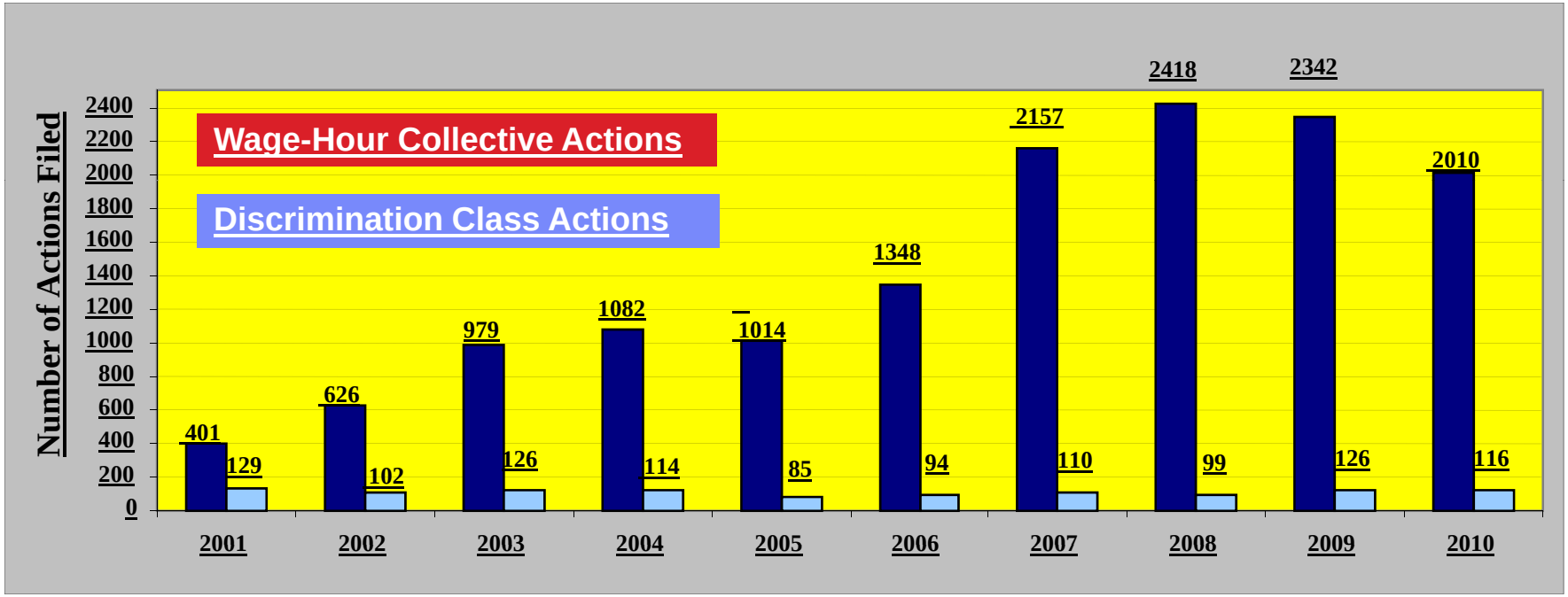
Recent Developments in Wage-Hour Class Actions and Related Strategic Considerations

Matthew W. Lampe
Jones Day

Adam T. Klein
Outten & Golden LLP

November 9, 2011

Wage-Hour Collective Actions Have Dramatically Increased Over Time



Impact of *Dukes* on Wage-Hour Class/Collective Actions

Dukes v. Wal-Mart

United States Supreme Court

- Federal Rule of Civil Procedure 23(b)(2)—Supreme Court reverses 9th Circuit (9-0)
    - "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different injunction or declaratory judgment* against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."

Dukes v. Wal-Mart

United States Supreme Court

- Federal Rule of Civil Procedure 23(a)—Supreme Court reverses 9th Circuit (5-4)
  - "The crux of this case is commonality—the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.' Rule 23(a)(2). That language is easy to misread, since any competently crafted class complaint literally raises common 'questions.' "
  - "'What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.'"
  - Plaintiffs must "demonstrate that the class members have suffered the same injury" not "merely that they have all suffered a violation of the same provision of law."
  - "Their claims must depend upon a common contention . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

Dukes v. Wal-Mart

Supreme Court Applies *Dukes* in
Wang v. Chinese Daily News, Inc., 623 F.3d 743 (9th Cir.),
vacated, --- S. Ct. ----, 2011 WL 4529957 (Oct. 3, 2011)

