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Employment MVP: Sheppard Mullin's Richard Simmons

By Melissa Lipman

Law360, New York (December 07, 2011, 6:46 PM ET) – By aggressively challenging proposed employee classes and plaintiffs in wage-and-hour suits, Sheppard Mullin Richter & Hampton LLP's Richard J. Simmons has scored key victories for clients ranging from Chipotle Mexican Grill Inc. to major California hospitals and earned himself a spot on Law360's list of Employment MVPs.

The veteran employment partner has amassed an impressive batting average by getting out in front of would-be class representatives by moving to deny certification before the plaintiffs can lodge their own motion with the court.

Playing this defensive shift has taken the bat out of plaintiffs' hands in a number of putative class actions, most notably in the Chipotle case.

The plaintiffs in that case sued Chipotle in early 2009, accusing the Mexican fast-food chain of a litany of overtime, meal and rest break violations. But instead of letting the workers file their motion to certify at their own pace, Simmons asked the court to deny class certification about a year into the litigation.

The move — which Simmons has since used successfully in other cases including the rejection of a proposed class of thousands suing Saddleback Memorial Medical Center — allowed Simmons to essentially force plaintiffs to play by the defendant's timetable and file quick follow-up motions to certify the class.

It also gave Simmons the key advantage of getting more pages in which to make his argument — having the opportunity to file two briefs on his client's motion to deny and a third opposing the plaintiffs' request to certify instead of a lone reply brief to a motion to certify — and more time to explain his client's case to the judge at oral arguments. The extra space proves particularly important when plaintiffs are alleging five to 10 causes of action, Simmons said.

Lodging the preemptive motion to deny certification also allowed Chipotle to challenge all of those allegations at once. When the workers did file to certify in that case, they only moved on the meal and rest period claims despite the full complement of California wage-and-hour violations alleged in the complaint.

"If I hadn't filed a motion to deny, all those other theories would still be part of the case. They could have lost on meal and rest breaks and filed another motion later," Simmons said. "By filing our own motion to deny class certification on all the theories that they raised, we were able to knock it all out at once, so it's much more cost efficient for the client."

A state appeals court affirmed the decision in October 2010, ruling — like their peers in the Brinker International Inc. case — that employers were only required to provide meal and rest breaks, not ensure

that workers take them. But even if the California Supreme Court strikes down that interpretation of the law in the pending Brinker appeal, the Chipotle ruling would still stand a chance of being affirmed, according to Simmons.

That's because the appellate judges also rejected the class on conflict of interest grounds, something that the state courts had not adjudicated in the past, Simmons said.

"You had some class members potentially pointing an accusing finger at other class members. It was a situation where some people in the proposed class would have to accuse others of criminal conduct in order to prevail," Simmons said.

The court denied certification in part because of the "magnitude of that conflict," so the ruling — one of several the state's highest court has accepted for review pending the outcome in Brinker — could survive on that basis alone, according to the attorney.

"Regardless of the outcome there, the conflict of interest ruling in Chipotle, which is absolutely novel, could portend enormously significant consequences in class action cases in the future because there are so many instances where plaintiffs' lawyers try to draw their classes so broadly as to include plaintiffs who have conflicts within themselves," Simmons said.

Beyond the Chipotle decision, Simmons has also recently racked up a series of dismissals and denials of class certification for several major California hospitals and health care centers.

Two of those cases — against Pomona Valley Hospital Medical Center and Long Beach Memorial Medical Center — addressed the novel question of whether employers could pay lower rates to employees who worked 12-hour shifts than those who worked 8-hour shifts even though they do the same tasks.

Simmons and Pomona prevailed in the federal trial and the Ninth Circuit agreed in 2009 that the move — which the plaintiffs claimed was an attempt to do an end-run around federal overtime pay requirements — did not violate the Fair Labor Standards Act.

The appeals court refused to rehear the matter en banc but asked the U.S. Department of Labor to weigh in. When the government agreed that Pomona's payment scheme was permissible, the panel updated its decision to reflect the amicus brief. The U.S. Supreme Court refused to hear the case in May.

"The case has enormously significant precedential effect both in and outside the health care industry because it does deal with the ability to pay different rates to people who perform the same work," Simmons said.

Simmons had equal success on a similar proposed class action claim filed against Long Beach under California state law.

Innovative strategies and legal issues aside, however, Simmons said everything really comes down to satisfying clients.

"We don't achieve anything unless we achieve great results for our clients and people know very early on in significant cases like this that we are committed," Simmons said. "It is about them, our clients, it's never about us."

– Editing by Andrew Park.

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