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A New Course at the FTC? President Obama Appoints Jon Leibowitz to be Chairman

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By appointing Commissioner Jon Leibowitz to lead the Federal Trade Commission, President Obama has taken another step in making good on his promise to "reinvigorate antitrust enforcement." Consistent with his selection of Christine Varney to head the DOJ Antitrust Division,[1] the President has chosen an outspoken advocate of expanded antitrust enforcement. Commissioner Leibowitz has made clear his view that the FTC has broad powers in the antitrust area. In addition, Leibowitz has demonstrated dogged determination on tough issues and a willingness to test the boundaries of the antitrust laws.

An Expansive View of FTC Power

Commissioner Leibowitz's views about the FTC's powers rely on *FTC v. Sperry & Hutchison Co.*,[2] in which the Supreme Court held that the Commission's power to proscribe "unfair methods of competition" under Section 5 of the FTC Act is not limited to enjoining practices "likely to have anticompetitive consequences after the manner of the antitrust laws."[3] In a series of cases in the 1980s, however, courts rebuffed FTC attempts to go after conduct beyond the reach of the Sherman and Clayton Antitrust Acts.[4] The prevailing view now holds that the idea that the FTC's competition authority goes beyond these antitrust laws is "no longer tenable."[5] The basis for this view is that the antitrust laws already protect against anticompetitive behavior while not discouraging aggressive competition.

Leibowitz challenges the prevailing view as "cramped and confused." [6] He insists that the "legislative history, statutory language, and Supreme Court interpretations reveal a Congressional purpose that is unambiguous and an Agency mandate that is broader than many realize."[7] He therefore encourages the Commission to "place greater emphasis on developing the full range of its jurisdiction."[8]

If embraced by the full Commission, Commissioner Leibowitz's views may lead to a substantially enhanced enforcement agenda. This is especially true, as Leibowitz himself has suggested, in the areas of standard setting and pharmaceuticals.[9]

Standard Setting and Section 5

The FTC is already on the cutting edge in issues involving the intersection of standard setting, intellectual property, and antitrust. The FTC was the first to apply antitrust law to so-called "patent ambushes" in the standard-setting context – the situation in which a patent holder fails to disclose or lies about its intellectual property only to later enforce that intellectual property against companies later producing products compliant with the resulting standard. During Commissioner Leibowitz's tenure, the FTC litigated two precedent-setting cases in this area. In *Unocal*,[10] the FTC set precedent by defining the circumstances in which false representations to a government standard-setting body about intellectual property rights may violate the antitrust laws. In *Rambus*, the FTC's antitrust challenge to conduct before a private standard-setting organization was ultimately rejected on appeal by the D.C. Circuit.[11] But the Commission's decision in *Rambus* has been widely cited

in both antitrust scholarship and in the federal courts. And, despite the setback in *Rambus*, Commissioner Leibowitz vowed that the FTC "would continue to make standard setting and monopolization cases a priority."[12]

Both *Unocal* and *Rambus* challenged the relevant conduct under Section 2 of the Sherman Act. Neither rested on the FTC's potentially broader powers under Section 5.

Commissioner Leibowitz, however, used *Rambus* as an opportunity to state the case for the application of these powers in the standard-setting context. He maintained that conduct may violate Section 5 even if the FTC does not show actual competitive harm (an essential element under the antitrust laws) so long as the FTC shows "sufficient anticompetitive attributes" such as "oppressiveness, lack of an independent business justification, anticompetitive intent, predation, collusion, deceit, a tendency to impair competition"[13] (a lower standard than the "exclusionary conduct" needed to show a violation under Section 2). He therefore urged that future FTC enforcement efforts consider that "the framers of the FTC Act gave the Agency a mandate – one unique to the Commission – to use Section 5 to supplement and bolster the antitrust laws by providing, in essence, a jurisdictional 'penumbra' around them."[14]

The FTC did just that its next standard-setting case, *N-Data*.[15] While *N-Data* involved representations regarding intellectual property before a standard-setting organization, it did not involve any failure to disclose or deception. Instead, the FTC alleged that N-Data repudiated a prior licensing commitment made to a standard-setting organization, demanding royalties higher than the original offer made at the time the organization was deciding whether to adopt the patented technology. Because there was no failure to disclose or deception, this conduct arguably did not violate the antitrust laws.

