

MVP: Cravath's Gary A. Bornstein

By Bryan Koenig

Law360 (September 8, 2021, 3:42 PM EDT) -- Gary A. Bornstein of Cravath Swaine & Moore LLP helped Qualcomm get reversed a Federal Trade Commission trial win that could have fundamentally rewritten the chipmaker's business model, making him one of Law360's 2021 Competition MVPs.

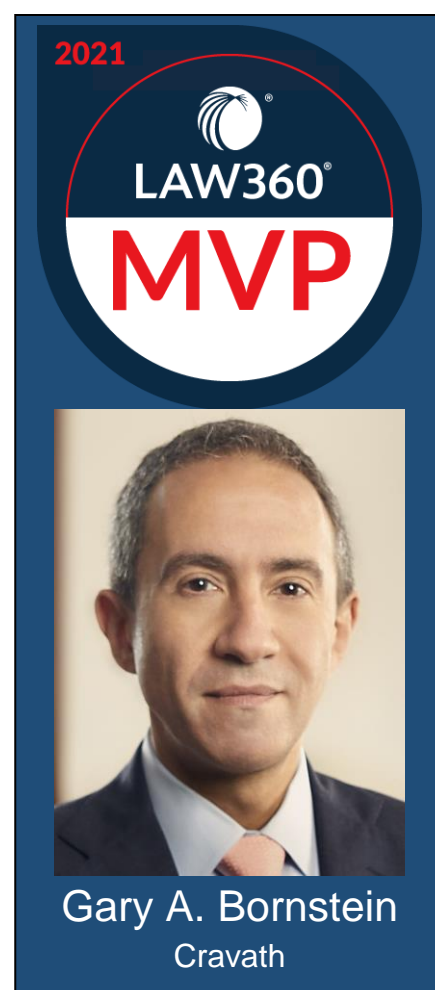
HIS BIGGEST ACCOMPLISHMENT:

Bornstein served as co-lead outside counsel for Qualcomm, alongside Robert A. Van Nest of Kecker Van Nest & Peters LLP, as they successfully defended the company against an FTC enforcement action that could have forced the chipmaker to fundamentally rewrite large swaths of its business model through restrictions on the kinds of contracts it could ink with customers.

The first round in the lawsuit targeting Qualcomm's allegedly anti-competitive "no license, no chips policy," as well as its refusal to provide rival chipmakers with licenses to its standard essential patents covering current cellular technology and instead only licensing cellphone manufacturers, went to the FTC in a May 2019 district court ruling from U.S. District Judge Lucy Koh. But a Ninth Circuit panel upended that ruling in August 2020 when it refused rehearing in October and the FTC definitively gave up on the case in May.

The victory, Bornstein said, was the culmination of six years of work in front of the FTC and in federal court by both Qualcomm's outside counsel and what he described as a highly engaged in-house legal team. That work went on even as the chipmaker battled other enforcement actions around the world targeting its licensing practices, some of which it has successfully challenged or resolved while others remain ongoing.

"It was very rewarding to get such a dramatic result for a client that I have spent a lot of time working with and that I greatly enjoy and respect and admire," Bornstein said. "It was a huge matter for them because the FTC was essentially challenging the foundation of half of their business and whether the whole thing, which had existed for 30 years, was just one big antitrust violation."



That accomplishment meant working with, and steering, a massive effort by a huge team of lawyers, Bornstein said.

"Ultimately the company can only write one brief and take one path," he said. "Sometimes it was difficult to reconcile two good ideas that might not be the same. But it was never difficult really in the sense of dealing with the people. The challenge was in dealing with a surfeit of good ideas."

HIS BIGGEST CHALLENGE:

Bornstein said the toughest part of his year was in getting to trial in Epic Games' closely watched antitrust case against Apple. Bornstein and Cravath are representing the video game company behind Fortnite as it challenges Apple's allegedly illegal monopolistic practices in the App Store, which include barring any other app store from iPhones to justify demanding a 30% commission on in-app purchases.

It's a legal and public relations fight Epic kicked off with an attempt to offer gamers a direct payments option for in-game purchases on both Android phones and iPhones, cutting out the middleman and offering players discounts based on the reduced charge, prompting Apple and Google to kick the company off their platforms. When they did, Epic was ready with lawsuits in August 2020.

The Google case, one of a web of government and private enforcement actions against the search giant, remains ongoing. But Epic's lawsuit against Apple, which is also battling private proposed class actions, went to trial in May, and the parties are currently awaiting a decision from U.S. District Judge Yvonne Gonzalez Rogers. Getting to that trial, Bornstein said, meant navigating incredibly complicated legal and technical issues, all in just nine months.

"I can't think of another [conduct] case of comparable complexity in the antitrust world that has actually gone from complaint to trial that quickly," he said.

Bornstein credited the pace to the judge and to the lawyers on both sides he said "worked extremely hard." And that included lawyers and Epic executives that, because of the pandemic, he'd never been able to meet in person.

"Part of it was just putting our collective noses to the grindstone, and digging in, and making personal sacrifices to do what we needed to do for the client. Part of it was preparation," Bornstein said, noting that Epic had already done its homework when it filed suit. "Part of it was a very motivated and very engaged client who cares very deeply about the issues that are at stake in the litigation. And devoted real resources to ensuring that we could be responsive to what the court needed from us."

WHY ANTITRUST LAW:

Bornstein's first introduction to antitrust law, which is a major part of his practice, he said, was "sheer fortuity," having worked for prominent antitrust attorney Robert Joffe when he first started at Cravath. One of the first cases he ever worked on as an associate was in navigating AOL's purchase of Time Warner.

"I just got really interested in it," said Bornstein.

Over time, Bornstein said he came to realize that antitrust cases "are of paramount importance to the company," with senior management and board members often becoming extremely invested in competition litigation.

"The amount of time that I've spent with the senior executives at either Qualcomm or Epic is [extraordinary] just because of the critical nature of the issues in litigation that went towards the company's business model or an issue that senior management really really cared about," he said.

Bornstein said he is also drawn to the challenge and difficulty of antitrust law, often navigating areas of law that have not yet been fully fleshed out.

"What's fun about antitrust sometimes is you've got open, interesting issues," he said. "And these days antitrust issues are hot and sexy. They're all over the news and the political discussion. They're just interesting. Inherently so."

WHAT MOTIVATES HIM:

Bornstein said he is driven by doing the right thing by his clients.

"These cases always have some kind of important business goal around them," he said. "And typically what you want is victory. And winning is good. But what's really motivating is helping the client through what's often a difficult situation, a critical or pivotal moment in the life of the company. It's humbling to be entrusted with that responsibility and motivating to know that you really have to live up to the trust that's been placed in you ... I also just like it, the work I mean. That helps."

— *As told to Bryan Koenig*

Law360's MVPs are attorneys who have distinguished themselves from their peers over the past year through high-stakes litigation, record-breaking deals and complex global matters. A team of Law360 editors selected the 2021 MVP winners after reviewing nearly 900 submissions.