- The Ninth Circuit in *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 753-55 (9th Cir. 2010):
  - Affirmed award of $7.7 million to California employees alleging wage-and-hour class claims
  - Affirmed district court's certification of a Rule 23(b)(2) class that included claims for monetary relief
  - Found that monetary relief did not predominate where plaintiffs sought to enjoin allegedly injurious employment policies
  - Concluded that claims for money and injunctive relief were "closely related"

- The Supreme Court in *Chinese Daily News, Inc. v. Wang, Lynn, et al.*, --- S. Ct. ----, 2011 WL 4529957 (Oct. 3, 2011):
  - Granted petition for a *writ of certiorari*, vacated (in two sentence opinion) judgment of the Ninth Circuit, and remanded to the Ninth Circuit in light of *Dukes*.

Dukes v. Wal-Mart

Application of *Dukes* to FLSA Conditional Certification

- *Ruiz v. Serco, Inc.*, 2011 U.S. Dist. LEXIS 91215 (W.D. Wis. Aug. 5, 2011):
  - Plaintiffs, who provide support services to military members and their families, alleged that they were misclassified as exempt
  - Court denied motion for conditional certification; no "common policy" because exemption determinations made by managers on an individual basis
  - *Dukes* Rule 23 holding is "instructive" and "generally provides guidance in deciding when certification of a collective action under the FLSA is appropriate"

- *MacGregor v. Farmers Ins. Exchange*, 2011 WL 2981466 (D.S.C. July 22, 2011):
  - Plaintiffs, who were claims representatives for insurer, asserted off-the-clock claims
  - Court denied motion for conditional certification; no evidence that insurer had an "unwritten policy" requiring supervisors to violate the FLSA
  - *Dukes* is "illuminating"; noting that "if there is not a uniform practice but rather decentralized and independent actions by supervisors that is contrary to the company's established policies, individualized inquiries are likely to predominate"

Dukes v. Wal-Mart

Application of *Dukes* to FLSA Conditional Certification

Some Courts have refused to apply *Dukes* to deny conditional certification on grounds that plaintiffs bear a heavier burden for Rule 23 certification than for FLSA conditional certification, or where no discretionary decisions were at issue.

- ***Ware v. T-Mobile USA***, 2011 WL 5244396 (M.D. Tenn. Nov. 2, 2011):
  - Plaintiff call center workers alleged that they were not paid for pre- and post-shift work
  - Court granted motion for conditional certification; *"Dukes* does not affect [the] analysis of whether the plaintiffs are similarly situated . . . under the FLSA."
  - "This case . . . involves a collective action brought under the FLSA where, unlike a Rule 23 class action, employees seeking to join the class are statutorily required to affirmatively opt-in."
- ***Faust v. Comcast Cable Commc's Mgmt, LLC***, 2011 WL 5244421 (D. Md. Nov. 1, 2011)
  - Plaintiff call center workers alleged that they were not paid for pre-shift boot-up time
  - Court granted motion for conditional certification; "As the *Dukes* case pertains to class certifications under [FRCP] 23 and was premised on alleged sexual discrimination . . . , and the present case pertains to certification of a collective action for unpaid overtime under the [FLSA], the Court finds *Dukes* to be inapplicable . . ."
- ***See also*** *Troy v. Kehe Food Distribs., Inc.*, 2011 WL 4480172, at *8 (W.D. Wash. Sept. 26, 2011); *Spellman v. Am. Eagle Express*, Inc., 2011 WL 4014351, at n.1 (E.D. Pa. July 21, 2011).

