GLI GLOBAL LEGAL INSIGHTS

Litigation & Dispute Resolution

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Contributing Editor: **Justin Michaelson**

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USA

Kenneth R. Adamo, Law Office of KRAdamo
Eugene Goryunov, Haynes and Boone, LLP

Efficiency of process

The U.S. legal adjudicatory system is split between Federal and State courts, with certain causes of action statutorily delegated to a particular court system. State courts have "general" jurisdiction over most types of civil cases. Where appropriate, State courts may apply the law of another State, Federal law, or even the law of another country, where required to do so by choice of law principles. Federal courts, on the other hand, are courts of "limited" jurisdiction over two types of cases: (1) those that invoke its "Federal question" jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States"; and (2) those that come to the court pursuant to its "diversity" jurisdiction of cases where the amount in controversy exceeds $75,000 and the dispute is between parties who are "diverse"; that is, citizens of different U.S. States, a citizen of a U.S. State and a citizen or subject of a foreign country, citizens of different States in a case where a citizen or subject of a foreign country is an additional party, or a foreign country as plaintiff and one or more citizens of U.S. States.

The jurisdiction of Federal courts is generally not exclusive. The plaintiff can choose where to bring its case: State or Federal court. A defendant sued in a State court may "remove" the action to Federal court if the case is of a type that could originally have been filed in Federal court. Some actions, however, by statute can only be brought in Federal court. For example, a cause of action created by Federal law, such as patent infringement, can only be litigated in Federal court. A tort or property claim is generally relegated to the State court system unless "diversity" jurisdiction allows for the case to be brought in Federal court.

Each State has its own system of courts of original jurisdiction and one or more appellate courts. This structure is similar to the Federal trial courts and courts of appeal. The U.S. Supreme Court oversees litigation of all Federal and State cases, but reviews only a limited number of cases. Put another way, there is no automatic right to have a case heard by the U.S. Supreme Court.

Cases in Federal court are governed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence. While each State has its own rules of civil procedure and rules of evidence, such rules are similar to, and many are based on, the Federal rules.

Litigation in the U.S. permits broad discovery of relevant documents and materials, including electronically stored communications and information. To curtail the cost of such extensive discovery, the Federal Rules of Civil Procedure were recently amended to narrow the scope of discovery to information that is "relevant" to a party's case and "proportional" to the need of the information for the case.

Efficiency in dispute resolution also relies on arbitration, and both Federal and State laws have been adopted to encourage the use of binding arbitration. Mediation before a third

party is also well accepted and many courts have implemented a "mandatory" mediation programme for all pending disputes.

Integrity of process

The U.S. Constitution guarantees due process and various fundamental rights to fair court proceedings. Criminal defendants, for example, have the right to a jury trial. Many civil causes of action also carry with them the right to a jury trial, but many parties elect to proceed before a judge only. No one (person or entity) can be brought into a court case without a formal written notice of the proceeding, the grounds for the proceeding, and service of summons. Once everyone is part of a case, each party has an opportunity to fully and fairly respond and defend itself. This includes the collection and production of documents, access to and the ability to present relevant witnesses and evidence to the trier of fact (judge or jury), and to cross-examine adverse witnesses. The accused party is presumed innocent until proven guilty and has the right to a judgment limited to the evidence presented to the trier of fact. Access to adequate legal representation is another hallmark of the U.S. legal system. Criminal defendants have the ability to request a defence attorney and many civil litigants may be able to secure *pro bono* counsel if they cannot afford to pay for representation. In fact, many organisations have been formed throughout the U.S. to assist litigants to secure *pro bono* counsel based on the subject matter of the lawsuit. Similar protections are afforded to corporations and individuals.

Privilege and disclosure

Attorney-client privilege

The U.S. legal adjudicatory system protects communications between an attorney and a client made for the purpose of obtaining legal advice. The intention of this protection is clear: to allow the client to discuss their case and exchange information freely with their attorney to secure effective legal representation. The privilege is not absolute, however, and does not protect communications made to assist the commission of a crime or fraud. The privilege may also be waived or lost by, for example, disclosure of otherwise-protected information to a third party.

Attorney work product

The U.S. legal system also protects documents prepared by an attorney or at the instruction of an attorney in anticipation of litigation, such as those recording "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation".

Waiver

It is understood that the client, not the lawyer, "owns" the privilege and, as a result, can waive it. This can occur if the client discloses the privileged information to a third party or relies on privileged information to support a litigation position. Once the privilege is waived, it cannot be re-established for the subject matter covered by the waiver. Waiver is different from disclosure in connection with a joint defence or common interest. These doctrines permit unrelated parties that are represented by separate counsel yet with aligned interests in a litigation to share privileged information without waiver. Disclosure of privileged information in connection with a settlement or mediation is also distinguishable from a waiver. The Federal Rules of Evidence (and corollaries of these rules in State court) permit parties to exchange privileged information in the context of settlement negotiations and generally prevent the recipient party from using that information in the case.

The U.S. legal system treats corporations similarly to individuals. In the context of privilege, for example, corporations generally enjoy the same privileges as individuals.

Evidence

The U.S. legal system permits a party to use any relevant evidence to make its case. This includes documents, communications, and things (both tangible and electronic) as well as witness testimony (both deposition and live; fact and expert). In fact, discovery is not limited to evidence that would be admissible at trial. As a result, the breadth of information potentially available to the parties makes the discovery process one of the most important and often most expensive aspects of litigation in the U.S. It should be noted that Federal court discovery is often broader than State court discovery.

