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D.C. Circuit Reverses Federal Trade Commission in Important Standard-Setting Case

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Yesterday, the D.C. Circuit reversed the Federal Trade Commission's opinion in the *Matter of Rambus, Inc.*, in which the FTC had found that Rambus engaged in exclusionary conduct leading it to monopolize markets for computer memory technology. The D.C. Circuit concluded that the FTC's inability to conclude that Rambus's conduct altered the outcome of the standard-setting process doomed the FTC's claim that Rambus engaged in unlawful monopolization, and the court further questioned whether there was substantial evidence to support the FTC's factual conclusion that Rambus engaged in deceptive conduct.

Background[1]
Reversing an ALJ decision dismissing the complaint, the FTC unanimously held in July 2006 that Rambus violated Section 5 of the FTC Act by engaging in exclusionary conduct, and that Rambus's conduct contributed to its acquisition of monopoly power in markets for computer memory technology. The FTC found that Rambus failed to disclose the existence of certain patent interests that were relevant to the memory standards then under consideration, despite the expectation of members of the standard-setting organization, JEDEC, which were based on the organization's policies and the disclosure practices of members. Additionally, the FTC found that Rambus purposefully misled members of JEDEC, causing them to believe that Rambus was not seeking patents that would cover the standards under consideration. Using the analytical framework of Section 2 of the Sherman Act, the FTC held that Rambus's conduct was deceptive, had the purpose and effect of gaining market power, and constituted unlawful exclusionary conduct for purposes of Section 2.

In a separate February 2007 opinion on the issue of remedy, the FTC: (1) ordered Rambus to license its patented technology on certain specified terms; (2) placed limits on the maximum royalty rates that Rambus could collect for use of its patents; and (3) imposed other significant conduct remedies that sought to limit Rambus's ability to engage in future deceptive conduct relating to standard-setting organizations.

The D.C. Circuit's Opinion in *Rambus, Inc. v. Federal Trade Commission*[2]
On appeal, the D.C. Circuit agreed with Rambus's argument that, even if its non-disclosure did violate JEDEC's rules, the FTC's findings do not show that Rambus's conduct was exclusionary, and thus the FTC failed to establish its claim that Rambus unlawfully monopolized the relevant DRAM technology markets.

The D.C. Circuit's opinion focuses on one particular finding by the FTC – that but for Rambus's conduct, JEDEC would have *either* (a) adopted a non-proprietary standard *or* (b) extracted a commitment from Rambus to license on reasonable and non-discriminatory (RAND) terms. The court noted that the Commission did not determine that one of the two possible results was the more likely. Slip Op. at 12-13.

The court "assume[ed] without deciding" that Rambus's avoidance of the first possible outcome would have been anticompetititive. In other words, the court explained that if Rambus's "more complete" disclosure would have caused JEDEC to adopt a different (open, non-proprietary)

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standard, then Rambus's non-disclosure might have been sufficient to support a monopolization claim. Slip Op. at 13. However, the court pointed out that the FTC's evidence did not demonstrate that this outcome would have occurred, and indeed the FTC's own remedy opinion stated that there was insufficient evidence to conclude JEDEC would not have included Rambus's technologies had it known the scope of Rambus's patent rights.

Because the court found that the FTC did not prove that JEDEC could and would have avoided incorporating Rambus's patented technologies in its DRAM standards, the D.C. Circuit focused on the question whether Rambus's conduct enabled it to avoid making a RAND commitment to JEDEC that it otherwise would have made, and whether this avoidance, standing alone, could support a monopolization claim under Section 2 of the Sherman Act. Relying on the Supreme Court's decisions in *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.* and *NYNEX Corp. v. Discon, Inc.*, and its own prior precedent involving allegedly deceptive conduct, the court concluded that "[d]eceptive conduct – like any other kind – must have an anticompetitive effect in order to form the basis of a monopolization claim," and that "[e]ven if deception raises the price secured by a seller, but does so without harming competition, it is beyond the antitrust laws' reach." Slip Op. at 13-14. The court found that if Rambus acquired its monopoly position lawfully (*i.e.*, by owning patents covering the best technology or essential technology) but used deception "simply to obtain higher prices," such conduct "has no particular tendency to exclude rivals and thus to diminish competition," and therefore cannot serve as the exclusionary conduct element of a monopolization claim under Section 2 of the Sherman Act. Slip Op. at 15. Relying on *NYNEX*, the court rejected the proposition that the loss of an opportunity to obtain a RAND commitment harms competition: "an otherwise lawful monopolist's end-run around price constraints, even when deceptive or fraudulent, does not alone present harm to competition in the monopolized market." Slip Op. at 18.

