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# Antitrust Advisory: Fifth Circuit Reiterates That Participants in Standard Setting Must Take the Bad With the Good

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The U.S. Court of Appeals for the Fifth Circuit held last week that an antitrust plaintiff must do more than show that its competitors, all members of the same standard-setting organization along with the plaintiff, disliked it and wished to see its patent removed from the common standard in order to support its antitrust claims. *Golden Bridge Technology, Inc. v. Motorola*, No. 07-40954 (5th Cir. Oct. 23, 2008). Rather, to prove an antitrust conspiracy, a plaintiff must submit evidence tending to exclude the possibility that the defendants were acting independently—particularly in the context of a joint standard-setting organization, which is an efficient and pro-competitive means for competitors to make precisely the sort of decisions that were complained of in this case.

## Why Is This Case Relevant?

The *Golden Bridge Technology* decision can be read together with the D.C. Circuit's April 22, 2008 decision in *Rambus v. Federal Trade Commission*, 522 F.3d 456 (D.C. Cir. 2008), to remind us that the benefits of the group standard-setting process will sometimes be accompanied by unwelcome costs for some participants in that process—and those costs are not necessarily redressable under the antitrust laws.

## Background of the Case

Golden Bridge Technologies ("GBT"), along with the named defendants[1] and approximately 260 other companies in the telecommunications technology space, were members of a nonprofit standard-setting organization called Third Generation Partnership Project ("3GPP"). The purpose of 3GPP was to develop universal wireless technology standards, and included within the standard was GBT's Common Packet Channel technology ("CPCH") for device-to-tower communications.

GBT's technology was only an optional feature within the 3GPP standard, and in fact no company had opted to implement its CPCH technology. In 2004, a number of 3GPP members (not including GBT) began compiling a list of old and unused technologies that could be removed from the 3GPP standard under established procedures. This list became known as the "cleanup list." The cleanup list did not originally include GBT's CPCH technology; several working group members exchanged e-mails discussing whether or not CPCH should be included on the list, but no decision was made among those members.

At the next plenary meeting of the relevant group, the cleanup list was presented to the group without GBT's CPCH technology. An Ericsson representative spoke up during the meeting and suggested that CPCH be added to the list. No immediate action was taken, but eventually CPCH was included on the list and the list was approved, thereby removing CPCH from the 3GPP standard. As the Fifth Circuit pointed out, GBT did not attend any of these meetings and, if it had done so, it could have opposed the action and thereby triggered a super-majority voting requirement to overcome its opposition. As it was, the cleanup list was approved unanimously, with GBT not participating.

## The Fifth Circuit's Holding

The Fifth Circuit upheld the district court's grant of summary judgment to the defendant wireless technology companies against GBT's Sherman Act Section 1 complaint, in which GBT alleged that the defendants had conspired with one another to exclude it from the market. GBT did not produce any evidence beyond the above-described e-mails that debated whether or not to include CPCH on the cleanup list. The Fifth Circuit recited the Supreme Court's formulation in *Matsushita*[2] that a plaintiff seeking damages under a Section 1 conspiracy theory must present evidence that "tends to exclude the possibility that the alleged conspirators acted independently." The court held that, although the e-mails did reveal a "common dislike for CPCH" among its competitors, such a dislike is not adequate to prove conspiracy, nor did it tend to disprove that the defendants simply thought CPCH old and outdated.

GBT's argument that the defendants had an economic motive to exclude it from the standard did not add to its case, the court held, since those economic motives could as easily be viewed as *independent* motivations as opposed to evidence of conspiracy. It did not help GBT's case that no one had ever actually paid anything to use CPCH technology.

Finally, the court recognized that "these informal communications [referring to the e-mail chain] are an important part of the standard-setting process, and that the 3GPP standards are beneficial to the market." Because the defendants' conduct just as likely served these pro-competitive ends, the court declined to infer that the defendants' conduct was anticompetitive absent evidence suggesting otherwise.

## Similarities to the *Rambus* Decision

In *Rambus,*[3] the U.S. Court of Appeals for the D.C. Circuit reversed and remanded a unanimous ruling of the Federal Trade Commission ("FTC") which held that Rambus, a designer and licensor of computer memory chips, violated Section 2 of the Sherman Act (and therefore Section 5 of the FTC Act) by failing to disclose to an industry standard-setting group charged with the formulation of memory standards its intentions to acquire patent coverage that would be essential to the implementation of the standards. Several years after its participation in the standard-setting process, Rambus began to inform manufacturers that it owned previously undisclosed patent rights over technologies required for the implementation of the standards, and demanding license fees for use of those technologies.

The D.C. Circuit reversed the FTC's finding of Section 2 liability for this conduct. Because the FTC had been unable to make a singular finding that the standard-setting organization would have adopted alternative standards that did not require use of the Rambus patents, the court held that the exclusion of competition—and therefore, proof of competitive harm—necessary for a finding of monopolization was not present.

The *Rambus* decision and the *Golden Bridge Technology* decision, when read together, suggest that when competitors cooperate in the standard-setting process, there can sometimes be unpleasant results for one or more participants, and such unpleasantness will not necessarily rise to the level of antitrust liability. In *Golden Bridge Technology* a competitor was forced out of the standard by its competitors, and in *Rambus* a number of competitors were stuck paying royalties that they had not anticipated when a participant failed to disclose its patent position. In both cases, the courts followed the well-worn maxim that the antitrust laws protect competition, not individual competitors, and the plaintiffs were left to lick their wounds without aid of the court.

**Endnotes**

[1] The defendants included Motorola, Ericsson, Qualcomm, and Lucent.

[2] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

[3] FTC's *Rambus* Decision Concerning Patent Holder's Behavior in Standard-Setting Process Reversed by D.C. Circuit (Mintz Levin Antitrust Advisory, April 24, 2008).