COURT OF APPEALS REVERSES FTC DECISION IN RAMBUS STANDARD-SETTING CASE AND HOLDS THAT A LAWFUL MONOPOLIST'S USE OF DECEPTION TO OBTAIN HIGHER PRICES IS NOT AN ANTITRUST VIOLATION

On April 22, 2008, the United States Court of Appeals for the D.C. Circuit vacated a decision by the Federal Trade Commission (the "Commission") in a long-running case involving the alleged failure of Rambus Inc. ("Rambus") to disclose its intellectual property relating to a standard for computer-memory technology. The Commission had previously found that, by concealing its patent interests during its participation in a standard-setting organization (an "SSO"), Rambus violated Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act (the "FTC Act").[1]

The D.C. Circuit sided with Rambus on appeal, holding that, even if Rambus deceived participants to obtain higher licensing fees, Rambus did not necessarily violate the Sherman Act. The Court explained that, if the SSO would have incorporated Rambus's technology into the standard regardless of whether Rambus disclosed its patents and pending applications, then Rambus obtained its monopoly power lawfully. The Court went on to say that a lawful monopolist's use of deception to obtain higher prices generally is not in itself an antitrust violation. The Court vacated the Commission's previous orders and remanded for further proceedings.[2] As of today, the Commission has not filed a petition for rehearing.

The D.C. Circuit's decision is notable because it appears to mark a sharp departure from previous Commission decisions involving participation in SSOs. Whereas the Commission has assumed that any conduct that undermines the standard-setting process harms competition and consumers for purposes of Section 5 of the FTC Act,[3] the D.C. Circuit required more explicit proof of causation under the Sherman Act. Although the Court found that the Sherman Act did not prohibit deceptive conduct in the particular circumstances proved by the Commission, the practical effect of the decision may be limited to the unique facts of this case.

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[1] For more information on the prior Commission decisions, *see* Willkie Farr & Gallagher LLP, *FTC Addresses Application of Antitrust Laws to Standard-Setting Process* (Aug. 9, 2006), *available at* http://www.willkie.com/files/tbl_s29Publications/FileUpload5686/2320/FTC_Addresses_Application_of_Antitrust_Laws.pdf and Willkie Farr & Gallagher LLP, *FTC Orders Compulsory Licensing and Sets Maximum Royalty Rate for Patents Concealed From Standard-Setting Organization* (Mar. 1, 2007), *available at* http://www.willkie.com/files/tbl_s29Publications/FileUpload5686/2399/FTC_Orders_Compulsory_Licensing.pdf.

[2] *Rambus Inc. v. FTC*, No. 07-1086, slip op. at 24 (D.C. Cir. Apr. 22, 2008).

[3] *See, e.g., In the Matter of Negotiated Data Solutions LLC*, File No. 0510094, Statement of the Federal Trade Commission, p. 2, *available at* http://www.ftc.gov/os/caselist/0510094/index.shtm.

Background

The Commission charged Rambus with antitrust violations relating to its alleged concealment of patents and pending patent applications related to dynamic random access memory ("DRAM") from the Joint Electron Device Engineering Council ("JEDEC"). An administrative law judge dismissed the complaint against Rambus in 2004, finding, in part, that Rambus did not violate JEDEC's disclosure policy.

The Commission reversed the administrative law judge's decision in 2006, finding that Rambus violated JEDEC's disclosure policy by concealing its patent interests until after JEDEC had adopted two DRAM standards. The Commission concluded that Rambus's behavior was exclusionary conduct in violation of Section 2 of the Sherman Act and, thus, that Rambus violated Section 5 of the FTC Act. The Commission issued a landmark remedial order in February 2007, compelling Rambus to license its DRAM technology and setting the maximum royalty rate that Rambus could charge licensees practicing the DRAM standards.

Rambus did not dispute the Commission's finding that its patent rights gave it monopoly power in four relevant markets (90% of DRAM production is compliant with the standards over which Rambus holds patent rights).[4] Rambus argued instead that it acquired its monopoly power lawfully.

