

“PREEMPTIVE” EMPLOYMENT LITIGATION: WHEN AN EMPLOYER’S BEST DEFENSE MAY BE A GOOD OFFENSE

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Last year alone, employees filed more than 75,000 charges of employment discrimination against employers with the Equal Employment Opportunity Commission (EEOC)¹ and countless more with state agencies and in federal and state courts. Even when employers prevail, often they do so only after incurring significant costs in time and money defending sometimes complex and lengthy litigation. And, with the 24/7 news cycle, as well as the burgeoning virtual world of Web sites, blogs and Youtube, companies involved in protracted employment-related lawsuits increasingly are vulnerable to negative publicity, spread around the globe at the speed of a mouse click, with potentially devastating consequences.

The growing risk of confronting high-stakes employment litigation has prompted some employers to embrace the old adage: The best defense is a good offense. When threatened, for example, with imminent litigation carrying with it the possible disclosure of confidential data, trade secrets or embarrassing information, a potentially costly class action, or even extortionate “settlement” demands, they are taking the bull by the horns, to resurrect another old expression, and suing first.

So-called “preemptive” litigation is not the appropriate response to all threatened employment lawsuits and there are risks, but an analysis of the potential benefits of striking first and a review of the relevant caselaw illustrate that, under the right circumstances, going on the offensive can be a highly effective way to protect a company’s legitimate business interests.

The Advantages of Being the Plaintiff

Employers who take the initiative and sue first may gain some significant advantages generally enjoyed by employees as plaintiffs in lawsuits, including the following:

- The employer-plaintiff chooses the timing, forum and venue. Depending on the nature of the employer-plaintiff’s claim, it may have the option of filing in federal court, rather than state court (or vice versa), and, if the employer-plaintiff chooses the federal route, it may even be able to select a federal circuit more favorably disposed to its position.
- Initially, at least, the employer-plaintiff defines the issue and drives the pre-trial agenda. Even if the employee-defendant raises other issues through defenses or counterclaims, it must first and foremost respond to the employer’s charges.

- As the plaintiff, an employer can devise its strategy in advance of filing suit, such as anticipating the employee’s defenses and counterclaims, developing responses, and preparing motion papers and requests for discovery.
- Should the case proceed to trial, the employer as plaintiff enjoys greater control over the proceedings. In addition to giving its opening statement before the employee does, and its closing statement after the employee’s, the employer also calls witnesses and presents its case first. This prerogative may allow the employer to cross-examine the employee before the employee has the opportunity to frame his or her story in its best light.
- The employer-plaintiff, as the presumed aggrieved party, is more likely to be viewed sympathetically by a jury than it would be if it were the defendant.
- In high-profile cases, the plaintiff-employer can seize the public relations initiative, calming clients, analysts, investors and underwriters.

As these few examples illustrate, a plaintiff’s edge can be formidable. Obviously, however, the employer must have both substantive grounds and a procedural basis to bring suit. This paper briefly addresses the “how” first, followed by the “when.”

The Declaratory Judgment Act: The Key to the Courtroom Door

A company threatened with an employment-related lawsuit may be able to strike first and establish its rights or the legitimacy of its actions and obtain appropriate relief by commencing a lawsuit under the federal Declaratory Judgment Act (the Act).² As Section I of the Act underscores, it is a unique procedural device:

In a case of actual controversy within its jurisdiction ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such.³

A plaintiff-employer, however, must satisfy certain requirements in order to avail itself of the Act, including the basic jurisdictional prerequisites of standing, ripeness and subject matter jurisdiction. Often the most troublesome requirement is establishing a cognizable “case of actual controversy.” As the Supreme Court recently acknowledged in *MedImmune, Inc. v. Genentech, Inc.*,⁴ a patent licensing case, its decisions “do not draw the brightest of lines between those declaratory-judgment actions that satisfy the case-or-controversy requirement and those that do not.”⁵

Nonetheless, the Court in *MedImmune* reiterated that to satisfy the “case or controversy” requirement, the dispute must be “definite and concrete, touching the legal relations of parties having adverse legal interests,” and it must seek “specific relief through a decree

of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”⁶ In short, “the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”⁷

The Supreme Court also has stressed that the Declaratory Judgment Act is “an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant.”⁸ Thus, even where the “case or controversy” and other jurisdictional hurdles are overcome, a federal district court has wide discretion whether to entertain an action under the Act. But once a court exercises its discretion to hear a declaratory judgment action, it has authority to provide broad relief, including injunctive remedies.⁹

The following discussion demonstrates how, notwithstanding the Act’s obstacles, the statute may be successfully invoked by employers to protect their interests against a threatened employee lawsuit.

