Ninth Circuit Strikes Down Sweeping Injunction Against Qualcomm and Reins In Expansive Interpretation of Sherman Act

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08 / 14 / 20

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On August 11, 2020, the U.S. Court of Appeals for the Ninth Circuit decisively reversed the Federal Trade Commission's (FTC or Commission) controversial district court win challenging Qualcomm's licensing practices. In rejecting every aspect of the lower court's decision, the Ninth Circuit panel addressed both general antitrust principles and questions specific to conduct by standard-essential patent holders. The decision caps a closely watched FTC enforcement action that was controversial from the start.

FTC v. Qualcomm

The FTC's complaint against Qualcomm, the world's largest smartphone chipmaker, had been the product of a 2-1 Commission vote in the waning days of the Obama administration. Then-Commissioner Maureen K. Ohlhausen dissented from the decision to file suit, criticizing the action as "based on a flawed legal theory ... that lacks economic and evidentiary support[.]"[1]

The FTC contended that Qualcomm had violated federal antitrust law through several of its patent licensing policies. Qualcomm holds a significant portfolio of patents that are essential to practicing various cellular standards (standard-essential patents, or SEPs), as well as many nonessential patents. Qualcomm licensed chips exclusively to original equipment manufacturers (OEMs), such as smartphone manufacturers, and, under its so-called "no license, no chips" policy, refused to sell modem chips to OEMs that did not sign patent license agreements requiring them to promise not to resell Qualcomm's chips. The FTC alleged that this policy, along with certain of Qualcomm's exclusive licensing agreements and purportedly "anticompetitive surcharges" imposed by Qualcomm's patent-licensing royalties, harmed competition by preventing rival chipmakers from competing in the modem chip markets.[2] The FTC also alleged that Qualcomm's conduct violated commitments made to standard-setting organizations (SSOs) that the SEPs in Qualcomm's portfolio would be licensed on fair, reasonable and nondiscriminatory (FRAND) terms. The case was filed in the U.S. District Court for the Northern District of California in January 2017 and was presided over by Judge Lucy H. Koh. Notably, after trial but before Judge Koh had issued a final decision, the Antitrust Division of the Department of Justice (DOJ) took the unusual step of filing a "statement of interest" in its sister agency's case, expressing concern over the impact that an overly broad remedy could have on the markets for 5G technology.[3]

In May 2019, Judge Koh issued an opinion siding with the FTC, finding Qualcomm's "no license, no chips" policy anticompetitive and concluding that its refusal to license to rival chipmakers violated both its FRAND commitments and an antitrust "duty to deal."[4] Judge Koh issued a permanent, worldwide injunction ordering, among other things, Qualcomm to make its patents available to rival chipmakers and prohibiting Qualcomm from conditioning the supply of modem chips on whether a customer has purchased a license.

The decision drew immediate criticism — including from current FTC Commissioner Christine S. Wilson — for significantly expanding the circumstances under which a company is required to do business with its competitors under Section 2 of the Sherman

[1] *In the Matter of Qualcomm, Inc.*, Dissenting Statement of Commissioner Maureen K. Ohlhausen, File No. 141-0199 (Jan. 17, 2017).

[2] *See* Complaint, *FTC v. Qualcomm, Inc.*, No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017).

[3] *See* Statement of Interest of the United States of America, *FTC v. Qualcomm, Inc.*, No. 17-CV-00220-LHK (N.D. Cal. May 2, 2019).

[4] *See* Findings of Fact and Conclusions of Law, *FTC v. Qualcomm, Inc.*, No. 17-CV-00220-LHK (N.D. Cal. May 21, 2019).

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Act.[5] Qualcomm promptly sought and won a partial stay of the injunction pending its appeal, supported by declarations from the Departments of Defense and Energy that emphasized Qualcomm's leadership in 5G technology and the affiliated national security benefits. In the appeal, Qualcomm also received merits *amicus* support from the DOJ,[6] as well as from former Federal Circuit Chief Judges Paul R. Michel and Randall Rader, among others.