Dukes v. Wal-Mart

Application of *Dukes* to FLSA Decertification Motions

- *Gilmer v. Alameda-Contra Costa Transit Dist.*, 2011 WL 5242977 (N.D. Cal. Nov. 2, 2011):
  - Plaintiff bus drivers alleged that they were not paid for "start-end" and "split-shift" travel time
  - Court denies FLSA second-stage motion to decertify
  - *Dukes* "does not stand for the proposition that an employer is entitled to an individualized determination of an employee's claim for back pay in all instances in which a claim is brought as a collective or class action."
  - "Plaintiffs in this case are not situated dissimilarly to one another, as the plaintiffs were found to be in *Dukes*."
  - "The variations in the modes of travel of Plaintiffs here, which affect the extent of [the employer's] liability for unpaid travel time, are more limited than the discretionary decision-making that led to failures to promote employees in *Dukes.*"
- *Cf. Bouaphakeo v. Tyson Foods, Inc.*, 2011 WL 3793962 (N.D. Iowa Aug. 25, 2011)
  - Plaintiffs, who worked at a pork processing plant, alleged they were denied compensation as a result of a gang time compensation system
  - Employer moved to decertify Rule 23 state law class in light of *Dukes*
  - Court denied motion; the *Dukes* "holdings and analysis [are] largely inapplicable to and/or distinguishable from the instant case"

Six Significant Second Circuit Wage-Hour Decisions:

In re Novartis
Shahriar v. Smith & Wollensky
Kuebel v. Black & Decker
Myers v. Hertz Corp.
Reiseck v. Universal Communications
Davis v. JP Morgan Chase

In re Novartis Wage & Hour Litig.: Exemption of Pharmaceutical Sales Representatives

Background

- 70 years: federal courts, pharmaceutical companies and the United States Department of Labor ("DOL") consider pharmaceutical sales representatives ("PSRs") to be salespeople exempt from overtime pay requirements under the Fair Labor Standards Act ("FLSA").
- Mid-2000s: PSRs begin challenging their exempt status and seeking back overtime pay.
- Dozens of lawsuits filed across the country.

