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Q&A With Simpson Thacher's Joe McLaughlin

Law360, New York (November 19, 2010) -- Joseph M. McLaughlin is a litigation partner in the New York office of Simpson Thacher & Bartlett LLP. He has represented U.S. and international clients in class action, shareholder derivative and other aggregated proceedings in trial and appellate courts across the country, including the U.S. Supreme Court. He is the author of the two-volume treatise, "McLaughlin on Class Actions: Law and Practice," which has been cited as authoritative in dozens of federal and state trial and appellate courts around the country.

Q: What is the most challenging case you've worked on, and why?

A: I was lead trial counsel for an overseas holding company at the Brooklyn federal court jury trial of RICO and consumer fraud claims brought by Blue Cross/Blue Shield of 20 states seeking multi-billion dollar damages for increased health care expenses arising from tobacco-related illnesses. Defendants in tobacco litigation did not enjoy especially high public approval at the time. These novel health care recovery claims of an insurance company presented a massive aggregation of claims arising out of individualized alleged harms to many thousands of insureds without seeking class certification.

The plaintiffs' strategy was to try the case with statistical proof in order to sidestep the numerous individualized issues and defenses that would likely have blocked class treatment of the claims of underlying insureds. After several months of trial, we sought a directed verdict. After oral argument, the plaintiffs voluntarily dismissed the claims against our client.

Q: What accomplishment as an attorney are you most proud of?

A: In 1997, I moved to dismiss a complex class action in Missouri federal court, the plaintiff filed his opposition and the court wrote an impressive opinion — denying the motion. But the court had overlooked that we were permitted a reply brief and oral argument was scheduled. My faith in the willingness of judges to be persuaded was cemented when, following reply and argument, the court vacated the first opinion and substituted a still more impressive opinion granting the motion to dismiss.

I am also honored to have successfully represented professional golfer Casey Martin in the Supreme Court, where the court delineated the application of the Americans with Disabilities Act to professional sports.

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

A: The intersection of contractual arbitration clauses and putative class actions has introduced unpredictability into the dispute resolution programs of companies nationwide. A mutual waiver of the ability to bring a class action in court or arbitration is a key component of countless consumer and employment arbitration agreements. State and federal courts in California have developed that state's unconscionability law to a point that effectively invalidates any standardized consumer agreement that does not permit classwide dispute resolution. A rule conditioning the enforceability of arbitration provisions on the availability of classwide arbitration threatens the utility of arbitration as a means to resolve small-scale disputes that routinely arise in commercial relationships.

Forum-shopping counsel are already bringing class actions in California on behalf of non-California residents whose home states would have enforced individual arbitration. The Supreme Court recently heard argument on an appeal from the Ninth Circuit which should determine whether, despite a consumer and a company's agreement that each must arbitrate claims and only on an individual basis, the consumer may file a putative class action in court.

Q: Where do you see the next wave of cases in your practice area coming from?

A: The Dodd-Frank Act will energize a class action bar already aggressively pursuing claims concerning residential mortgage transactions under TILA, HOEPA, RESPA, HMDA and consumer protection laws. Class actions challenging alleged predatory lending practices in residential mortgages have proliferated during the financial crisis, typically contending that loan documentation was inadequate, or the lender collected unlawful fees, pre-payment penalties and finance charges from mortgage loan borrowers. Dodd-Frank significantly expands TILA's and RESPA's requirements and liability, including doubling the statutory damages cap in class actions under those statutes.

Experience teaches that the class action bar is resilient and creative after setbacks. Consider the strategic decision by class plaintiffs' counsel often to pursue only claims for economic injury arising from use of products traditionally the subject of personal injury actions. In response to the wall of case law denying certification to proposed personal injury classes, plaintiffs have stripped the personal injury component out of the liability equation, eliminating the individual issues of causation and damages that usually preclude certification of personal injury classes.

Disclaiming personal injury recovery and focusing on economic injury, class action plaintiffs have migrated toward state consumer protection acts, usually seeking recovery for residents of one state and narrowing the products involved. Economic injury suits appeal to plaintiffs because many consumer protection acts do not require proof of intent or reliance by any individual on alleged misrepresentations in order to recover.

Another very recent illustration of plaintiffs' agility is their response to decisions rejecting attempts to obtain loan rescission under TILA on a class-wide basis. Plaintiffs in California suits challenging adjustable rate loans that allegedly failed to disclose the certainty of negative amortization for borrowers who elected to pay a "teaser rate" are recasting the TILA rescission claim as a private attorney general claim under California's Unfair Competition Law.

In this way plaintiffs are seeking rescission by another name through classwide injunctive relief against future foreclosures and reformation of putative class members' loan terms to reallocate prior monthly payments of borrowers to both principal and interest, even though borrowers only made minimum payments that did not cover all interest owed.

Q: Outside your own firm, name one lawyer who's impressed you and tell us why.

A: I am fortunate — blessed would be a better word — to have two larger than life lawyers as touchstones. Apart from my father, Judge McLaughlin, who deserves more than the space allotted, to lawyers wishing to learn the aspects of first-class trial work, I can recommend no better resource than the transcripts of now-Judge John Keenan, a trial lawyer of rare completeness.

As a prosecutor, he displayed a daunting arsenal of an advocate's gifts: a faculty for stripping away nonessentials and laying bare the heart of a controversy in crisp language, and arguments that were simple and rooted in common sense (which is to say usually unanswerable). He exposed fallacies in argument relentlessly but with nimble wit and unfailing courtesy. Most importantly, the listener understood these came from a straight shooter, which judges and jurors recognize and appreciate. These transcripts teach the advocate's equivalent of a perfect baseball swing: effortless, smooth and with a very high rate of success.

Q: What advice would you give to a young lawyer interested in getting into your practice area?

A: Read cases regularly. Study good briefs to extract the architecture of persuasive legal writing. Publish and teach at CLEs to elevate your profile within and outside the firm. Take ownership of the class action issues in your cases. In a profession where unpredictability abounds, it's always within your control to be the best prepared person in the room. Keep your eyes and ears open, assimilate the example of the ablest lawyers around you.