

Competition Group Of The Year: Cravath

By **Bryan Koenig**

Law360 (February 4, 2022, 2:02 PM EST) -- Cravath Swaine & Moore LLP helped successfully defend Qualcomm once again from antitrust claims targeting the chipmaker's patent practices, this time undoing the certification of a class of an estimated 250 million phone buyers, netting it a spot as one of Law360's 2021 Competition Groups of the Year.

Twice Cravath has successfully represented Qualcomm at the Ninth Circuit on rulings against it from U.S. District Judge Lucy Koh — first in the enforcement suit from the Federal Trade Commission, and more recently from the certification of the class similarly accusing the chipmaker of anti-competitive licensing practices.

In late September, the Ninth Circuit sent the consumer case back to the district level, finding that Judge Koh wrongly held that claims under California's Cartwright Act can apply to the nationwide class.

Thanks to a prohibition on damages claims under federal antitrust law for indirect buyers, state law had been consumers' only chance at certification on claims targeting Qualcomm's "no license, no chips" policy that requires phone manufacturers to license its standard essential patents regardless of where they purchase modem chips. Like the FTC, the consumers had also attacked Qualcomm's refusal to license rival chipmakers and exclusive supply agreements the company had in the past with Apple Inc.

Even as it defended Qualcomm against the FTC and private cases alongside Keker Van Nest & Peters LLP, Goldstein & Russell PC, Morgan Lewis & Bockius LLP, Wilson Sonsini Goodrich & Rosati PC and Norton Rose Fulbright, Cravath and other firms also represented the chipmaker in a massive licensing dispute with Apple that settled in 2019. Handling all of those cases, Cravath's Yonatan Even said, required "a pretty complicated dance."

Among the difficulties: Some issues were handled at the same time across cases, while others were handled separately, he said.

"That caused all kinds of challenges," said Even, who also noted that Qualcomm's legal team had to figure out how developments in each case affected the others.

The legal team also had to figure out which battle to fight and where to fight it, according to Even.



"There were obviously a lot of battles here," he said. Ultimately, the team settled in the consumer case on a strategy focusing entirely on the class certification battle because the merits of the allegations would be decided more quickly in the FTC case, which the Ninth Circuit upended in August 2020.

Also important, according to Even, was telling the Ninth Circuit panel handling the class certification appeal that a separate panel had already ruled against the underlying theories in the FTC case. The class certification panel, he said, "gave pretty stern directions to the district court to think whether there is a place for a class to be certified at all given the Ninth Circuit's ... conclusions of law in the FTC appeal and the very many parallels between these two cases."

Cravath also helped Mylan navigate its \$12 billion purchase of Pfizer Inc.'s Upjohn off-patent brand and generic drug business, which won the FTC's divided approval in late October 2020 under a divestiture deal requiring China-based Upjohn to sell off six drugs, while Netherlands-based Mylan had to divest one.

Cravath antitrust practice chair Christine A. Varney described the deal as "probably the last big pharmaceutical merger that got done before the current resistance to mergers has swept into antitrust in the United States and in Europe." When the deal was first inked, Varney said the parties didn't anticipate a great deal of resistance, only for the seas to change between announcement and closing.

Indeed, FTC Democrats who were at the time in the minority on the commission decried the merger clearance settlement as evidence that the agency is hesitant to contest pharmaceutical deals and instead prefers the kind of drug-specific divestitures that critics argue are inadequate. With Democrats now running the FTC and the U.S. Department of Justice, that antipathy to mergers has only deepened.

"At the end of the day, they were verging on making this the beginning of the end of mergers," Varney said. "But I think through sheer persistence and use of creative solutions and persuading the staff that this was not the case the FTC wanted to mark the beginning of the end on. Then incredibly great advocacy at the commission level and why this would result in actually lower generic drug prices and more efficiency in the market."

Even similarly called the deal the most challenging merger he's handled in recent years. The merger review process, he said, involved handling input from different commissioners, necessitating "constant dialogue" with agency officials to try and answer their questions and demonstrating claims that the horizontal overlaps would be addressed and the deal would drive down drug prices.

"It was a really delicate regulatory dance with us trying our best to bring about some kind of deal that would be palatable," Even said.

Looking ahead, Varney said there's plenty of room to grow for the Cravath competition practice of about 15 partners which is focused primarily on antitrust, supported by as many as 60 associates, out of the almost entirely U.S.-focused firm's 90 partners.

"The demand is enormous," Varney said.

--Additional reporting by Dave Simpson, Julia Arciga, Chelsea Naso, Dorothy Atkins and Matthew Perlman. Editing by Ellen Johnson.

All Content © 2003-2022, Portfolio Media, Inc.