Civil Justice Reform – Law Firms

A Seasoned Practitioner's Thoughtful Observations On The Civil Justice Reform Discussion

The Editor interviews ***Dwight J. Davis****, King & Spalding LLP.*

Editor: Mr. Davis, would you tell our readers something about your professional experience?

Davis: I attended college on a military scholarship, and following graduation I served as an infantry officer. I was an Airborne Ranger. I returned to civilian life in 1979 and went to law school, during which I had the opportunity to serve a clerkship at King & Spalding in Atlanta. The firm, then as now, had a wonderful reputation for litigation, which is what I wished to pursue. During that summer I received a call from senior partner and former Attorney General Griffin Bell, who told me he thought it would be a good idea for me to join the firm on graduation from law school, which I did. I have been at the firm ever since.

Editor: Please tell us about your practice. How has it evolved over the course of your career?

Davis: My practice probably mirrors the trajectory of litigation in the U.S. over the last 25 years. When I started practicing in the early 1980s most practitioners were generalist litigators, and most of the cases involved one plaintiff and one defendant. My first ten trials were all in the state of Georgia.

In the early 1990s I recall speaking with a law professor friend of mine and noting that I thought the plaintiffs' bar had figured out how Rule 23 of the Federal Rules of Civil Procedure, the class action rule, would allow them to recover extraordinary amounts of money without a proportionate increase in the amount of work. I went on to say that this represented a substantial risk to corporate America and that I was going to specialize in this area. My timing was very good. By the mid-'90s class actions were simply burning through the country's litigation system, certainly up to 2005, which is when the Class Action Fairness Act was passed. Over this period I focused primarily on class actions in several different ways. King & Spalding represents *Fortune* 100 companies and financial institutions. Both types of company have been within the crosshairs of the plaintiffs' bar. I have represented banks, insurance companies and retailers in a variety of class action litigations, both in the Southeast and nationally.

Editor: I understand you have been involved with the Defense Research Institute for a considerable time. Would you give us an overview of DRI and its mission?

Davis: DRI is a great organization in several ways. It is a forum for discussion across the entire defense bar, and it enables those of us who appear in this arena to communicate and share ideas on corporate defense practice generally and on specific issues, including changes in the law. I have written articles for DRI in recent years, and I find the organization a terrific vehicle for cross-pollination.

Dwight J. Davis

Editor: Speaking of which, what are some of the challenges that defense counsel face today?

Davis: First, I think the deck is stacked in favor of the plaintiffs' bar because they can choose where and when to wage the battle. And, to add insult to injury, they can strike repeatedly. For national companies carrying on business in every state jurisdiction, this can be a major dilemma. In the aftermarket parts litigation, State Farm lost the class certification issue one time out of eleven separate actions, and that resulted to a 1.2 *billion* dollar judgment. It took five years of appellate litigation to get that judgment overturned, and in the meantime all that money had to be set aside in anticipation of an ultimately unfavorable outcome. To say nothing of the efforts of management and the extraordinary costs related to the bad publicity resulting from the judgment.

I have a client facing 13 separate class actions across the country, which means that it must pretty much have to run the table in order to avoid liability. This is extremely frustrating in light of the fact that traditional concepts such as collateral estoppel ought to prevent plaintiffs from pursuing multiple class actions across a wide range of jurisdictions or litigating and re-litigating in the same jurisdictions. I had a situation recently where we defeated class certification in one jurisdiction. The plaintiff then re-filed in a neighboring jurisdiction. We removed the matter over to federal court and moved to dismiss because the plaintiff was collaterally estopped from pursuing the claim. Because the plaintiff brought in another class member with a slightly different theory, the judge ruled that the plaintiff was not estopped. I believe there is a fundamental unfairness in this.

Second, another significant challenge is what defense lawyers call the "no damages" class action. The plaintiffs' bar says these are economic loss class actions. Having failed to demonstrate the existence of a class of people actually injured by some product or suffering from some tangible loss, the plaintiffs' bar has utilized state consumer fraud statutes to claim that the plaintiffs are entitled to the return of the purchase price. Unfortunately, they have had some success in a number of jurisdictions, and this type of claim appears to be on the increase.

