Akin Gump's New York office has a longstanding reputation for our work in funds, restructuring and fund-related litigation. But New York is a corporate city and it is not easy being known as a stand-out among such great competition. My focus as a corporate practice manager has been and continues to be to let people know about how good our entire corporate group really is — in the city and throughout the country. We do billion-dollar deals and our clients know how great we are. More people should be let in on the secret.

I also think that we need to have more critical mass. But, while I want us to grow I don't want to grow just to get bigger. Our goal is to add muscle mass, not fat!

Business Law Currents: What do you do to keep everyone at the top of their game?

KB: *From the multitude of sports analogies, you have probably guessed that I grew up as a jock. I played basketball and was a point guard. Leaving aside academics, my greatest accomplishment in high school was setting a school record (that still stands) in assists. That sort of speaks to my philosophy here: Everybody on the team needs to be a productive and contributing member of the team; we don't rely on solo superstars. If you succeed you are applauded and if you don't you are coached to do better. It is a collective effort and we take pride in helping each other out.*

Business Law Currents: Any unexpected or fun experiences of note?

KB: *Our NY offices here at One Bryant Park have such great views that it has attracted a lot of interest from filmmakers. There's a movie coming out on June 17th called "Mr. Popper's Penguins" starring Jim Carrey. They crew used our offices for four days and, in an effort to assuage the lawyers who could not use the conference rooms, the film crew offered up two "extra" roles. We had a raffle — one lawyer and one staff person were chosen to be an extra for a day. Of the 93 lawyers who put their name in the hat, yours truly was selected. I had no fewer than 92 emails saying "It was fixed!" Look for me behind the reception desk: Jim Carrey walks in and — 152 takes later — I give him a dirty look. All in a day's work.*

Kerry E. Berchem, co-head of Akin Gump's corporate practice and member of the firm's management committee, advises companies, including boards of directors, and financial services clients, including distressed, private equity and hedge funds, in (i) mergers, acquisitions and private equity investments; (ii) capital markets transactions; (iii) corporate governance matters and (iv) reorganizations and recapitalizations. In 2011, she was named to the *American Lawyer's* "45 Under 45" list, recognizing the top female lawyers in private practice. In 2010, she led one of the largest financial services mergers of the year. As noted by *Chambers USA*, displaying "*great business judgment*," Kerry Berchem is recommended as "*go-to counsel*" on corporate matters. For ancillary advice outside of the M&A realm, one client stated: "*She always finds the right person for the right issue.*" Her "*unparalleled commitment to clients*," was particularly noted by sources.

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