

Litigator of the Week: Michael Scarborough of Sheppard Mullin

By **Scott Flaherty**

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It's not often that patent and antitrust laws collide. But in a recent instance where that happened to Samsung Electronics Co., Sheppard Mullin Richter & Hampton's Michael Scarborough pulled out an important victory.

Samsung and other Android smartphone makers had been targeted by Cascades Computer Innovation LLC, a descendant of the "original patent troll." Cascades was upset that the companies were working with RPX Corp., a self-described "defensive patent aggregator" that buys up patents and licenses them to technology heavyweights such as Samsung. This strategy aims to insulate the technology companies from predatory patent suits by nonpracticing entities like Cascades. Cascades accused Samsung and others of violating the Sherman Act by conspiring to boycott it. On Tuesday, Oakland U.S. District Judge Yvonne Gonzalez Rogers threw out the suit.

"Anytime antitrust and IP come together, it makes for interesting dynamics because they're such opposing regimes in their way of looking at the world," said Scarborough, an antitrust lawyer who has been representing Samsung since 2002. Antitrust law promotes competition, he points out, while patents can create market exclusivity.

Before Cascades launched its antitrust suit, it had sued Samsung, HTC Corp., Motorola and others for patent infringement in 2011. All the defendants settled except Samsung, which was represented by Kirkland & Ellis in the patent case. In September 2015 a Kirkland team led by Luke Dauchot won a defense jury verdict in in Chicago federal court.



Michael Scarborough

Meanwhile, the antitrust case filed by Cascades in 2012 proceeded on a separate track. Judge Gonzalez Rogers dealt a blow to the defendants in December 2013, when she refused to dismiss it. She held that Cascades had made a plausible case that the smartphone makers had violated antitrust laws by striking a tacit agreement to negotiate patent licenses collectively through their RPX membership. RPX was defended by Latham & Watkins.

The antitrust case was put on hold as the infringement cases played out in Chicago. By the time the antitrust case got active again last October, all the other smartphone makers had settled, leaving just Samsung and RPX as defendants.

Scarborough argued that Cascades' antitrust theory was doomed because it lost its patent infringement case. "We applied core antitrust principles ... to say, look, when a patent is not infringed, there can't be any damages for an alleged boycott to not license that patent," Scarborough said.

Following a Dec. 15 hearing—which pitted Scarborough against Daniel Ferri of Niro, Haller & Niro, representing Cascades—Gonzalez Rogers on Tuesday sided with Scarborough. "The Sherman Act Section 1 conspiracy is no longer plausibly alleged," she wrote.