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What The Qualcomm Case Tells Us About FTC And FRAND

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Law360, New York (January 26, 2017, 1:54 PM EST) -- On Jan. 17, 2017, the Federal Trade Commission filed suit against Qualcomm Inc. in the U.S. District Court for the Northern District of California for allegedly monopolizing the market for CDMA and LTE baseband processor technologies. The suit alleges that Qualcomm utilized anti-competitive licensing tactics to extract excessive royalties from original equipment manufacturers for its standard-essential patents and to weaken its competitors by refusing to license its patents on fair, reasonable and nondiscriminatory terms. It also alleges that Qualcomm thwarted the growth of its competitors by entering into an exclusive agreement with Apple Inc. that provided discounted royalty rates in exchange for exclusivity and an agreement not to challenge Qualcomm's licensing terms as violating any FRAND commitment.

The suit ironically comes just four days after the FTC and the Antitrust Division of the U.S. Department of Justice issued their revised "Antitrust Guidelines for the Licensing of Intellectual Property," in which they declined to adopt guidelines relating to precisely this sort of conduct. For example, the American Antitrust Institute had lobbied for the agencies to include in the revision a statement that refusal to license SEPs on FRAND terms could amount to unlawful monopolization or unfair and deceptive conduct. The revised guidelines did not, however, address the issue. Instead, there remains a smattering of business review letters, statements and enforcement actions (now including the Qualcomm case) that were not incorporated into the guidelines notwithstanding calls to do so, for example, from noted economists Joseph Farrell and Carl Shapiro.

It also came just three days prior to the inauguration of Donald Trump, and shortly before the departure of Obama appointee and former FTC Chairwoman Edith Ramirez. Notably, issuance of the complaint was authorized by a 2-to-1 vote of the commission (therefore hinging on the vote of Ramirez), with a written dissent by now-Acting Chairwoman Maureen Ohlhausen.

In the Qualcomm complaint, the FTC alleges that Qualcomm possesses "monopoly and market power" in the markets for baseband processors complying with the CDMA and LTE

standards. It allegedly abuses that market power in three ways.

- First, by conditioning OEM access to its baseband processors on their agreement to its "no license, no chips" terms, which allegedly acts as a "tax" that raises OEMs' cost of constructing and selling handsets and requires payment of royalties to Qualcomm on sales of handsets that incorporate a competing baseband processor;

- Second, by refusing to license SEPs to competitors (either at all or on FRAND terms), including Intel and Samsung, Qualcomm maintained its monopoly on baseband processors and effectively "taxed" its competitors' sales to OEMs; and

- Third, by "extracting" exclusivity from Apple in exchange for partial royalty relief, Qualcomm in effect penalized Apple for using any baseband processor supplied by Qualcomm's competitors. In so doing, Qualcomm excluded its competitors from selling to a uniquely important OEM, thereby weakening their ability to market their products to other OEMs.

The harms that the complaint alleges have arisen from this conduct include the raising of prices charged to OEMs and, consequently, to end users; the weakening of demand for baseband processors overall due to higher acquisition costs; the exiting from the market of certain of Qualcomm's competitors; increased margin pressure on the remaining competitors; and the suppression of innovation in mobile technologies.

FTC staff will no doubt characterize its complaint against Qualcomm as the mere application of traditional antitrust principles to conduct that just happens to involve intellectual property licensing. If that were the case, then it should have been uncontroversial to include a discussion of these types of practices in the revised guidelines as suggested by commenters.

But notwithstanding the revised guidelines' silence on the issue, the Qualcomm case shows once again that the FTC does in fact see SEPs as a special-case application of Section 5 of the FTC act. Tellingly, the complaint describes (at paragraph 49) the FTC's view of the problem:

> Standard-setting participants often hold patents covering technologies that are incorporated into a standard. Once a standard incorporating proprietary technology is adopted, the potential exists for opportunistic patent holders to insist on patent licensing terms that capture not just the value of the underlying technology, but also the value of standardization itself. To address this "hold-up" risk, SSOs often require patent holders to disclose their patents and commit to license standard-essential patents ("SEPs") on fair, reasonable, and non-discriminatory ("FRAND") terms. Absent such requirements, a patent holder might be able to parlay the standardization of its technology into a monopoly in standard-compliant products.

This further confirms the current FTC's view that, by operation of the antitrust laws and the FTC Act, a patent holder surrenders its right to exclude — the very essence of the patent right itself — if it agrees to contribute its technology to a standard. Many in the field believe that this is a substantive interpretation of the law that requires more, and more public, discussion and analysis prior to its application to rights holders in the everyday practice of their trade, particularly given the lack of evidence that "patent holdup" is a significant or pervasive problem.

It was this very lack of evidence of anti-competitive effects in the Qualcomm case that led Commissioner Ohlhausen to issue a written dissent decrying the lack of facts or economic analysis to show that Qualcomm's licensing practices led to the alleged anti-competitive harms in the marketplace. Her dissent recognizes the right of SEP holders to monetize their investments, stating that "reasonable royalties are not an exclusionary tax, even if paid by competitors." But she does not dispute — at least not expressly — the complaint's underlying premise that the holder of an SEP gives up its right to exclude others when it contributes its patent to a standard.

Assuming that the Trump FTC continues to prosecute the Qualcomm case — which is far from a certainty — resolution of the case will provide key guidance on the appropriate treatment of SEPs under the antitrust laws and the FTC Act.

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