Commissioner Leibowitz joined the majority in a sharply divided 3-2 decision to challenge the conduct under the FTC's Section 5 powers. The majority maintained that the conduct was an "unfair method of competition" because "this form of patent hold-up is inherently 'coercive' and 'oppressive' with respect to firms that are, as a practical matter, locked into a standard."[16] In a sharp dissent, then Chairman Majoras protested that condemning a party for breaching its prior licensing commitment without finding a concurrent Sherman Act violation set the Commission on a "slippery slope."[17] She charged the majority with failing to identify any "meaningful limiting principle" to discern an ordinary breach of contract case from an "unfair method of competition."[18]

But the majority went even further. It also alleged that the conduct was an "unfair practice" under Section 5, an allegation normally reserved for consumer protection matters and used to protect consumers or small businesses as opposed to the major corporations subject to N-Data's royalty demands. In response, then Chairman Majoras expressed "serious policy concerns about using our consumer protection authority to intervene in a commercial transaction" to protect these "victims."[19]

As *Rambus* and *N-Data* demonstrate, Commissioner Leibowitz's promise that the FTC will continue to make standard-setting cases a priority is likely to mean further exploration of Section 5's limits. Those who participate in standard-setting activities should take heed.

Pharmaceutical Companies Be Warned

Not only may Chairman Leibowitz lead the FTC toward a more expansive enforcement of its powers in the standard-setting context, he may also set the FTC's path in pharmaceutical cases. In particular, Leibowitz has indicated that Section 5 may be appropriate to challenge brand pharmaceutical efforts to "evergreen" their drug products.

As with standard-setting cases, the FTC has been on the forefront of antitrust issues involving pharmaceuticals. The FTC has led the antitrust charge against so-called "reverse payment" patent infringement settlements, in which a brand pharmaceutical company will make payments to a would-be generic entrant to delay entry into the market.

Commissioner Leibowitz has been a leading opponent of this conduct, calling it "pay for delay." Beginning in the late 1990s, the FTC issued several consent orders to resolve challenges to reverse payment settlements. But the only Commission decision in a litigated case holding that reverse payment settlements violated the antitrust laws was vacated by the Eleventh Circuit.[20] The Commission had held that the payment from the patent-holding, brand pharmaceutical company was

a "*quid pro quo*" for the generic agreeing to stay off the market.[21] In other words, the exclusion was due to the payment. The circuit court disagreed, holding that so long as the exclusion of the generic was within the "exclusionary potential of the patent," it was the patent, not the payment, that kept the generic product off the market.[22] Two other federal courts of appeals reached similar conclusions in private antitrust actions.[23]

Undeterred, Commissioner Leibowitz has doggedly championed a two-pronged offensive – the use of litigation to create a circuit split to get the issue before the Supreme Court[24] and advocating legislative action.[25] Commissioner Leibowitz has led FTC efforts in testifying before Congress in support of legislation outlawing reverse payment arrangements.[26] And he's been an avid supporter of FTC litigation to challenge this type of conduct.

Since the *Schering-Plough* case, the FTC has brought two cases in district court challenging reverse payment settlements. In February 2008, the Commission sued a branded pharmaceutical company,[27] alleging that it entered into unlawful settlements with four generic companies.[28] Commissioner Leibowitz wrote a partial dissent to the FTC's decision to sue, arguing that the agency should have gone further by suing the generic manufacturers as well.[29] Eleven months later, in January 2009, Commissioner Leibowitz's views seem to have prevailed. The Commission filed suit against a brand company as well as two generic companies, alleging that the defendants entered into unlawful reverse payment settlements.[30] In a concurring statement, Commissioner Leibowitz maintained that "[e]liminating these pay-for-delay settlements is one of the most important objectives for antitrust enforcement in America today."[31]