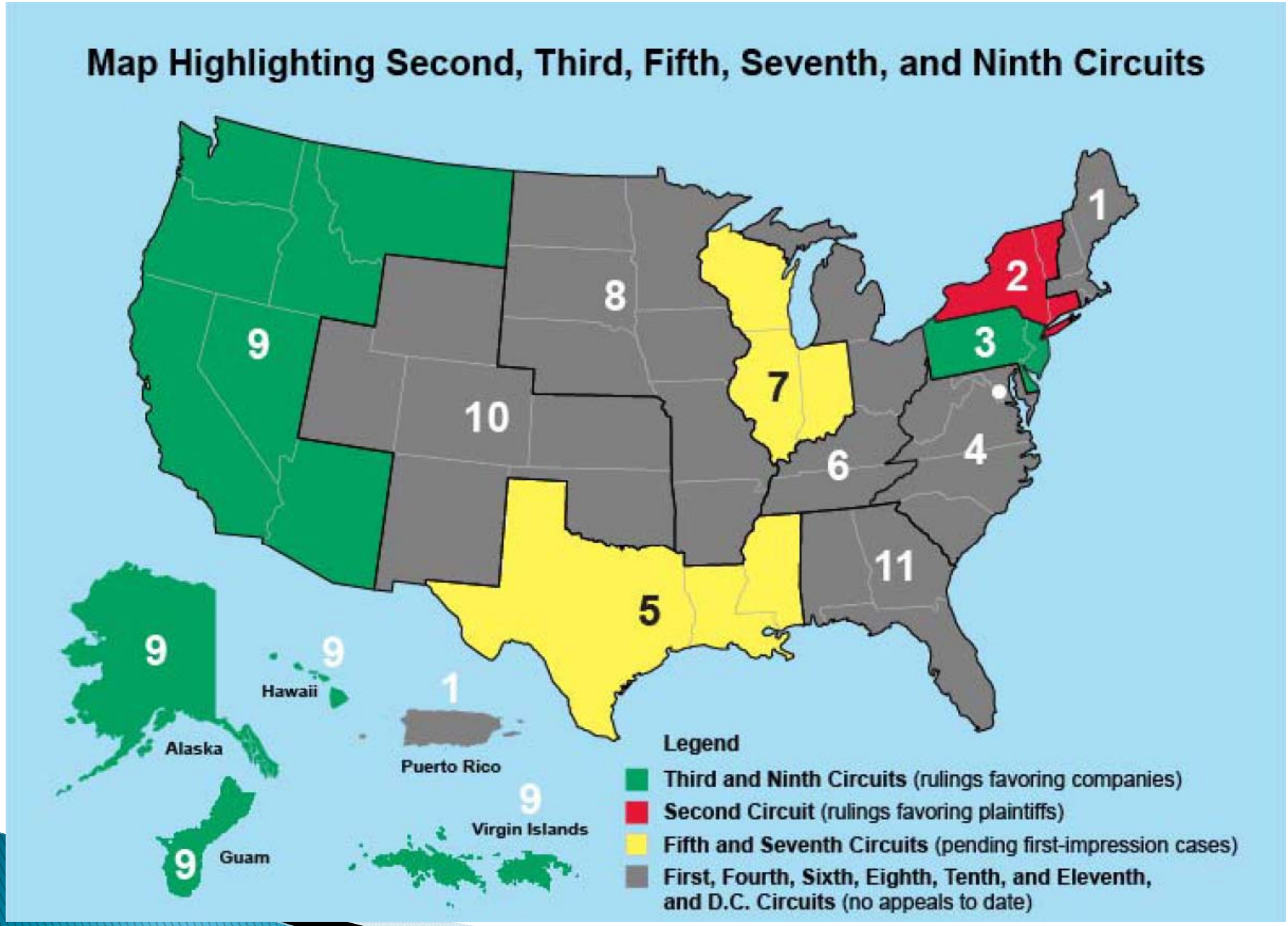
Pharmaceutical Sales Reps

In re Novartis Wage & Hour Litig., 611 F.3d 141 (2d Cir. 2010)

- Plaintiff sales reps asserted overtime claims under FLSA and NYLL
- US DOL filed amicus brief arguing that sales reps do not satisfy the outside sales or administrative exemptions
- Court held:
  - DOL interpretations are entitled to "controlling" deference
  - Sales reps do not satisfy outside sales exemption because they do not "transfer ownership," "take an order for a purchase," or "obtain . . . a binding commitment to prescribe."
  - Sales reps do not satisfy administrative exemption because they do not "have any authority to formulate, affect, interpret, or implement Novartis's management policies or its operating practices, . . . are [not] involved in planning Novartis's long-term or short-term business objectives, . . . [do not] carry out major assignments in conducting the operations of Novartis's business, . . . [and do not] have any authority to commit Novartis in matters that have significant financial impact."

Pharmaceutical Sales Reps

- *Christopher v. SmithKline Beecham*, 635 F.3d 383 (9th Cir. 2011)
  - Position of DOL in its amicus brief was not entitled to deference
    - "In view of many similarities between PSRs and salespeople in other fields, pharmaceutical industry norms, and the acquiescence of the [DOL] over the last seventy-plus years, we cannot accord even minimal *Skidmore* deference to the position expressed in the *amicus* brief."
  - Held that sales reps were exempt under outside sales exemption
    - "Plaintiff's contention that they do not 'sell' to doctors ignores the structure and realities of the heavily regulated pharmaceutical industry."
- *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010)
  - Plaintiff submitted DOL's *Novartis* amicus brief, but court did not address
  - Held that sales reps were exempt under FLSA administrative exemption
    - Work was "directly related" to "management or general business operations" because "it involved a high level of planning and foresight, and the strategic plan that [plaintiff] developed guided the execution of her remaining duties."
    - Work involved the "exercise of independent judgment with respect to matters of significance" because plaintiff "executed nearly all of her duties without direct oversight."
- *Baum v. AstraZeneca LP*, 372 Fed. Appx. 246 (3d Cir. 2010)
  - Held that sales reps were exempt under Pennsylvania's administrative exemption; Plaintiff submitted *Novartis* amicus, but court did not address


Map Highlighting Second, Third, Fifth, Seventh, and Ninth Circuits
1
2
3
4
5
6
7
8
9
10
11
9
Alaska
9
Hawaii
1
Puerto Rico
9
Virgin Islands
9
Guam
Legend
Third and Ninth Circuits (rulings favoring companies)
Second Circuit (rulings favoring plaintiffs)
Fifth and Seventh Circuits (pending first-impression cases)
First, Fourth, Sixth, Eighth, Tenth, and Eleventh, and D.C. Circuits (no appeals to date)

Pharmaceutical Sales Reps

Cert Petition in *Christopher v. SmithKline Beecham, Corp.*, No. 11-204 (U.S. Aug. 17, 2011)

- August 12, 2011: Plaintiff-Appellant in *Christopher* filed a petition for a *writ of certiorari* before the Supreme Court.
- October 17, 2011: Defendant-Appellee filed response
  - Defendant-Appellant *supported* grant of certiorari, citing confusion, uncertainty and financial impact caused by circuit split.
- The Supreme Court could announce its decision on whether to grant *certiorari* as early as November 28, 2011.

