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TOP VERDICTS

THE LARGEST & MOST SIGNIFICANT
VERDICTS AND APPELLATE REVERSALS
IN CALIFORNIA IN 2020

TOP APPELLATE REVERSALS

Federal Trade Commission v. Qualcomm Inc.

Gazing at the 233-page sweeping antitrust ruling against his client penned by U.S. District Judge Lucy H. Koh of San Jose, Gary A. Bornstein knew that Qualcomm's legal team had a major appellate fight ahead. "We were obviously disappointed, but not totally shocked," he said. "From the trial, we had some sense that that was where her thinking was."

Koh's May 2019 ruling held that Qualcomm's licensing practices stifled competition in chip markets, harmed rival equipment manufacturers, caused higher consumer prices and amounted to an unreasonable restraint of trade. She issued a permanent worldwide injunction against Qualcomm's licensing requirements for customers. Koh's decision threatened to destroy Qualcomm's business model and encouraged a parallel consumer class action that she had certified in an earlier order estimating damages at nearly \$5 billion. Only an appellate reversal, it seemed, could save the company from serious harm.

"After digesting all that, we turned quickly to mapping out a plan for addressing what we saw as problems with the analysis and finding a path through what

she had done," Bornstein said. "Part of our problem was that there were a lot of factual findings and in our view deeply unfair credibility determinations—and those are hard things to deal with on appeal. In the end, the legal errors in the FTC's position became the focus of our opposition on appeal."

For the crucial argument before the 9th Circuit panel, Qualcomm brought on as lead counsel the prominent appellate advocate Thomas C. Goldstein, who has served as counsel to a party in about 125 merits cases at the U.S. Supreme Court and in numerous significant courts of appeal matters. Special Counsel Brian H. Fletcher argued for the FTC. Fletcher did not return messages; the FTC declined to comment for this story.

Goldstein not only prevailed when a unanimous panel reversed Koh and vacated the injunction, but said he enjoyed himself doing so. "It's a fond memory to have argued the case in person," he said of the Feb. 13, 2020 argument session, among the last to be held at circuit headquarters in San Francisco before the pandemic forced everyone online. "The court was quite shockingly well-informed.



BORNSTEIN

The judges had found every weakness in each side's position and knew how to press on them." *FTC v. Qualcomm Inc.*, 19-16122 (9th Cir., op. filed Aug. 11, 2020).

The case was a tough one, combining complicated business issues and advanced chip-making technology, Goldstein acknowledged. "It was the most complex case I have ever undertaken," he said. "The district judge had excoriated the client's business model, but the judges on the panel saw through that and rejected it."

case INFO

Antitrust

Court: 9th U.S. Circuit Court of Appeals
Judge: Judge Consuelo M. Callahan

Appellants' lawyers: Goldstein & Russell PC, Thomas C. Goldstein, Kevin K. Russell, Eric F. Citron; Cravath, Swaine & Moore LLP, Gary A. Bornstein, Antony L. Ryan, Yonatan Even, M. Brent Byars, Richard W. Clary, Alexander S. del Nido, Michael J. Zaken, Brendan C. Benedict, Nathaniel A. W. Crider, Andrew D. Huynh, Eric J. Zepp, Vadim Egous, Anthony D. Lauriello, Amanda R. Bakowski, Kathryn E. Bolas; Morgan Lewis & Bockius LLP, Willard K. Torn, Geoffrey T. Holtz, Richard S. Taffet; Kecker, Van Nest & Peters, Robert A. Van Nest Jr., Eugene M. Paige, Cody S. Harris, Matan Shacham, Justina K. Sessions; Wilson Sonsini Goodrich & Rosati, Michael W. McConnell; Qualcomm Inc., Donald J. Rosenberg

Appellee's lawyers: Federal Trade Commission, Brian H. Fletcher, Geoffrey M. Green, Mark J. Woodward, J. Alexander Ansaldo, Dana F. Abrahamsen, Joseph R. Baker, Wesley G. Carson Kent E. Cox, Rajesh S. James, Philip J. Kehl, Jennifer Milici, Daniel Matheson, Kenneth Merber, Nathaniel Hopkin

The circuit rejected the FTC's petition for en banc rehearing; no Supreme Court cert petition has been filed.

— John Roemer