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The Employer's 'Sue-First' Strategy

In high-stakes litigation, 'preemptive strike' has produced results.

BY RONALD M. GREEN

THESE DAYS, business is anything but "usual" and the need to protect corporate assets from waste and costly litigation has never been greater. While many companies respond aggressively to traditional bottom-line threats to their business, such as a patent infringement or product liability suit, most are less assertive with respect to employment-related litigation threats. This reluctance is understandable because employment laws, by their nature, force employers to play defense and countermeasures, however well-meaning, can be labeled retaliatory. But boldness can be an employer's ally. In some instances, it is appropriate and advantageous for an employer to seize the litigation initiative and strike first.

Several high-stakes employment litigation threats may be amenable to a "preemptive strike" strategy, including:

- a threatened class action arising from a reduction in force or other employment-related decision;
- an employee's threatened disclosure of confidential or proprietary information and/or large-scale defection; and
- an employee's attempted extortion, particularly when premised upon threats of humiliation or embarrassment and loss of client or customer confidence.

Each of these scenarios may present an opportunity for an employer to consider an outside-the-box strategy—preemptive litigation. The most striking aspect of the sue-first cases discussed below is the correlation between a preemptive approach to litigation and a favorable outcome. In this regard, the importance of being the plaintiff cannot be overemphasized. In addition to their ability to frame the issues and anticipate defenses and counterclaims, plaintiffs select the timing and forum, and they control many other aspects of the litigation process.

When the employer sues first as the aggrieved party, the decision-maker's perception of who was in the wrong may change from conventional thinking. Moreover, even where sue-first employer-plaintiffs are not wholly successful, their willingness to preemptively and forthrightly air their legal rights and obligations may earn the fact finder's respect while leveling the playing field. Consequently, they may earn a more positive outcome than they might have realized as the defendant.

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Employment Class Actions

Employment class actions cost employers hundreds of millions of dollars annually in awards and settlements. The upward trend in these high-stakes lawsuits shows no sign of abating, and, in fact, all manner of employment litigation tends to increase in tough economic times.

Although an employer anticipating a class action often has no better option than to wait to be sued and then contest certification of the class, there are circumstances where it may be advantageous for an employer to strike first. A comparison of two employment class actions, the first of which is currently before the U.S. Supreme Court, illustrates the potential power of a sue-first strategy.

The Supreme Court will decide in *AT&T v. Hulteen*[1] whether the company violated the Pregnancy Discrimination Act of 1978 (PDA) by not providing female employees with service credit (for pension calculation purposes) for pregnancy-related leaves taken before enactment of the PDA when the pre-PDA policy of its predecessor company was to give service credit to employees on disability leave for other reasons.

The defendant, AT&T, followed a typical defense strategy in employment cases: It defended against the charges before the Equal Employment Opportunity Commission (EEOC) and prevailed before the trial court and a panel of the U.S. Court of Appeals for the Ninth Circuit. In a contentious split decision on an en banc rehearing, however, the Ninth Circuit ruled against the company.[2] After almost 15 years of litigation, AT&T is still defending its actions, now before the Supreme Court.

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In contrast, when confronted with virtually the identical issue, the employer in *Ameritech Benefit Plan Comm. v. Communication Workers of Am.*[3] went on the offense. As in *Hulteen*, Ameritech's policy of not recalculating retirement benefits for employees who took pre-PDA pregnancy leaves turned into a legal dispute. Several affected employees filed discrimination charges with the EEOC, and one employee eventually brought a lawsuit against the company in a federal district court in Ohio, alleging violations of the PDA.[4]

While this suit was pending, several other employees unsuccessfully challenged the policy through internal procedures. Concerned that more lawsuits were in the offing, Ameritech decided to take a preemptive approach and used the federal Declaratory Judgment Act (DJA) to ask a federal court to "declare the rights and other legal relations of any interested party seeking such declaration," provided that the party can establish "a case of actual controversy."[5] The company filed a "reverse" class action in an Illinois federal district court against all female employees affected by the policy and their union, seeking a declaration that it had not violated any of the laws invoked in the pending employee action in Ohio.

