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Client Alert

No License, No Chips, No Problem: Ninth Circuit Vacates Injunction in *FTC v. Qualcomm*

August 21, 2020

Last week, the Ninth Circuit issued its long-awaited decision in *FTC v. Qualcomm* and vacated the district court's injunction against the company. The decision provides guidance on how the antitrust laws should be applied to novel patent licensing schemes and settles some uncertainty surrounding if and when a company is obligated to cooperate with its competitors. The decision also closes one more chapter in a battle between the two federal agencies tasked with enforcing American antitrust law.

"No License, No Chips." The case revolves around Qualcomm's patent licensing practices. Qualcomm is a major manufacturer of cell phone chips. It also owns patents covering technology necessary for most modern cellphones (*i.e.*, standard-essential patents) and is contractually obligated to license these patents to others on fair, reasonable, and nondiscriminatory (FRAND) terms. Qualcomm chooses to license these patents only to end-product manufacturers, such as Apple and Samsung, and not to rival chip manufacturers. According to Qualcomm, the policy allows it to avoid a problem known as patent exhaustion: if Qualcomm licensed its patents to rival chip manufacturers, those rivals could sell their chips to companies like Apple and Samsung, who then would have no incentive to license the patents from Qualcomm. Instead, Qualcomm allows rival chip manufacturers to use the patented technology without a license, as long as the rival chip manufacturers agree to only sell their chips to companies that have licensed the patents from Qualcomm. For its part, Qualcomm will not sell its own chips to companies that have not licensed the patents. In this way, Qualcomm ensures that end-product manufacturers license the patents from Qualcomm, regardless of who they buy chips from.

In January 2017, the Federal Trade Commission challenged this "no license, no chips" policy as violating antitrust laws. Following two years of litigation and a ten-day bench trial, Judge Lucy Koh issued an order agreeing with the FTC and permanently barring Qualcomm from engaging in the no license, no chips policy around the world. The Ninth Circuit stayed the injunction pending Qualcomm's appeal, noting that Judge Koh's decision was either "a trailblazing application of the antitrust laws, or . . . an improper excursion beyond the outer limits" of antitrust law.

Last week's decision in favor of Qualcomm reversed the district court's opinion. The court framed the issue as one of anticompetitive behavior versus hypercompetitive behavior. Noting that novel business practices in technology markets often are too hastily labelled as anticompetitive, the Ninth Circuit held that the district court erred because it looked at the harm that Qualcomm's no license, no chips policy was causing in the patent licensing market, and not just the modem chip sales markets. Harm to customers outside of the relevant chip sales market is beyond the scope of antitrust law, according to the Ninth Circuit. And focusing on just the modem chip sales markets, the Ninth Circuit held that there was insufficient evidence of harm to competition (rather than just harm to Qualcomm's chip-selling competitors) to establish liability.

No Antitrust Duty to Deal. The Ninth Circuit also rejected any duty to deal with competitors imposed by the district court, and concluded that Qualcomm had not disadvantaged any specific competitor with its licensing policy. A previous Supreme Court case, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, established that in certain circumstances a dominant market participant's refusal to deal with its competitors could be an antitrust violation. Judge Koh relied heavily on *Aspen Skiing* in holding that Qualcomm's refusal to license to rival chip manufacturers outside of the no license, no chips policy was anticompetitive. But the Ninth Circuit ruled that *Aspen Skiing* does not apply where Qualcomm had not terminated a profitable course of dealing, there was long-term competitive profitability from Qualcomm's licensing policy, and Qualcomm was not refusing to sell products it was already selling to other customers. The panel concluded that Qualcomm's refusal to enter into licenses with its rival chipmakers does not violate the antitrust laws.

FTC v. DOJ. The Qualcomm decision also closed the latest chapter in an unusual inter-agency spat between the two federal agencies responsible for antitrust law enforcement in the United States—the FTC and the Department of Justice. The DOJ went so far as to request, and was ultimately permitted, to participate in oral argument, so that it could publicly oppose the FTC. While the opinion does not explicitly cite to the DOJ's briefing, the decision appears to silently endorses the DOJ's IP-protective policies when it counsels caution in applying antitrust law to what are effectively FRAND contract disputes. Further, the Ninth Circuit's criticism of the "anticompetitive surcharge" theory of harm is consistent with the DOJ's position that the district court incorrectly analyzed anticompetitive harm and misread Federal Circuit law to supply a theory of antitrust harm. And both the Ninth Circuit's opinion and the DOJ's brief viewed Qualcomm's practices of setting royalty rates based on the price of handsets and charging higher royalties to chip suppliers and OEMS who do not purchase Qualcomm chips as ordinary, profit-maximizing behavior. Both also expressed skepticism that the "no license, no chips" policy was inherently exclusionary given that it was applied uniformly to all of Qualcomm's competitors. It seems that for two agencies long at odds over the proper balance between antitrust enforcement and patent protection, the DOJ has won at least this round.

What's Next. While the FTC may consider en banc or Supreme Court review, the DOJ and other parties have already noted the decision in pending cases. As a result, the Ninth Circuit opinion, including its approval of a single-level licensing scheme and interpretation of the antitrust duty to deal, will likely be revisited by other courts in short order, particularly in high-profile patent licensing litigations.

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