The Act May Be Useful Where an Employee Who Holds a Sensitive Position Threatens to Sue

When an employee with access to trade secrets, other confidential data, or potentially embarrassing information threatens to sue, and is likely to rely on information obtained from that employment-based access, the employer may legitimately believe that the employee has created an untenable conflict of interest. The question then arises: What are the employer’s rights and obligations? May it lawfully terminate the employee or, at a minimum, change his or her job duties? If the employer does so, might it be liable for retaliation?

Arguably, this is the kind of situation the Declaratory Judgment Act was intended to address. Unfortunately, decisions adjudicating the merits of an employer’s request for a declaratory judgment in such “advisory opinion” cases are scarce. One reason, of course, is that employers have been reluctant or unaware of their right to take the initiative. Another reason is that in the reported instances in which an employer “struck first,” the dispute often was resolved fairly quickly.¹⁰

Before discussing cases in which an employer has effectively used the Act, we first address what appears to be the only decision in which a court flatly held that the statute should not be invoked in cases involving employment claims.

In *MicroStrategy, Inc. v. Convisser*,¹¹ a decision rendered in 2000 by a federal district court in Virginia, Betty Lauricia, a Vice President at MicroStrategy, a Virginia Internet company, filed age and sex discrimination charges with the EEOC, as well as a complaint with the Department of Labor’s Wage and Hour division alleging violations of the Fair Labor Standards Act (FLSA). Her attorney then sent an eight-page letter to the company detailing the alleged discrimination experienced by Lauricia and other employees and threatening to sue.

In response, MicroStrategy placed Lauricia on paid leave because it believed there was a conflict of interest between her position as a corporate officer with access to confidential information and the charges she had just filed. Two days later, the company brought an action against Lauricia and her counsel seeking a declaratory judgment that: (1) the leave was lawful under the FLSA; (2) it could terminate her without violating the FLSA; and (3) she breached her duty of loyalty by stealing and disclosing trade secrets and other confidential information.

The U.S. District Court for the Eastern District of Virginia dismissed the suit, concluding that there was no “case or controversy” because Lauricia had not filed a lawsuit and the letter containing the threats did not satisfy the “case or controversy” requirement. The court further ruled that even if it had subject matter jurisdiction, it would dismiss the action on the ground that a federal court should not entertain employment disputes under the Declaratory Judgment Act, lest the court “become a super-personnel advisor to wary employers.”¹²

Three years after the *MicroStrategy* decision, in a case with similar facts, a different federal district court reached the opposite conclusion.¹³ That case involved the National Manager of Human Resources for an American subsidiary of a foreign company. The manager’s responsibilities included handling discrimination complaints brought by employees at the EEOC and in state agencies as well as managing payroll and employee benefits.

In response to a series of complaints from employees involving the manager’s areas of responsibility, the company took away his payroll and benefits functions. Some months later, the company received a letter from the manager’s attorney accusing the company of, *inter alia*, discrimination and retaliation against him. The manager further alleged that the company had violated U.S. immigration laws and had discriminated against other employees. Threatening to sue, the manager indicated that he would rely on information (*e.g.*, assertions set forth by other employees in EEOC charges), which the company considered sensitive and confidential to bolster his claims.

Like the employer in *MicroStrategy*, the company here believed that the manager had created an intolerable conflict of interest. The company thus placed him on a paid leave of absence while it reconfigured his job to eliminate the conflict of interest. However, when the company notified him to return to work, the manager opted not to do so, and the company treated his decision as a voluntary resignation.

