

Judge David O. Carter's Speech

Chinese businesses and companies are heavily involved in our economy in the United States, and often are active in our legal system. In discussing some of the most common struggles and challenges these companies face in our legal system, I think it is important to highlight a few primary areas.

I. Procedural Issues

First, for companies without a presence in the United States, or with a limited presence, or for those suing such companies, it is best to start with the jurisdiction of the federal courts, and say a brief word about our state court system.

As many of you already know, the United States has two fundamental legal systems. First, our federal system, in which I serve as a judge. The federal system is the most relevant for this audience; we handle the majority of litigation between domestic entities and international entities, the bulk of intellectual property litigation, and nearly all litigation related to federal statutes. The other system is the state court system, which is really fifty separate systems, each of which exists within its respective state.

There are two issues I would like to highlight. The first is quite obvious: be conscious of which system you find yourself in, and follow the rules and procedures for that system. This means a few things. It includes being aware of the actual law of the forum, because your legal responsibilities, rights, and obligations might be different under federal law than any given state law. That's the obvious one. It also includes the procedural rules and what we call the local rules, the nuts and bolts of when things are due, how they should be filed, and what a party is responsible for in the process of litigating a case. The last piece is the culture of the forum, in terms of how parties and attorneys interact with each other, how they interact with the Court, and what's common and expected – the soft things. When practitioners get confused about which forum they are in, sometimes I see some pretty unfortunate mistakes that can really prejudice a case. They might miss crucial deadlines, cite the wrong law, or waive certain procedural rights that could make a serious

difference. So, just as an initial thought, watch out for the state law and federal law differences.

The second procedural piece I want to highlight is a note on a recent Supreme Court case on general personal jurisdiction. In federal court, I only have jurisdiction over an individual or a company if certain requirements are met, which many of you are probably familiar with. I can only call you into my Court if you have enough of a presence in my district that we think it's fair for someone to be able to sue you there. If you're being sued for something that you did in my district, I have jurisdiction. But sometimes someone might file a lawsuit against you even though nothing related to the lawsuit happened in my jurisdiction. Similarly, you might want to bring a lawsuit against someone in your home district for conduct that didn't actually happen there. Whether you can do that depends on general personal jurisdiction.

I bring this up because the Supreme Court recently issued a new opinion on general jurisdiction that I think will really change things for foreign corporations. It's *Daimler AG v. Bauman*, and it came out in January of this year. The plaintiffs brought claims against a German company for events that all happened outside the United States, arguing that they could sue the company in California because the company had a large subsidiary there, Mercedes-Benz USA. The subsidiary had a big presence in California – multiple physical offices, including a factory and regional office, and was the largest supplier of luxury cars in California. The Supreme Court said that, even if the Court assumed the subsidiary was the same as the parent (which isn't clear), the presence in the California wasn't enough to for the plaintiffs to be able to sue.

All of your general counsels' offices and so on will already know about this. For the purposes of litigating in my Court, I want to bring up a few specific things. First, it just got much harder for a plaintiff to sue you in any state other than your place of incorporation or your main place of business in the United States. So, when you file your early motions to dismiss, don't forget that – a few of our parties have already, and have lost out on good opportunities for their clients. If you don't make that argument when you have the chance, you waive it.

Second, if you're trying to bring a lawsuit, it gets harder to sue someone in your preferred jurisdiction if the events you're talking about

didn't actually happen there. This can really cause problems if you are trying to sue another international corporation over a contract to manufacture or deliver goods, for example, and no conduct actually happened in the states. This is a good reason to consider putting forum selection clauses in your contracts, to short-circuit this problem; choose the venue for litigation in advance.

So, that's a relatively recent change in procedural law that has been making some waves in our courts recently, especially for our foreign litigants.

II. The Regulatory System

I also want to touch on the importance of planning for the legal implications of our regulatory systems. The regulations underlying all of our statutes create a whole separate set of obligations and responsibilities, and they can be particularly troublesome for international actors. There are two big takeaways here: First, be aware that there are a lot of regulatory systems at play, and they have serious consequences. Second, those consequences can be legal or practical.