Shahriar v. Smith & Wollensky: Hybrid Actions

- Compatibility of FLSA Collective Actions and Rule 23 State-Law Class Actions

Hybrid Actions

Shahriar v. Smith & Wollensky, --- F.3d ----, 2011 WL 4436284 (2d Cir. 2011)

- Plaintiff waiters asserted minimum wage and overtime claims under FLSA and NYLL.
- District court granted plaintiffs' motion for Rule 23 class certification, exercising supplemental jurisdiction over plaintiffs' state-law claims. *Id.* at *4
- At issue in the appeal before the Second Circuit
  - Whether lower court abused its discretion in exercising supplemental jurisdiction over the plaintiffs' state-law claims.
- Court held:
  - Supplemental jurisdiction was appropriate pursuant to 28 U.S.C. § 1367 where the federal and state claims "form part of the same case or controversy" and the state claims do not raise complicated or novel issues of law, and do not substantially predominate over the federal claims.
  - No compelling reason to decline supplemental jurisdiction where the language of the FLSA does not prevent the exercise of supplemental jurisdiction; FLSA "savings clause" states that FLSA does not excuse noncompliance with state law; and the legislative history provides no support for precluding the hybrid action.

Hybrid Actions

29 U.S.C. § 216(b) and Nationwide Rule 23 State Law Claims -- Tradeoffs for Plaintiffs' Counsel

- FLSA
  - May be easier to obtain class certification
  - Offers possibility of liquidated damages and attorneys' fees, which may not be available under state law
  - Early stage, court facilitated notice
  - Accommodates nationwide cases
  - *But* opt-in mechanism limits class size

- Rule 23
  - Opt-out mechanism allows for larger classes and, therefore, larger aggregate damages
  - Longer state law statutes of limitation (some states: NY, CA)
  - *But* increased risk that class will not be certified
  - Does not easily accommodate nationwide cases

Hybrid Actions

- Circuit Court Decisions Allowing Hybrid Actions
  - *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 963-74 (7th Cir. 2011): "We conclude that there is no categorical rule against certifying a Rule 23(b)(3) state-law class action in a proceeding that also includes a collective action brought under the FLSA."
  - *See also Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 761 (9th Cir. 2010), *vacated on other grounds*, No. 10-1202, --- S. Ct. ---- (U.S. Oct. 3, 2011); *Lindsay v. Gov't Employees Ins. Co.*, 448 F.3d 416 (D.C. Cir. 2006)

- Circuit Court Decisions Precluding Hybrid Actions
  - *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 311 (3d Cir. 2003): The court declined supplemental jurisdiction over state-law class claims where novel state issues involved.
  - *But see Fisher v. Rite Aid Corp.*, No. 11-1685 (3d Cir. Mar. 17, 2011)
    - District Court found that "a Section 216(b) collective action and a Rule 23 class action are 'inherently incompatible,'" and held that this incompatibility extends to separately filed actions. 764 F. Supp. 2d 700 (M.D. Pa. 2011).
    - The compatibility issue is pending on appeal
    - Oral argument is scheduled for January 13, 2012
    - The US DOL has submitted an *amicus brief* in support of appellant

FLSA & NYLL Developments

Kuebel v. Black & Decker Inc., 643 F.3d 352 (2d Cir. 2011)

- Employee sued under both the FLSA and the NYLL on behalf of himself and a class of employees. Employer won summary judgment and Employee appealed.
- Two claims at issue in the appeal before the Second Circuit:
  - whether the time spent commuting between home and the job site was compensable for employee working out of his home and at several job sites; and
  - whether he should have been paid for overtime hours worked that he did not record.
- Court reversed in part, affirming summary judgment on commute time claims and reversing summary judgment on off-the-clock claims
  - Even if home activity is "integral and indispensable" to his principal job activities, it is well-established in the law that normal home to job site travel time is not compensable.
  - Employee's recollected estimates of the time he worked were sufficient to pass the burden to the employer of showing hours worked. Despite written policies that all time worked should be recorded, testimony that Employee was instructed not to record more than forty hours per week created a question of fact that survived summary judgment.

