

Transportation Group Of The Year: Gibson Dunn

By **Daniel Wilson**

Law360, Washington (January 21, 2016, 10:25 PM ET) -- Gibson Dunn's recent efforts across a variety of transportation industry matters, including Matson's complex \$610 million acquisition of Horizon Lines and successful challenges to federal railroad regulations, have earned it a spot on Law360's list of Transportation Groups of the Year.



While the firm doesn't have a formal transportation practice, its informal transportation group encompasses several hundred lawyers working across all sectors of the industry, including automotive, railroad, maritime and air transport matters, who are necessarily spread across the firm's practices, according to litigation partner Thomas Dupree.

"When you handle one of these transportation cases, you really need to draw upon skills from a variety of practice areas ... you need to be aware of administrative law precedence, environmental precedence, regulatory precedence, class action precedence," Dupree said. "Transportation matters often implicate a vast array of subject matters and bodies of precedent in a way that other cases don't."

Dupree over the past year has helped to handle several major matters for railroad industry clients, among others, including a D.C. Circuit victory for the Association of American Railroads vacating a Federal Railroad Administration letter ruling.

The FRA had determined that operation of the new Ultra Cab II cab signal system should be considered a "covered service" under railroad labor law, which would have put related railroad employees under maximum-hour laws and imposed other regulatory requirements.

But close study by Gibson Dunn attorneys revealed a flaw in the FRA's rationale for the rule, showing that although the agency had argued that it had studied the Ultra Cab II system in a previous proceeding, the referenced proceeding had actually involved another cab signal system, Dupree said.

And the firm is continuing to press due process claims before the D.C. Circuit in another recent AAR case that has further displayed the firm's willingness to tackle issues from unusual angles.

That challenge, involving regulations stemming from a federal statute giving Amtrak joint authority alongside the FRA to set rules governing performance and scheduling of passenger trains, which mostly operate on lines owned by freight railroads, was based on an unusual argument, focused on the underlying statute.

While the decision was ultimately vacated by the U.S. Supreme Court, ruling that Amtrak should be considered a government entity for purposes of the case, the firm had initially and successfully argued that the Constitution prohibits delegation of rulemaking authority to private companies, with the D.C. Circuit ruling in favor of AAR.

Dupree declined to comment on the Amtrak case specifically as a pending matter, but said that in general, Gibson Dunn's transportation work often showcased the creative thinking of the firm's attorneys.

"In a lot of cases, the obvious argument isn't necessarily the best one, and we pride ourselves with being able to come up with creative, outside-of-the-box arguments that in many cases lead to a decisive victory," he said.

And its attorneys, in another significant transportation-related case, also successfully helped Wilmington Trust Co. as trustee for the general unsecured creditors trust in the bankruptcy of General Motors Corp., or "Old GM," avoid liability for claims in lawsuits over faulty ignition switches, in an **April decision** currently on appeal before the Second Circuit.

Of counsel Lisa Rubin, who argued for the trust in the case, said it had involved a number of challenges, including the broad number of parties involved, constitutional arguments not part of typical commercial litigation and the length of time since the underlying bankruptcy had been resolved.

In the end, the firm pursued a two-pronged strategy, first by attempting to demonstrate that if plaintiffs in ignition switch litigation had claims over issues purportedly known by GM at the time of the bankruptcy, that shouldn't allow for recourse against the trust, while also arguing that such claims against the trust were "equitably moot," ultimately winning a favorable ruling, Rubin noted.

"On one hand, [the judge] said yes, the people who had economic losses did suffer a due process violation, and [that] the injunction that says 'New GM' should not be held responsible was overbroad," Rubin said. "On the other hand, the judge simultaneously held that even to the extent that it would be permissible to allow them to file much, much too late claims against the trust, that would be inequitable."

Outside of the courtroom, the firm also demonstrated its transportation industry chops in several major deals, including Matson Inc.'s \$610 million acquisition of rival Horizon Lines Inc., which closed in May.

With the two shippers holding the majority of the Hawaiian cargo shipping market, there was significant antitrust scrutiny, requiring the simultaneous \$141.5 million sale of Horizon's former Hawaii operations to The Pasha Group, ramping up the complexity of the deal, according to lead partner Douglas Smith.

"It had to be a three-way transaction, and if two-way transactions are difficult, three-way transactions

are exponentially more difficult,” he said. “All the way along, the core and most difficult issues were keeping all three parties moving towards the same goal-line, as everybody’s situation changed over time.”

Also underlying the transaction were considerations of the Jones Act — a maritime law — and a recapitalization of Horizon that heavily changed its capital structure and several changes in its leadership, as well as related debt transactions for both Matson and Pasha that had to be taken into account. But the deal ultimately ended “very successfully,” Smith said, giving Matson a significant leg up in the Alaska shipping market.

--Editing by Patricia K. Cole.

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