Costs

Generally speaking, parties in U.S. litigation bear their own legal fees and expenses, win or lose, although there are some exceptions to this rule. A "prevailing party" may be able to recover some of its costs of litigation and any party can move the court to recover its attorney's fees. However, recovery of attorney's fees is rare unless, for example, the opposing party acted egregiously. Fee-shifting provisions may also change the *status quo* and be included in contracts between the parties or based on statute (Sherman Anti-trust and RICO). Even where authorised, only reasonable fees can be recovered.

Litigation funding

Contingency

The U.S. permits contingent fee agreements between clients and attorneys, where the attorneys are paid only if the client prevails. Generally, such agreements give the attorneys a percentage of the amount the client recovers. Contingent fee agreements have become common in personal injury cases as well as patent infringement litigation.

Third-party financing

Litigation financing by uninterested third parties is a growing business in the U.S. Unlike contingent fee agreements, third-party financing shifts the risk of recovery from law firms/lawyers onto financial firms. These firms essentially invest in a client's litigation and often base their own recovery of the invested funds, and any earned interest, on when the case is settled or otherwise concludes. In other words, a litigation financing firm may agree to collect less of a client's recovery if the client's case is resolved early on before the financing firm makes a significant investment into the case, on the one hand, or collect a more substantial portion of the client's recovery if the case is resolved only after an expensive trial, on the other hand.

Class actions

Class actions are permitted in Federal and State courts. Such lawsuits are brought by representatives of a class of similarly situated plaintiffs when it would otherwise be impractical for each plaintiff to bring their own lawsuit and be joined into a single case. It is not uncommon for a class action lawsuit to represent the interests of many thousands of plaintiffs, including those that do not even know that they may have an assertible cause of action. The outcome of a class action case, whether settled or tried to judgment, can bind absent (and even unknowing) members of a class but only if a court finds a settlement

or judgment to be fair, adequate, and reasonable. Class action cases may be lucrative business for lawyers at least because Federal and some State statutes provide for an award of attorney's fees to the prevailing class.

Interim relief

U.S. courts have the authority to enter preliminary injunctions and temporary restraining orders, among other interim relief, to preserve the *status quo* pending resolution of the parties' dispute.

Enforcement of judgments/awards

Judgments and awards, whether compensatory or punitive, may be enforced differently depending on the type of relief. Specific performance of an obligation, or negative performance, may be ordered in appropriate circumstances, for example. Money damages can be enforced by direct payment, transfer of a posted bond (if ordered by the court), or by property attachment or garnishment where warranted.

Cross-border litigation

It is not uncommon for certain disputes to be multi-national in nature. The U.S. component of a multi-national dispute can be brought in a U.S. court so long as the defendant(s) has sufficient "minimum contacts" to justify that court exercising jurisdiction over the party. Aside from a direct U.S. litigation component, U.S. law allows parties to a foreign proceeding to apply for discovery in the U.S. for use in the foreign case. The discovery request, and its scope, is within the sole discretion of the U.S. court where the request is made.

International arbitration

The U.S. is favourable to international arbitrations and this pro-arbitration policy is embodied in the Federal Arbitration Act (FAA). The FAA controls the scope of arbitration agreements and requires courts to enforce such agreements according to their express terms. Under the FAA, U.S. courts will ordinarily honour a contractual choice of law provision, where specified, even where the court would otherwise be required to apply the law of another State or country.

Mediation and ADR

U.S. courts treat arbitration and mediation agreements like any other contract. In other words, courts look to principles of contract law to interpret the agreements. Contracting parties are free to choose the mechanisms and procedures. Significantly, some States have adopted default arbitration and mediation procedures that apply when an agreement is silent about the specifics.

Regulatory investigations

The U.S. Congress has created many agencies responsible for administering statutory responsibilities. Federal and State government agencies can launch investigations at their discretion, and many of these investigations are resolved through settlements. For example, the United States International Trade Commission is charged with investigating whether articles of commerce being imported into the U.S. infringe a valid intellectual property right. These investigations can conclude with a general or limited exclusion order or a cease-and-desist directive, which functions as if it were an injunction.

Kenneth R. Adamo
Tel: +1 312 527 0620 / Email: kradamo23@gmail.com

Ken Adamo is the Principal in the Law Office of KRAdamo in Chicago, Illinois. Ken has extensive experience as lead counsel in jury and non-jury cases before State and Federal courts and before the United States International Trade Commission, as well as *ex parte* and post-grant PTAB experience in the U.S. Patent and Trademark Office. He has had substantial experience as lead counsel in arbitrations and other alternative dispute resolution proceedings, and actively practises before the U.S. Court of Appeals for the Federal Circuit, having appeared in over 45 appeals to date.

Eugene Goryunov
Tel: +1 312 216 1630 / Email: eugene.goryunov@haynesboone.com

Eugene Goryunov is an experienced trial lawyer who represents clients in complex patent matters involving technologies from consumer goods to high technology, networking, and wireless telephony to medical devices and therapeutics. He has extensive experience and regularly serves as first-chair trial counsel in post-grant review trials (IPR and PGR) on behalf of both Petitioners and Patent Owners at the USPTO. Mr. Goryunov is also deeply involved as trial counsel in all aspects of cases in Federal courts around the country, Section 337 investigations at the USITC, and appeals at the Federal Circuit.

Law Office of KRAdamo

360 W. Illinois, Apt 620,
Chicago IL 60654, USA
Tel: +1 312 527 0620 / URL: www.kradamo.com

Haynes and Boone, LLP

180 N. LaSalle St., Suite 2215,
Chicago IL 60601, USA
Tel: +1 312 216 1630 / URL: www.haynesboone.com

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