

Appellate Group Of The Year: Gibson Dunn

By **Andrew Strickler**

Law360 (January 14, 2019, 11:11 AM EST) -- Gibson Dunn & Crutcher LLP won big at the U.S. Supreme Court in challenges over a federal gambling statute and the appointment of administrative judges at the U.S. Securities and Exchange Commission, while the appellate practice helped redefine “money remuneration” under a Depression-era railroad tax law, continuing the firm’s streak as one of Law360’s Appellate Groups of the Year.

Mark Perry, who co-chairs the appellate and constitutional law group, credited the firm’s ongoing appellate success to a willingness among an experienced team to test their colleagues, prepping for oral arguments and a cross-practice approach to case strategy. Recent partner additions also mean the firm now has “full time” appellate specialists in all 10 U.S. offices, he said.

“We’re always willing, at the drop of the hat, to put aside whatever we’re doing so we can go help moot our colleagues,” he said. “We get along with a real environment of collegiality, and clients see that. It makes the overall product that much stronger, in addition to it being a fun thing to do.”

After a six-year battle for the state of New Jersey, Gibson Dunn prevailed at the U.S. high court in a sports betting case that had taken on wide constitutional and statutory importance. In a 7-2 decision, the court sided with state officials and struck down a federal law banning states from legalizing sports betting.

Gibson Dunn was involved in the case from the early stages, which harkens back to a 2011 voter referendum on amending the state constitution, a legal challenge from a small army of professional and collegiate sports organizations and a tough battle through the Third Circuit.

“There was no pre-printed playbook for this case,” Perry said. “Over time, our lawyers were able to develop our constitutional arguments, refine them, and present them to a variety of courts over the years, really underscoring the creativity and excellence of our lawyers.”

In another major case in the high court, a Gibson Dunn team led an appeal for former investment adviser Raymond Lucia against a sanction from an SEC administrative law judge. Seeking to overturn a D.C. Circuit finding, Lucia argued that ALJs should be treated as “officers” subject to the appointments clause because they carry out judicial proceedings. A 7-2 majority agreed.



Gibson Dunn continues to represent Lucia as he faces an ongoing SEC challenge and in the D.C. Circuit, where the firm is seeking legal fees from the case decided at the U.S. Supreme Court.

“It looks a little vindictive what they’re doing to Ray, but we’ll keep fighting because when you’re right, you’re right, and we may have to take them to the Supreme Court twice,” Perry said.

In yet another high court win for the firm, Thomas Dupree Jr., co-partner-in-charge in Washington, D.C., led the legal team for three Canadian National Railway Co. subsidiaries in a case over taxation of employer-provided stock options.

In a 5-4 decision, the court agreed with the railroads that stock options given to employees didn’t qualify as taxable “money remuneration” under the Railroad Retirement Tax Act, which was enacted in the 1930s. The ruling reversed a Seventh Circuit decision from 2017 in a \$13.3 million suit against the Internal Revenue Service.

The focus on the old statute, Dupree said, was his chance to delve into its historical legislative context and an opportunity to see the contemporary division between “textualist” justices and those with a more “holistic” statutory interpretation.

“It was a statute that was somewhat dusty, but in this case, it became the battlefield for these two schools of thought on the Supreme Court,” he said.

Gibson Dunn also secured significant appellate wins last year outside the high court. A team led by D.C. partner Eugene Scalia, who co-chairs the firm’s administrative law and regulatory practice, represented the U.S. Chamber of Commerce and other business groups at the Fifth Circuit, where a 2-1 panel agreed to vacate the U.S. Department of Labor’s controversial fiduciary rule for retirement account advisers.

The firm was also at a California federal court for a successful constitutional challenge to the assignment of putative damages between client Kimberly-Clark Corp. and spinoff Halyard Health Inc. in a surgical gown suit. Under a new calculation, Kimberly-Clark’s damages dropped from \$350 million to about \$19.4 million. The firm continues to represent Kimberly-Clark in cross-appeals.

Gibson Dunn also made some notable additions to the appellate group over the last year. In Dallas, Allyson N. Ho, a leading appellate lawyer formally of Morgan Lewis & Bockius LLP, joined the firm to lead the state-focused practice. Her husband, former Texas solicitor general James Ho, left Gibson Dunn for the Fifth Circuit bench in 2017. Frederick Yarger, who represented Colorado as state Solicitor General in the Masterpiece Cakeshop case at the U.S. Supreme Court two years ago, also joined Gibson Dunn in Denver.

With Yarger’s addition, the firm has for the first time a dedicated appellate partner in every domestic office.

“Size alone is not going to cut it, of course, but our practice is a very large and experienced group of over-performers who manage to work together,” Perry said.

This is Gibson Dunn's seventh appearance on Law360's annual list of top appellate groups since 2011.

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