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MVP: Berger Montague's David F. Sorensen

By **Bryan Koenig**

Law360 (October 6, 2020, 9:15 PM EDT) -- David F. Sorensen of Berger Montague PC was part of a team of class action lawyers who negotiated the largest single-defendant antitrust pharmaceutical settlement of its kind, netting him a spot as one of **Law360's 2020 Competition MVPs**.





**David F.
Sorensen**
Berger Montague

HIS BIGGEST ACCOMPLISHMENT THIS YEAR:

Sorensen helped represent the direct drug buyers who won **the largest private antitrust settlement** of its kind with a single defendant in history: a \$750 million deal reached in October 2019 with Allergan PLC to get its Forest Laboratories unit out from under a massive antitrust suit in New York federal court accusing the drugmaker of anti-competitive conduct to keep generic versions of the Alzheimer's drug Namenda off pharmacy shelves.

This type of litigation, based on the generic drug approval process and how brand drugmakers can contest would-be generics, goes back more than two decades, Sorensen said.

"And I've been doing them for more than 20 years. So in all these years, that's the largest on record," Sorensen said. "It was done quickly, relatively speaking, in terms of the schedule the judge put us under."

HIS BIGGEST CHALLENGE:

The Namenda case, which settled the day trial was set to start, posed a great challenge, according to Sorensen, who pointed to the complicated story that the plaintiffs had to tell of a two-pronged anti-competitive strategy. One prong was a "pay for delay" scheme — deals with generics makers whom they had earlier sued for infringement to keep their versions out of pharmacies. The other was "product hopping," in which drug makers introduce a new form of their drug, such as an extended-release version, when another kind's patent is expiring.

The plaintiffs, Sorensen said, had to show damages from that product hopping even in the face of an injunction won by the New York attorney general that had stopped Allergan from pulling older, immediate-release versions of Namenda and forcing customers to switch between formulations.

"We're alleging that, well, it's all well and good that there's an injunction eventually issued. But the damage, a lot of it had already been done," Sorensen said.

To show that damage, Sorensen said, the case was built around demonstrating

that Allergan was warning that it would be replacing the IR version, which on its own would affect the market.

"We came in and said well, yes, the federal court in the attorney general's case stopped the ultimate pulling of the product. But the switch had already happened in effect because of your announcement," he said. "We had to prove it. We had to go in front of a jury and be ready to say this caused real damage."

That part of the case in turn had to be tied in with the pay-for-delay allegations, Sorensen said.

WHY ANTITRUST LAW:

When he arrived at Berger Montague in 1993 after time as a Dechert LLP associate, Sorensen said he found himself "plunged" into two areas of law with which he had not had a great deal of experience: antitrust class actions and environmental cases, including the so-called Rocky Flats environmental case, which kicked off in the early 1990s. A few years after he arrived and just as the Rocky Flats case was cooling down, although it would not settle until the 2010s, pay-for-delay litigation began to heat up, "and sort of the rest is history," Sorensen said.

"It's been ever since. The cases have been fascinating," he said. "And it's been really kind of cool to watch the law develop in this area and try to help it develop. See it go all the way up to the Supreme Court."

Sorensen even played a small role, filing an amicus brief in that Supreme Court case, *FTC v. Actavis*, which held that patent settlements can face antitrust scrutiny in some circumstances. In the years since, Sorensen said, he has worked to try to get other courts to view Actavis the way he does.

"It's been fun, challenging to be part of that," he said.

HIS MOTIVATION:

Sorensen is driven by the chance to dig into new subject matter and figure it out, as well as by pulling together different areas of the law.

"I actually enjoy digging into legal problems and tracing cases backwards," he said, from citation to citation back to wherever a legal precedent originated, which gives a chance to argue that the citation may not actually be what it's been interpreted as over the years.

"What I enjoy about it is that process of really digging into, in some ways the historical part of it. But going back and analyzing ... the intellectual history of ideas," Sorensen said.

Sorensen also finds deposing experts "a lot of fun."

Matching wits isn't the right phrase, he said. "It's more just trying to engage with them when you know that they have expertise you don't. But you're a lawyer and you have expertise that they don't," Sorensen said.

— 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 2020 MVP winners after reviewing more than 900 submissions.