FLSA and NYLL Developments

Myers v. Hertz Corp., 624 F.3d 537 (2d Cir. 2010)

- Plaintiffs claimed that they were improperly classified as exempt from overtime pay requirements under FLSA & NYLL.
- District court denied FLSA conditional certification motion and Rule 23 motion for class certification of NYLL claims; plaintiffs filed interlocutory appeal
- Court affirmed denial of Rule 23 motion and found it lacked pendent appellate jurisdiction over denial of FLSA conditional certification
  - NYLL § 191, titled "Frequency of Payment," "only involves the timeliness of wage payments, and does not appear to afford plaintiffs any substantive entitled to a particular wage."
  - In Rule 23 motion for class certification in exemption cases, courts must examine duties actually performed by plaintiffs.
    - "[T]he existence of a blanket exemption policy, standing alone, is not itself determinative of the main concern in the predominance inquiry: the balance between individual and common issues."
  - Two-step approach to FLSA class certification is "sensible."
    - At first step in exemption cases, plaintiffs must make a "modest factual showing" that "there are other employees who are similarly situated with respect to their pay provisions, on which the criteria for many FLSA exemptions are based, who are classified as exempt pursuant to a common policy or scheme."

FLSA & NYLL Developments

Reiseck v. Univ. Communications of Miami, Inc. 591 F.3d 101 (2d Cir. 2010)

- Plaintiff, who was an advertisement salesperson, alleged that she was misclassified as exempt in violation of the FLSA and NYLL. Employer won summary judgment; district court held that plaintiff satisfied administrative exemption. Plaintiff appealed.
- At issue in the appeal before the Second Circuit:
  - Whether "District Court erred in concluding that [plaintiff] was not eligible for overtime pay because she fell within the so-called 'administrative exemption' to the FLSA."
- Court reversed, holding that plaintiff did not perform work directly related to management policies or general business operations
  - "Because [Plaintiff's] primary duty was the sale of advertising space, she is properly considered a 'salesperson' for the purposes of the FLSA and therefore does not fall under the administrative exemption."
  - Plaintiff did not "promote sales"; "Because [Plaintiff] sold advertising space, it seems that she must have 'promoted sales.' But under that theory, any sales clerk in a retail store would 'promote sales' when assisting potential customers."
- Court remanded to district court to consider whether Plaintiff satisfied outside sales exemption
  - May 2011: District court holds, in two-page opinion, that "summary judgment is not appropriate for either side"

FLSA & NYLL Developments

Davis v. JP Morgan Chase & Co.
587 F.3d 529 (2d Cir. 2009)

- Plaintiff loan underwrites alleged that he was misclassified as exempt in violation of the FLSA and NYLL. Employer won summary judgment and Plaintiff appealed.

- At issue in the appeal before the Second Circuit:
  - "whether underwriters tasked with approving loans, in accordance with detailed guidelines provided by their employer, are administrative employees exempt from the overtime requirements of the" FLSA and NYLL

- Court reversed, holding that plaintiff "did not perform work directly related to management policies or general business operations"
  - "As an underwriter, [Plaintiff's] primary duty was to sell loan products under the detailed directions of the Credit Guide. There is no indication that underwriters were expected to advise customers as to what loan products best met their needs and abilities. Underwriters were given a loan application and followed procedures specified in the Credit Guide in order to produce a yes or no decision."
  - "Their work is not related either to setting 'management policies' nor to 'general business operations' . . . but rather concerns the 'production' of loans—the fundamental service provided by the bank."

US DOL Enforcement Efforts & Focus on Independent Contractors

DOL Enforcement Efforts

- U.S. DOL & ABA Partnership
  - On November 13, 2010, Vice President Biden and the DOL announced a partnership between the DOL and the American Bar Association "to help workers resolve complaints received by DOL's Wage and Hour Division"
  - Since December 13, 2010, "people whose cases cannot be pursued [have been]provided with a newly created toll-free number that will connect them with an ABA-approved attorney referral service so they can find a qualified lawyer to help with their claims." Blog of the White House Middle Class Task Force (Nov. 19, 2010) (http://www.whitehouse.gov/blog/2010/11/19/helping-middle-class-families-pursue-justice)
  - "In addition, when the Wage and Hour Division has conducted an investigation, the complainant will now be provided information about the Wage and Hour Division's determination regarding violations at issue and back wages owed. This information will be given to the complainants in the same letter informing them that the Wage and Hour Division will not be pursuing further action, and **will be very useful for attorneys who may take the case.**" DOL Wage & Hour Div. Website (http://www.dol.gov/whd/resources/ABAReferralPolicy.htm) (emphasis added)

