Are Antitrust Claims Against Licensors of Standard Essential Patents Dead On Arrival?

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If the September 2020 *Continental Automotive Systems, Inc.* opinion is any indicator, the answer seems to be "yes," at least where an alleged violation of fair, reasonable, and nondiscriminatory ("FRAND") terms and conditions is concerned. Following on the heels of *F.T.C. v. Qualcomm Inc.*, the Northern District of Texas dismissed a complaint in which Continental Automotive Systems, Inc. ("Continental") alleged, among other things, that Nokia Corporation and other technology companies (together, "Licensor Defendants") violated Sections 1 and 2 of the Sherman Act by pooling their standard essential patents ("SEP") in joint licensing entities called Avanci, LLC and Avanci Platform International Limited (together, "Avanci"). *Continental Auto. Sys., Inc. v. Avanci, LLC*

In its complaint, Continental argued that Licensor Defendants and Avanci (together, "Defendants") refused to license to Continental and charged Continental's downstream customers (car manufacturers) non-FRAND terms, violating the Sherman Act. Continental's alleged sole use of the SEPs was to produce telematics control units ("TCUs")—which enable cellular connectivity—for car manufacturers (referred to as original equipment manufacturers or "OEMs"). According to Continental, SEP holders are obligated to agree with standard setting organizations ("SSOs") that they will license their SEPs on FRAND terms. Defendants moved to dismiss the complaint for, among other reasons, lack of Article III antitrust standing and failure to state a claim.

Agreeing with Defendants, the court declined to find antitrust standing due to Continental's failure to show antitrust injury. There was no antitrust injury, according to the court, because (1) Continental could still produce TCUs for OEMs, which were actively licensing the patents; and, (2) Continental, being an upstream entity, was only remotely impacted, if at all, by Defendants' alleged agreement to require non-FRAND terms. As to the former point, the court explained that Continental "may be able to produce TCUs at a lower cost, since it would not have to pay a license for an SEP, because the OEMs have one," and that Continental failed to "allege that it has been unable to continue to produce and sell TCUs to the OEMs or that the OEMs cannot obtain SEP licenses from Defendants."

Despite finding no antitrust standing, the court proceeded to analyze Continental's claims under Sections 1 and 2 of the Sherman Act. With respect to Continental's illegal restraint of trade claim under Section 1, the court found no violation because Licensor Defendants could individually license the patents outside of the Avanci licensing arrangement. The court also found no violation of Section 2, which pertains to unlawful monopolization. In so holding, the court observed that increased monopoly power is an inevitable result of SSO participation, and that monopoly power by itself is not an antitrust violation. The court further noted that monopoly prices are an important element of the free-market system, and that an allegation of a violation of an SSO contractual requirement does not amount to a claim for an antitrust violation, but instead is really a claim for breach of contract.

In short, while the *Continental* court narrowly interpreted antitrust law, the court left open the possibility that contract law principles could serve as an avenue for liability. It remains to be seen whether other courts will rule as the *Continental* court did on antitrust claims in the SEP context, and how, if at all, such decisions will affect licensing and monetization opportunities.

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