

## Technology Group Of The Year: Gibson Dunn

By Rachel Rippetoe

*Law360 (February 15, 2022, 2:04 PM EST)* -- Gibson Dunn & Crutcher LLP successfully defended Hewlett Packard Enterprise Co.'s record \$3 billion verdict before the Ninth Circuit and secured a victory for Uber in a ruling that found the ride-hailing company's drivers would have to arbitrate their class action, earning the firm a spot as one of Law360's 2021 Technology Groups of the Year.

The New York-based law firm in 2021 also helped Facebook Inc., now called Meta Platforms Inc., in August nip in the bud a putative class action from millions of advertisers claiming the company misled them about its ability to accurately deliver advertisements to its users, and defended Apple Inc. from accusations that its App Store violated antitrust laws in a row with Epic Games and other app developers.

In August, the firm scored a victory for client Uber Technologies Inc. in the Ninth Circuit when a unanimous panel said that a lower court correctly tossed to arbitration a proposed class action by Uber drivers, disagreeing with the drivers that they were exempt from Federal Arbitration Act requirements as interstate transportation workers.

Theane Evangelis, a Law360 2021 Class Action MVP who served as a lead counsel for Uber in the class action and appeal, said it's an exciting time to represent technology clients at Gibson Dunn, as the firm helps some of the most innovative companies navigate a shifting legal landscape.

"When you have new technology, unsettled law, and high stakes, those are all of the ingredients for the exact case where you'll find our team," Evangelis said. "Our clients have some of the most innovative business models, and oftentimes that implicates issues at the center of a national debate — like worker classification in the gig economy, in the case of Uber — or in the case of Apple, the application of antitrust rules to new business models. These are issues that affect how we live in our society and how we do business."

Evangelis said that the Uber case was particularly significant for the firm, as the Ninth Circuit was the first court of appeal to rule on ride-hailing drivers and where they fit into the Section 1 exemption of the Federal Arbitration Act.

Massachusetts Uber drivers filed a dispute in September 2019 accusing the ride-hailing company of misclassifying them as independent contractors instead of employees and failing to reimburse business



expenses or pay minimum wage or overtime under Massachusetts law. The plaintiffs pointed to Section 1 of the FAA, which exempted "seamen," "railroad employees" and "any other class of workers engaged in foreign or interstate commerce" from arbitration requirements and argued that Uber drivers land in this category.

But Gibson Dunn lawyers successfully argued in a lower court and on appeal that drivers who use Uber are not using that technology to provide interstate transportation, rather they're providing local trips, and Uber drivers do not transport goods or people in the channels of interstate commerce. "The central part of their job is not moving things across state lines," Evangelis said.

The firm was tasked with explaining Uber's technology and business model and relating it to a law that was written nearly 100 years ago, Evangelis said. But she said that's the kind of challenge that makes her job fun. As her clients innovate and continue creating something new, their lawyers are tasked with setting the precedent for what the law surrounding that technology will look like.

"We were helping the court understand Uber's business model and applying the law that's a century old to new problems now and new questions now," she said. "When there is no playbook, we write the playbook. That is what is so exciting about the sector and about the practice and representing clients like Uber."

Evangelis was also a part of the Gibson Dunn team that settled a similar class action accusing food delivery provider Postmates Inc. of misclassifying couriers in November.

She said that the stakes for technology clients are only getting higher, as the law is rapidly changing. Many of her client's business models are being attacked by "enterprise-threatening" lawsuits, facilitated by some plaintiff friendly legislation like California's AB5 law, she said.

"We've seen the plaintiffs bar continuing to push the envelope and stretch the law in ways that maybe it wasn't intended, in ways that would attempt to stifle growth and innovation," Evangelis said. "Our job is to protect our clients' ability to innovate, so that they can provide their technology to everyone and to help make our lives better and make our businesses better."

In another Ninth Circuit victory, the firm successfully wrapped up a decadelong battle between HP and Oracle Inc. in June. Gibson Dunn lawyers were able to preserve the full \$3 billion verdict that Hewlett Packard won in 2016.

Sam Liversidge, a partner who worked on the Hewlett Packard case, said that the summer's final victory for the two-phase trial cemented one of the firm's biggest wins in the technology sector. He said Oracle essentially tried to have the entire decadelong case retried at the Ninth Circuit, challenging almost everything a California state jury and a superior court judge decided initially on the case.

"Particularly over that length of time with several trials and an appeal in the midst of trial and then back and another trial, I mean, it's just a lot to have scrutinized at that level," Liversidge said. "And it was pretty gratifying to have it all, every piece of it, affirmed."

At the root of June's ruling was a decision Oracle made in March 2011 to cease offering new versions of its software products to customers running Hewlett-Packard Co.'s Itanium servers. (In 2015, Hewlett-Packard renamed itself HP Inc. and spun off Hewlett Packard Enterprise.)

Liversidge said the Ninth Circuit's affirmation bolstered that what Oracle did "really was intended to cause maximum harm" to Hewlett-Packard and did significant damage to the company's server business.

He said that Oracle has now paid the full \$3 billion plus a significant amount of interest that had been accruing through the appeals process.

Both Liversidge and Evangelis said what makes Gibson Dunn's practice special is its interdisciplinary focus.

"We really seem to have lawyers in so many different disciplines doing top level work for our biggest tech clients," Liversidge said. "We're really talking about antitrust, [intellectual property], privacy, appellate class actions, labor and employment, technology transactions and trial groups coming together."

Evangelis said technology companies have long been a strategic focus of the firm and represent a significant portion of its client base, and she said it's a goal of the practice to continue growing its capabilities in an evolving landscape.

"We have a deep bench and a tremendous amount of talent," Evangelis said. "And we embed our appellate lawyers up at the early stages — our class action experts and our labor and employment experts as well, and our tech expertise — all of that comes together for an interdisciplinary approach that solves problems, and is as innovative and creative as our clients are themselves. That's really the standard for us is to be as creative and innovative as our clients are."

--Additional reporting by Irene Spezzamonte, Max Kutner, Craig Clough and Bryan Koenig. Editing by Andrew Cohen.

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