While these cases have been brought under the Sherman Act, Commissioner Leibowitz makes the case for the FTC to use its Section 5 powers to challenge "evergreening" practices. According to him, "certain strategies" used by brand pharmaceutical companies "for example, obtaining patents by inequitable conduct, misrepresenting information to the FDA, or destroying the distribution channel of their own existing product – seem to serve no purpose other than to undermine the ability of a generic to compete."[32] Because of "the courts' ever-narrowing of the antitrust laws," Commissioner Leibowitz argues that these practices should "qualify as violations of Section of 5 of the FTC Act."[33]

Mergers in for Closer Scrutiny

Not only has Commissioner Leibowitz advocated that the Commission embrace a broader view of its powers in conduct cases, he has also indicated a willingness to push the envelope in merger law. In December 2008, the FTC filed a complaint in federal district court challenging Ovation Pharmaceuticals' 2006 acquisition of the drug NeoProfen.[34] NeoProfen is one of two pharmaceutical treatments sold in the United States for a congenital heart defect primarily affecting premature babies.[35] Prior to its acquisition of NeoProfen, Ovation had acquired the rights to Indocin, the only other pharmaceutical treatment for the condition, from Merck Pharmaceuticals. Commissioner Leibowitz joined Commissioner Rosch in the view that the FTC should also challenge this earlier acquisition.

The Commissioners' theory was novel. Merck had not charged a monopoly price for Indocin because of the potential that doing so (charging high prices for a drug used by premature babies) might hurt its reputation and thereby reduce Merck's sales of other products.[36] As a smaller company without a broad product line, Ovation did not have these concerns. Thus, even though Ovation's acquisition of Indocin did not reduce the number of competitors, it made the imposition of a monopoly price for the product more likely. While no case has held that a transaction removing a reputation-related restraint violates the merger laws, Commissioners Rosch and Leibowitz argued that this is indeed a viable theory under Section 7.[37]

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Companies, especially those involved in standard setting and in the pharmaceutical industry, should take note of the President's appointment. Chairman Leibowitz's views on the power of the FTC, his willingness to think outside of the box¸ and his demonstrated ability to be relentless, may challenge established antitrust paradigms. It's not likely to be business as usual.

