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Antitrust Advisory: FTC's Rambus Decision Concerning Patent Holder's Behavior in Standard-Setting Process Reversed by D.C. Circuit

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On April 22, 2008, the U.S. Court of Appeals for the D.C. Circuit reversed and remanded an earlier ruling of the Federal Trade Commission (FTC) in *In re Rambus, Inc.*[1] In a unanimous decision, the appellate court ruled that the FTC erred in holding that Rambus violated Section 2 of the Sherman Act by attempting to enforce patent rights covering technology that was essential to implement the SDRAM and DDR SDRAM standards, both of which define operational interfaces for random access memory chips. The court also questioned whether, on remand, the FTC would be allowed to ground a violation on the theory that Section 5 of the Federal Trade Commission Act (FTC Act) gives the agency a broader mandate to challenge conduct than is found in the Sherman Act and other antitrust statutes. The court's decision is clearly a setback for the FTC in its effort to use antitrust theories to challenge the exercise of patent rights in certain situations where a patent owner may have participated without full disclosure in the adoption of an industry standard. In addition, the D.C. Circuit's reversal of the FTC's decision demonstrates that the line in the sand the FTC attempted to draw in its *Rambus* decision is not set in stone; the FTC must meet a high burden to prove that deceptive behavior by a monopolist is anticompetitive.

In August 2006, the FTC held unanimously that Rambus, a designer and licensor of industry standard SDRAM and DDR SDRAM memory chips, violated Section 2 of the Sherman Act (and therefore Section 5 of the FTC Act) by failing to disclose to a computer industry standard-setting group charged with the formulation of those two standards its intentions to acquire patent coverage that would be essential to the implementation of the standards. Rambus had participated as a member of that standard-setting organization, the Joint Electronic Device Engineering Council (JEDEC), which worked on a cooperative basis with industry participants to develop standards for random access memory chips. In 1999, several years after withdrawing from participation in JEDEC, Rambus began to inform major DRAM and chipset manufacturers that it owned previously undisclosed patent rights over technologies required for the implementation of the JEDEC standards, demanding license fees for use of those technologies.

The FTC found, despite the conclusions of its own Administrative Law Judge to the contrary, that Rambus had breached JEDEC policies requiring disclosure of patent interests related to standardization, and that the disclosures Rambus did make were misleading. The FTC concluded that Rambus's "alleged deception enabled it *either* to acquire a monopoly through standardization of its patented technologies rather than possible alternatives, *or* to avoid limits on its patent licensing fees that the [standard-setting organization] would have imposed as part of its normal process of standardizing patented technologies." On this basis, the FTC found that Rambus's acts constituted unlawful monopolization.

The D.C. Circuit disagreed. Because the Commission had been unable to make a singular finding that JEDEC would have adopted an alternative to the SDRAM standards that did not require use of the Rambus patents, the court held that the exclusion of competition necessary for a finding of monopolization was not present. The court rejected the FTC's alternative monopolization theory that even if JEDEC would knowingly have adopted the identical standards, it would have required a commitment by Rambus to extend reasonable and nondiscriminatory royalty rates, which in turn would have led to lower royalties. Without necessarily agreeing with the underlying factual premise that rates would have been lower had there been full disclosure by Rambus, the court held that even if the rates would have been lower, that fact still would not support a finding of monopolization, because high prices without exclusion do not limit competition and in fact are more likely to increase competition.

The D.C. Circuit's opinion does not change the fact that deceptive conduct by a monopolist may be actionable if it harms competition. But it does hold the FTC to a high burden of proving that the deception resulted in anticompetitive harm. Accordingly, those participating in standard-setting should take care to avoid using deceptive conduct to achieve a more profitable patent position; at the same time, such firms can be assured that an allegation of anticompetitive deception will require a real showing of proof.

In its original *Rambus* decision, the FTC based its finding of a violation only on the legal theory that Section 2 of the Sherman Act was violated. The FTC suggested in the appeal, however, that the agency might have a broader mandate under Section 5 of the FTC Act based on Rambus's deception of JEDEC and the other participants. The court did not rule on that issue directly, but expressed doubts by way of *dicta* as to whether Rambus actually did deceive JEDEC. The court questioned whether JEDEC properly required disclosure of patent rights that had not yet been filed with the patent office.

This suggestion by the FTC of a broader use of Section 5 became concrete in a more recently filed case. In January 2008, the FTC filed a complaint and consent decree in *In the Matter of Negotiated Data Solutions, LLC*.[2] The *Negotiated Data* complaint charges the respondent with refusing to honor a licensing commitment made several years earlier by the then owner of the patents (National Semiconductor) during an Institute of Electrical and Electronic Engineers proceeding in which the Fast Ethernet standard was formulated and adopted. The complaint does not allege either monopolization or deceptive conduct, merely that refusal to honor a license commitment made in connection with a standard-setting proceeding is an unfair trade practice violative of Section 5. The FTC decision to file the *Negotiated Data* complaint was based on a 3-2 vote of the Commission, with then Chairman Majoras and then Commissioner Kovacik dissenting.

Endnotes

[1] Docket No. 9302 (D.C. Cir. Apr. 22, 2008)

[2] FTC Case No. 051 0094

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