In its highly anticipated decision, the Ninth Circuit panel unanimously rejected the lower court's reasoning, vacating the judgment and reversing the worldwide injunction against Qualcomm. The panel concluded that the district court had erroneously imposed the antitrust duty to deal on Qualcomm, had impermissibly looked outside the relevant antitrust market in order to infer an anticompetitive act and had relied on outdated evidence of agreements that were terminated before the suit was filed to justify a broad, forward-looking global injunction. The Ninth Circuit further rejected the argument that a SEP holder's violation of FRAND commitments could independently create antitrust liability, instead pointing to patent and contract law as sources for potential remedies. The decision reflects a considered effort to rein in the district court's expansive interpretation of general antitrust principles and their specific application to SEP holders, as well as recognition that the antitrust laws aim to preserve companies' incentives to innovate and compete. Recognizing that while "[a]nticompetitive behavior is illegal under federal antitrust law[,]" the panel was adamant that "[h]ypercompetitive behavior is not."[7]

Rejection of District Court's Expansive Interpretation of Antitrust Laws

The Ninth Circuit decision contains several notable conclusions regarding the scope of Section 2 of the Sherman Act and what constitutes cognizable antitrust harm.

First, the court reaffirmed that there is no general duty to deal with competitors beyond the limited exception found in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985), no such claim existed against Qualcomm where there was scant evidence of a prior course of dealing (as required by post-*Aspen Skiing* Ninth Circuit precedent) and clear data showed that Qualcomm's licensing practices were more profitable in both the short and long term.[8]

Second, the Ninth Circuit repeatedly emphasized that the district court had failed to adequately account for the realities of the marketplace and the actual impact of Qualcomm's practices in the relevant market. In applying the antitrust rule of reason to the FTC's monopolization claims, the court noted that it was the FTC's initial burden to demonstrate that Qualcomm's practices had a significant anticompetitive effect in the relevant market — here, the markets for CDMA and LTE cellular modem chips.[9] The lower court had reasoned that Qualcomm's refusal to license its SEPs to competitor chip manufacturers created an anticompetitive surcharge for OEMs that used non-Qualcomm chips.[10] But the Ninth Circuit rejected this argument, concluding that it was impermissible for a court to infer anticompetitive conduct harming Qualcomm's competitors simply from higher prices paid by OEM customers.[11] Merely identifying a monopoly and inferring harm from high prices will not satisfy a plaintiff's burden, the court noted, as the Sherman Act does not prohibit a monopolist from simply charging high prices.[12]

The panel pointed to *Ohio v. Am. Express Co*., 138 S. Ct. 2274, 2284 (2018), as establishing the proposition that new technologies and new business strategies could be mistaken for anticompetitive conduct by regulators while actually being procompetitive.[13] Indeed, in *Qualcomm*, as in *AmEx*, the Ninth Circuit found the challenged conduct to have spurred fiercer competition, as evidenced by the successful entry and expansion of other major chip firms and the continued decline of OEM prices.[14] The Ninth Circuit reiterated that plaintiffs must clearly show anticompetitive harm in the market, rather than simply pin antitrust liability on the ability to charge prices higher than what regulators may perceive to be "reasonable."

Clarification of Limits of Antitrust's Application to SEP-Related Conduct

In addition to addressing general antitrust principles, the Ninth Circuit also clarified the intersection of antitrust law and claimed breaches of FRAND commitments, issuing a near-total rejection of the use of antitrust laws to police such conduct. The FTC had alleged that, regardless of a duty to deal, Qualcomm's breach of its voluntary commitment to license on FRAND terms itself constituted an antitrust violation. The court rejected the FTC's claims, noting the "persuasive policy arguments" against applying antitrust law to FRAND breaches.

[5] Christine Wilson, *A Court's Dangerous Antitrust Overreach*, Wall St. J. (May 28, 2019).

[6] *See* Brief of the United States of America as *Amicus Curiae* in Support of Appellant and *Vacatur, FTC v. Qualcomm Inc.*, D.C. No. 19-16122 (9th Cir. Aug. 30, 2019).

[7] *FTC. v. Qualcomm Inc.*, D.C. No. 19-16122 at 55 (9th Cir. Aug. 11, 2020).

[8] *Id.* at 32-35.

[9] *Id.* at 27.

[10] *Id.* at 30.

[11] *See id.* at 40-41.

[12] *Id* at 44-45.

[13] *Id.* at 23-24.

[14] *See id.* at 48-52.

