

Transportation MVP: Gibson Dunn's Thomas Dupree Jr.

By Linda Chiem

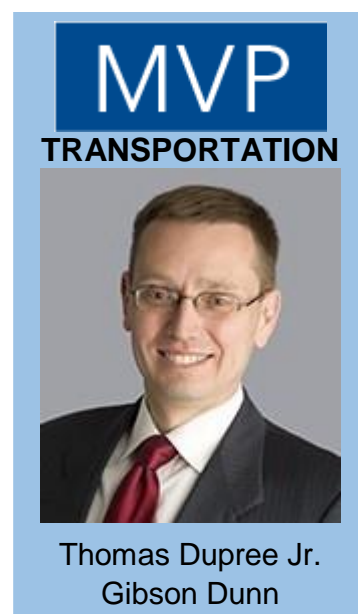
Law360, New York (December 12, 2016, 1:38 PM EST) -- Gibson Dunn's trial and appellate ace Thomas Dupree Jr. scored a major victory in getting the D.C. Circuit to strike down as unconstitutional a federal law that gave Amtrak regulatory power over freight railroads, earning him a spot on Law360's 2016 list of Transportation MVPs.

Dupree is a powerhouse litigator who has argued more than 70 appeals before each of the 13 federal circuits, as well as the U.S. Supreme Court. In 2016, he represented the railroad and automotive industries in some of the most closely watched transportation cases of the year challenging U.S. Department of Transportation regulations, but he has an infectious exuberance for appellate work addressing issues across multiple industries.

"I am so fortunate to work on the cases I get to work on and I'm energized by my cases," Dupree told Law360. "I love handling matters at the intersection of constitutional, administrative and appellate law. It's an exciting time to be a litigator and in particular, in challenges to government regulations."

Dupree successfully argued a long-running D.C. Circuit challenge that pitted the nation's largest freight railroads against the DOT's Federal Railroad Administration and Amtrak, the nation's intercity passenger railroad. The end result: The appeals court ruled in April that the Passenger Rail Investment and Improvement Act of 2008 was unconstitutional because it gave Amtrak the power to set performance and scheduling standards and essentially regulate the freight railroads that compete with it for track use.

It's a ruling that will reset the constitutional boundaries as to when Congress can give one entity regulatory power over another, particularly in the same industry where that entity is a market participant.



“[The government’s argument] has been that these [on-time performance] standards don’t have any regulatory effect because all they can do is trigger a government investigation but that argument has failed at every step,” Dupree said. “There obviously is a regulatory effect if you’re subject to a mandatory federal investigation and you can be subject to civil penalties.”

The DOT fought tooth and nail against the D.C. Circuit’s ruling, pushing for a rehearing or a rehearing en banc, insisting that the three-judge panel invalidated an act of Congress on "novel constitutional grounds" and based its holding on the "mistaken conclusion" that Amtrak's role in promulgating the metrics and standards amounted to regulatory authority.

However, the D.C. Circuit in September denied the DOT’s rehearing bid. The agency has until January to decide whether it wants to petition the U.S. Supreme Court to hear the dispute again.

Also this past year, Dupree was part of the Gibson Dunn team that helped Toyota Motor Corp. and Toyota Motor Sales USA Inc. escape a putative class action in Northern California alleging the carmaker, along with other Japanese corporations, aided and abetted the Japanese government in committing Racketeer Influenced and Corrupt Organizations Act and human rights violations during World War II when the Japanese military kidnapped more than 200,000 Korean women and forced them to work as sex slaves, or “comfort women.”

Toyota was dismissed from the suit in December 2015, after the Gibson Dunn team successfully established that the entire lawsuit was barred by the political question doctrine, all applicable statutes of limitations, and involved an improper alter ego claim. Further, they argued that the case involved extraterritorial conduct that U.S. laws could not reach.

According to U.S. District Judge William Alsup’s ruling, a 1965 treaty between Japan and Korea released all claims related to the war between the two countries and their nationals and the court, consequently, did not have authority over the claims, which makes them nonjusticiable political questions. The court then entered the final judgment in favor of the defendants in June 2016.

“This lawsuit was similar to one we had won in the Supreme Court — the Daimler v. Bauman case — that had pretty significant constitutional law [implications] and set precedent involving allegations of extraterritorial conduct,” Dupree said. “This had to do with conduct that happened a long time ago, outside the U.S., yet they were trying to pursue litigation in a U.S. courtroom. The Toyota case fell into that category where we felt the claims were not just factually baseless but had no business being litigated.”

And in November 2015, Dupree won an important case for railroad giant CSX related to its plan to rebuild and modernize a more than century-old Washington, D.C., tunnel called the Virginia Avenue tunnel. Federal authorities approved the tunnel expansion project after a multiyear National Environmental Policy Act review, but a community group opposed to the project sued federal and

district officials alleging violations of NEPA and D.C. law and sought a preliminary injunction to stop construction.

But Dupree scored a series of victories, in the district court and then in the D.C. Circuit, ultimately resulting in the construction of the tunnel now being underway.

“It’s a very important project and one issue we’re going to see in the coming years is there is going to be a lot more double-stacked intermodal shipments — the use of two containers instead of just one on freight trains,” Dupree said. “This was an absolutely mission critical infrastructure project that benefits business and consumers by allowing freight to move. This is exhibit A of a win-win situation for rebuilding American infrastructure.”

--Editing by Emily Kokoll.

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