I had a case a few years back that was entirely about dolls. The litigants were both American companies, but all of their products were manufactured in China. One of the companies had to recall about 21 million toys from this manufacturer. The toys were over the regulatory limits for the amount of lead they were permitted to contain. This caused a series of serious problems for the manufacturer, and its American counterpart, although maybe partially responsible, didn't exactly step up to the plate. So, a few things to note here. First, be very careful with the regulations for products, both state and federal. If there is a big enough snafu, it can catch the attention of the government agencies assigned to police these things, or even state attorneys general; all of these situations can be very expensive and also very bad for a company's public relations.

Another particularly important regulatory consideration is the role of U.S. Customs at the border. Customs can do a number of things, because it's both the country's border police and the acting arm for any agency that asks it to enforce a regulation or law. For anyone importing goods to the United States, understanding the Customs system is crucial. Customs

can delay goods or seize them entirely, depending on who instructs them to act. The right forum for contesting Customs' action also depends on the authority they are acting under – cases can either go to the Court of International Claims or the District Court. I flag this particularly because it's not uncommon now for intellectual property litigants to go after claimed trademark or copyright infringement in the Court of International Trade, through Customs enforcement. Patent infringement is more commonly dealt with through the International Trade Commission, which in turn has its own set of administrative law judges.

A major practice point here is simple: be responsive to any litigation in these areas. It's never a good idea to be slow to respond or to ignore a court, obviously. But particularly in this area, there can be some nasty consequences. For example, if the Department of Commerce brings an antidumping investigation against you, and you refuse to cooperate or participate by providing information, say, the Department can seek an adverse inference against you in Court. So, as a very particular thing to consider, definitely participate and respond even if the body reaching out to you isn't an actual federal Court.

I flag these things to highlight first the importance of being aware of how complex these systems are and how much trouble they can cause you. Second, I want to emphasize that the procedures, rules, and governing law for each of those forums will be different. We have an entire administrative legal system that you may have to contend with, and I don't want anyone caught unawares.

III. Labor Law

I want to touch on one point that is relevant for any business trying to operate any kind of facilities in the United States. We not infrequently see our international actors struggling with our labor laws. Again, as with everything, there are federal and local rules about how a business can hire, treat, and fire its employees. My court is in California, which has particularly strong protections for employees, for example. So the first mistake to avoid is being caught off-guard by these rules – hourly wages, reasons you can hire and fire people, the rights of people who experience injuries at work, overtime pay, etc. These rarely have mental state requirements, so a company is generally liable even if

they don't realize these rules exist.

The more important piece that is relevant to my court is the procedural device of the class action. Most of our labor suits come to us as class action lawsuits, particularly the wage and hour claims. Class actions are a unique procedural device, and they require different types of briefing and a different approach. One of the biggest differences in class action litigation is the motion to certify a class. It requires discussing whether the similarity of the issues and the plaintiffs, essentially, mean it makes sense to have all of the plaintiffs litigate together. I see one very central and very common mistake in these cases: parties will try to argue the merits of their case in the certification motions and opposition. Focus on the facts of the class and the claims; that's where the meat of the question really is. The merits might be tangentially important, but they will not form the real core of the certification issue.

IV. Jury Trials

Finally, I want to touch on jury trials. This is an area that is particularly puzzling to our international litigants, and it can cause some confusion and missteps. So I do want to highlight a couple of areas where we see the most friction in transition.

First, remember that jury trials are continuous. Because we pull jurors from our communities, all of the evidence and argument will be presented at once. There might be a break of a couple of days every so often, but the case will be essentially completely heard in one process. This creates a more compact litigation schedule, and it privileges a different type of preparation.

Second, be conscious of the different preparation materials that a jury will need to decide the issues in your case. The most important of these is likely the jury instructions, the specific legal statements that they will use to figure out what the legal outcome should be.

Finally, don't forget that convincing a jury is a different skill than convincing a judge. Often our parties, both international and domestic, that aren't used to jury trials struggle to connect with juries,

to explain things in a way that makes sense to people who likely aren't lawyers, and to present their clients in the best light.