

Transportation Group Of The Year: Gibson Dunn

By Linda Chiem

Law360 (February 15, 2019, 4:50 PM EST) -- Gibson Dunn & Crutcher LLP beat the federal government in a battle over the taxability of railroad employee stock options and dismantled a thousands-strong driver misclassification class action against Uber Technologies Inc., earning the firm a spot among Law360's Transportation Groups of the Year.

The firm's deep bench of appellate and trial aces and an experienced team of environmental lawyers and administrative law and regulatory experts have helped Gibson Dunn carve a place for itself as one of the most sought-after firms for transportation companies grappling with high-stakes litigation. According to Tom Dupree, co-partner-in-charge of Gibson Dunn's Washington, D.C., office, the firm's strengths on transportation matters stem from its ability to draw on the talents of hundreds of its more than 1,300 attorneys worldwide across various practice groups, making it a multidisciplinary effort.



"The transportation world is so diverse and faces such a variety of interesting and challenging legal issues that are difficult to pigeonhole," Dupree said. "For example, you could be litigating something in court and at the same time you're fending off regulatory inquiries from agencies and trying to persuade policymakers to adopt a more favorable set of regulations."

Dupree likened his practice to playing "three-dimensional chess."

"You have to be aware that what you're achieving or doing on the litigation front might affect how things are playing out on the regulatory front," he said.

One of the firm's biggest successes of 2018 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.

Canadian National Railway Co. subsidiaries Wisconsin Central Ltd., Illinois Central Railroad Co. and Grand Trunk Western Railroad Co. turned to Gibson Dunn to take their \$13.3 million dispute with the Internal Revenue Service to the nation's high court. The goal was to have the justices resolve what the railroads viewed as a circuit split on the question of whether stock that a railroad transfers to its employees is taxable under the Railroad Retirement Tax Act.

Gibson Dunn successfully 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 said. "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 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 last June.

Gibson Dunn has also steadfastly defended ride-hailing giant Uber against scores of class actions alleging it misclassified drivers as independent contractors instead of employees. After years of tireless litigation on this issue, Gibson Dunn secured a seismic win for Uber when the Ninth Circuit in September dismantled a certified class of hundreds of thousands of Uber drivers alleging they were misclassified as independent contractors by upholding the validity of Uber's arbitration agreements.

The decision in *O'Connor v. Uber* turned the tide in the litigation and underscored the power of class waivers in arbitration agreements to shield companies like Uber from legal attacks on core aspects of its business model.

"The Ninth Circuit's decision is a win not only for the gig economy but for all class action defendants," said Theane Evangelis, a partner and co-chair of Gibson Dunn's class action group and vice chair of the firm's California appellate practice group. "It confirms that sprawling classes of hundreds of thousands of individuals like the one certified in *O'Connor* are inappropriate and should not be certified in the first place."

Gibson Dunn also 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."

--Editing by Nicole Bleier.