Focus on Independent Contractors

US DOL estimated in 2010 that worker misclassification has cost $40 billion in tax revenues since 1996. Anti-misclassification initiatives are on the rise:

- Payroll Fraud Prevention Act (Introduced in Senate on April 8, 2011; now in committee):
  - Would require employers to provide a notice to its "employees and non-employees" showing (i) the person's classification as employee or IC; (ii) a statement directing the individual to a DOL website summarizing the rights of employees and non-employees under the FLSA; (iii) the address and phone number of the local DOL office; and (iv) statement directing ICs to DOL with questions about classification
- Employee Misclassification Prevention Act (Introduced in House on October 13, 2011; now in committee):
  - Would require employers to maintain records of non-employee workers and presumes employee status where no records are kept
    - Must maintain "the remuneration and hours relating to the performance of labor or services by each" IC as well as the notices provided to each IC
  - Contains same notice requirements as proposed Senate Payroll Fraud Prevention Act
- US DOL signs a memorandum of understanding with the IRS on September 19, 2011:
  - Agree to share data and coordinate enforcement efforts to curtail employee misclassification.
  - Labor agencies of seven states, including Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Utah and Washington, have also signed
  - Hawaii, Illinois, Montana, and New York are expected to sign

Focus on Independent Contractors

IRS announced on September 21, 2011 the launch of its Voluntary Classification Settlement Program:

- Taxpayers may "reclassify their workers as employees for employment tax purposes for future tax periods with partial relief from federal employment taxes"

  Eligibility:

  - consistently treated the worker as a nonemployee
  - filed all Form 1099s for that worker for the last three years
  - must not be under misclassification audit
  - must have complied with the results of any previous audit

  VCSP Agreements:

  - taxpayer agrees to treat the class of workers as employees in the future
  - pays only 10% of the employment tax liability that might have been due on the workers' compensation for the most recent year;
  - not liable for interest or penalties
  - will not be subject to audit regarding the workers being reclassified

  Taxpayers must apply using Form 8952, Application for Voluntary Classification Settlement Program, available at IRS website

Focus on Independent Contractors

States Also Focus On Independent Contractors

- New York's Construction Industry Fair Play Act:
  - Effective October 26, 2010
  - Presumption that person hired by construction contractor is an employee unless worker is a "separate business entity," OR is free from control and direction, service is outside usual course of business, and worker is customarily engaged in independent trade similar to service at issue.
  - Requires that notice be posted regarding tax obligations of independent contractors and the rights of employees.
  - Imposes civil and criminal penalties for violation by contractor

Class Action Waivers in Arbitration Agreements

Class Action Waivers in Arbitration Agreements

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (Apr. 27, 2011):

- Issue: "whether the [Federal Arbitration Act] prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures."
- Held: Federal Arbitration Act preempted a California state contract rule, the *Discovery Bank* rule, which deemed a class-action arbitration waiver to be unenforceable as unconscionable when it is part of an adhesion contract, damages are predictably small and the consumer alleges a scheme to cheat consumers.

Class Action Waivers in Arbitration Agreements

AT&T Mobility LLC v. Concepcion – Cont'd:

- 5 to 4 majority concludes that Federal Arbitration Act preempts a California rule that class action waivers in consumer contracts are unconscionable
- The "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."
- "[C]lass arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA" because it (1) sacrifices informality, transforming arbitration into a slow and costly process; (2) leaves required procedural formalities and due process rights in the hands of arbitrators; (3) increases risks to defendants; and (4) is poorly suited "to the higher stakes of class litigation."

Class Action Waivers in Arbitration Agreements

2d Circuit Addresses Similar Issue One Month Before *Concepcion*

In re American Express Merchants' Litig., 634 F.3d 187 (2d Cir. 2011) (March 8, 2011)

- Plaintiff merchants filed class action antitrust suit against credit card issuer
- Court held that mandatory class action waiver provision contained in arbitration clause in credit card acceptance agreement was unenforceable
- Court found that "the class action waiver in this case precludes plaintiffs from enforcing their statutory rights"
  - "We find . . . as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws."

