



## Q&A

# Gary Bornstein at Cravath Swaine & Moore in New York, who was counsel to Qualcomm

## How did an unfavourable ruling at the district court impact the defence strategy against the FTC's monopolisation claim and what were the key hurdles in overcoming that?

The district court issued an extraordinarily lengthy opinion of 233 pages, in which it credited the statements of virtually all third-party witnesses that were adverse to Qualcomm and rejected the testimony of nearly all witnesses from Qualcomm and friendly third parties. It also imposed a remedy that would require dismantling a licensing programme Qualcomm had spent 30 years building. Working with our extraordinary co-counsel, our team worked to identify the legal errors that were not only clearest on the law but also least dependent on disputed facts. We also sought to delineate the narrowest interim remedy that would allow Qualcomm to avoid irreparable harm to its licensing programme while the appeal was pending. That strategy then evolved into a motion for an urgent stay and – having won that motion – the ultimate appeal briefing.

## What implications does the ruling have on intellectual property rights and licensing practices as they relate to competition rules?

While the ruling did not break new ground in terms of intellectual property rights and licensing practices, it reiterated the basic premise – long recognised in Supreme Court precedent and in cases like *FTC v Rambus* – that patent licences are governed first and foremost by patent law and contract law, not antitrust law. That basic premise holds true even if the patented technology at issue has been adopted as part of a technical standard or is subject to a commitment to license on FRAND terms. Disputes around FRAND terms are therefore contractual disputes, and should not be turned into antitrust disputes absent a clear showing that the licensor or licensee does something that harms the competitive process.

## How did having the DOJ on your side in a dispute with the FTC affect your work on this matter?

The DOJ's involvement did not necessarily affect our day-to-day work on the appeal, but its involvement was important in two ways. First, a core argument raised by the FTC was that its theory of the case was a simple application of longstanding antitrust principles. That argument lost much of its power when even the DOJ disagreed with it. Second, the DOJ brought to bear its unique perspective on the effects that the district court's remedy could have on national security, which may have contributed to the Court of Appeals' decision to issue a partial stay of the injunction – without which the appeal could have been rendered meaningless.

## The Antitrust Division has shifted its policy on intellectual property in the past couple of years, and it has diverged not only with the FTC but also with other agencies around the world. How do you expect the new administration to approach the topic?

It is too early to be sure what the new administration's stance on the intersection between antitrust and intellectual property issues is going to be. Based on current developments, however, we expect the administration's energies will be devoted toward other issues and that the battles over standard-essential patents will recede somewhat in prominence, particularly given the *Qualcomm* decision.