

## MVP: Gibson Dunn's Rachel S. Brass

By Bryan Koenig

*Law360 (September 16, 2022, 2:02 PM EDT)* -- Gibson Dunn & Crutcher LLP's Rachel S. Brass helped develop class certification law by successfully defending fast-food franchises against major "no-poach" litigation, and she helped achieve a win for Apple against Epic Games, carving out a spot as one of Law360's 2022 Competition MVPs.

### **HER BIGGEST ACCOMPLISHMENT:**

Brass and her team won back-to-back rulings in late July 2021 in separate cases striking down class certification for workers suing fast-food chains McDonald's and Jimmy John's for including "no-poach" language in their franchise agreements inhibiting franchisees from hiring and recruiting workers from other franchisees within the chain.

Former McDonald's workers were denied class certification because their claims of a "national" labor market ran up against what the judge said was actually "hundreds or thousands of relevant markets" limited to small geographic areas. And a former Jimmy John's worker was deemed to have been a manager, not a lower-level staffer, who couldn't show he was personally impacted by the no-poach language because he "was never denied the opportunity to change locations because of the provision."

"Those back-to-back class certification wins were certainly the highlight of my year," Brass said.

Those rulings were important points in the individual chains' battles and the broader development of cases accusing a variety of franchised chains of violating antitrust law through no-poach provisions, hundreds of which have been abandoned under pressure from state attorneys general. For Jimmy John's, the win helped push a settlement in September 2021. The case against McDonald's was ultimately tossed in a ruling now on appeal.

"They were momentous in a couple of ways," Brass said. "They're the first decisions in ... a series of lawsuits filed against franchise systems alleging that provisions of the franchise agreements were unlawful. And both rejected class certification, and they're the first decisions to really wrestle deeply with those class action concepts in this context."



"Both courts rejected and dismantled the plaintiffs' class certification theories on different independent grounds, adopting arguments we advanced," she added. "And importantly, both courts recognized the uncontested evidence about the pro-competitive effects of the no-poach provisions in each of those franchise agreements."

In addition to failing on the evidence, Brass said that the cases showed that "when tested with evidence," the plaintiffs' cases "failed the test of common sense." The judges recognized, she said, that "single-brand franchise employment labor markets don't exist" because employees can always seek work outside the chain.

#### ***HER BIGGEST CHALLENGE:***

Representing Apple against the landmark case from Epic Games and winning a decision in September 2021 rejecting most of the video game company's allegations over the Silicon Valley giant's App Store rules (the case is currently on appeal) was a "once-in-a-lifetime experience" — and a challenge, Brass said.

"Because everybody brings your A-game and all your adrenaline to a matter like that," Brass said. "It's finishing that."

"It's carrying that same intensity and enthusiasm after a trial like that to all of your other matters," Brass added. "Your [merger] filing. Your compliance trainings. Your meet and confers. As a professional, you have to find the same amount of joy and challenge in those matters in front of you. To enjoy your career, to do the best for your clients. To do it all when you are not under the bright lights. But if someone tells you that move back and forth is easy, I would love to know their secret."

#### ***WHY SHE'S A COMPETITION LAWYER:***

The "move back and forth" may not be easy. But it's also why Brass chose competition law.

"You're not just handling incredibly complex litigation matters and investigations," she said. "You do also get to work with clients and their businesses every day, often on the matters that are the most important to them."

"Right now that is often answering one-off questions on noncompetes and nonsolicits, given the agencies' focus on those issues and people wanting to turn square corners and do the right thing," Brass said. "Or evaluating an acquisition and guiding it through the agencies. Or helping a really successful company understand the guardrails they need to follow to mitigate antitrust risk."

While the exhilaration of winning a lawsuit "has its place," Brass said that all the work "that doesn't make the press" is "just as rewarding."

Competition law, Brass said, also comes with a "deep collegiality" with her fellow antitrust attorneys, including on the other side of the table. That collegiality may be missing in other parts of the law, Brass said, but antitrust law has held onto it.

"And it makes all these other things just a lot more fun," she said.

#### ***HER PROUDEST MOMENT:***

Brass is particularly proud that when a colleague at another firm couldn't take on representing Duke

University against a lawsuit accusing over a dozen top private universities of conspiring to limit financial aid, he recommended her and Gibson Dunn.

"Earning that kind of respect and trust from your competitors, when it comes to their own really important client relationships, I just think that's the biggest compliment you can get," she said.

***HER ADVICE TO JUNIOR ATTORNEYS:***

Brass says her best advice is easy to dish out: "Get out of your comfort zone."

"If you love mergers, try civil litigation," she said. "If you're confident investigations are your thing, go try advice work. If you think tech is the most amazing industry, work with clients in older-school sectors like agriculture or transportation. And I mean this outside of work, too. If you love cities, learn to backpack, go get off the grid."

She continued, "As lawyers, I think the more we put ourselves in situations where we challenge our ordinary way of thinking and we engage with legal problems and issues in a new way, the better we serve our clients. And also the more we expand our gaze beyond the laptop in front of us and at the broader world, the better we're able to see the big picture when we are doing legal work. And of course I also think as a bonus, it's usually the most fun and the most rewarding when you try something new and something hard."

— *As told to Bryan Koenig.*

*Law360's MVPs of the Year 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 2022 MVP winners after reviewing more than 900 submissions.*

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