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Appellate Group Of The Year: Gibson Dunn

By **Ryan Davis**

Law360, New York (January 19, 2012) -- The appellate group at Gibson Dunn & Crutcher LLP notched a landmark victory for Wal-Mart Stores Inc. that reshaped class action law and a helped limit the scope of liability for securities fraud in a case involving Janus Capital Group Inc., earning the firm a spot on Law360's Appellate Groups of 2011.

The U.S. Supreme Court rulings in Wal-Mart v. Dukes and Janus v. First Derivative Traders both represented important shifts in the legal landscape, said Gibson Dunn partner Mark Perry.

"For the most part, we're moving the law in these cases, and that's the fun part of the job," he said. "It's not about where the law was yesterday, but about where it's going."

The firm's involvement in the Wal-Mart case, in which the plaintiffs alleged gender discrimination under Title VII of the Civil Rights Act, began in 2004 after a class was certified consisting of as many as 1.5 million female workers.

"When we came into the case, it was seen as being over," said Theodore Boutrous, co-chairman of the firm's appellate group. "The class was certified and the plaintiffs' lawyers were acting as if there had been a trial and they won."

However, the firm realized that the case raised many critical issues in class certification law that were ripe for review by the Supreme Court, Boutrous said. That was the ultimate goal, as the firm knew it faced a tough road at the Ninth Circuit, which has difficult rules for defendants in class actions.

"We and our clients took the long view," he said. "It was a seven-year process and not a lot of companies would have toughed it out."

After the Ninth Circuit affirmed class certification in a 6-5 en banc ruling in 2010, Wal-Mart took the case to the Supreme Court, arguing that the plaintiffs' individualized, fact-intensive claims of discrimination were inappropriate for class certification.

The firm maintained that the issues of the case were not specific to Wal-Mart, but affected all companies and put together a strong group of amicus briefs by major companies, Boutrous said.

On June 20, the high court sided with Wal-Mart and overturned class certification, ruling 5-4 that the class could not meet the standard for certification under Federal Rule of Civil Procedure Rule 23(a)(2), which requires that there be "questions of law or fact common to the class."

"Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question," the court wrote.

The ramifications of the Supreme Court's decision have been felt in class action cases far and wide over the last seven months, Boutrous said.

"The Supreme Court's ruling has had a major impact already in state and federal courts around the country," he said. "Courts are taking a much closer look at class certification to ensure that it is fair to all parties."

In addition, there is a new focus on ensuring that a case can be tried if a class is certified, he said, whereas before the ruling, many judges assumed a case with a certified class would settle.

Boutrous noted that in addition to the 5-4 ruling shutting down the class action against Wal-Mart, the Supreme Court unanimously found in the case that a different rule, 23(b)(2), barred class treatment of claims seeking monetary relief in the form of back pay.

That part of the ruling laid down standards that preclude the type of "trial by formula" designed by the Ninth Circuit, in which liability and back pay would have been determined for a sample set of the class members, then extrapolated for the remainder of the class without further individualized proceedings.

"That part of the ruling has not gotten as much attention, but we're especially pleased that all nine justices ruled that way," he said.

In the other major Supreme Court victory for Gibson Dunn this year, the firm defended Janus in a case that presented a challenge because it was the first time plaintiffs had tried to bring securities fraud claims against the mutual fund industry.

The plaintiffs sued after it became public in September 2003 that executives at Janus Capital Group and its wholly owned subsidiary Janus Capital Management LLC permitted so-called market-timing transactions.

They claimed the revelation allegedly caused the subsidiary's assets under management to plummet by $14 billion, and sought to hold JCM liable for drafting allegedly misleading prospectuses given to mutual fund investors, even though the company was not named in the prospectuses.

Gibson Dunn was hired by Janus at the start of the case and handled it from the district court all the way to the Supreme Court, arguing that the suit improperly sought to expand the scope of liability for securities fraud beyond those with the ultimate authority over statements made in a prospectus.

The district court dismissed the suit, but that decision was reversed by the Fourth Circuit, which held that the drafter of a statement issued to the market might face liability under securities law.

Perry said that ruling caused alarm on Wall Street because it could extend liability to all participants in the securities markets, including bankers, lawyers, accountants and investment advisers.

"The way we pitched it to the courts was that the case was not just about mutual funds, but about any company that provides services to public companies," he said.

On June 13, the Supreme Court voted 5-4 to bar plaintiffs from bringing private aiding-and-abetting lawsuits over misleading prospectuses against the people and firms that may have prepared the statements but did not have ultimate authority over them.

The ruling drew a bright line that clarified the scope of liability under securities law, Perry said.

"The effect of the ruling is to exclude liability for the service providers that are a significant part of the Wall Street world," he said.

Because the case presented an issue of first impression, Gibson Dunn made an effort to frame its argument using a common sense analogy in its brief to the high court, Perry said.

"We struggled to find a way to describe it, but the way we put it in the brief was that it was similar to the distinction between the speechwriter and the person giving the speech," he said.

The Supreme Court used that analogy in its ruling, writing that "even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit — or blame — for what is ultimately said."

Gibson Dunn's appellate practice has 30 partners and associates and is an expanding area for the firm, and this year added two new partners, Amir Tayrani in Washington and Theane Kapur in Los Angeles.

"We're growing and we're not done yet," said Perry. "It's a very important part of our practice."

According to Boutrous, the appellate practice is "one of the broadest and strongest at the firm."

"It's expanded each and every year in terms of the size and types of cases we handle," he said.

Methodology: In November, Law360 solicited submissions from over 500 law firms for its practice group of the year series. The more than 550 submissions received were reviewed by a committee of Law360 editors. Winners were selected based on the significance of the litigation wins or deals worked on; the size and complexity of the litigation wins or deals worked on; and the number of significant, large or complex deals the firms worked on or lawsuits the firm had wins in. Only accomplishments from Dec. 1, 2010 to Dec. 1, 2011 were considered.

--Editing by John Quinn.