The company filed a lawsuit in the U.S. District Court for the Southern District of New York under the Declaratory Judgment Act, asking the court to find that its treatment of the manager was lawful, and that he had breached his duty of loyalty to the company. The company further requested an injunction enjoining the manager from revealing the sensitive and confidential EEO and other personnel information that he possessed as a result of the position he had held at the company. In response, the manager moved to

dismiss the company's federal lawsuit and then brought an employment discrimination lawsuit in New York State court.

As required by the Act, before the federal district court could declare the rights and obligations of the parties, the company first had to establish to the court's satisfaction that: (1) the letter from the manager's attorney contained a threat to sue; (2) the threat constituted a "case or controversy" between the company and the manager; and (3) the court should exercise its discretion and adjudicate this matter.

The manager argued that the letter merely stated his rights and did not contain a threat. Unconvinced, the court, in an unreported decision, found that a controversy did, in fact, exist, based on various statements in the letter, including that the manager was considering naming certain company executives in a lawsuit charging retaliation and unlawful discrimination.

Next, in deciding to exercise its discretion and take the case, the court rejected the manager's representation that, if the federal court dismissed the case, he would proceed with claims based only on New York State and New York City law, thereby eliminating the federal question (*i.e.*, alleged Title VII discrimination violations). The court rejected his argument because the manager's assertions did not provide the company with a guarantee that he would not later change his mind and pursue federal claims against the company.¹⁴

Thus, the manager's motion to dismiss was denied, as was his subsequent motion for reconsideration, and the company was permitted to go forward with its lawsuit for a declaratory judgment that its actions with respect to the manager's employment were lawful, and that he had breached his duty of loyalty to the company. Shortly after the court's ruling, the case settled.

A 2006 case, *Leon v. IDX Sys. Corp.*,¹⁵ further illuminates the potential advantages of striking first. There, IDX's director of medical informatics, Mauricio Leon, began to complain of alleged mismanagement of a federally-funded project not long after he was hired. About a year later, the company placed him on unpaid leave and brought an action for a declaratory judgment, which sought a judicial determination that the company could terminate him without violating the anti-retaliation provisions of the Sarbanes-Oxley Act (SOX), the False Claims Act and the Americans with Disabilities Act. In response, Leon filed suit against IDX, alleging, *inter alia*, that the company had unlawfully retaliated against him by placing him on leave. He also filed a SOX whistleblower charge with the Department of Labor (DOL).

Subsequently, during the discovery process, IDX learned that, despite explicit instructions to the contrary, Leon had intentionally deleted thousands of files from his company-issued laptop computer, some of which contained pornography. IDX terminated Leon and, on IDX's motion, the district court sanctioned him by dismissing all of his claims and ordering him to pay the costs incurred by IDX in investigating the spoliation,

as well as the company's attorney's fees. However, the court refused to enjoin the DOL's SOX investigation.

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's sanctions against Leon, but reversed the district court on its refusal to enjoin the DOL investigation. Finding that the proceedings were likely barred under the doctrine of *res judicata*, the issue was remanded to the trial court for further consideration.

Thus, IDX's preemptive action ultimately provided the company with evidence that led to a favorable resolution of the case.

Notwithstanding *MicroStrategy*, these subsequent cases highlight the utility of the Declaratory Judgment Act for employers in the right circumstances. Where an employer has important and urgent reasons to protect confidential information in the hands of a high-ranking employee who threatens to sue, striking first by seeking declaratory and injunctive relief may be an effective strategy to pursue.

The Act May Be Useful To Determine the Validity of Employment-Related Agreements, Programs and Benefit Plans

Employment agreements covering a range of matters abound in the workplace. For example, it is common practice, particularly in conjunction with a reduction-in-force, for laid-off employees to receive additional severance pay in exchange for signing a release and waiver of any claims they may have in connection with their employment with the company. Sometimes, however, employees try to avoid their contractual obligations and threaten to file a lawsuit. Some employers have successfully used the Declaratory Judgment Act to counter such employee attempts to circumvent lawful employment agreements.

