

In the Big Easy, Litigation's Tough

By Steven Andersen

New Orleans is unlike any other U.S. city—it seems to have one foot on another continent, even in another time. The city's rich history and vibrant mix of cultures are a big part of its charm and draw visitors from around the world. But for companies that suddenly find themselves in Louisiana courts, the Delta's beguiling eccentricities can become vexing and expensive.

“Louisiana is subject to a unique civil law system, and you have a backdrop here of different approaches to certain legal issues,” says [David M. Whitaker](#), a partner at [Kean Miller Hawthorne D'Armond McCowan & Jarman LLP](#) in New Orleans. “This creates pitfalls for the unwary.”

Whether it's contending with the Louisiana Civil Code, which shares roots with the Napoleonic Code, wrestling with New Orleans' notoriously difficult jury pool or dealing with a highly political elected judiciary, litigation in New Orleans presents many challenges for inexperienced companies.

Litigation Off the Wall

Unlike English Common Law, the basis for the legal system in the other 49 states, the Civil Code isn't based on case law. A core set of statutes provides the fundamental principles, and judges often have wide latitude on their interpretation.

“The biggest shocker for people who aren't used to doing business here is simply that a different system exists at all—it's something that they're not used to,” says Kean Miller Partner [Lisa A. Easterling](#).

Easterling's practice focuses on construction litigation, a hot area that has seen a lot of out-of-state companies drawn into Louisiana courts recently. The rebuilding effort after Hurricane Katrina attracted far-flung construction companies, suppliers and other service providers to the region, subjecting them to the full spectrum of local liabilities.

The first wave of Katrina cases focused largely on insurance and real estate disputes. As those resolve, they're being followed by construction defect cases.

“We're going to start seeing a mushrooming of defect litigation,” Easterling says. “We're working on Chinese drywall right now. The multidistrict litigation has been consolidated here in New Orleans, and so that area is very active.”

The massive demand for rebuilding materials filled the market with new products, as well as products from unfamiliar suppliers—a dramatic example being the large quantity of drywall imported from China.

The unknown, however, always carries risk, and in this case, plaintiffs allege the Chinese drywall contains corrosive elements that damage electrical, plumbing and HVAC systems. Given the ubiquity of drywall in construction, the potential liability is staggering.

“There are thousands and thousands of parties in these cases—it's huge,” Easterling says. “There are cases against foreign manufacturers, U.S. distributors, retailers, home builders. Virtually anybody who touched the drywall is involved.”

Stay Out of the Pool

Staying out of court is always preferable, but it's particularly important in New Orleans, where a combination of culture,

socioeconomics and a plaintiff-friendly jury selection process stacks the odds against corporate defendants.

“We have a particularly challenging jury pool,” says Whitaker. “Most companies that go to civil district court here in New Orleans find it’s very difficult for them to get a trial by a jury truly of their peers.”

As a labor and employment lawyer—always an inherently preventive practice—Whitaker recommends companies with employees in Louisiana review their policies and practices with a keen eye to local liabilities in order to best avoid the courtroom.

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Although Louisiana is not nearly the employer’s nightmare that California can be, there are a number of state laws that present unusual challenges to employers, he says.

“For example, we have a really nasty wage payment statute, which I find substantially more punitive than those I see in other states,” Whitaker says. “If employees who are owed money can show a company acted in bad faith, they are entitled to full penalty wages for every day the company doesn’t pay, up to 90 days. A \$10 dispute can quickly become a three-month pay dispute, plus attorney’s fees.”

Other Louisiana laws that can trip up employers include a comprehensive but loosely worded whistleblower statute that shields employees who report against their employer, and a highly complicated law covering non-compete agreements.

Whitaker recalls the predicament of a Texas-based company with a strong Louisiana presence that wanted to hire away the employee of a New York-based competitor who had signed a non-compete agreement.

“Actually, in that case, for being a New York-based company, the competitor did a pretty

good job with the non-compete,” he says. “There was just one little problem.”

The competitor didn’t have the employee sign the agreement with the direct employer, but rather with a holding company, a no-no under Louisiana’s very specific law. The competitor sued, believing it had an ironclad case, but got a surprise at the preliminary injunction hearing.

“We figured out a pretty unique Louisiana argument that had these New York lawyers very upset,” Whitaker says. “At the end of the day, they ended up having to settle, and our client was able to go ahead and hire the employee, a sales manager, to their great advantage.”

Home Cooking

The local flavor is by no means limited to state law. Even federal court in Louisiana has a complexity all its own.

“Without a doubt as you move from state to state, you run into what we call ‘home cooking,’” says Kean Miller Partner [Charles R. Talley](#). “You definitely need local knowledge when it comes to Louisiana, starting with your judiciary. Is the judge conservative or liberal? Is he an intellectual or does he just shoot from the hip? You definitely have to be dialed into your home court to be able to handle it effectively.”

You also have to master the local idiosyncrasies of a practice area. For Talley and his colleague [Bradley J. Schlotterer](#), another Kean Miller partner, that’s maritime and admiralty law.

New Orleans’ location at the mouth of the continent’s most important waterway makes it a hub of both ocean and river shipping, but the most unusual aspect of local maritime law is its overlap with the offshore oil and gas industry.

“A drilling vessel is not what the forefathers were thinking about a hundred years ago when they were drafting legislation,” Schlotterer says. “But today oil and gas are totally intertwined with admiralty and maritime law because of all of these floating structures.”

As a consequence, maritime law in Louisiana federal court is a hybrid area that requires a full understanding of two distinct industries and their interaction.

“If you were to talk to a maritime lawyer in another district, they would have no clue about the type of law that Brad and I do,” Talley says. “It would be a foreign concept to them.”

The Gulf oil spill disaster has made the practice area more prominent than ever. Litigation over oil spills and offshore deaths is now fraught with intense media scrutiny and political pressure.

“There are so many lawyers trying to get in on these claims,” Talley says. “You drive down the highway in southern Louisiana right now and see billboards everywhere for lawyers soliciting that kind of work.”

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With almost 130 lawyers in three Louisiana cities, [Kean Miller Hawthorne D’Armond McCowan & Jarman LLP](#) is a full-service firm for companies doing business in Louisiana. The firm focuses on providing clients with critical insight on Louisiana’s distinct laws, regulations and legal culture.