Class Action Group Of The Year: Gibson Dunn

By **Ryan Boysen**

Law360 (February 7, 2022, 2:04 PM EST) -- Class action attorneys at Gibson Dunn & Crutcher LLP stopped two bet-the-company cases targeting Facebook and Jimmy John's dead in their tracks last year and reversed major decisions against Walmart, Comcast and Uber on appeal, earning the firm a spot among Law360's 2021 Class Action Groups of the Year.

Chris Chorba, who co-chairs the firm's class action group alongside fellow partner Kahn Scolnick, said one thing that sets Gibson Dunn apart from its competitors in this area is the sheer size of the group they oversee.

At last count, there were roughly 100 partners and 200 associates in the class action group, roughly a fifth of Gibson Dunn's 1,500 attorneys, Chorba said. Those attorneys may also specialize in other areas that overlap with class actions, like employment, consumer protection, securities or antitrust, but Chorba said they're all fully committed to class action litigation.

"Those 300 attorneys are not just handling one class action case every few years," Chorba said. "They're living and breathing it every day."

"I think that's really our secret sauce," he added. "There are a lot of good class action firms out there, but very few with the depth and breadth of our team."

That size advantage can be seen in Gibson Dunn's approach to two important cases last year, where the firm's relentless focus on discovery produced a mountain of evidence that overcame opposing counsels' legal theories.

The first of those cases was a proposed class action alleging the advertising tools offered by Meta Platforms Inc., formerly known as Facebook Inc., don't work as well as the company claims.

With potentially tens of billions of dollars at stake, the Gibson Dunn team went to work, gathering dozens of declarations from small-business owners who love Meta's ad tools and a range of other evidence showing those tools often work quite well. They also dug up information on the plaintiff in the case, a small entity who'd tried to pitch the idea of shorting Meta stock to hedge funds and whose owner has authored a book denigrating Meta's advertising capabilities.

The federal judge overseeing the case denied class certification in August, finding that the plaintiff, IntegrityMessageBoards.com, was not in a position to represent other businesses who advertise on Meta, whose popular platforms include Facebook, Instagram and WhatsApp. The judge also said IMB hadn't put forth enough evidence to show that other businesses in the proposed class were as dissatisfied with Meta's advertising experience as it was.

"We developed an extensive fact record, and that's really what made the difference in this case," Chorba said.

Gibson Dunn used a similar approach to shut down a suit alleging sandwich chain Jimmy John's, a unit of Inspire Brands Inc., and the owners of its franchised restaurants violated antitrust law with "no poach" provisions that prohibit workers from quitting at one store and getting hired at another.

The plaintiffs in that case claimed the practice drove down wages for Jimmy John's 615,000 employees, but the Gibson Dunn team amassed a trove of evidence showing the no-poach provisions hardly ever affect employees in the real world.

Gibson Dunn gathered scores of declarations showing employees often switch between locations with ease and that many of them were unaware the no-poach provisions even existed. The federal judge overseeing the case declined to certify the class, finding that the lead plaintiff hadn't shown any evidence he was actually harmed by the no-poach provisions.

"From day one we focused not on the plaintiff's theory, but on how things actually worked in practice," Scolnick said. "That theory just didn't hold up when confronted with the evidence we were able to gather."

Scolnick said the case could have been "enterprise threatening" for Jimmy John's given the massive size of the proposed class. Several similar suits have also been filed against other chain restaurants.

Gibson Dunn used a similar approach in an appeal of a $102 million class action judgment against Walmart Inc. for alleged pay stub and meal break violations.

The suit never alleged that Walmart had failed to pay its employees what they were owed, only that it hadn't complied with California regulations on how to document that pay.

The Gibson Dunn team was able to go back and show that the lead plaintiff hadn't actually been harmed at all by the situation and that, in any case, Walmart had complied with the regulations if they were read a different way. The Ninth Circuit agreed on both counts, and threw out the $102 million judgement in May.

"No one suffered any injury, and that's what we were able to show," Chorba said. "This was just an attempt to capitalize on a murky provision in a complicated labor code in order to certify a class action and score a massive judgement."

Gibson Dunn also notched two other important wins in the Ninth Circuit last year.

In one case, a three-judge panel unanimously held that Uber Technologies Inc.'s arbitration agreements with its drivers are enforceable and not subject to an exemption for transportation workers, wiping

out an earlier win for the workers in district court. In another case, the Ninth Circuit revisited an earlier ruling by the California Supreme Court to find that Comcast Corp. cable subscribers also couldn't sidestep their own arbitration agreements, and the case was therefore likely preempted by the Federal Arbitration Act.

Chorba said those recent wins highlight how Gibson Dunn's class action group has grown and evolved in response to the explosion in large consumer class action cases since the 1990s.

"Class actions will remain a major focus of our litigation group, because that's where our clients continue to face some of their biggest challenges," he said.

--Editing by Andrew Cohen.