In *Kellogg Co. v. Sabhlok*,¹⁶ for instance, Jatinder Sabhlok, Kellogg's Vice President of its International Research and Development Group, lost his job as part of a reduction-in-force. Accepting the option given to other separated employees, Sabhlok received an enhanced severance package in return for signing a separation agreement and release-of-claims form. At Kellogg's request, Sabhlok, who was then 55 years old, agreed to extend his employment for one year to assist in the group's reorganization. At the conclusion of the one-year extension, Sabhlok signed an amendment to the original separation agreement for which he received additional compensation.

More than a year after his one-year extension ended, Sabhlok, through counsel, wrote to Kellogg threatening to sue for age discrimination and breach of contract. Among other assertions, Sabhlok contended that at the time he agreed to the extension, he was induced to stay on by promises that a permanent position would be found for him. He further claimed that younger, less qualified individuals were chosen over him for the positions that did become available.

Kellogg opted to preempt Sabhlok's threatened suit and filed a declaratory judgment action, asking the court to declare that the separation agreement and amendment precluded a suit by Sabhlok. Finding that the agreement as amended included, among other provisions, an unambiguous provision that the company had no obligation to rehire Sabhlok, the district court granted the company's request for a declaratory judgment. The U.S. Court of Appeals for the Sixth Circuit recently affirmed the lower court's ruling.¹⁷

While *Sabhlok* involved a suit by one employee, sometimes an employer faces a potential challenge by a group of employees. When confronted with such threats, the employer may be able to resolve the matter expeditiously and efficiently by preemptively seeking a declaratory judgment against all affected employees.

For example, in *Ameritech Benefit Plan Comm. v. Communications Workers of Am.*,¹⁸ the employer, in response to a lawsuit filed by one employee and several charges filed by others with the EEOC, brought a "reverse" class action. It sought a declaratory judgment that, in light of the Pregnancy Discrimination Act, its current method of crediting service dates for pension benefits and other benefit purposes did not violate Title VII, the Equal Pay Act, ERISA or various state laws. The U.S. Court of Appeals for the Seventh Circuit held that the trial court properly granted Ameritech summary judgment on all of its claims.

A similar approach was recently taken by the employer in *Haliburton Co. Benefits Comm. v. Graves*,¹⁹ which also brought a "reverse" class action and request for declaratory relief, after receiving complaints from retirees about amendments made by the company to one of its retiree medical plans. Although the employer did not prevail on the merits, its use of the Declaratory Judgment Act (and the class action mechanism) allowed it to achieve a quicker and perhaps less costly determination of the validity of the contested plan amendments than would likely have resulted if the company had sat back and waited to be sued piecemeal.

The Act May Be Useful to Counter Extortionate Demands

Though not nearly as common as other threats, extortionate demands against employers are, by their very nature, extremely serious and potentially costly matters. As defined, for example, by New York law, extortion is a felony that occurs when a person "compels or induces another person to deliver ... [money or other] property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will expose a secret or publicize an asserted fact, whether true or false, tending to subject ... [the targeted] person to hatred, contempt or ridicule."²⁰

In popular terminology, extortion is blackmail; a person threatens to go public with damaging accusations unless they receive "hush money." Normally, the amount of money sought is exorbitant and bears no relationship to anything other than the financial worth of the victim. Extortionate demands are far in excess of what can be awarded by a court or jury, and are generally attempted against wealthy and/or famous people who would likely suffer serious, if not irreparable, damage to their reputation, career and

earnings potential if the accusations were made public, regardless of whether they are true or total fabrications.

One high-profile extortion case, though not employment-related, holds some important lessons for employers. That case involved Michael Flatley, the entertainer known for his association with the Irish dance troupe, “River Dance.” Two months after he had spent the night with Tyna Marie Robertson, Flatley’s lawyer received a letter from Robinson’s attorney, Dean Mauro. In the letter, Mauro asserted that Flatley had raped Robinson and demanded a seven-figure payment to settle her claims. If a settlement were not reached within a specified time, the attorney threatened to go to the “worldwide” media with the story, and implicitly further threatened to report Flatley to various U.S. and British government agencies, including the IRS, the Social Security Administration and “Immigration Services.”