Certifying the class, the Illinois federal court granted Ameritech's request that it transfer and consolidate the Ohio employee suit with Ameritech's declaratory judgment action. The court thereafter granted Ameritech's motion for summary judgment on the merits and rejected all of the defendants' counterclaims.

On appeal, the U.S. Court of Appeals for the Seventh Circuit addressed whether Ameritech had established subject matter jurisdiction and met the DJA's requirement of a cognizable "case of actual controversy." The court held that its "basis for jurisdiction comes from the underlying controversy [interpretation of the PDA], not the particular party initiating suit."[6] With respect to the EEOC's ripeness claim, the Seventh Circuit ruled that even though some employees' charges were still pending before the agency, the parties, in effect, had waived this argument when the EEOC issued right-to-sue letters to individual employees, one employee filed suit and the defendants filed counterclaims.[7]

The court did strike down the class certification over concern whether Ameritech could adequately represent the interests of the class,[8] but it nevertheless addressed the merits of the case with respect to the named parties (and subsequent, formal intervenors). In upholding the trial court's determination in favor of Ameritech on the merits, the Seventh Circuit presciently noted that its ruling would have "a powerful stare decisis effect."[9]

Indeed, shortly after Ameritech had filed its declaratory judgment action, the EEOC brought its own suit, a class action, against Ameritech in the same jurisdiction where the original employee suit had been filed—the Northern District of Ohio. Significantly, the Ohio district court granted Ameritech's motion for summary judgment and the U.S. Court of Appeals for the Sixth Circuit affirmed, stating, "We find the Seventh Circuit's analysis to be persuasive, and we thus adopt it in this case."[10]

Although there is no definitive cause and effect between the different results in the *AT&T* and *Ameritech* cases based solely on each company's divergent litigation strategies, the contrast between how each employer approached the issue illustrates the potential impact of seizing the initiative, a strategy that becomes all the more important to a company's bottom line in difficult economic times. While AT&T continues to be bogged down in litigation, Ameritech achieved a relatively quick victory. Moreover, the tentacles of Ameritech's sue-first strategy had broad, positive reach, encompassing both the original employee lawsuit and the subsequent EEOC class action.

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Confidential Information

In recent years, written noncompete, nonsolicitation and confidentiality agreements between employers and their employees have gained in popularity, and employers are becoming more assertive in enforcing them. Even absent a written agreement, however, the common law doctrine that employees, especially those with access to sensitive, confidential information, owe their employers a duty of loyalty may enable an employer to prevent an employee from using proprietary or confidential information to compete with the employer or for other improper purposes.[11] For example, the duty of loyalty may come into play where an employee threatens to sue and disclose confidential information in support of his or her claims. In such a situation, an employer may want to take a sue-first approach and seek injunctive and/or declaratory relief.

The Declaratory Judgment Act requires the presence of a "case of actual controversy." The issue of when a threat to sue and disclose confidential information satisfies this requirement was raised a few years ago in an unreported case before the U.S. District Court for the Southern District of New York in which the author's firm represented the employer.[12] There, the employer had removed certain functions from its human resources manager in response to employee complaints. The employer subsequently received a lawyer's letter accusing the company of, among other things, discriminating and retaliating against the manager as well as other employees. The letter further advised of the manager's intent to sue and support his claims with information contained in charges lodged with the EEOC by other employees—data the company considered confidential and to which the manager was privy only because of his position.

In response to the threatened lawsuit, the company placed the manager on leave to prevent his further access to confidential information. When the employer subsequently revised the manager's job duties to minimize certain data access, the employee refused to return to work. The company then filed suit for a declaratory judgment and injunctive relief, seeking a declaration that its actions had been proper, that the employee had breached his duty of loyalty to the company and that the employee had abandoned his job by refusing to report to work. In addition, the employer requested an injunction to prevent the manager from disclosing confidential information about the company. The court, not persuaded by the manager's contention that the letter was merely a statement of his rights and not a threat to sue, allowed the employer's lawsuit to continue.[13] The case was settled soon thereafter.

