

Transportation Group Of The Year: Gibson Dunn

By Jeannie O'Sullivan

Law360 (February 2, 2018, 3:53 PM EST) -- Gibson Dunn & Crutcher LLP last year was the driving force behind legal victories for BNSF Railway Co. in a forum shopping showdown and the Association of American Railroads in a constitutional battle over regulatory authority, steering the firm right into a spot on Law360's Transportation Groups of the Year.

Uber Technologies Inc. and high-speed transportation start-up Hyperloop Technologies Inc. also had Gibson Dunn as their courtroom co-pilot over the past year, in arbitration and class action matters for the former and in a global settlement of bombshell litigation between the latter and its onetime executives.

In other representations by Gibson Dunn, Fiat Chrysler was granted a Georgia Supreme Court review of a \$40 million wrongful death judgment, CSX Transportation Inc. is moving forward with several large transportation infrastructure projects, and the the Association of Global Automakers and its members receive ongoing advice on regulatory, rulemaking and litigation matters concerning the implementation of the federal emissions standards for motor vehicles.

The firm's mastery of the array of legal areas that come into play in transportation cases — including regulatory, administrative, class action, environmental and constitutional — is what fuels its reputation, according to partner Thomas H. Dupree Jr., a Washington, D.C.-based member of Gibson Dunn's litigation department and its appellate and constitutional law practice group.

"In terms of the breadth of our practice, its unparalleled," Dupree said.

Several hundred of the firm's 1,360 attorneys worldwide work on transportation matters, according to Dupree, who noted that the firm's work in this area is more of a multidisciplinary effort than a formal practice group.

BNSF Railway, one of North America's largest rail systems, has Gibson Dunn to thank for the U.S. Supreme Court's May ruling that Montana courts can't assert jurisdiction over claims made by nonresident employees injured while working outside the state. The 8-1 vote overturned the Montana Supreme Court's finding that individuals have a right to sue in the state even though they have no connection to it under the Federal Employers Liability Act, a 1908 law that protects railroad workers



injured on the job. The justices found that FELA doesn't address personal jurisdiction over railroads.

The case marks an important battle against forum shopping, according to Andrew S. Tulumello, the co-partner in charge of the Washington, D.C., office, who represents BNSF. Before the decision, any of the railroads could be and were sued anywhere they did business for any employee injury, he said.

"These cases now need to be filed in a place that has a logical connection to the lawsuit. That is very good for the civil justice system, very good for BNSF and for the rail industry as a whole," Tulumello said.

In a separate win for BNSF under Gibson Dunn's representation, the D.C. Circuit in October denied a certification bid by direct purchasers attempting to mount a multibillion-dollar price-fixing class action against the four major U.S. railroads.

"Our expertise in handling issues in the railroad industry enabled us to make a presentation that told a simple, short and powerful story," Tulumello noted.

The rail industry's trade organization, the Association of American Railroads, made the best of Dupree's constitutional expertise in its face-off with the U.S. Department of Transportation before the D.C. Circuit. Together with Gibson Dunn partner David A. Schnitzer, Dupree convinced the D.C. Circuit in March to strike down as unconstitutional a statute giving Amtrak regulatory authority over freight railroads.

The ruling backed AAR's position that, under the U.S. Constitution, an entity cannot simultaneously hold roles as a for-profit corporation and a government regulator in that same industry.

"Can the government create its own for-profit 'Government Cola Corporation' and then give it a mandate to go regulate Coke and Pepsi? We say no," Dupree said.

Gibson Dunn continued its defense of Uber in a high-profile class action brought by California drivers alleging they should be classified as employees rather than independent contractors in securing the Ninth Circuit's review of a district court's class certification order as the case sped toward trial. Following Gibson Dunn's argument before the federal appeals panel in September, the matter was paused until the U.S. Supreme Court decides a trio of closely watched cases on whether employers can legally include class waiver provisions in employee arbitration agreements.

Uber likewise scored successes in the Ninth and Eleventh circuits regarding the enforceability of its arbitration agreements with drivers, with Gibson Dunn battling opposition from the National Labor Relations Board in convincing both circuits that drivers who accepted Uber's arbitration agreements can only assert claims in individual arbitration.

In another appellate triumph for the ride-hailing company, Gibson Dunn persuaded the Second Circuit to find that a rider who launched a price-fixing class action had accepted a binding arbitration agreement with Uber, according to Gibson Dunn partner Theane Evangelis, an appellate, class action and general commercial litigation partner in the firm's Los Angeles office.

That decision overruled a district court order denying Uber's motion to compel arbitration and questioned whether the Federal Arbitration Act even applies to contracts formed over the internet, said Evangelis, who represents Uber.

"These decisions have set powerful precedents that will have a broad impact across other cases," she said.

--Additional reporting by Vin Gurierra and Linda Chiem. Editing by Catherine Sum.

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