In response, Flatley filed a lawsuit against Robertson and her attorney for civil extortion and various other wrongs, including defamation and fraud. Attempts by Robertson and Mauro to have Flatley’s lawsuit dismissed eventually reached the California Supreme Court on a variety of issues, including whether Mauro’s letter to Flatley was simply a pre-litigation settlement offer and therefore an exercise of the “constitutionally protected right of petition” under the First Amendment. The California Supreme Court held that the attorney’s letter and other conduct constituted extortion “as a matter of law” and as such were not protected by the First Amendment.²¹ Flatley thus was permitted to continue with his lawsuit.

Just as Flatley seized the offensive when threatened with extortion, it can be appropriate for an employer to do so as well. An apt illustration is a 2004 New York case involving a high-profile media personality who was accused of inappropriate behavior by an employee he supervised.²²

The employee, who resigned after working for the company for four years but later returned to her old job, had her attorney send a letter to the company a few months after her return in which she accused the high-profile supervisor of improper conduct towards her. The letter stated that the employee was prepared to sue and suggested that the company should consider settling the matter because the employee’s allegations could be very damaging to the company and the supervisor. The employee later demanded \$60 million to “settle” the matter.

Before the employee made good on her threat to sue, the company and the supervisor filed a lawsuit in federal court against her and her attorneys seeking declaratory and injunctive relief, as well as damages. The suit alleged a number of wrongs, including attempted extortion, tortious interference with prospective business relations, and intentional infliction of emotional distress. In addition, the suit sought declaratory judgments that:

- The employee, who had taken a paid leave after sending the threatening letter and never returned to work, had abandoned her job and that the company’s decision to

deem her actions a voluntary resignation was neither discriminatory nor retaliatory; and

- Based on the alleged attempted extortion, the company and the supervisor had no liability to her for the alleged inappropriate behavior or anything else concerning her employment.

The matter was settled soon after the complaint was filed.

Prevailing in the Court of Public Opinion

Because they involved high-profile parties, these cases underscore an important secondary benefit of preemptive litigation, namely, minimizing the potentially serious damage to a party's reputation that can result from an attempted shakedown. Sometimes, those in the public eye find that, even if they prevail in litigation, the negative publicity caused by the ordeal is so damaging that their judicial "success" is little more than a Pyrrhic victory. Clearly, preemptive litigation should be initiated only where there is a legitimate legal basis for doing so. But as with a courtroom jury, the ability of an aggrieved party to present his or her position as the true victim can be extremely persuasive in the court of public opinion.

Some Caveats

Like any litigant, an employer who seeks declaratory relief when threatened with a suit from an employee runs the risk that the court will reject its request on some jurisdictional basis. Employers who decide to initiate such preemptive litigation also should be aware that they assume the additional risk that the commencement of a preemptive suit, under some circumstances, could be viewed as evidence of unlawful retaliation under anti-discrimination laws.²³

As one court has speculated,²⁴ this risk may have increased following the Supreme Court's ruling last year in *Burlington N. & Santa Fe Ry. Co. v. White*,²⁵ which considerably broadened the definition of retaliation to encompass virtually any employer act which would "dissuade[] a reasonable worker from making or supporting a charge of discrimination."²⁶ Indeed, at least one court has relied on *Burlington Northern* in finding a *prima facie* case of retaliation, where the employer brought a state law action for, *inter alia*, malicious prosecution against a former employee after she lost her sex harassment case.²⁷

In any case, the determination of whether an employer lawsuit constitutes retaliation involves a fact-driven analysis. In this regard, the Supreme Court's earlier ruling in *BE&K Constr. Co. v. NLRB*²⁸ supports the argument that employer suits do not, at least on their face, constitute retaliation. There, the Court balanced the employer's First Amendment right to petition the court with the employee's right to engage in activity protected by the Labor Management Relations Act, free from retaliation. The Court came down on the side of the First Amendment, holding that the employer's unsuccessful suit

against several unions was not unlawful interference with activity protected by the statute, *even if brought with a retaliatory motive*, unless the suit was objectively baseless. Some judicial precedent exists for applying *BE&K* in employment discrimination cases and rejecting employee retaliation claims based on a “first strike.”²⁹

Employers considering preemptive litigation should also be aware of so-called anti-“SLAPP” [Strategic Lawsuit Against Public Participation] laws, which permit a defendant (*e.g.*, an employee) to seek dismissal of a lawsuit on the ground that the suit constitutes illegal retaliation against a person who has engaged in protected activity. A number of states have anti-SLAPP laws, including California and New York.

