

FTC Goes Toe-To-Toe-Toe-Toe With Qualcomm, DOJ

By Bryan Koenig and Matthew Perlman

Law360 (February 11, 2020, 8:55 PM EST) -- The Federal Trade Commission is slated to defend its antitrust win over Qualcomm's licensing practices before the Ninth Circuit on Thursday in what could be the most public display yet of an intense divide between the nation's two antitrust enforcers.

The U.S. Department of Justice's Antitrust Division was granted permission to participate in the oral arguments in support of Qualcomm, pitting the FTC lawyers in-person against their DOJ counterparts after they have so far traded blows only in court filings and public comments.

But even without the unprecedented interagency confrontation, the case is noteworthy to both antitrust and intellectual property lawyers because the FTC's case attacking core pieces of Qualcomm's business model addresses the intersection of patent rights and antitrust law.

Authorized on a 2-1 vote by the previous commission lineup just days before President Donald Trump took office, the FTC's California federal court lawsuit accuses Qualcomm of violating antitrust law through its "no license, no chips" policy requiring customers to license the its patents in order to buy its chips, without which smartphones cannot connect to wireless networks.

At issue Thursday is U.S. District Judge Lucy Koh's May 2019 decision to side with the FTC and order Qualcomm to scrub that policy from its supply contracts. Judge Koh also granted the FTC's request to order Qualcomm to scrap its policy of licensing standard-essential patents, or SEPs, only to phone companies and instead license them to rival chipmakers, too.

The three circuit judges weighing that ruling must decide if Judge Koh's order violates the general presumption in U.S. law against requiring companies to do business with specific customers. They'll also be mulling the competitive effects of the no license, no chips policy on competitors, and whether simply charging high royalty rates amounts to a competitive harm as Judge Koh found, or if exercising patent rights rarely violates antitrust law as the DOJ argues.

A Growing Rift

Both the DOJ's interest in the case, and the size of the rift between the enforcers, have grown over time.

The first cracks appeared when the DOJ stepped in before Judge Koh had issued her opinion, in what many practitioners consider an unprecedented foray by one agency into its peer's case. At the time, the

department urged the judge to hold a separate remedies hearing in the event she found against Qualcomm, in order to avoid an overly broad fix that could hamper the development of next-generation wireless technology, known as 5G.

After Judge Koh sided with the FTC and issued a ruling without holding a hearing, the DOJ helped convince the Ninth Circuit to partially pause her order to revamp Qualcomm's contracts. To make that argument, the DOJ got backing from the U.S. Departments of Defense and Energy in contending the lower court's injunction could undermine U.S. leadership in 5G technology, a setback they said could threaten national security. The DOJ and its allies say the country needs to play a leading role in the technology's development, lest it become dependent on technology developed by China.

Protecting the U.S.' role in the development of 5G is also a linchpin for DOJ approval of T-Mobile's purchase of Sprint. The telecom giants say that they need to combine resources to realize the full possible benefits of 5G. There, too, 5G pitted antitrust enforcers against one another, although in that case it was the coalition of more than a dozen Democratic state attorneys general contesting the DOJ-blessed merger in a challenge. A federal judge rejected the AGs' case Tuesday.

In participating in Qualcomm oral arguments Thursday, the DOJ may want to be careful what it wishes for, according to Daniel McCuaig, a former longtime DOJ antitrust litigator who is now a partner at Cohen Milstein Sellers & Toll PLLC.

DOJ may face tough questioning from the judges and could concede that some conditions must be imposed on Qualcomm's licensing practices, he said.

"A key concession from the DOJ could swing things in the FTC's favor," McCuaig said in an email.

The Qualcomm case also appears to represent a philosophical divide between FTC enforcers, who say that patent rights can be competitively abused and must be constrained by commitments that SEP holders make to broadly license their technology on fair terms, and DOJ enforcers, who have argued that licensing commitments almost never trigger antitrust law. DOJ Antitrust Division chief Makan Delrahim has made those arguments when addressing SEPs, which are crucial to technological compatibility, although he's recused from the Qualcomm case.

"Delrahim has been more protective of intellectual property than the FTC has been," said Ankur Kapoor, a Constantine Cannon LLP partner who submitted an amicus brief backing the FTC on behalf of the High Tech Inventors Alliance, whose members include Google and Microsoft.

The enforcement divide doesn't only exist between the FTC and DOJ.