Extortionate Demands

In recent years, the subject of attempted "extortion" has been the focus of much media coverage, largely as a result of the willingness of numerous celebrities, including Oprah Winfrey, Bill Cosby, Bruce Willis, 50 Cent, Burt Reynolds and Yoko Ono,[14] to take aggressive preemptive measures against extortionate demands by disgruntled or opportunistic employees, associates and even acquaintances. Though, typically, most celebrities file criminal charges against the perceived extortionist, some have taken a different route—initiating a preemptive civil action. In one of the most graphic examples of a celebrity striking first, "Riverdance" entertainer Michael Flatley brought an action for civil extortion against a woman who threatened to charge him with sexual assault if he did not buy her silence. In December 2007, a jury ordered the woman to pay Mr. Flatley more than $11 million for making false allegations to extort money from him.[15]

More recently, in a case that places attempted extortion squarely in the employment context, the

actor Rob Lowe filed a lawsuit against his children's former nanny who allegedly threatened to go public with "a vicious laundry list of false terribles" if he did not pay her $1.5 million to keep quiet. Mr. Lowe's suit alleges violation of a confidentiality agreement, defamation and infliction of emotional distress, and seeks $1 million in damages.[16]

Celebrities, however, are not the only ones vulnerable to extortion schemes. High-level corporate executives and professionals in many fields may face similar threats from vengeful, discontented workers and poor-performing employees who fear losing their jobs. The attempted extortion may involve any of a number of threats, such as the disclosure of confidential or embarrassing information or even a threat to file a baseless whistleblower or sexual harassment charge if the target fails to pay the demanded "hush money."

In the employment context, a sue-first strategy in response to attempted extortion is most appropriate where (1) the employee's (or former employee's) asserted claim is believed to be baseless; (2) a reasonable negotiated resolution is not feasible and litigation appears inevitable; (3) seizing the public relations high ground is appropriate, advantageous and justified; (4) business interests (including the company's reputation) would be significantly harmed by delay and by its status as a defendant; and (5) the monetary demands of the claimant by any measure are grossly out of proportion to even the harm alleged.

For example, in a case a few years ago, an employee allegedly threatened her supervisor, a popular media personality, that she would go public with charges of inappropriate conduct if he, and the media company for which he worked, did not agree to "settle" the matter for an amount wildly disproportionate to the harm she alleged. The company, represented by the author's firm, and the supervisor, preemptively filed a lawsuit against her and her attorneys in a New York state court for, among other alleged wrongs, attempted extortion, tortious interference with prospective business relations, intentional infliction of emotional distress, and a declaratory judgment that neither the company nor the supervisor had any liability to her under any applicable employment laws. Soon after the suit was filed, the case settled.[17]

In a variation on this theme, in 2006, the now-beleaguered insurance company AIG sued its former accounting vice president in federal court in New York, alleging that she had attempted to "harass, extort and injure" the insurer. According to AIG's complaint, after the employee was terminated for insubordination, she not only threatened to go public with charges of alleged accounting improprieties on the part of the company unless AIG agreed to meet her settlement demands, but she subsequently disseminated confidential business information to competitors and legal adversaries.[18]

Notably, the *Flatley* case, discussed above, was brought in California which has a specific statute authorizing civil actions for extortion, limiting preemptive lawsuits in some instances by "anti-SLAPP" legislation.[19] In New York, however, the law is less clear. A New York state appellate court has ruled that state law does not allow for a civil action for attempted extortion. In that case, *Minnelli v. Soumayah*,[20] the performer Liza Minnelli sued her former assistant and bodyguard for extortion and attempted extortion, alleging that he demanded an "exorbitant salary for services he did not perform" and threatened to make public certain "facts" about her in an effort to cause serious injury to her reputation.

The trial court found, and the Appellate Division, First Department, affirmed, that while extortion and attempted extortion are criminal offenses under New York law, there is no private right of action to bring such a claim per se. Ms. Minnelli, however, was allowed to proceed with her other claims against the former employee, including claims for breach of contract (confidentiality agreements) and breach of fiduciary duty and an action for a declaratory judgment that the confidentiality agreements were valid and enforceable.

Even where a court refuses to recognize a claim for civil extortion, however, an employer may have a viable action for intentional infliction of emotional distress, tortious interference with prospective business relations, breach of duty of loyalty or, as in *Minnelli*, breach of fiduciary duty.