August 1, 2011: 2d Circuit issues order *sua sponte* indicating that it will consider whether to rehear case; states "no further briefing necessary at this time"

Class Action Waivers in Arbitration Agreements

Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547 (S.D.N.Y. 2011) (March 3, 2011):

- Decided 5 days before *In re Am. Express* and 1 month before *Concepcion*
- Employee brought FLSA collective action alleging that employer violated the FLSA and New York laws by failing to compensate plaintiff and other similarly situated for overtime worked.
- Defendant moved to compel arbitration of the plaintiff's claims individually, based on class waiver provision in the parties' arbitration agreement.
- Court denied the defendant's motion and found the arbitration agreement to be unenforceable "because it prevents [the plaintiff] from vindicating her statutory rights."
- Motion for reconsideration in light of *Concepcion* is currently pending

Class Action Waivers in Arbitration Agreements

Chen-Oster v. Goldman, Sachs & Co., 785 F. Supp. 2d 394 (S.D.N.Y. 2011), *reconsideration denied*, 2011 WL 2671813 (S.D.N.Y. July 7, 2011):

- Female employees brought Rule 23 class action alleging pattern or practice of gender discrimination
- Citing *In re Am. Express*, Court held that an arbitration agreement between and employer and employee was unenforceable where it precluded the plaintiff employee from enforcing federal statutory right under Title VII to be free from a pattern and practice of gender discrimination – a right which the plaintiff may not vindicate individually. 785 F. Supp. 2d 394 (2011).
- Court declined to reconsider its holding in light of *Concepcion*. 2011 WL 2671813 (S.D.N.Y. July 7, 2011).
  - "*Concepcion* involved the preemption of state contract law by a federal preference for arbitration embodied in a federal statute, the FAA."
  - The Supreme Court "emphasiz[ed] that [the FAA's Savings Clause] did not save the state contract law at issue in the case because 'nothing in [the Savings Clause] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.'"
  - "This case [Chen-Oster] demands consideration of a separate issue: whether the FAA's objectives are also paramount when, as here, rights created by a competing federal statute are infringed by an agreement to arbitrate."

Class Action Waivers in Arbitration Agreements

Brown v. Ralphs Grocery Co., 197 Cal. App. 4th 289 (2d Dist. 2011):

- Employee brought class action and PAGA representative action asserting claims under Cal. Labor Code
- Employer moved to compel arbitration. Trial court denied motion, finding class action waiver and waiver of right to pursue representative action under PAGA unenforceable.
- Cal. Court of Appeal held that ruling on class action waiver was not supported by substantial evidence but that trial court correctly ruled that waiver of PAGA right to bring representative action was unenforceable.
  - *AT&T* "did not specifically address whether California state law applicable to waiver of statutory representative actions – which actions are a means to enforce state labor laws for the benefit of the public – was preempted by the FAA."
  - "And, even if a PAGA claim is subject to arbitration, it would not have the attributes of a class action that the *AT&T* case said conflicted with arbitration, such as class certification, notices, and opt-outs. Until the United States Supreme Court rules otherwise, we continue to follow what we believe to be California law."

Class Action Waivers in Arbitration Agreements

Sonic-Calabasas A. v. Moreno, --- S. Ct. ----, 2011 WL 2148616 (Oct. 31, 2011):

- Supreme Court grants *cert* petition
- Vacates a California Supreme Court ruling that employee with a wage claim against his employer had a right to informal hearing before the State Labor Commissioner ("Berman hearing") notwithstanding an arbitration agreement between the employee and employer in which the employee waived the option of such a hearing. *Sonic-Calabasas A. v. Moreno*, 247 P.3d 130 (Cal. 2011)
- Remands case to California Supreme Court for further consideration in light of *AT&T Mobility LLC v. Concepcion*, 563 U.S. --- (2011)

Recent Statutory Developments in New York Wage-Hour Law

New York State Developments

Wage Theft Prevention Act

- Went into effect on April 9, 2011
- Increased damages for failure to pay wages, minimum wages, overtime (liquidated damages increased from 25% to 100% of wages owed)
  - *Ji v. Belle World Beauty, Inc.*, No. 603228/2008 (Sup. Ct. N.Y. Cnty. Aug. 24, 2011) (allowing retroactive application of Act's increased liquidated damages provision because provision is remedial and does not "impair vested rights or create new rights")
- Additional content for mandatory Wage Notice to employees (NYS DOL issued template notices)
- Employee acknowledgment of receipt of Wage Notice
- Sets forth requirements for Wage Statements

Questions?