Antitrust and Competition Law

Qualcomm Wins Ninth Circuit Appeal, Vacating Worldwide Injunction on Its Patent Licensing Practices

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On August 11, the US Court of Appeals for the Ninth Circuit vacated a judgment against Qualcomm Inc. in its ongoing antitrust dispute with the Federal Trade Commission (FTC) involving fair, reasonable, and non-discriminatory (FRAND) licensing issues.[1] The Ninth Circuit panel unanimously ruled in favor of Qualcomm, and against the FTC, reversing the district court's judgment finding that several of Qualcomm's core patent licensing practices violated federal antitrust law.[2]

The Ninth Circuit's ruling represents a key development at the intersection of antitrust law and FRAND licensing obligations for standard essential patents (SEPs). The court of appeals rejected a "trailblazing application of the antitrust laws" to Qualcomm's so-called "no license, no chips" policy and related patent licensing practices.[3]

Antitrust Law Does Not Impose a Duty to License SEPs to Direct Competitors on FRAND Terms.

The FTC claimed that Qualcomm violated both its FRAND commitments and an antitrust duty to deal by refusing to license its SEPs to rival chipmakers. The Ninth Circuit began by holding that no antitrust duty required Qualcomm to license its SEPs to its competing chip suppliers.[4] The court held that the narrow *Aspen Skiing* doctrine—the "one, limited exception" to the longstanding rule that there is "no antitrust duty to deal" imposed by federal law—did not apply.[5] The Ninth Circuit underscored that the exception only applies "in rare circumstances," is "at or near the outer boundary" of antitrust liability, and the FTC conceded that the district court erred by applying the *Aspen Skiing* exception.

The Court Endorsed Qualcomm's Procompetitive Justifications for OEM-Level Licensing.

The FTC argued that, even if Qualcomm did not violate an antitrust duty to deal, its decision to only license its patent portfolio at the OEM level still violated Section 2 of the Sherman Act. The Ninth Circuit disagreed, holding the FTC identified no harm to competition in the market for modem chips, and noting that Qualcomm proffered a reasonable, procompetitive justification for its practices.[6] Specifically, the court noted the practice avoided the need for Qualcomm to manage multi-level licensing, which would lead to inefficiencies and less profit. This justification was strengthened both by the fact that MediaTek and Intel had entered the relevant market after Qualcomm obtained monopoly position, and by the fact that Qualcomm's competitors with "similar SEP portfolios," Nokia and Dolby, were also licensing only at the OEM level for the same "good reasons."[7]

This aspect of the panel's decision also criticized the FTC's argument for "skip[ping] ahead to an examination of Qualcomm's procompetitive justifications" before discharging its initial burden of proving a harm to competition in the relevant market, distinct from mere harm to competing chip suppliers.[8] As the panel noted, antitrust law protects competition, not competitors. Because the FTC had not established anticompetitive harm, the court suggested that it was "less critical of Qualcomm's procompetitive justifications for its OEM-level licensing policy," which, in any case, appeared reasonable and consistent with industry practices.[9]

Absent Evidence of Predatory Pricing, Qualcomm's Licensing Royalty Rates and "No License, No Chips" Policy Did Not Violate Antitrust Law.

The Ninth Circuit also rejected the district court's "primary theory," holding that Qualcomm's SEP licensing royalty rates and "no license, no chips" policy did not support an antitrust violation.[10] First, the panel concluded that the FTC failed to prove an antitrust violation based on Qualcomm's "unreasonably high" royalty rates. Because evidence suggested Qualcomm did not charge below-cost retail prices for its chips in a scheme to "squeeze" competitors out of the market,[11] and lost market share to competitors who "found ways to successfully compete,"[12] the court concluded that Qualcomm's royalty rates were "exactly the type" of price competition encouraged by antitrust law.