Conclusion

The sue-first approach is not a panacea for all employment disputes, but, in the right circumstances, it can be a powerful tool in an employer's arsenal of litigation strategies—a now proven, effective strategy if used appropriately, eschewed by some as too "risky," but more likely to prompt an employer to wonder: "Why didn't I think of that?"

1. *AT&T Corp. v. Hulteen*, 498 F.3d 1001 (9th Cir. 2007), cert. granted, 128 S.Ct. 2957 (2008).
2. Id.
3. 220 F.3d 814 (7th Cir. 2000).
4. *Bernabei v. Ameritech Corp.*, No. 97-CV-02209 (7th Cir. 2005).
5. 220 F.3d at 818-19.
6. Id. at 819 (citation omitted).
7. Cf. *AT&T Co. v. EEOC*, No. 00-5280 (D.C. Cir. Nov. 16, 2001), where the court rejected AT&T's eventual preemptive strike against the EEOC for lack of ripeness because the company had not been formally sued yet, and, thus, there was no "final agency action." Notably, the *Ameritech* court stated that it was not addressing whether it would rule the same way had the defendants not filed counterclaims and had there not been a pending suit by one employee. 220 F.3d at 819.
8. Cf. *Halliburton Co. Benefits Comm. v. Graves*, 463 F.3d 360 (5th Cir. 2006), clarified, 479 F.3d 360 (5th Cir. 2007), where the court apparently permitted a "reverse" employment class action.
9. 220 F.3d at 821.
10. *EEOC v. Ameritech Servs. Inc.*, No. 04-3496, 2005 WL 1027519 (6th Cir. May 3, 2005).
11. See, e.g., *Forge Indus. Staffing v. La Fuente*, No. 06 c 3848, 2006 WL 2982139 (N.D. Ill. 2006); *A&L Scientific Corp. v. Latmore*, 265 AD2d 355 (2d Dept. 1999).
12. The author's firm represented the employer in this matter.
13. Cf. *MicroStrategy Inc. v. Convisser*, Civ. A. No. 00-453-A, 2000 WL 554264 (E.D. Va. May 2, 2000) (letter containing threat to sue failed to meet DJA's "case of actual controversy" requirement).
14. See, e.g., "Oprah Winfrey's Extortion Nightmare," Jan. 7, 2007, available at http://www.associatedcontent.com/article/119087/oprah_winfreys_extortion_nightmare.html; "Yoko Ono's driver accused of attempted extortion for $2m," Associated Press, Dec. 13, 2006, updated June 23, 2008, available at http://www.2news.tv/news/entertainment/4912401.html.
15. "Michael Flatley awarded $11 million," Associated Press, Dec. 18, 2007, available at http://www.cnn.com/2007/SHOWBIZ/Music/12/18/people.michaelflatley.ap/index.html.
16. Rob Lowe, "Household Betrayal," Huffingtonpost.com, April 7, 2008, available at http://www.huffingtonpost.com/rob-lowe/household-betrayal_b_95472.html; "Rob Lowe and Family Sue Former Nanny and Chef, " Associated Press, April 8, 2008, available at http://www.huffingtonpost.com/2008/04/08/rob-lowe-and-wife-sue-for_n_95568.html.
17. The author's firm represented the company in this matter. The firm also represented the supervisor in the initial court proceedings.
18. "AIG sues former employee, alleges extortion," Reuters, Dec. 22, 2006, available at http://www.reuters.com/article/fundsFundsNews/idUSN2229114020061222.
19. Anti-"SLAPP" (Strategic Lawsuit Against Public Participation) laws are intended to prevent lawsuits designed to intimidate the targeted defendant from bringing or continuing his or her lawsuit. Such laws permit a defendant to seek dismissal of a lawsuit on the ground that the suit constitutes unlawful interference with the defendant's right to petition the government for redress (i.e., bring a lawsuit). A number of states have anti-SLAPP laws, including California and New York.
20. 41 AD3d 388 (1st Dept. 2007), aff'g, Index No. 115809/04, 2006 WL 5111069 (N.Y. Sup. Ct. N.Y. County 2006).

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