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FTC v. Qualcomm: Trial and Possible Implications

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Nearly two years after the Federal Trade Commission ("FTC") brought its unfair competition case against Qualcomm, the case has proceeded to trial. Despite the ongoing partial shutdown of government operations, the trial began on January 4, 2019, before the Honorable Lucy Koh in the Northern District of California. This article analyzes important developments in the case as it has proceeded – including the significant motion to dismiss and partial summary judgment rulings – and offers thoughts on the just commenced trial.

Motion to Dismiss Ruling

The FTC sued Qualcomm in January 2017, on the eve of a change in administration. It alleged anticompetitive behavior in connection with Qualcomm's licensing program covering wireless communication standard-essential patents ("SEPs") subject to a commitment to license on fair, reasonable, and non-discriminatory ("FRAND") terms. The FTC brought its complaint under Section 5 of the FTC Act, which prohibits "unfair methods of competition," as opposed to bringing an express claim for a violation (or violations) of Sections 1 and/or 2 of the Sherman Act (which prohibits agreements that unreasonably restrain trade and various forms of monopolization, respectively).

The FTC's allegations largely center on (1) Qualcomm's "no license-no chips policy," under which Qualcomm allegedly conditions customers' access to Qualcomm's wireless SEPs on taking a license on its preferred terms, and (2) Qualcomm's apparent practice of refusing to offer licenses to competing chip manufacturers, instead insisting on licensing only to original equipment manufacturers ("OEM") of wireless devices. Additionally, the FTC alleges that Qualcomm entered into a *de facto* exclusive dealing arrangement with Apple, in which Qualcomm conditioned partial relief from its supra-FRAND royalties upon exclusive use of Qualcomm chips.

The district court denied Qualcomm's motion to dismiss in June 2017. Even though the FTC's case was brought on a Section 5 theory, Judge Koh held that the FTC had sufficiently alleged claims under Sections 1 and 2 of the Sherman Act and therefore also stated a claim under Section 5 of the FTC Act. Specifically, the opinion concluded that the alleged "no-license, no chips policy," combined with Qualcomm's alleged refusal to license to its competitors, effectively foreclosed the possibility of any licensee challenging Qualcomm's royalties as above FRAND for fear of losing access to Qualcomm's chipset supply. Additionally, the court rejected Qualcomm's argument that it was entitled to choose to license only at the OEM level, holding that the FTC had adequately alleged that the FRAND commitment renders inapplicable the general antitrust rule that there is no duty to deal with one's competitors.

In the opinion, Judge Koh also addressed Qualcomm's defense that there could not be a FRAND violation because the royalty expressed as a percentage of the end-use device has not changed over time. In rejecting that argument, she stated that the fact that Qualcomm "collects the *same* 5% royalty on the total value of a 2017 smartphone as Qualcomm collected on the total value of a 2006 phone, despite the fact that both handset technology and Qualcomm's SEP portfolio has changed dramatically over the past decade, support[ed] FTC's allegations that Qualcomm's SEP royally rates are above FRAND."

Partial Summary Judgment Ruling

In another significant pre-trial ruling, Judge Koh granted the FTC's motion for partial summary judgment in November 2018. That ruling held that Qualcomm's FRAND commitment means that it must offer licenses to its SEPs to competing chipset suppliers. The decision was based on 9th Circuit precedent; the intellectual property rights ("IPR") policies of two applicable standard-setting organizations, the Alliance for Telecommunications Industry ("ATIS") and the Telecommunications Industry Association ("TIA"); and the prior course of conduct of Qualcomm, and other SEP-holders, in granting licenses to certain chip manufacturers.

Several aspects of Judge Koh's partial summary judgment decision are noteworthy. First, the opinion squarely held that "Ninth Circuit precedent establishes that Qualcomm's FRAND commitments include an obligation to license to all comers, including competing modem chip suppliers." Second, by not permitting a SEP-holder to pick and choose with respect to willing licensees, it preserves the purpose of the non-discriminatory prong of FRAND. And third, the holding is consistent with the patent law damages principle requiring that reasonable royalty damages for infringement be apportioned to the smallest salable unit that actually practices the relevant patent, as opposed to the entire device.

Furthermore, the partial summary judgment decision could potentially bring about important changes in the way that SEPs are licensed and litigated. In the increasingly expanding network of industries that implement cellular standards, SEP-holders that adhere to a licensing model directed solely towards end-user devices likely will face heavy scrutiny. The same holds true for similarly-structured patent pools that act as licensing agents for individual SEP-holders. And, as more SEP-holders license at upstream levels of the supply chain, the patent exhaustion doctrine will limit the potential infringement exposure of downstream suppliers and end-user devices.

Significance of the Ongoing Trial in Light of International and Domestic Developments

SEP-holders, potential licensees, and all companies participating in wireless communications industries should be closely watching the trial as it unfolds. The FTC's case fits into a broader pattern to curb certain SEP licensing practices used by Qualcomm and others. Such proceedings include:

- In August 2018, Qualcomm settled with the Taiwan Fair Trade Commission for $93 million, in addition to agreeing, among other things, to offer licenses to competing chipset manufacturers.

- In January 2018, the European Commission fined Qualcomm $1.2 billion for abusing its dominant position in the market for chips that comply with the 4G Long-Term Evolution ("LTE") standard, based in part on allegations concerning payments by Qualcomm to Apple to prevent Apple from buying from Qualcomm's rivals.

- In December 2016, the Korea Fair Trade Commission ("KFTC") fined Qualcomm $854 million, the largest fine ever levied in that country, and imposed a corrective order requiring Qualcomm to negotiate licenses to competitors and renegotiate licenses with OEMs. It is important to note that Qualcomm is appealing the decisions of the European Commission and the KFTC.

- In February 2015, China's National Development and Reform Commission fined Qualcomm $975 million and issued a rectification plan.

But while the FTC's enforcement action is in line with that of some other jurisdictions, it stands in contrast to the recent views expressed by the Antitrust Division of the U.S. Department of Justice ("DOJ"). Indeed, the DOJ has questioned whether it is appropriate to apply competition law to enforce a FRAND commitment, insisting that adequate remedies exist in contract or other common law theories. However, Judge Koh's prior rulings in the Qualcomm case demonstrates how the current DOJ view is out of sync with legal precedent in the U.S., not to mention the decisions described above in other jurisdictions (pending appeals).

The recently commenced trial comes at an important crossroad for U.S. competition policy. Will the U.S. be the latest jurisdiction to impose significant limitations on Qualcomm's SEP licensing practices? Or will the trial in San Jose result in an outcome consistent with the DOJ's current view that there is no role for competition law in the licensing terms for SEPs? Barring unforeseen events, the answers to these pressing questions appear to be near.

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