

MVP: Gibson Dunn's Thomas H. Dupree Jr.

Law360 (November 30, 2018, 3:27 PM EST) -- Thomas H. Dupree Jr. of Gibson Dunn & Crutcher LLP beat the Internal Revenue Service in a battle over the taxability of railroad employee stock options and struck down a Surface Transportation Board railroad performance rule, upending the regulatory regime for railroads and landing him among **Law360's 2018 Transportation MVPs**.

HIS BIGGEST ACCOMPLISHMENT THIS YEAR:

Dupree's biggest success this year was persuading the U.S. Supreme Court to reverse a divided Seventh Circuit's May 2017 finding that stock options given to railroad employees were considered money and were therefore taxable.

Already known in legal circles as a trial and appellate ace who has argued more than 80 appeals before each of the 13 federal circuits as well as the Supreme Court, Dupree was brought on board by Canadian National Railway Co. subsidiaries Wisconsin Central Ltd., Illinois Central Railroad Co. and Grand Trunk Western Railroad Co. to take their \$13.3 million dispute with the IRS to the high court. Dupree's goal was to have the justices resolve a circuit split on the question of whether stock that a railroad transfers to its employees is taxable under the Railroad Retirement Tax Act.

The rail carriers argued that the stock was not a form of "money remuneration" and that the Seventh Circuit majority's construction of the term "money" fell in line with present-day usage when it should've adhered to the meaning of "money" in 1935 when the RRTA was enacted.

"It was a fascinating and challenging case because we really needed to go scurrying around to find Depression-era dictionaries because this was a statute that was enacted in the New Deal," Dupree told Law360. "The way we presented the case was to argue that the plain meaning of the word 'money' as of the 1930s did not encompass stock."

The MVP logo features the letters 'MVP' in a blue, serif font. The letter 'V' is partially enclosed by a red circle with an upward-pointing arrow, symbolizing a Most Valuable Player.

**Thomas H.
Dupree Jr.
Gibson Dunn**

The justices grappled with the plain language of a statute versus the intent of a statute and ultimately agreed with the railroads that their stock options to employees are not taxable in a 5-4 decision in June.

“A number of the [justices’] questions concerned how you determine what the plain meaning of money is, there was a lot of discussion of historical context, there were a lot of questions going to the practical significance of ruling one way or the other,” Dupree said. “The justices had very good, thoughtful questions for both sides. It was not a case where the justices were tipping their hands during the arguments to which way they might go.”

WHAT MOTIVATES HIM AS A TRIAL AND APPELLATE ATTORNEY:

A self-described “Gibson Dunn lifer,” Dupree has spent his entire legal career at the firm save for a stint at the U.S. Department of Justice from 2007 to 2009. Earlier this year, he was named co-partner-in-charge of the firm’s Washington, D.C., office.

He frequently says he feels fortunate to work on cases at the intersection of constitutional, administrative and appellate law, and he remains as fired up as ever.

“My goodness, we have a collection of talent here in Washington,” Dupree said. “I’m game for everything. I wake up in the morning and I am ready to go. I’m perpetually energized, and the chance to be in this role, for me, has just been fun, educational and rewarding.”

OTHER NOTABLE CASES HE’S WORKED ON:

In February, the Supreme Court denied Amtrak’s attempt to undo the Eighth Circuit victory Dupree scored in July 2017 on behalf of freight railroads represented by the Association of American Railroads claiming the Surface Transportation Board overstepped its authority when it finalized a 2016 rule defining what it considers an on-time Amtrak train arrival or departure when investigating railroads for delays.

“I’m a litigator by nature. I’m a happy warrior. I love complex and challenging work, and I’ve just been very fortunate and blessed over the years to have a lot of fascinating cases that raise fascinating issues,” Dupree said. “And in the transportation space, the litigation often plays out against the backdrop of a heavily regulated industry so you have to understand not just the statutes, but the regulations that might apply to your case.”

Dupree is also doing his part to stem the growing tide of warranty litigation in California where plaintiffs’ lawyers have been aggressively pursuing large judgments against automakers in “lemon law” lawsuits.

He successfully beat back car buyer Blake Edward Nielsen’s attempt to have Fiat Chrysler cover his nearly \$300,000 in attorneys’ fees and costs under California’s Song-Beverly Consumer Warranty Act, which allows for a so-called “prevailing party” to recover attorneys’ fees and costs.

Even though Nielsen went to trial and won a jury verdict of \$48,267.41, the California appeals court determined that he wasn't actually the "prevailing party" because he ended up with a judgment that was less than the restitution settlement that Fiat Chrysler had offered him, and which he had rejected, earlier in the litigation. Fiat Chrysler offered to pay Nielsen back the \$49,782.52 he spent on a Jeep Grand Cherokee he claimed had electrical and engine defects.

"California warranty litigation has been spiraling out of control and poses serious constitutional and other questions," Dupree said. "This decision sends a very strong signal to the plaintiffs' bar that they are running huge risks by spurning reasonable settlement offers."

ADVICE FOR JUNIOR ATTORNEYS:

Dupree strongly believes that a well-read lawyer makes for a better-informed lawyer, and that broader exposure to exceptional writing — beyond just legal filings — can only enhance an attorney's arsenal of skills.

"It still holds true that if you want to be a great writer, you have to be a great reader," he said. "The trap that young lawyers fall into is they confine themselves to reading briefs and cases at the expense of novels, history books and just the many types of great literature that the world has to offer us."

A good start might be 19th century British novelists.

"If you pay attention to how Thomas Hardy sets a scene and learn from him, I promise you that you'll be writing a much more compelling statement of facts in your next appellate brief," Dupree said.

— *As told to Linda Chiem*

Law360's MVPs are attorneys who have distinguished themselves from their peers over the past year through high-stakes litigation, record-breaking deals and complex global matters. A team of Law360 editors selected the 2018 MVP winners after reviewing nearly 1,000 submissions.