

Litigator of the Week: Theodore Boutrous Jr. of Gibson, Dunn & Crutcher

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Theodore “Ted” Boutrous Jr. is not exactly known for being shy. The gregarious Gibson, Dunn & Crutcher partner, with his trademark swoop of silvery hair, has been at the forefront of some of the most heated legal battles around the country, from *Wal-Mart v. Dukes* to the fight over California’s gay marriage ban.

Now, he’s at ground zero of the next big courtroom showdown: defending Uber Technologies Inc. and its view of how drivers fit into the “gig economy.”

Even for such a major legal personality, some of Boutrous’ zingers in the Uber litigation have been stunningly blunt. After a district court judge nullified Uber’s arbitration agreements with its drivers, Boutrous let the U.S. Court of Appeals for the Ninth Circuit know just how wrong the judge got it.

“In short,” he wrote, “the district court erred at nearly every step of its analysis, refusing to enforce valid arbitration provisions based on sheer hostility toward arbitration and manifestly erroneous factual and legal conclusions.”

The aggressive approach paid off. On Wednesday, a Ninth Circuit panel thoroughly reversed the decision by U.S. District Judge Edward Chen of the Northern District of California, chiding him for ignoring circuit precedent and routing the drivers into



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Photo: Diego M. Radzinski/NLJ

arbitration. The development tilts the playing field in Uber’s favor as it seeks to stem the tide of class actions that have beleaguered the company—and earns Boutrous our “Litigator of the Week” mantle.

“It dramatically changes the landscape of the litigation in multiple respects,” Boutrous said of the decision in an interview Thursday. Even beyond the Uber cases, he added, the decision will help push back against what he characterized as a “lingering hostility” to arbitration in district courts.

Boutrous has balanced a careful duality in the Uber litigation. In front of Judge Chen, a man with whom he clearly doesn’t see eye-to-eye, Boutrous is all smiles and politeness. But in the briefs, his sharp edge as an appellate lawyer comes through.

Boutrous has blasted Chen in separate appeals to the Ninth Circuit for “unprecedented and deeply flawed” decisions, embarking on “seek-and-destroy mission” to sink Uber’s arbitration clauses, and setting the stage for a “runaway class action” against Uber.

“I enjoy arguing before Judge Chen,” Boutrous said, when asked about his no-holds-barred style. “These are disagreements about legal principles. When you’re on appeal, you have to clearly identify what the error is.” He also said that with so many cases coming before the Ninth Circuit, it’s important to make the language “eye-catching.”

It’s not the only recent Ninth Circuit win in his cap. In a different case up on appeal, the owner of a Toyota Prius tried to bring a class action against the automaker because his car didn’t stop fast enough—allegedly almost causing a crash. The district court agreed with Boutrous that the plaintiff had not shown sufficient evidence of a defect, and a Ninth Circuit panel affirmed last Friday.

The Uber case decided this week involved claims that the company breached credit reporting laws in the way it conducted background checks on its drivers. Plaintiffs sought to sue on behalf of a nationwide class action. The case actually settled before the appeal was heard, with a built-in contingency that would have brought the settlement to \$9 million from \$7.5 million if the plaintiffs won.

But the decision has a much broader impact, especially for two major California and

Massachusetts class actions that center on the issue of how drivers are classified. Those cases are still pending against the company, since Chen rejected an \$84 million settlement last month. With the Ninth Circuit victory in hand, Uber is at least in a stronger negotiating position; it could also ditch settlement talks altogether and try to decertify the class based on the arbitration ruling, shutting down that litigation.

Boutrous said he knew at the outset that the lawsuits against Uber would have multiple “phases” and bring challenges on a range of legal questions—from the employee-contractor issue, to the enforcement of arbitration agreements, to the viability of a driver class action. While he anticipated that he might lose on some motions, Boutrous said, other aspects have not turned out as he expected. He was surprised that district courts viewed the employee-contractor issue as a jury question.

While many observers have characterized the Uber litigation as having the potential to resolve the wider gig-economy worker debate, Boutrous sees it differently. “These are issues that companies like Uber are studying, and it’s going to be a combination of factors that are going to continue to enhance and develop a system that addresses everyone’s needs in a fair way,” he said.

“You can’t solve all the world’s problems with litigation,” he added, laughing. “Even though that’s what I do.”

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