In fact, the attorney who was sued in the *Flatley* case raised California’s anti-SLAPP law in his unsuccessful attempt to have Flatley’s extortion suit against him dismissed. There, the California Supreme Court held that the attorney’s participation in the illegal extortion scheme deprived him of any protection under the state’s anti-SLAPP law.³⁰ It is unclear, however, how a court might rule where the defendant (*i.e.*, the employee or employee’s attorney) is not engaged in such blatantly unlawful conduct.

The law on whether an employer suit constitutes retaliation is at best murky, but not altogether discouraging by any means. An employer who has a legitimate and immediate need for judicial intervention should be cognizant of, but not necessarily deterred by, the risk of a retaliation claim. Moreover, if the court concludes that the declaratory judgment action is meritorious, it will not credit the employee’s retaliation claim.

Conclusion

Employees enjoy a wide array of protections under federal, state and local employment laws, which allow them to seek redress for legitimate wrongs. At the same time, employees who seek to disclose confidential information, avoid the express provisions of employment agreements, or shakedown the company or one of its employees should not be allowed to misuse these protections as shields from the consequences of their improper, and, in some cases, illegal conduct. In such situations, preemptive litigation may provide an appropriate and effective way for the employer to protect its vital business interests. For the few employers who are known to have used the strategy, it has largely affirmed the age-old advice that the best defense often is a good offense.

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¹See EEOC “Charge Statistics FY 1997 through FY 2006, available at <http://www.eeoc.gov/stats/charges.html>.

² 28 U.S.C. §§ 2201-2202.

³ 28 U.S.C. §2201(e).

⁴ 127 S. Ct. 764 (2007) (Patent licensee not required to break or terminate its license agreement before seeking a declaratory judgment in federal court that the underlying patent is invalid, unenforceable, or not infringed).

⁵ *Id.* at 771.

⁶ *Id.* (citations omitted).

⁷*Id.* (citing *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)) (footnote omitted).

⁸ *Wilton v. Seven Falls Co.*, 515 U.S. 277, 278 (1995).

⁹ See, e.g., *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Steffel v. Thompson*, 415 U.S. 452, 466-67 (1974).

¹⁰ See Sana Siwolop, “Management: Recourse or Retribution?; Employers Are Taking On Disgruntled Workers in Court”, *New York Times*, June 7, 2000, available at <http://select.nytimes.com/search/restricted/article?res=F60912FC3E5B0C748CDDAF0894D8404482>.

¹¹ Civ. A. No. 00-453-A, 2000 WL 554264 (E.D. Va. May 2, 2000).

¹² *Id.* at *4. MicroStrategy appealed for emergency injunctive relief to the U.S. Circuit Court of Appeals for the Fourth Circuit. When the appeal was denied, the company filed suit in state court and obtained an order compelling Lauricia and her attorney to turn over company documents in their possession. The court also imposed a gag order on the parties. *MicroStrategy, Inc. v. Lauricia*, No. CH 000520, 82 Fair Emp. Prac. Cas. (BNA) 1568 (Va. Cir. Ct. May 3, 2000). See also *Ameritech Benefit Plan Comm. v. Communications Workers of Am.*, 220 F.3d 814 (7th Cir. 2000), where the court observed: “[T]he question whether an employer should have the right to short circuit the EEOC’s internal processes by running to court and filing a declaratory judgment action in a Title VII suit is an important one, which will have to be addressed in a case that raises it properly.” *Id.* at 819. The issue was not before court because an employee had filed suit prior to the employer seeking a class action declaratory judgment, see discussion, *infra*, and the court concluded it had subject matter jurisdiction, since the Act “allows suits for declaratory judgment where federal jurisdiction would exist in a coercive suit brought by the declaratory judgment defendant.” *Id.* at 818 (citation omitted).

