

Litigator of the Week: Reframing the Independent Contractor Fight

In a battle over classifying workers as employees or independent contractors, Gibson Dunn partner Jason Schwartz figured out how to reframe the fight.

By **Ben Hancock**
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Battling over whether workers should be classified as employees or independent contractors, you might say, is in vogue in the labor law scene these days. It's an issue that has certainly captured the attention of lawyers in Silicon Valley, home of the gig-economy.

But if you can reframe the fight, that might just be the better defense strategy.

Jason Schwartz, a litigation partner in Gibson, Dunn & Crutcher's Washington, D.C. office, led a team that successfully defeated a nationwide class action against marketing company Credico LLC by taking an alternate route to defeating claims that workers had been misclassified.

Instead, Schwartz convinced U.S. District Judge Paul Engelmayer of the Southern District of New York last week that Credico wasn't an employer to the plaintiffs at all—and that even if it were, their status as outside salespeople meant they couldn't pursue minimum wage claims.

"These rulings collectively preclude liability for all defendants on all counts," Engelmayer wrote in an Oct. 27 order granting summary judgment in favor of Credico. Though related cases will go on in other venues, the ruling lands Schwartz the title of Litigator of the Week for extricating his client from this particular legal quagmire.



Jason Schwartz of Gibson Dunn & Crutcher in Washington, D.C. May 4, 2017.

The company functions as something of a middleman in a program operated by the government to help give low-income people access to mobile phones. It contracts on one side with Sprint, which receives a subsidy for participating in the program, and on the other with local sales offices that hire people to go out and actually sign up people to buy phones.

In the Vasto case, several salespeople who worked for a subcontractor to Credico in New York called Cromex Inc. sued Credico, alleging that they had been misclassified and were owed minimum wage, and that they had been fired as retaliation for complaining about their

working conditions. Both Credico and Cromex were sued under the “joint employer” theory.

But rather than try tackle the independent contractor issue, Schwartz instead found evidence that the workers barely knew what Credico was. According to Engelmayer’s ruling, some didn’t even know how to contact the company.

The approach worked. Engelmayer summed up that “even assuming plaintiffs were employees, they were employees only of Cromex, and therefore only Cromex can be held liable” under federal and New York state labor laws. The ruling was critical to undoing a conditionally certified national class action against Credico.

The other point that Gibson Dunn won on was an argument over the “outside sales exception.” In a nutshell, it holds that even employees—if they are salespeople in the field who can’t be monitored—aren’t subject to minimum wage and overtime requirements, and can instead be paid on commission under New York and federal labor laws.

Schwartz successfully argued that plaintiffs fell under that exception, pointing directly to pleadings that characterized their jobs. “When we came into the case and saw that, we thought, ‘This is fantastic,’” he said in an interview Thursday.

Schwartz said oral arguments were intense and lasted several hours, and praised Judge Engelmayer for his

thoroughness. It was the second time the judge had heard a case on the issue, after a hearing on a New York-only class action against Credico involving different plaintiffs (which was also defeated on summary judgment by Schwartz and his team in a ruling the month before).

The newer ruling is a “significant decision that takes apart a [Fair Labor Standards Act] class action, which is really hard to do because the standard for employment is very liberal,” he added.

His opposing counsel in Vasto was Harold Lichten of the Boston plaintiffs firm Lichten & Liss-Riordan, which has made a name for itself in California for going after companies like Uber and GrubHub. Lichten is pursuing other cases against Credico in both California and Massachusetts, but said he hasn’t made a decision on whether to appeal the Vasto case.

“While it’s true that Gibson Dunn litigates a case to the Nth degree ... Mr. Schwartz himself is a very honorable guy and we had no animosity during the litigation,” Lichten said by phone. “I think both California and Massachusetts are more favorable on this issue, but we will see.”

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