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PERSPECTIVE

## To cooperate, or not to cooperate?

*That is the question in Federal Trade Commission v. Qualcomm*

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*Don't cooperate with your competitors!*

That's a foundational imperative of antitrust law — the body of law devoted to protecting and ensuring fair competition in the marketplace. The idea is simple: Fierce competition — rather than cooperation among competitors — pushes companies to offer customers the best products and services at the lowest prices.

But last month's win for the Federal Trade Commission in *FTC v. Qualcomm*, 17-cv-00220 (N.D. Cal., filed Jan. 17, 2017), illuminates an increasingly fractured fault line in this foundation: When is cooperation actually required to ensure competition? This fault line has important implications for the future of the digital economy — particularly emerging technology ecosystems, such as 5G, the Internet of Things, networked self-driving vehicles, and app, music, and operating system platforms. Some of those ecosystems were conceptualized based on assumptions of either cooperation among competitors or

walled platforms that exclude competitors.

The case revolves around Qualcomm's chip-making and patent-licensing business lines. Qualcomm is a major cellphone modem chip manufacturer. It also owns patents covering certain cellular communications technologies. Private standards development organizations elected to incorporate Qualcomm's patented technologies into several marketplace technical standards. While a patent is a legal monopoly, non-standard-essential patented technology usually still involves competition, giving implementers of the technology a choice of which patents to license. But implementers of standard-essential patented technology, such as 4G smartphone makers, must license the patents essential for 4G. As a condition for Qualcomm's patented technology to be included in the standard, Qualcomm agreed to license its standard-essential patents (SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms.

The FTC sued, claiming that through its so-called "no license, no chips" policy, Qualcomm uses its power in the market for the supply of modem chips to coerce smartphone makers and



Daily Journal photo

Judge Lucy Koh of the Northern District of California

other implementers of its SEPs to buy chips from Qualcomm rather than its competitors and pay Qualcomm above-FRAND (supracompetitive) licensing royalties.

In a 233-page opinion after a bench trial, Judge Lucy Koh held that these practices violated federal antitrust laws. Specifically, the court held, among other things, that "Qualcomm has an antitrust duty to license its SEPs to rival modem chip suppliers." The court also ordered Qualcomm to renegotiate its existing contracts with customers without the "no license, no chips" policy. And it ordered Qualcomm to license its rivals "on FRAND terms."

The "duty to deal" facet of Judge Koh's ruling relies on a 1985 Supreme Court decision, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Aspen Skiing ran three of the four ski resorts in Aspen; Aspen Highlands ran

the fourth. For over a decade, the two rivals offered a joint ski pass to all four resorts and split the profits. But Aspen Skiing stopped, in part because it thought that consumers would buy passes to its three resorts if no all-Aspen pass was available. Aspen Highlands sued. The Supreme Court held that Aspen Skiing's three resorts had become "essential facilities" for Aspen Highlands to compete; thus, Aspen Skiing's refusal to deal with Aspen Highlands was a violation of the antitrust laws. In reaching this conclusion, the Supreme Court relied in part on the competitors' previous cooperation.

In *Qualcomm*, Judge Koh ruled that Aspen Skiing applied for three primary reasons. First, after initially volunteering to license its SEPs to rival chipmakers, Qualcomm subsequently terminated that "profitable course of dealing" because licensing solely to

phone makers was more lucrative. Second, it was “motivated by anticompetitive malice” in doing so. And third, the market for licensing modem chip SEPs is an “existing retail market.”

For decades, commentators have criticized *Aspen Skiing* as an example of government overreach. The Supreme Court itself has described it as “at or near the outer bound” of antitrust liability. *Verizon v. Trinko*, 540 U.S. 398 (2004). Critics argue that forcing rivals to cooperate is contrary to the basic tenets of antitrust law. It can even make illegal collusion easier to accomplish and harder to detect. And the tension between cooperation and competition can create an unpredictability that makes it difficult for businesses to know how to act. *Aspen Skiing* itself offers an example: 10 years before the Supreme Court mandated that Aspen Skiing cooperate with Aspen Highlands, the Colorado attorney general had sued the two companies for just such cooperation. What’s a business to do, critics ask, in light of such conflicting guidance?

This controversy has revealed divisions, even among and within the regulatory agencies charged with enforcing the antitrust laws. The FTC filed the *Qualcomm* complaint in spite of a rare written dissent by then-FTC Commissioner Maureen Ohlhausen. Before Judge Koh issued her ruling, the Department of

Justice — the other federal agency responsible for the enforcement of federal antitrust law — filed a document in the case expressing concern that an FTC win might lead to “overly broad” relief that “could result in reduced innovation, with the potential to harm American consumers.”

Indeed, FTC officials had conflicting reactions to their agency’s win. FTC Bureau of Competition Director Bruce Hoffman and FTC Commissioner Rohit Chopra hailed the decision as “an important win for competition in a key segment of the economy” and “a huge victory for every consumer who uses a smartphone and every American who believes in competitive markets,” respectively. But FTC Commissioner Christine Wilson characterized *Aspen Ski-*

*ing* as “discredited” and called Judge Koh’s ruling “both bad law and bad policy.”

So what does the future hold? Qualcomm has appealed the decision. In evaluating a duty to deal (i.e., to license SEPs to rivals) under the antitrust laws (and *Aspen Skiing*, in particular), the 9th U.S. Circuit Court of Appeals may opine on whether *Aspen Skiing* applies to the licensing of SEPs and address Federal Circuit authority that the antitrust laws do not impose a duty to share intellectual property. *In re Indep. Serv. Orgs. Antitrust Litig.* Perhaps it will also examine whether changes in patent exhaustion law affected the legality of Qualcomm’s changes in licensing practices. The appellate rulings on these and other issues may impact patent licensing, especially where

SEPs are involved, as well as emerging technology ecosystems. In the meantime, Judge Koh’s opinion has framed the next chapter in the debate over competition versus cooperation between competitors.

While businesses wait for more guidance from the courts, they can take at least one step to protect themselves from antitrust liability — and prevent their competitors from harming them and competition: Don’t terminate, or allow termination of, a voluntary and profitable course of dealing (cooperation) with competitors absent legal advice — especially where the course of dealing affects an existing retail market. And, in any event, businesses should consult their friendly neighborhood antitrust lawyer about how these issues affect their business and competition. ■

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