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FTC Loss in Rambus Litigation

Alleged Deception During Standards-Setting Process Does Not Support Monopolization Claim Unless the Standards Body Would Have Standardized on a Different Technology

Avoidance of a RAND Commitment Leading to Higher Prices for Licenses Does Not By Itself Amount to Anticompetitive Harm

On April 22nd, the DC Circuit Court of Appeals set aside the FTC's 2006 decision that Rambus Inc. unlawfully monopolized four technology markets through deceptive conduct during the JEDEC standards development process for two widely-implemented computer memory standards. The Court held that Rambus's conduct, even if deceptive, was not exclusionary and did not cause anticompetitive harm if it merely prevented the JEDEC standards body from extracting a binding RAND commitment, leaving Rambus free to charge higher royalties to license its patented technologies necessary to implement the resulting standards. By contrast, if the FTC had been able to find, as it expressly did not, that but for Rambus's deceptive conduct JEDEC was certain to have excluded Rambus's patented technology from the standard altogether in favor of alternative technologies, then the Court might have sustained a finding that Rambus illegally acquired monopoly power. Relying heavily on the Supreme Court's *NYNEX* decision, the Court reasoned that conduct that leads to higher pricing by a monopolist, but not to wrongful acquisition of the monopoly position itself, does not cause harm to competition cognizable under the antitrust laws.

The Court also went on to express serious doubts about whether the evidence showed that Rambus engaged in deceptive conduct at all. In doing so, it leaned away from the FTC's expansive approach of using testimony from standard setting participants about their understanding and expectations to supplement a reading of JEDEC's written patent disclosure policies, and towards the Federal Circuit's earlier call, in related proceedings involving Rambus's JEDEC conduct based on state law fraud claims, for strict construction of written patent disclosure policies. Although the Court remanded the case to the FTC for further proceedings, it is not clear what actions the FTC may have available to it, and as a practical matter the Court's decision may put an end to the FTC case.

This decision is likely to create additional incentive for standard setting bodies to give increased attention to patent disclosure and licensing policies, both to ensure that their written patent disclosure policies are sufficiently clear and detailed, and to create a more explicit record regarding the assumptions and tradeoffs they make when choosing between competing technologies upon which to base a standard.

A copy of the Court's decision may be found here.

The FTC Decision

The precise scope and nature of the actual JEDEC disclosure policies, the understanding that participants actually had during the relevant period concerning what they were required to disclose, and what if anything those policies required Rambus to disclose, were all subjects of intense dispute during the FTC's litigation (as they have been in other private litigation against Rambus). For example, the Administrative Law Judge (ALJ) during the FTC's proceedings dismissed the FTC staff's complaint on grounds that Rambus had not withheld material information impermissibly. The ALJ also found that even if Rambus had made a full disclosure, there was insufficient evidence that JEDEC would have chosen to write its standard differently to avoid the Rambus technologies.

The FTC vacated the ALJ's decision, however, and found that while the JEDEC policies were not clearly stated, the evidence supported a broad interpretation that required participants to disclose not only patents and patent applications that are "relevant" to the standard under development, but also any plans they might have for relevant patents or patent amendments in the future. Based on that interpretation of JEDEC's policies, the FTC found that Rambus had breached its duties to JEDEC by willful and intentional deception about Rambus's patents and patent plans that were "highly material" to the standard-setting process.

The FTC determined that "but for Rambus's deceptive course of conduct, JEDEC either would have excluded Rambus's patented technologies from the JEDEC DRAM standards, or would have demanded RAND assurances, with an opportunity for ex ante licensing negotiations." (Slip. Op. p. 9, quoting *In re Rambus*, Opinion of Commission at 74.) The FTC accordingly held that Rambus's deception amounted to exclusionary conduct that significantly contributed to its acquisition of unlawful monopoly power, in violation of Sherman Act § 2 and therefore an unfair method of competition and unfair or deceptive acts or practices in violation of § 5(a) of the Federal Trade Commission Act. As a remedy, the FTC ordered compulsory licensing under what it determined to be reasonable royalty rates intended to approximate those that would have been negotiated had Rambus timely disclosed its patents and patent intentions.

The Court of Appeals Decision

The Court of Appeals disagreed, and held that the FTC had failed to demonstrate that Rambus's conduct was exclusionary under settled principles of antitrust law. The Court found that the fatal flaw in the FTC's reasoning and conclusions arose from its factual findings stated in the alternative: The FTC determined that, had Rambus disclosed its patent position and intentions fully, JEDEC would *either* have written the SDRAM standards to exclude the Rambus technologies, *or* would have insisted that Rambus commit upfront to licensing on acceptable RAND terms. Since the finding was in the alternative, the Court concluded that both of these alternatives must amount to exclusionary conduct that harms competition in order to support a monopolization claim.