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The FTC premised its SEP-based claims solely on the "intentional deception" theory articulated in the U.S. Court of Appeals for the Third Circuit's decision in *Broadcom Corp. v. Qualcomm Inc. Broadcom* had held that a patent holder's intentional false promise to license essential patents on FRAND terms, coupled with the SSO's reliance on that promise and the patent holder's subsequent breach of the promise, could constitute a Section 2 violation.[15] The Ninth Circuit rejected the FTC's argument because unlike in *Broadcom*, "the district court found neither intentional deception of SSOs on the part of Qualcomm nor that Qualcomm charged discriminatorily higher royalty rates to competitors and OEM customers using non-Qualcomm chips."[16] Thus, even the "Third Circuit's ... exception to the general rule that breaches of SSO commitments do not give rise to antitrust liability" did not apply to the FTC's claims. The Ninth Circuit went on to criticize the *Broadcom* exception itself and the FTC's attempt to apply the antitrust laws to breaches of FRAND commitments, a subject of significant debate and criticism from regulators and commentators, including Assistant Attorney General Makan Delrahim,[17] Ohlhausen[18] — at the time the FTC's acting chair — and even current FTC Chair Joseph J. Simons.[19] The Ninth Circuit noted the "persuasive policy arguments of several academics and practitioners with significant experience in SSOs, FRAND, and antitrust enforcement," focusing on critiques from former FTC Commissioner Joshua D. Wright and Judge Michel.[20]

Finally, the Ninth Circuit also rejected the district court's finding that Qualcomm's royalty rates were anticompetitive because they were "unreasonable." The Ninth Circuit emphasized that the FTC's theory and the district court's holding that patent royalties must "precisely reflect a patent's current, intrinsic value and are in line with the rates other companies charge" was based on patent theories, not antitrust theories.[21] Given that, the court refused to "to adopt a theory of antitrust liability that would presume anticompetitive conduct any time a company could not prove that the 'fair value' of its SEP portfolios corresponds to the prices the market appears willing to pay for those SEPs in the form of licensing royalty rates."[22] The Ninth Circuit also criticized the district court for its incorrect interpretation of Federal Circuit law addressing the use of the "smallest saleable patent-practicing unit" as a metric in patent royalty disputes and its application of those principles to an antitrust case.[23]

Lessons From the Ninth Circuit Decision

The Ninth Circuit opinion reins in a sprawling district court decision that, in the panel's view, exceeded the bounds of antitrust jurisprudence and threatened to dampen the type of innovative, "hypercompetitive" behavior that the antitrust laws aim to encourage. As a result, the narrow interpretation of *Aspen Skiing*, whereby an antitrust duty to deal can only arise in circumscribed circumstances, remains intact. The decision's conclusion that purported anticompetitive harms must be experienced in the relevant market and demonstrably harm competition — not individual competitors, and not just customers — will require greater rigor from antitrust plaintiffs in future cases. Finally, the decision has significant implications for SEP holders accused of antitrust violations resulting from purported breaches of FRAND. The Ninth Circuit's caution against using "the hammer of antitrust law ... to resolve FRAND disputes when more precise scalpels of contract and patent law are effective"[24] clarifies the boundary of antitrust law where plaintiffs have in recent years been pushing to broaden its scope.

The *Qualcomm* dispute has served as a continuing source of friction between the two U.S. antitrust enforcers, particularly given the DOJ's public interjection in its sister agency's case. The FTC has not yet said whether it will seek *en banc* review at the Ninth Circuit or petition the U.S. Supreme Court for *certioriari*.

[15] *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007)

[16] Op. at 38-39.

[17] Honorable Makan Delrahim, "The 'New Madison' Approach to Antitrust and Intellectual Property Law" (Mar. 16, 2018).

[18] Maureen K. Ohlhausen, The Elusive Role of Competition in the Standard-Setting Antitrust Debate, 20 Stan. Tech. L. Rev. 93 (2017).

[19] Prepared Remarks of Chairman Joseph Simons, Georgetown Law Global Antitrust Enforcement Symposium (Sept. 25, 2018). Though a critic of his own agency's theory of harm, Chairman Simons had initially recused himself from the lawsuit; however, as of August 14, 2020, it was reported that Simons is no longer recused from the case. See B. Remaly, "FTC Chair Simons Not Recused From Next Qualcomm Steps," Global Competition Review, Aug. 14, 2020.

[20] Op. at 39-40 (citing *Amicus Curiae* Br. of The Honorable Paul R. Michel (Ret.) at 23; Joshua D. Wright, SSOs, FRAND, and Antitrust: Lessons From the Economics of Incomplete Contracts, 21 GEO. MASON L. REV. 791 (2014).

[21] Op. at 43-44.

[22] *Id.* at 44.

[23] *Id.* at 41-43.

[24] Op. at 39 (citing *Amicus Curiae* Br. of The Honorable Paul R. Michel (Ret.) at 23).