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Judge, Jury, and Executioner: Fifth Circuit Slams Courthouse Door on Antitrust Plaintiff Denied SEP Licenses Subject to FRAND Commitments

By Jonathan Rubin



The U.S. Court of Appeals for the Fifth Circuit recently slammed the courthouse door on the plaintiff in *Continental Automotive Systems v. Avanci, LLC* (5th Cir., Feb. 28, 2022), a manufacturer of telematic control units (“TCUs”) that provide cellular communications to automobiles. The court held that Continental lacked Article III standing to sue patentees, Nokia, Conversant, Optis, Sharp, and their licensing agent, Avanci, for monopolization for refusing to license standard-essential patents (“SEPs”) under fair, reasonable, and non-discriminatory (“FRAND”) terms.

The individual defendants, owners of SEPs that are essential to various cellular standard technologies, made contractual commitments to various Standard Setting Organizations (“SSOs”) to license the SEPs on FRAND terms. The defendant patentees pooled the SEPs and appointed Avanci as licensing agent for the bundle (patent pools are not anticompetitive if the individual patentees offer licenses outside the pool). Continental alleged that Avanci will only negotiate licenses with automobile OEMs, in whose products the components are ultimately installed, and not with component manufacturers, such as Continental. Avanci’s policy, according to Continental, is intended to enable defendants to extract non-FRAND royalties from OEMs that “Avanci knew Continental could not agree to.”

Plaintiff’s complaint put forward two theories of injury. First, it alleged that Continental risked exposure to potential claims for indemnification from OEM customers forced to pay non-FRAND royalty rates. On a motion to dismiss, the district court ruled that this theory of harm did not describe a concrete injury sufficient to support Article III standing.^[i] But Continental also alleged that its inability to obtain a license on FRAND terms itself caused it injury, which the court ruled to be sufficient to plead injury-in-fact for Article III purposes because “the denial of property to which a plaintiff is entitled causes injury in fact.” *Id.* at 726.

Although the denial of a FRAND license described an injury sufficient for Article III purposes, the district court also ruled that Continental failed to show harm to its “competitive position” or “its position as a consumer of products used in its devices” and, therefore, the allegations were insufficient to allege antitrust injury. *Id.* at 729. Continental was still able to produce TCUs because licenses were available to the OEMs, perhaps even at a lower cost. Accordingly, the district court held, Continental had not suffered the type of injury the antitrust laws were intended to prevent, so it lacked antitrust standing for its Section 2 claim.

On appeal, the Fifth Circuit vacated the judgment of the district court in a split decision that *neither* of Continental’s theories of injury were sufficient for Article III standing.^[ii] The court reasoned that Continental could be neither harmed by being forced to forgo the SEP licenses nor benefited if it had obtained them. Because they were available to the OEMs, Continental didn’t need SEPs licenses to operate and no evidence in the record showed that defendants required “redundant” licensing up and down the chain of distribution. By

actively licensing the OEMs, the court reasoned, defendants were providing Continental the rights it needed under FRAND conditions. Because the plaintiff was not “denied property to which it was entitled,” it had not alleged an injury-in-fact sufficient for Article III standing.

Several legal issues commonly arise when a plaintiff alleges a violation of Section 2 based on conduct in connection with the licensing of SEPs. Chief among them is whether the defendants actually engaged in anticompetitive conduct that harmed competition. For example, in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007), Qualcomm’s intentional false promise that it would license its technology on FRAND terms, on which the SSOs relied in choosing the technology for inclusion in the standard, followed by its insistence on non-FRAND licensing terms, was anticompetitive conduct sufficient to support a monopolization claim under Section 2. On the other hand, in *Rambus v. FTC*, 552 F.3d 456 (D.C. Cir. 2008), the FTC failed to prove that the SSO would not have adopted the patentee’s technology but for the deception, so the deception alone did not establish the element of anticompetitive conduct. The *Rambus* court observed, “an otherwise lawful monopolist’s use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition.” *Id.* at 460.

These and similar issues arise in *Continental*, where reasonable minds can differ over whether, for example, Continental has antitrust standing for its Section 2 claim or whether defendants’ alleged *ex ante* commitments to the SSOs, intentional deception, and subsequent *ex post* behavior in the marketplace, amounts to anticompetitive conduct cognizable under Section 2. But because the Fifth Circuit has determined, as a matter of law, that Continental has suffered no injury-in-fact, these issues will never be litigated.

Under the leading case of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), Article III standing is established when a plaintiff shows (i) a concrete and particularized injury in fact, (ii) caused by or fairly traceable to the actions of the defendant, and (iii) capable of resolution and likely to be redressed by judicial decision. Importantly, the burden on the plaintiff to demonstrate standing grows heavier at each stage of the litigation. “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.” *Id.* (internal quotation marks omitted).

The plaintiffs in *Continental* were afforded no such presumption at this early stage of the litigation. The Circuit Court second-guessed the plaintiff on the subject of its own injury, deciding that Continental could not have been harmed because it “does not need to personally own SEP licenses to operate its business” *Continental*, at *11.

The conduct described in the complaint, in which a licensing agent agrees to negotiate SEP pool licenses with OEMs but not with component manufacturers, is suspect enough to call for a check against the language and circumstances of the defendants’ *ex ante* FRAND commitments. Thus, in a case that should have led to discovery into the competitive effects of the defendants’ licensing practices, the terms of the commitments made by defendants to the SSOs, and the other circumstances that could establish the elements of a Section 2 claim, the court has slammed shut the courthouse door, substituting its own judgment regarding the needs of the plaintiff’s business to deprive it of Article III standing. The decision should be reconsidered by the court and, if made final, appealed to the U.S. Supreme Court.

[i] *Cont’l Auto. Sys., Inc. v. Avanci, LLC*, 485 F.Supp.3d 712 (N.D. Tex. 2020).

[ii] A footnote discloses that one member of the panel, Judge Ho, would affirm the judgement of the district court that Continental sufficiently alleged Article III standing but the allegations failed to state a cause of action under the Sherman Act.

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