Additionally, although Qualcomm required OEMs to pay licenses in order to purchase its chips, the court emphasized that this practice also did not support an antitrust violation. The panel highlighted evidence that OEMs could discipline Qualcomm's pricing through arbitration, negotiations, actual or threatened litigation, or threatening to move to other chip suppliers—including Apple's decision to switch to Intel as its main chip supplier in 2014.[13] Further, no rule in antitrust required Qualcomm to license its SEPs independently from chip sales and collecting royalties, and/or limiting its chip customer base to licensed OEMs. The panel again emphasized the general rule that "businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing" under settled antitrust principles.[14] Even if the policy was "unique in [Qualcomm's] industry," the Ninth Circuit held that Qualcomm's profit-seeking behavior, standing alone, could not establish an antitrust violation.[15]

Qualcomm's "Exclusive Deals" With Apple Did Not Support the FTC's Antitrust Claims.

The court addressed issues raised by the FTC's argument that Qualcomm violated the Sherman Act by signing "exclusive deals" with Apple that foreclosed a substantial share of the relevant market for CDMA modem chips.[16] Many such arrangements entail "economic benefits," "including the enhancement of interbrand competition." Therefore, the opinion reaffirms that exclusive dealing must have "the actual or practical effect of substantially foreclosing competition" in the defined relevant market to form an antitrust violation.

In Qualcomm's case, the record did not suggest that any competitor or potential competitor was affected by Qualcomm's 2011 and 2013 exclusive CDMA chip contracts with Apple. Rather, as previously noted, the record showed that Intel successfully wrested Apple from Qualcomm in 2014.

The SSPPU Patent Damages Rule Did Not Support the FTC's Antitrust Claims.

Within its discussion of Qualcomm's SEP licensing royalty rates, the Ninth Circuit rejected the district court's holding that a violation of the rule in patent law that a "reasonable royalty" must be based on the "smallest salable patent-pricing unit" (SSPPU) would be an antitrust violation.[17] The court flatly rejected a theory of antitrust liability that, in its view, "would presume anticompetitive conduct any time a company could not prove that the 'fair value' of its SEP portfolios corresponds to the prices the market appears willing to pay for those SEPs in the form of licensing royalty rates."[18]

The Proper Remedy for a Breach of FRAND Commitments Exists in Contract Law, Not in Antitrust Law.

The Ninth Circuit refrained from deciding whether Qualcomm breached any of its FRAND commitments through the allegedly anticompetitive scheme. The opinion, however, makes clear that whatever remedy may exist for Qualcomm's FRAND violations, "the remedy for such a breach lies in contract and patent law."[19] Moving forward, this holding suggests that violations of FRAND commitments gives rise to breach of contract claims, not antitrust liability. In other words, an OEM's recourse for similar alleged violations is to file a breach of contract action under standard-setting organization bylaws—*not* antitrust law.

Please don't hesitate to contact us if you have any questions or comments on this topic. Our contact information is below.

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[1] *F.T.C. v. Qualcomm*, No. 19-16122 (9th Cir. Aug. 11, 2020) (Callahan, J.) (Op.).

[2] Op. at *9, 56.

[3] *See F.T.C. v. Qualcomm*, 935 F.3d 752, 757 (9th Cir. 2019) (granting Qualcomm's request to stay district court's injunction pending appeal, and characterizing order and injunction as either "a trailblazing application of the antitrust laws" or "an improper excursion beyond the outer limits of the Sherman Act").

[4] Op. at *33.

[5] *Id*. at *32-33 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 485 (1985); *see also id.* at *32 (citing *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004) (characterizing *Aspen Skiing* as "at or near the outer boundary" of § 2 liability).

[6] *Id.* at *37-38; *see also id.* at *51.

[7] *See id*. at *37, *37 n.17.

[8] Op. at *37-38.

[9] *Id.* at 38.

[10] *See id..* at *40-48, *49-51.

[11] *Id.* at *46-48.

[12] *See id.* at *12

[13] *Id.* at *49.

[14] Op. at *50 (citation omitted).

[15] *Id.* at *51.

[16] *Id.* at *52.

[17] *Id.* at *42-43.

[18] *Id.* at *44.

[19] *Id.* at *56.

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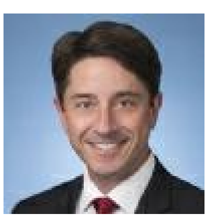

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