The D.C. Circuit Decision

The D.C. Circuit held that Rambus's behavior did not constitute monopolization under Section 2 of the Sherman Act. According to the Court, the primary flaw in the Commission's position was that it posited two possible alternative scenarios that might have been caused by Rambus's deception, but did not prove that both of them were anticompetitive.

In the two scenarios, the Commission concluded that "but for" Rambus's deception, JEDEC would have *either* (1) excluded Rambus's patented technologies from the standard, *or* (2) required Rambus to commit to license its intellectual property on reasonable and nondiscriminatory ("RAND") terms.[5]

The Court assumed without deciding that the first scenario could support a monopolization claim: if the SSO would have adopted an alternative standard if Rambus had properly disclosed its intellectual property rights, then Rambus's deception would have harmed competition.[6] In that situation, Rambus would have obtained monopoly power through exclusionary conduct and not because of "a superior product, business acumen, or historical accident."[7] However, the Commission failed to prove that JEDEC would not have adopted Rambus's technology if Rambus had disclosed its intellectual property.[8]

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[4] *Id.* at 4, 12.

[5] *Id.* at 9.

[6] *Id.* at 13.

[7] *Id.* at 11.

[8] *Id.* at 13.

The second scenario assumes that Rambus's technology would have been incorporated into the standard even if the JEDEC participants had known about Rambus's intellectual property rights. Here, the Court assumed that the only consequence of Rambus's deception was that it obtained higher (non-RAND) licensing fees for its technology. According to the Court, "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."[9] The Court reasoned that such deception, although it might result in higher prices to consumers, does not affect the "competitive process" or the "competitive structure" of the market, and thus does not violate the Sherman Act.[10] Thus, if JEDEC would have incorporated Rambus's technology into the standard absent Rambus's deception, then "Rambus's alleged deception cannot be said to have an effect on competition in violation of the antitrust laws; JEDEC's loss of an opportunity to seek favorable licensing terms is not as such an antitrust harm."[11]

The Court also expressed doubts about the sufficiency of the evidence that Rambus actually deceived the SSO, because the SSO's disclosure requirements, particularly regarding unpublished patent applications and other trade secrets, "suffered from a staggering lack of defining details."[12] Because of the chance of further proceedings on remand involving a "stand-alone" claim under Section 5 of the FTC Act, the Court expressed its "serious concerns about the strength of the evidence relied on to support some of the Commission's crucial findings" regarding JEDEC's disclosure policies and Rambus's behavior.[13]

Comparison To Other Decisions

The D.C. Circuit's decision marks a significant departure from previous decisions involving deceptive behavior and other misconduct directed towards SSOs. For example, in a recent complaint and proposed consent order involving Negotiated Data Solutions ("N-Data"), the Commission found that N-Data's refusal to honor licensing commitments made to an SSO violated Section 5 of the FTC Act even if the refusal did not amount to an antitrust violation under the Sherman Act. A majority of the Commission assumed that, because standard-setting mechanisms themselves eliminate competition, any conduct that undermines the integrity of the standard-setting process might harm consumers.[14]

In a recent case decided by the U.S. Court of Appeals for the Third Circuit, Broadcom Corp. accused Qualcomm Inc. of disclosing its intellectual property rights to an SSO and making a RAND commitment, but then reneging on that commitment by offering discriminatory terms to different potential licensees.[15] The Third Circuit held that, if a patent holder makes an intentionally false

[9] *Id.* at 15.

[10] *Id.* at 16-17.

[11] *Id.* at 19.

[12] *Id.* at 22 (citation and internal quotation omitted).

[13] *Id.* at 19.

[14] *In the Matter of Negotiated Data Solutions LLC*, File No. 0510094, Statement of the Federal Trade Commission p. 2, *available at* http://www.ftc.gov/os/caselist/0510094/index.shtm.