FTC Commissioner Christine Wilson also took the rare step of publicly criticizing her own agency's enforcement action. Her willingness to do so is a likely sign of a split within the FTC: Chairman Joseph Simons is recused from the matter, leaving the case evenly divided between the commission's two Democrats and Wilson and fellow GOP Commissioner Noah Phillips. The FTC cannot drop the suit or cut a deal with Qualcomm, however, because any action on the case would require a majority vote.

The FTC is not alone in going after Qualcomm. Phone buyers are pursuing their own class action against the chipmaker mirroring the FTC's claims. That case is currently awaiting a Ninth Circuit ruling on Judge Koh's decision to certify a nationwide class estimated at some 250 million people. The DOJ opposes the certification, arguing in an amicus brief that the court should not have applied California class action law

beyond the state's borders.

On the Merits

After the Ninth Circuit agreed to pause the case, the DOJ filed another brief, this time attacking the merits of the FTC's case. In addition to raising concerns about national security, the DOJ argued that the lower court's ruling threatens to "deserve the purposes of antitrust law."

The department maintained that the court was wrong to find Qualcomm's licensing practices anti-competitive based on "unreasonable" royalty rates and alleged patent law violations, contending that Judge Koh failed to establish any harm to competition.

The antitrust duty to deal may be the most vulnerable part of Judge Koh's ruling, according to attorneys. Lisa Kimmel, a senior counsel in Crowell & Moring LLP's antitrust group and an FTC alum, said in an email that the FTC has tried in its briefing in the instant case to shift away from that duty to deal under the U.S. Supreme Court's 1985 ruling in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*

The agency has instead argued that the duty to deal comes from Qualcomm's commitment to license its technology on fair and reasonable terms when designating it as standard essential.

Instead of grounding its case in *Aspen Skiing*, Kimmel said the FTC has tried to focus on the D.C. Circuit's decision in the federal government's antitrust case against Microsoft, which dealt heavily with an alleged monopolist's exclusive dealing.

"This jumped out to me as a clear shift from the trial court strategy. I will be interested to see how many times the FTC claims the case is 'just like Microsoft' in their oral argument, and ultimately whether the Ninth Circuit agrees," Kimmel said.

If the Ninth Circuit disagrees with the duty to deal finding, University of Minnesota Law School professor Thomas F. Cotter says the panel will have to decide if that part can be separated from the rest of Judge Koh's opinion or if it dooms her findings in their entirety.

As for Qualcomm, the company argued in August that Judge Koh never identified harm to competition, a core prerequisite in antitrust cases. Allegedly unreasonable royalties supposedly forced on phone makers for whom its chips are a must-have, the chipmaker said, are not by themselves anti-competitive because they're charged to phone manufacturers rather than chipmakers competing with Qualcomm.

The FTC itself has continued to defend its case and Judge Koh's ruling, arguing that Qualcomm's high royalty rates amount to a tax on its rivals. The agency said in November that Qualcomm used its dominant position in the market to illegally maintain a monopoly and extract a tax on chips made by rivals, with "predictable consequences" of raising rival prices and keeping them from underbidding the chipmaker.

Nor do the DOJ's national security concerns withstand scrutiny, the FTC said. Those arguments, according to the FTC, were based on "pure speculation" about Qualcomm becoming less profitable as a result of the injunction.

The FTC's enforcement action also targets agreements Qualcomm had with Apple that it alleges effectively required Apple to buy chips exclusively from Qualcomm.

Qualcomm is represented by attorneys from Goldstein & Russell PC, Morgan Lewis & Bockius LLP, Cravath Swaine & Moore LLP, Keeker Van Nest & Peters LLP and Wilson Sonsini Goodrich & Rosati PC.

The FTC is represented in-house by Heather Hipsley, Michele Arington, Brian H. Fletcher, Ian R. Conner, Daniel Francis, Jennifer Milici, Alexander Ansaldo, Joseph Baker, Wesley Carson, Geoffrey Green, Rajesh James, Kenneth Merber and Mark Woodward.

The DOJ is represented by Michael F. Murray, William J. Rinner, Jennifer Dixon, Patrick M. Kuhlmann and Jeffrey D. Negrette of the DOJ's Antitrust Division.

The case is FTC v. Qualcomm Inc., case number 19-16122, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Anne Cullen, Christopher Cole and Ryan Davis. Editing by Breda Lund.