D.C. Circuit's Decision is Consistent with the Third Circuit's Recent *Broadcom vs. Qualcomm* Opinion

The D.C. Circuit's opinion comments on the other recent Court of Appeals decision addressing the question whether deceptive conduct can serve as the basis for a monopolization claim under Section 2 – the Third Circuit's recent decision in *Broadcom Corp. v. Qualcomm*.[3] In *Broadcom*, the Third Circuit held that in a private standard-setting environment, a patent holder's intentionally false promise to license essential proprietary technology on fair, reasonable, and non-discriminatory terms, coupled with the standard-setting organization's reliance on that promise when including the technology in the standard, and the patent holder's subsequent breach of that promise, is anticompetitive conduct actionable under the Sherman Act.[4]

On the surface, the D.C. Circuit's *Rambus* opinion and the Third Circuit's *Broadcom* opinion appear to be in tension with one another; however, upon a closer look, consistencies appear. Although the outcomes at the appellate court level were different in *Rambus* and *Broadcom*, the facts were also different, and the two decisions are, in fact, reconcilable. The D.C. Circuit itself distinguished the *Rambus* case from *Broadcom*, noting that the Third Circuit reversed dismissal of Broadcom's complaint since it explicitly alleged that Qualcomm's deceptive conduct caused the standard-setting organization to adopt a standard employing Qualcomm's intellectual property. The D.C. Circuit "assume[d] without deciding" that the FTC may have had a valid claim against Rambus under the same theory, except that the FTC – following a lengthy investigation and full trial – did not have evidence sufficient to permit a definitive finding that Rambus's non-disclosure resulted in JEDEC's decision to incorporate Rambus technology into the standard. In other words, whereas in *Broadcom* there were alternative technologies to the Qualcomm technology prior to the adoption of the standard, no alternative technologies appear to have been available in *Rambus*.

The Need for Clarity in Standard-Setting Organizations' IP Rights Policies

Because of the possibility of further proceedings on remand, the D.C. Circuit also expressed its "serious concerns about the strength of the evidence . . . regarding the scope of JEDEC's patent disclosure policies and Rambus's alleged violation of those policies." Slip Op. at 19. The court noted that "the Commission evidently could find that Rambus violated JEDEC's disclosure policies only by relying quite significantly on participants' having been obliged to disclose their work in progress on *potential* amendments to pending applications." Slip Op. at 20. The court stated that this interpretation – based on the testimony of certain participants – "seems to significantly stretch the policies' language." Slip Op. at 20. The court stressed the need for "clear guidance" in standard-setting organization disclosure policies that require disclosure of trade secrets, especially "where disclosure of those trade secrets implicates antitrust concerns" because standard-setting organizations involve collaborations of competitors. Moreover, the court explained that "the more vague and muddled a particular expectation of disclosure, the more difficult it should be for the Commission to ascribe competitive harm to its breach." Slip Op. at 22. Standard-setting organizations with intellectual property rights policies should therefore take note of this decision.

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Footnotes

[1] For additional information regarding the liability and remedy decisions at the FTC, see our prior updates at http://www.mofo.com/news/updates/files/update02229.html and http://www.mofo.com/news/updates/files/update02322.html.

[2] *Rambus, Inc. v. Federal Trade Commission*, No. 07-1086 (D.C. Cir. April 22, 2008), *available at* http://pacer.cadc.uscourts.gov/common/opinions/200804/07-1086-1112217.pdf.

[3] *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007).

[4] For additional information regarding the Third Circuit's *Broadcom* decision, see our prior update at http://www.mofo.com/news/updates/files/12761.html.

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