[15] *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 304 (3d Cir. 2007).

commitment to license on RAND terms and the SSO relies on that commitment when deciding to include the technology in the standard, a subsequent breach of that commitment is actionable anticompetitive conduct.[16] The D.C. Circuit noted that the Commission could not rely on that decision, however, because the Commission had failed to prove that Rambus's deception caused JEDEC to incorporate its technology.[17]

Implications Of The D.C. Circuit Decision

In contrast to the decisions discussed above, the D.C. Circuit held that the Sherman Act does not prohibit deceptive conduct in connection with standard setting if the deception (1) cannot be proved to have caused the technology to be incorporated into the standard, and (2) relates only to the price of the technology in question and does not exclude competition. The Court's decision will heighten the burden for both the government and private parties of proving the anticompetitive effect (*i.e.*, the exclusion of competition and the distortion of the competitive structure of the relevant market) of a patent holder's failure to disclose its intellectual property to an SSO. In addition to proving deception and monopoly power, the challenging party will have to prove that the SSO would not have incorporated the proprietary technology into the relevant standard if (1) participants had known about the undisclosed intellectual property rights, and (2) the rights holder had not committed to license the technology on RAND terms.

Although the *Rambus* decision seems to depart significantly from prior Commission enforcement policy, its practical impact might be limited. The D.C. Circuit based its decision on the Commission's admission (inadvertent or otherwise) that the record did not contain sufficient evidence to conclude that Rambus's deceptive conduct proximately caused the adoption of Rambus's intellectual property as the relevant standard. Given the importance of that admission to the Court's holding, the government and private plaintiffs are likely to present sound evidence of causation in future standard-setting cases under Section 2 of the Sherman Act.

In addition, the *Rambus* decision offers two lessons to SSOs and their participants. First, it will be difficult to prove that a patent holder engaged in deceptive conduct unless the SSO has clear disclosure policies that cover patents and pending applications.[18] Second, SSOs should adopt new policies, or clarify their existing policies, to state that they will not incorporate patented technology into an industry standard absent a RAND or other specific pricing commitment. For example, one leading SSO, the IEEE Standards Association ("IEEE-SA") requires the holder of an essential patent relating to a standard to provide a Letter of Assurance that the patent holder either will not

[16] *Id.* at 314 (reversing grant of motion to dismiss claims for monopolization and attempted monopolization under § 2 of the Sherman Act).

[17] *Rambus*, slip op. at 17. The D.C. Circuit added that, to the extent the *Broadcom* case concluded that a lawful monopolist's deceit that has the effect of raising prices without an effect on competitive structure is a cognizable violation of the Sherman Act, that holding is contrary to the Supreme Court's decision in *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998). In *Discon*, the Supreme Court found that a lawful monopolist's deception of a regulatory agency to obtain higher prices to consumers was itself not an antitrust violation because the deception did not harm the competitive process. 525 U.S. at 136-37.

[18] *See id.* at 20.

enforce its rights against persons practicing the standard or will license its rights on RAND terms.[19] IEEE-SA also allows a patent holder to file a Blanket Letter of Assurance that applies to all patent claims that are essential to the practice of a standard and that the patent holder has the ability to license then or in the future.[20] SSOs might make such blanket assurances mandatory prerequisites for participation in the SSO.

Lawyers, in turn, are reminded to attend to the sufficiency of their proof when bringing antitrust claims. The D.C. Circuit has held that violation of Section 2 of the Sherman Act in the standard-setting context requires behavior that proximately causes the exclusion of competitors before or after market power is achieved. Evidence that does not support that causal relationship will not suffice to sustain a Section 2 violation. Much of the Court's decision flows from the Commission's own ambivalence as to whether Rambus's nondisclosure in fact caused JEDEC to adopt Rambus's technology.

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[19] IEEE Standards Association, *Comments re: In the Matter of Negotiated Data Solutions LLC*, FTC File No. 051 0094, p. 3, *available at* http://www.ftc.gov/os/comments/negotiateddatasol/534241-00002.pdf.

[20] IEEE-SA Standards Board Operations Manual § 6, *available at* http://standards.ieee.org/guides/bylaws/sect6-7.html#blanket-loa.