The good news is that with the Class Action Fairness Act of 2005 it is possible to get these claims, begun in state court, over to federal court. Normally, this results in an impartial and objective decision on the initial class action determination, and, if the class is certified, under CAFA it can be taken up on interlocutory appeal.

Editor: Speaking of state consumer fraud statutes, are some jurisdictions leaning too far in the direction of the plaintiffs' bar?

Davis: Absolutely. In the late 1990s the plaintiffs' bar came to realize how these statutes might be utilized, and some rather absurd decisions ensued. For example, it was not uncommon to find an out-of-state plaintiff suing an out-of-state defendant in some particularly plaintiff-friendly jurisdiction. Fortunately, some of the appellate courts have begun to look at this state of affairs with a jaundiced eye. In *Avery v. State Farm* the trial court and an intermediate appellate court determined that the Illinois consumer fraud statute applied to transactions taking place outside of Illinois. Finally, in 2005, the Illinois Supreme Court ruled that the statute applied only to transactions occurring within the state. That, I believe, is the proper scope of these consumer fraud statutes. If the state legislature wants to protect the consumers of their state and enacts such a statute, fair enough. Any enterprise which decides to do business with the consumers *of that state* must comply with the terms of that statute. That represents a level playing field for everyone. It is entirely unfair, however, to apply the Illinois statute to transactions taking place in Iowa or Missouri.

Editor: Do you have any thoughts on expert evidence reform?

Davis: Here in Georgia we are attempting to enact legislation which would make the *Daubert* standard regarding the admissibility of expert witness testimony – which prevails in federal court – applicable to proceedings in our state courts. There is a great deal of expert evidence abuse in many non-federal jurisdictions, and the *Daubert* standard is meant to enable judges to act as gatekeepers in determining whether the so-called expert testimony is relevant and reliable. DRI has taken a leadership role in this discussion, incidentally.

Editor: How about judicial compensation?

Davis: I think that everyone has an interest in a fair and impartial, and competent, judiciary. The decline of judicial compensation vis-à-vis the compensation that private practice offers cannot help but have an impact on the quality of the bench. Just recently I read an article which noted that judicial salaries were essentially at the same level as those of law professors 25 years ago, while today judges are paid approximately two-thirds of what law professors command. This is an anomaly that must be addressed. To be sure, there are highly qualified and dedicated lawyers in private practice who decide to leave the bar for a position on the bench, but it is becoming increasingly difficult to take that step.

Editor: E-discovery has been both a blessing and a burden for our profession. With the amendments to the Federal Rules of Civil Procedure, are we finally moving into some coherent and consistent framework for this litigation tool?

Davis: Yes. I am encouraged by the direction taken by the amendments to the Federal Rules. It is going to take some time for case law and the commentators to sort out some of the unanswered questions, but I think the Federal Rules will establish reasonable guidelines and a process for working through what has been a contentious and very expensive area in the litigation world.

Editor: Given the immense complexity of modern commercial cases, how do you feel about recourse to juries in virtually all civil trials?

Davis: At the risk of saying something that may be somewhat controversial to this audience, I continue to have a great deal of faith in the American jury system. It not only works on the average, it works in the vast majority of cases irrespective of the factual complexity. Unfortunately, what we hear by way of criticism is almost always directed at anomalies: jurisdictions that, for whatever reason, have come to have a jury pool that is slanted in one direction or another, or jurisdictions with a reputation for even-handedness where a particular jury has run amuck. If my life, my liberty or my property were on the line, I would prefer to have 12 fair-minded citizens who are conscious of their public duty decide my fate, as opposed to having the determination made by a single person, no matter how highly educated or experienced.

Editor: In your view, does the American legal system, in its present state, deter investment in the U.S?

Davis: I have spoken with clients about the risks entailed by being caught up in litigation in certain jurisdictions. There is no doubt that in certain jurisdictions the legal system has a dampening effect on inbound investment. An informed investor is simply not going to take chances with these jurisdictions, and, over time, that is going to have a negative impact on the people of that jurisdiction. This is a very important part of the civil justice reform discussion, however, and I am hopeful that over time the realization that a fair and impartial legal system encourages inbound investment will result in some long overdue changes. A legal system does not have to be perceived as investor-friendly – although that is not a bad thing – but it does have to be perceived as fair and impartial.

Please email the interviewee at ddavis@kslaw.com with questions about this interview.