

DOJ Urges Caution If FTC's Qualcomm Case Brings Remedies

By Bryan Koenig

Law360 (May 3, 2019, 7:14 PM EDT) -- The U.S. Department of Justice has taken the unusual step of wading into the Federal Trade Commission's case against Qualcomm over the chipmaker's patent licensing practices, arguing that if the company is found liable, the California federal judge should avoid any "overly broad remedy" that might harm 5G development.

In a filing Thursday, the DOJ's Antitrust Division took care not to address the merits of the FTC's case, now awaiting a decision from U.S. District Judge Lucy Koh after trial wrapped in January. But in pushing for a hearing to carefully mete out an order against Qualcomm's licensing practices if Judge Koh finds in the FTC's favor, the DOJ may have hinted at a disagreement between the agencies over the proper enforcement for patents key to technological standards.

At the core of the FTC's case, and the DOJ's concern, is Qualcomm's "no license, no chip" policy, whereby it refuses to sell its premium modem chips to cellphone makers unless those companies enter into patent licensing agreements with it for its technology, much of which has been designated as essential to technological standards. The FTC says the policy is double-dipping and violates antitrust law, providing Qualcomm monopolistic leverage to artificially hike royalty rates, and the agency wants a broad injunction scrapping the practice.

In its statement of interest, however, the DOJ's Antitrust Division warned the FTC's bid to force a renegotiation of Qualcomm's current licensing agreements "does not appear to be limited to those licenses affected by Qualcomm's allegedly anticompetitive practices" in the markets designated in the FTC's lawsuit. If Qualcomm's licensing practices are found anti-competitive, the DOJ said, Judge Koh should convene additional briefing and evidentiary proceedings to consider the scope of the injunction to be imposed.

"There is a plausible prospect that an overly broad remedy in this case could reduce competition and innovation in markets for 5G technology and downstream applications that rely on that technology," the DOJ said. "Such an outcome could exceed the appropriate scope of an equitable antitrust remedy. Moreover, it has the distinct potential to harm rather than help competition."

Experts told Law360 on Friday that it is exceedingly rare for one of the two federal antitrust enforcers to jump into a case being pursued by its peer. But such appearances — the DOJ made sure to say it isn't intervening in the Qualcomm case — are not entirely unheard of, and the statement of interest seems to fit broadly into the Antitrust Division's growing activist streak pursued through its amicus program.

"The DOJ seemed to be bringing to the court's attention how antitrust remedies must be carefully fashioned to address proven anti-competitive harm — no more and no less. You don't want to prohibit practices that may be pro-competitive, and you don't want to leave anti-competitive practices in place," Ankur Kapoor, a partner at Constantine Cannon who focuses on antitrust litigation and counseling, said in an email. "The FTC certainly knows all that and I think that the court likely had a remedies hearing in mind even without the DOJ's statement. And I would be very surprised if Qualcomm didn't ask for one in the event the court held that Qualcomm's licensing practices violated the antitrust laws."

Qualcomm itself had argued in the trial that a broad injunction order would wrongly nullify hundreds of contracts when the FTC hadn't shown any harm to competition. Despite the parallel to Qualcomm's arguments, Cozen O'Connor antitrust litigator David Reichenberg told Law360 in an email that the DOJ's filing does seem to indicate the department believes a liability finding to be "in the realm of possibility."

The DOJ's brief, experts said, also appears to fit broadly into the intellectual property advocacy of division chief Makan Delrahim. Delrahim has repeatedly spoken out on the right of patent holders to use their intellectual property rights in ways that he says often don't run afoul of antitrust law, such as in demanding high rates for essential technology.

The antitrust chief has said charging high rates on standard essential patents, which are supposed to be licensed on fair terms, is likely a contract dispute rather than an antitrust one. At the same time, he's argued that antitrust enforcers should be focusing more on patent licensees who implement the technology.

"I think they honestly have this view that you should not interfere in what patent holders do through the antitrust laws," said Jorge L. Contreras, a law professor at the University of Utah's S.J. Quinney College of Law. "That's a view that Mr. Delrahim has made very clear over the last couple of years."

While Delrahim has signed onto other statements of interest filed in cases such as proposed class actions targeting fast-food chains accused of anti-competitive no-poach deals, the assistant attorney general is recused from the Qualcomm case and his name was absent from Thursday's filing, likely because he served as a registered lobbyist on Qualcomm's behalf when he was in private practice.

Qualcomm, which has faced enforcement actions around the world, declined to comment Friday, as did the DOJ. An FTC spokesman on Friday said only that the agency believes it has a "strong case that Qualcomm violated the antitrust laws, and if the court rules in our favor we look forward to a discussion of remedies."

A possible driver of the DOJ's participation months after trial closed and with a decision potentially imminent, attorneys said, is the far more recent settlement last month between Qualcomm and Apple. That deal resolved a globe-spanning fight over Qualcomm's allegations of patent infringement and Apple's allegations that the no license, no chips practice had forced it to spend billions more than it would have otherwise. Qualcomm recently disclosed that Apple will be paying the chipmaker at least \$4.5 billion under a deal that also comes with multiyear licensing and chipset supply arrangements.

The FTC and Apple filed suit within days of each other in early 2017.

Lisa Kimmel, a senior counsel in Crowell & Moring LLP's antitrust group, said the DOJ's interest may have been drawn both by the Apple-Qualcomm settlement and by the decision from Intel, Apple's only other

modem chipset supplier, to bow out of the 5G space the same day the settlement was announced — Intel's departure likely sets up Qualcomm for a key role in 5G.

The DOJ, Kimmel said, likely has "genuine concerns" that an overly broad injunction against Qualcomm "could actually harm a market that's working pretty well."

Perhaps the more open question, according to Kimmel, is how the current members of the commission feel about a case they inherited from their Obama administration predecessors. The FTC has floated the possibility of a settlement — which requires a majority vote to approve — but Kimmel noted FTC Chairman Joseph Simons recused himself from the Qualcomm case, and it remains unknown how the four other commissioners, two Democrats and two Republicans, feel about the litigation.

The DOJ is represented by Andrew C. Finch, David L. Anderson, Michael F. Murray, William J. Rinner and Daniel E. Haar.

The FTC is represented in-house by Jennifer Milici, Joseph Baker, Lin Wang Kahn, Daniel J. Matheson, Rajesh S. James and Wesley G. Carson.

Qualcomm is represented by Robert A. Van Nest and Justina Kahn Sessions of Kecker Van Nest & Peters LLP, Antony L. Ryan, Richard J. Stark, Gary A. Bornstein and Yonatan Even of Cravath Swaine & Moore LLP and Richard Zembek, Marc Collier, Eric Hall, Daniel Leventhal and Talbot Hansum of Norton Rose Fulbright.

The case is FTC v. Qualcomm Inc., case number 5:17-cv-00220, in the U.S. District Court for the Northern District of California.

--Additional reporting by Dorothy Atkins, Matthew Perlman and Daniel Siegal. Editing by Marygrace Murphy.