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FRONT PAGE NEWS

Plaintiffs' Bar "Reboots" on EPL Suits

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EPL risks get new life after Wal-Mart, AT&T Supreme Court rulings

By Susanne Sclafane

Risk managers hanging their hats on favorable Supreme Court rulings in employment class actions against Wal-Mart or AT&T last year, had better learn names Chen-Oster and McReynolds, a defense attorney suggests.

These are the name of plaintiffs that have seen their cases move ahead successfully in lower-court employment cases post-*Wal-Mart*, illustrating the point that the plaintiffs' bar is now "rebooting" with new strategies to replace those dented by the Supreme Court in 2011, according to Gerald L. Maatman Jr., partner and co-chair of the class action defense group for Seyfarth Shaw in Chicago.

Maatman, who will participate in Tuesday afternoon session of the Risk and Insurance Management Society annual conference this week titled, "Are Employment Class Actions Dead After Wal-Mart and AT&T?" answers the question emphatically. "The death of class actions is prematurely reported. Class actions are alive and well," he says.

Addressing each of the decisions in turn during an interview with Advisen recently, Maatman first discussed *AT&T Mobility v. Concepcion*—a 2011 case in which the Supreme Court held that the Federal Arbitration Act preempted California state law precedent that had said class-action waivers in consumer contracts were unenforceable.

In the wake of the decision, Maatman sees plaintiffs' lawyers looking for new angles of attack to thwart class-action waivers in arbitration agreements. "Simply creating an arbitration agreement and saying, 'I no longer need to worry about class-actions'" may not work. "It's not the silver bullet that many thought" it might be in the wake of *AT&T*.

"There is significant litigation where arbitration agreements are being attacked and in certain instances successfully attacked such that the plaintiffs' bar is able to get around the agreements."

How?

"One is to argue that the way the agreement is constructed is unfair. In legal terms, it's called unconscionable," Maatman reports.

Employers can try to address this by making their arbitration agreements as fair as possible. "But the fairer it looks the more expensive it becomes and maybe less desirable for employers," he said. "There may be an inverse relationship between how you construct the arbitration clause and how impervious it will be to attack on grounds of unconscionability."

Maatman describes a second emerging strategy as more devious of the part of plaintiffs attorneys who argue that "there is something untoward or inconsistent with public policy in allowing employers to contract their way out" of these cases.

That argument has been applied successfully already to two cases in New York—*Chen- Oster v. Goldman Sachs*, where the court rued that it is against public policy to have an arbitration agreement that prohibits employees from bringing a gender discrimination claim on a collective basis, and *Raniere v. Citigroup*, where the same holding was made in the context of a wage-and-hour case.

"I call this a rebooting process," Maatman said, referring to new approaches emerging from the plaintiffs' bar. He said plaintiffs' lawyers have been equally active in their attempts to circumvent the Supreme Court's June 2011 ruling in *Wal-Mart Stores Inc. v. Dukes, et. al*. In *Dukes*, the Supreme Court ruled that the 1.6 million women alleging that the retail giant discriminated against them did not have enough in common to constitute a class under Rule 23 of the Federal Rules of Civil Procedure governing class actions.

For the most part, employers have done very well in the aftermath of the High Court ruling, Maatman says. "Ever since Dukes, there have been a cascading number of decisions in federal and state courts that have decertified pending class actions. "

But the plaintiffs' bar is resourceful, Maatman asserts, pointing to two key successes—one in *United States v. City of New York*, where a judge certified some discrete issues in a discrimination class action last Fall.

In a second case, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith*, a Seventh Circuit court judge also ruled in February of this year that he could certify discrete issues. "It is the first circuit decision since *Wal-Mart* where a federal circuit despite *Wal-Mart* has nonetheless certified an employment case—this one a race discrimination case involving pay and promotions," Maatman says.

In an item on his firm's Workplace Class Action Litigation blog posted three days after a ruling, Maatman described the specifics of the case in detail, which involve a two company-wide policies alleged to be discriminatory—one allowing in individual offices, rather than managers,

to decide to work on teams, and another setting criteria to transfer customer accounts when a broker leaves the firm.

The upshot of all this is that "corporate America still needs to be focused on compliance, compliance, compliance," Maatman says. "The best way to win a class action is to never be sued in a class action," he says.

Joining Maatman at the RIMS session on Wednesday will be Thomas Hams, EPLI practice leader for Aon Risk Solutions, and Kevin Deegan, director of corporate risk management for Best Buy.

Hams in a video clip preview of the session released by Aon last week promises that the speakers will review some "very negative developments from the government in response" to the Wal-Mart and AT&T cases, and "provide insights into avoiding those concerns from the government."

Maatman told Advisen that there has been a series of cases involving the Equal Employment Opportunity Commission "that have a dotted-line relationship" to *Wal-Mart*. There is a notion that if the Supreme Court ruling is stopping lawyers from bringing these cases, then the EEOC now has a larger role because it is not constrained by Rule 23. The EEOC "can bring large-scale pattern-of-practice cases unrestrained."

Maatman says risk managers need to realize that "dealing with the EEOC is a much higher-stakes phenomenon today than it might have been before."

"Treat those charges with respect—with a lot of attention—and don't slough off the fact that it's just an EEOC charge because from small acorns big trees grow," he says.

Providing some general advice for risk managers on all the developments he discussed, Maatman says simply, "Don't let down your guard."

Maatman provided more specific advice to risk managers that will be captured in a longer version of this article to be published in Advisen's Management Liability Journal (MLj) in June.

In our inaugural addition of MLj published last December, Aon's Hams authored an article on a different employment topic, titled, "Chronically Unemployed: The New Protected Class?"

MLj is available at the Advisen Corner Store, http://corner.advisen.com/journals.html

In addition to writing for Seyfarth Shaw's blog, Maatman is the author of the firm' Annual Workplace Class Action Litigation Report. The 2012, published earlier this year, is available to clients of the firm and interested corporate counsel by sending an e-mail to ClassActionReport@seyfarth.com.