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Q&A With Mayer Brown's John Zaimes

Law360, New York (July 01, 2013, 11:18 AM ET) -- John Zaimes is a partner in Mayer Brown's Los Angeles office and serves as co-leader of the firm's employment litigation group. He has employment-related litigation and counseling experience, including wrongful termination, wage and hour, harassment and discrimination claims, as well as Occupational Safety and Health Administration matters and reductions in force. He also handles corporate internal investigations, matters involving covenants not to compete, employee solicitation and the protection of trade secrets and confidential information.

Q: What is the most challenging case you have worked on and what made it challenging?

A: Two cases that I worked on have been the most challenging for similar reasons but in very different contexts. The first is Meghrig v. KFC Western, 516 U.S. 479 (1996), initially a small case that, through a series of unusual turns, made it all the way to the U.S. Supreme Court.

The case was filed in the early 90s by property owners who discovered soil contamination caused by leaks from gas station storage tanks that had been on the property in the early 60s. The defendants were passive landowners who were briefly in the chain of title because they had inherited the property from their father many years earlier. The case was first filed in state court as a state Comprehensive Environmental Response, Compensation and Liability Act case, and we succeeded in having it dismissed in the trial court based on the petroleum exclusion in CERCLA. That case was affirmed on appeal.

The case was then refiled in federal court under the Resource Conservation and Recovery Act. The RCRA does not authorize post-cleanup damages recovery lawsuits like this one but was instead designed to provide injunctive relief to stop ongoing damage from environmental contamination. The district court so held, and the case was appealed to the Ninth Circuit Court of Appeals, again with more costs and fees having to be incurred by the defendants. Surprisingly, the Ninth Circuit reversed (2 to 1) and held that the case could proceed under the RCRA.

We petitioned the U.S. Supreme Court for certiorari and were fortunate that the Eighth Circuit had, during the time our cert petition was pending, reached the opposite conclusion, resulting in a split in the circuits. The Supreme Court granted cert and ultimately reversed the Ninth Circuit, 9 to 0.

The great challenge of this case was that our clients were two private citizens who were completely uninvolved in and unaware of the contamination but just happened to be the only people connected to the property whom plaintiff could locate. They had to endure repeated attempts to use inapplicable statutes to try to recover monies from them. Ultimately, they prevailed, but not without significant financial cost to them.

The second most challenging case was a more recent class action filed against a direct seller, whose business model relied on independent contractor commission-based sales people to sell its product directly to customers, without any retail locations and without any sales employees. The company was sued in a wage and hour class action, which alleged as its fundamental claim that the independent contractors — and there were tens of thousands of them — were de facto employees entitled to hourly wages, reimbursement for expenses incurred in the course of their employment, etc.

The theory of the case was fundamentally flawed, but our biggest challenge was that we could not get the court to rule on our dispositive motions, and the case dragged on for over three years. It was an extremely sensitive bet-the-company case for our client because the mode of doing business that was being challenged was the entirety of the company's business model, and losing the case would have meant losing the company.

Ultimately, the case settled, but even then, the initial settlement was disapproved by the court for reasons that surprised all parties, and the case looked like it would continue to drag on. A subsequent settlement was ultimately approved by the court.

Q: What aspects of your practice area are in need of reform and why?

A: The aspects of my practice area that are in most need of reform are the attorneys' fees provisions in the California Labor Code. The Labor Code is structured in such a way that it provides a virtually automatic attorneys' fees entitlement to any plaintiff who prevails in a wage and hour claim. That entitlement has led to an epidemic of wage and hour class actions being filed in California over the last 10 years, with no end in sight.

In many cases, the claims are not strong, but the cost of defending wage and hour class action claims is high, so in the vast majority of cases, settlements are the vehicle through which the cases get resolved. Oftentimes, the financial benefit to the class members is far less than the benefit to the attorneys pursuing the case, which only serves to fuel the filing of additional cases.

One particular California Labor Code provision, the California Labor Code Private Attorney General Act, is in need of reform for that reason and for other reasons. It authorizes a single plaintiff to file a representative action on behalf of other similarly situated employees and to recover civil penalties on behalf of him/herself and the other employees, without having to meet the established class action requirements applicable to other representative actions. And because the statute also provides for attorneys' fees, it again serves as an incentive to file more and more of these kinds of suits.

The proliferation of these kinds of suits is having a significant negative impact on businesses in California, and the Labor Code is in need of reforms that would limit the financial incentive for plaintiffs and their counsel to pursue cases that are, in many instances, lacking in significant merit. A prevailing party attorneys' fees statute would go a long way toward eliminating a number of claims that have less merit.

Q: What is an important issue or case relevant to your practice area and why?

A: Two cases were handed down by the California Supreme Court last year that have had a huge impact on wage and hour class action in California. The first, Brinker Restaurant Corp. v. Superior Court, 53 Cal.4th 1004 (2012), clarified once and for all that the statutory requirement that employers "provide" a 30-minute duty-free meal period to their hourly employees for most work shifts does not mean that the employer must "ensure" that those meal periods are taken but simply must make those meal periods available to employees. The resolution of that issue is expected to reduce the number of meal-period class action filings.

Within a matter of weeks after the Brinker decision was handed down, the Supreme Court decided Kirby v. Immoos Fire Protection Inc., 53 Cal.4th 1244 (2012), holding that plaintiffs' counsel are not entitled to recover attorneys' fees in connection with their pursuit of meal-period claims. This is a step in the right direction, but it unfortunately only impacts meal-period claims. Many other kinds of wage and hour claims continue to be pursued in California, fueled by the automatic attorneys' fees incentive for plaintiffs' counsel.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: I have worked with many attorneys over the years who have greatly impressed me, but two stand out in particular, both of whom were mentors when I was a younger lawyer. The first is Ralph Zarefsky, now a United States magistrate judge, and the other is David MacCuish, with Alston and Bird. Both share qualities that have not only impressed me and others but also have been goalposts to which I constantly look in my own career.

First, both are incredibly intellectually honest and supremely ethical. Second, both possess an exceptional ability to analyze and explain legal and factual concepts, particularly in their writing, that have tremendous clarity, power and persuasiveness.

Q: What is a mistake you made early in your career and what did you learn from it?

A: Early in my career, I tried a smaller case in which we appeared to have a strong position, and we relied heavily on a particular witness to support that position. I dutifully prepared the witness for testimony at trial, and he was articulate, intelligent and able to handle both direct examination and mock cross-examination (by a very young attorney) effectively. Unfortunately, during the trial itself, he misstepped during cross-examination, and the case was lost.

I learned two key lessons from that experience. One is that witness preparation is one of the most challenging aspects of litigation because one's ability to control what the witness will say on the stand or in deposition is limited. Second, because of those limitations, I learned the hard way that it is critically important to aggressively cross-examine the witness during preparation and to anticipate the worst possible line of questioning. That may mean having to make the witness uncomfortable in preparation and to spend great amounts of time in witness prep, but the consequences of not doing so more than justify the discomfort and time.

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