¹³ Epstein, Becker & Green represented the company involved in this case.

¹⁴ In deciding to hear the request for a declaratory judgment, the court also relied on the fact that the suit encompassed federal questions regarding immigration law and the terms of a treaty. The federal court was considered a more appropriate forum for adjudicating these matters.

¹⁵ 464 F.3d 951 (9th Cir. 2006).

¹⁶ 471 F.3d 629 (6th Cir. 2006).

¹⁷ Employers also may seek declaratory relief with respect to other types of employment agreements, such as arbitration agreements. See, e.g. *Alliance Bernstein Inv. Research and Mgmt., Inc.. v. Schaffran*, 445 F.3d 121 (2d Cir. 2006), where, in an unusual move, the employer sought a declaratory judgment that the employee’s claim that his termination was retaliatory, in violation of SOX, was *not* arbitrable. Implicitly approving the employer’s use of the Declaratory Judgment Act to resolve the issue, the Second Circuit nevertheless held that, under the NASD rules which governed this case, the question of arbitrability was for the arbitrators to decide.

¹⁸ 220 F.3d 814 (7th Cir. 2000).

¹⁹ 463 F.3d 360 (5th Cir. 2006), *clarified*, 479 F.3d 360 (5th Cir. 2007).

²⁰ N.Y. Penal Law § 155.05(e). In addition to state statutes outlawing extortion, it is also a federal crime. See, e.g., 18 U.S.C. § 1951(b)(2) (The Hobbs Act), which defines extortion as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”

²¹ *Flatley v. Mauro*, 139 P.3d 2 (Cir. 2006). Notably, some state bar legal ethics rules, such as those of the New York Bar, provide that, even where a claim has merit, if the “settlement” demand is grossly disproportionate to any provable loss, the demand may be so unreasonable as to constitute grounds for the imposition of discipline against the attorney making the demand on behalf of his or her client. See, e.g.,

Model Code of Prof'l Responsibility DR 1-102 and 7-102. *See also Matter of Yao*, 231 A.D.2d 346 (1st Dep't 1997); *Matter of Benjamin*, 129 A.D.2d 886 (3d Dep't 1987).

²² Epstein, Becker & Green represented the company in this matter. The firm also represented the high-profile supervisor in the initial court proceedings involving the filing of the plaintiffs' complaint against the employee and her counsel.

²³ *See, e.g., Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996); *Hernandez v. Data Sys. Int'l., Inc.*, 266 F. Supp. 2d 1285 (D. Kan. 2003).

²⁴ *Spiegel v. Schulmann*, No. 03-CV-5088, 2006 WL 3483922 (E.D.N.Y. Nov. 30, 2006).

²⁵ 126 S. Ct. 2405 (2006).

²⁶ *Id.* at 2407 (citation omitted).

²⁷ *Greer-Burger v. Temesi*, No. 87104, 2006 WL 2023571 (Ohio Ct. App. July 20, 2006). Notably, in addition to citing *Burlington Northern*, the court relied on the employer's request for punitive damages as evidence of its retaliatory intent.

²⁸ 536 U.S. 516 (2002).

²⁹ *See, e.g., Sahli v. Bull HN Info. Sys., Inc.*, 774 N.E.2d 1085, 1092 (Mass. 2002), where the Massachusetts Supreme Judicial Court, relying on *BE&K*, held that "[w]hen an employer files a complaint seeking a declaration of its rights, duties and obligations under a contract that it entered into with an employee, and the lawsuit has a legitimate basis in law and fact, the employer does not violate ... [the state's anti-discrimination law], absent evidence that the employer's purpose is other than to stop conduct it reasonably believes violates the terms of the contract." *See also Silverstein v. Microsystems Software, Inc.*, 837 N.E.2d 728 (Mass. Ct. App. 2005) (The filing of a claim does not constitute retaliation under state law where the claim has a legitimate basis in law and fact and where there is no evidence that the filing party's purpose is other than to stop conduct it reasonably believes is unlawful).

³⁰ *Flatley*, 139 P. 3d at 2.