Footnotes

[1] *See* Sean Gates and Tej Srimushnam, *A New Direction?*, The Deal (Feb. 5, 2009).
[2] 405 U.S. 233 (1972).
[3] *Id.* at 244.
[4] *See E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *Boise Cascade v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980).
[5] Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 Antitrust L.J. 761, 766 (2005) ("It used to be thought that 'unfair methods of competition' swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable. The Sherman and Clayton Acts have been interpreted so broadly that they no longer contain gaps that a broad interpretation of Section 5 of the FTC Act might be needed to fill."); *see also* 5 Julian O. Von Kalinowski, Peter Sullivan & Maureen McGuirl, Antitrust Laws and Trade Regulation § 77.02 (2007) ("the prevailing view is that there are limitations on Section 5's applicability to conduct which stretches beyond the letter of [the Sherman or Clayton Acts]."); Dissenting Statement of Chairman Majoras, In the Matter of Negotiated Data Solutions LLC, File No. 051- 0094 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf.
[6] Concurring Statement of Commissioner Jon Leibowitz, Rambus, Inc., Dkt No. 9302 (2004), *available at* http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf.
[7] *Id.*
[8] *Id.*
[9] *See* Jon Leibowitz, "Tales from the Crypt" Episodes '08 and '09: The Return of Section 5 ("Unfair Methods of Competition in Commerce are Hereby Declared Unlawful"), Remarks before the FTC Section 5 Workshop (October 17, 2008), *available at* http://www.ftc.gov/speeches/leibowitz/081017section5.pdf.
[10] Union Oil Co. of Cal., 2005 WL 2003365 (2005).
[11] *Rambus Inc. v. FTC,* 522 F.3d 456 (D.C. Cir. 2008), *cert denied*, 77 U.S.L.W. 3346 (Feb. 23, 2009).
[12] James Vicini and Diane Bartz, *US top court won't hear FTC appeal in Rambus case*, Reuters, Feb. 23, 2009, *available at* http://www.reuters.com/article/marketsnews/idINN2330346820090223?rpc=33.
[13] Concurring Statement of Commissioner Jon Leibowitz, Rambus, Inc., Dkt. No. 9302 (2004), *available at* http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf.
[14] *Id.*
[15] Negotiated Data Solutions LLC, File No. 051 0094 (2008), *available at* http://www.ftc.gov/opa/2008/01/ethernet.shtm.
[16] Analysis of Proposed Consent Order to Aid Public Comment, Negotiated Data Solutions LLC, File No. 051 0094 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf.
[17] Dissenting Statement of Chairman Majoras, Negotiated Data Solutions LLC, File No. 051- 0094 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf.
[18] *Id.*
[19] *Id.*
[20] *Schering-Plough Corp. v. FTC,*402 F.3d 1056, 1068 (11th Cir. 2005).
[21]Schering-Plough Corp., 136 F.T.C. 956, 988 (2003)
[22]402 F.3d at 1066.
[23] *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (2008); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006).
[24] *See* Jon Leibowitz, Exclusion Payments to Settle Pharmaceutical Patent Cases: They're B-a-a-a-ck! (The Role of the Commission, Congress, and the Courts), Remarks to Second Annual In-House Counsel's Forum on Pharmaceutical Antitrust at 8-9 (Apr. 24, 2006), *available at* http://www.ftc.gov/speeches/leibowitz/060424PharmaSpeechACI.pdf.
[25] *See* Concurring Statement of Commissioner Jon Leibowitz, FTC v. Watson Pharms., File No. 071 0060, *available at* http://www.ftc.gov/os/caselist/0710060/090202androgeleibowitzstmt.pdf.
[26] *Paying Off Generics to Prevent Competition with Brand Name Drug: Hearing Before the Senate Comm. On the Judiciary,* 110th Cong. (2007) (statement of Jon Leibowitz, Commissioner, Federal Trade Commission), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=2472&wit_id=5981; *Hearing on H.R. 1902, the Protecting Consumer Access to Generic Drugs Act of 2007 Before the House Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection*, 110th Cong. (2007) (statement of Jon Leibowitz, Commissioner, Federal Trade Commission), *available at* http://www.ftc.gov/speeches/leibowitz/070502reversepayments.pdf.
[27] *FTC v. Cephalon, Inc.*, No. 08-cv-2141-RBS (E.D. Pa. filed Feb. 13, 2008), *available at* http://www.ftc.gov/os/caselist/0610182/index.shtm.
[28] *See* Sean P. Gates and Jeffrey Jaeckel, *Cephalon: FTC's Shot At Reverse Payments*, Competition Law360 (Feb. 15, 2008).
[29] *See* Statement of Commissioner Jon Leibowitz Concurring in Part and Dissenting in Part, Cephalon, Inc., File No. 061-0182, *available at* http://www.ftc.gov/os/caselist/0610182/080213comment.pdf.

[30] *FTC v. Watson Pharms.*, No. CV-09-00598 (C.D. Cal. filed Feb. 2, 2009).
[31] *See* Concurring Statement of Commissioner Jon Leibowitz, FTC v. Watson Pharms., File No. 071 0060, *available at* http://www.ftc.gov/os/caselist/0710060/090202androgeleibowitzstmt.pdf.
[32] *See* Jon Leibowitz, "Tales from the Crypt" Episodes '08 and '09: The Return of Section 5 ("Unfair Methods of Competition in Commerce are Hereby Declared Unlawful"), Remarks before the FTC Section 5 Workshop (October 17, 2008), *available at* http://www.ftc.gov/speeches/leibowitz/081017section5.pdf.
[33] *Id.*
[34] Complaint, *FTC v. Ovation Pharms.*, No. 08-10156 (D. Minn. Dec. 16, 2008), *available at* http://www.ftc.gov/os/caselist/0810156/081216 ovationcmpt.pdf.
[35] *Id.* at 1-2.
[36] *See* Concurring Statement of Commissioner J. Thomas Rosch, FTC v. Ovation Pharms., File No. 0810156, *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf; Concurring Statement of Commissioner Jon Leibowitz, FTC v. Ovation Pharms., File No. 0810156, *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf.
[37] *Id.*