The Court assumed (but did not decide) that if more complete disclosure by Rambus would, in fact, have caused JEDEC to exclude the Rambus technologies from the standard in favor of alternative technologies, then this would constitute harm to competition from rival technologies, and would support a finding that Rambus acquired monopoly power unlawfully. But the Court believed that the FTC's second alternative finding — that even if Rambus had fully disclosed, JEDEC would still have adopted the Rambus technology for its standards if Rambus had committed to RAND licensing — simply meant that manufacturers might have enjoyed lower royalty rates if Rambus had fully disclosed. While the manufacturers may now pay higher royalties as a result of Rambus's deception, that does not represent harm to the competitive process. "Even if deception raises the prices secured by a seller, but does so without harming competition," the Court said, "it is beyond the antitrust laws' reach." (Slip. op. at p. 14.)

The Court relied heavily for its conclusion on the Supreme Court's decision in *NYNEX Corp. v. Discon Inc.*, 525 U.S. 128 (1998), which held that deception and manipulation of the regulatory process, resulting in higher prices to buyers and consumers, did not amount to unlawful monopolization since the consumer injury resulted from deceptive conduct by a monopolist that acquired its monopoly power through lawful means, rather than through deception that excluded rivals and made the market itself less competitive. The Court of Appeals believed the *NYNEX* decision was controlling in this rather different context. In its view, Rambus licensees may pay more than they would have absent Rambus's deception, but since JEDEC would still have chosen the Rambus technologies even with full disclosure, the higher prices would not be the result of any exclusionary conduct. The FTC had argued that because the alleged deception in the *Rambus* case itself may have resulted in the acquisition of monopoly power, the *NYNEX* line of cases (involving deception to exploit monopoly power that had been acquired lawfully) was inapposite. The Court was evidently not persuaded by this argument.

The DC Circuit did acknowledge and attempt to distinguish the Third Circuit's decision in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (2007), which addressed very similar facts on a motion to dismiss — allegations of deception in standards-setting as a basis for monopolization claims. The *Broadcom* Court, describing the FTC's *In re Rambus* decision as a "landmark," held that an intentionally false promise to a standards setting organization to license on RAND terms could be sufficient anticompetitive conduct to support a claim of monopolization, on grounds that it increased the likelihood of monopoly power for the patent holder. The DC Circuit in its own *Rambus* decision distinguished the *Broadcom* decision by saying that, "to the extent that the ruling rested on the argument that the deceit lured the [standards setting organization] away" from alternative technologies, it was based on cognizable competitive harm, unlike the FTC's decision. But the Court also noted that, to the extent that the *Broadcom* decision, like the FTC's decision under review, rested on the argument that monopolization may be found based on deceit that has the effect merely of raising prices, it is not consistent with controlling precedent in the Supreme Court's *NYNEX* decision. Thus it appears that there may be a conflict on this point between the DC Circuit and the Third Circuit.

Further Proceedings

The Court remanded the case so that the FTC could consider whether, even if Rambus's conduct did not violate Sherman Act § 2, it might nevertheless still violate the potentially broader language of Section 5(a) of the FTC Act prohibiting unfair methods of competition and unfair or deceptive acts or practices. That theory was not a basis for the FTC's decision and order, however, and Rambus may be expected to argue that any such claim has been abandoned. Although only one Commissioner expressed an interest in this theory in the *Rambus* opinions themselves, the subsequent statement of a majority of Commissioners in the *Negotiated Data* matter might indicate a renewed interest in pursuing Section 5 theories in this context.

Nonetheless, the Court seized on the possibility of further proceedings to express its "serious concerns" about the strength of the evidence concerning the scope of JEDEC's patent disclosure policies and Rambus's alleged violation of those policies. The Court criticized the FTC's findings on those issues as "murky" and "uncertain," but observed that the FTC's interpretation of JEDEC's disclosure policies "seems to significantly stretch the policies," perhaps beyond what is justified by the evidence. In particular, the Court noted that participants in standards organizations are potential competitors, and that therefore it would expect that the organization would define clearly any obligations for competing participants to disclose information that they would ordinarily treat as trade secrets.

In the wake of this decision, it would be prudent for standards bodies to take steps to clarify and add detail to their written patent disclosure policies. The decision also provides an incentive for standards bodies in at least some situations to create more detailed records regarding their decisions about competitive tradeoffs when choosing which technologies to incorporate into standards, so as to make it easier to establish after the fact whether different assumptions would or would not have led to different outcomes.

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

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