

D.C. Circuit Increases Burden of Proving an Antitrust Violation in Cases Involving Misrepresentations to Standard-Setting Organizations

April 24, 2008

In a decision issued April 22 in *Rambus v. FTC*, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit increased the burden of proving antitrust claims premised on misrepresentations to an industry standard-setting organization (SSO). The panel unanimously reversed the Federal Trade Commission's (FTC's) decision that Rambus violated Section 5 of the FTC Act by failing to disclose patents under development to an SSO that later adopted an industry standard requiring use of those patents. In potential conflict with the Third Circuit's decision last year in *Broadcom v. Qualcomm*, the panel held that in order to violate the antitrust laws, a misrepresentation in or an omission from a disclosure to an SSO must result in the SSO adopting a different standard than it otherwise would have.

During the early 1990s, while Rambus developed a patent portfolio in the computer memory industry, it participated as a member of the Joint Electron Device Engineering Council (JEDEC), serving on the committee that developed standards for computer memory products. While serving on the committee, Rambus allegedly failed to disclose to JEDEC information pertaining to patent amendments and patent applications that it intended to file. Standards later adopted by JEDEC required use of the Rambus patents that were developed from the undisclosed amendments, and Rambus sought licensing fees from DRAM producers whose products followed the standards. On June 18, 2002, the FTC filed a complaint alleging that Rambus's omissions violated antitrust laws by unlawfully monopolizing the technology markets in which its patented technologies compete. An Administrative Law Judge (ALJ) of the FTC initially determined that Rambus did not violate antitrust laws. However, the FTC vacated the ALJ's decision in 2007 and found Rambus "willfully and intentionally engaged in misrepresentations, omissions, and other practices that misled JEDEC members about intellectual property information 'highly material' to the standard setting process." Rambus appealed the FTC's decision to the D.C. Circuit, which yesterday reversed the FTC and remanded the case for further proceedings consistent with the court's opinion.

The D.C. Circuit's *Rambus* decision requires that plaintiffs pursuing antitrust claims premised on misrepresentations or omissions to an SSO must show that the SSO would not have adopted the standard in question *but for* the misrepresentation or omission. In other words, the misrepresentation or omission must have caused the SSO's decision to adopt a particular standard. In holding that "deceit merely enabling a monopolist to charge higher prices than it otherwise could have charged—would not in itself constitute monopolization," the court rejected the argument that the loss of an opportunity to seek favorable licensing terms is a violation of antitrust law. This holding arguably conflicts with the

Third Circuit's decision last year in *Broadcom v. Qualcomm* as well as previous decisions by the FTC in the Unocal and Dell matters.

In *dicta*, the court also addressed the types of omissions that might violate Section 5 of the FTC Act, even if they did not produce the type of anticompetitive effects required by Section 2 of the Sherman Act. Specifically, the court suggested that an omission will only be actionable under Section 5 where it clearly violates the relevant SSO's disclosure policies. JEDEC's disclosure policies in this case were sufficiently ambiguous that, in the court's view, they did not necessarily require Rambus to disclose its plans for future amendments or patent applications.

Finally, the *Rambus* decision casts doubt on whether omissions of the type made by Rambus could ever rise to the level of unlawful exclusionary conduct. The opinion implies that it would be exceedingly difficult for an SSO to craft an effective policy requiring members to disclose not only existing patents, but any technologies or potential patents that were in development at the time a standard was being considered.

If you would like further information regarding the issues raised in this Morgan Lewis LawFlash, please contact any of the following Morgan Lewis attorneys:

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