

## FTC Suit Against Intel Seeks Broader Liability Standards in Antitrust Cases

December 30, 2009

More than three years ago, then Commissioner, now Chairman, Jonathan Leibowitz of the Federal Trade Commission (FTC) advocated that the agency rely on the broad language in Section 5 of the FTC Act to expand the scope of its antitrust enforcement agenda. As Chairman Leibowitz explained, “Section 5 was intended from its inception to reach conduct that violates not only the antitrust laws themselves, but also the policies that those laws were intended to promote. . . . The Commission, in my view, should place greater emphasis on developing the full range of its jurisdiction.” The FTC moved a step closer to implementing the Chairman’s vision on December 16 when it filed an administrative complaint against Intel that includes “stand-alone” Section 5 antitrust claims. The Section 5 claims in *Intel* allow the FTC to challenge conduct that would not be unlawful under the Sherman Act, the primary antitrust statute, and thus to potentially expand antitrust liability standards significantly.

Section 5 of the FTC Act defines the scope of the FTC’s authority to prosecute anticompetitive conduct. It broadly condemns “unfair competition” without explicitly defining that term. Although some cases in the 1970s and 1980s applied Section 5 as a stand-alone antitrust claim, the FTC for the last 20 years has largely relied on joint Section 5 and Sherman Act claims, with the scope of liability defined by precedent construing the Sherman Act. In recent years, however, various FTC commissioners have expressed growing concern that judicial opinions limiting the scope of the Sherman Act—particularly as it relates to single-firm conduct—were unduly limiting the FTC’s enforcement agenda.

In January 2008, the FTC issued a consent decree *In the Matter of N-Data* settling stand-alone Section 5 claims challenging the IP licensing practices of N-Data. The *N-Data* case signaled the FTC’s commitment to expanding its antitrust enforcement agenda in single-firm conduct cases beyond the bounds of Sherman Act liability. However, as a case settled without litigation, *N-Data* left unanswered how broadly the courts might construe the FTC’s Section 5 powers.

That question will likely be answered in the *Intel* case. The complaint claims Intel undertook a “course of conduct” that dismantled its rivals’ ability to compete. It asserts that Intel engaged in a range of activities, including loyalty discounts, bundled discounts, unilateral refusals to deal, raising rivals’ costs, predatory pricing, and disseminating materially false competitive information. Although each of these activities could in certain circumstances give rise to liability under the Sherman Act, the courts over the last 20 years have significantly narrowed the scope of Sherman Act liability for such alleged conduct. For instance, Supreme Court precedent requires plaintiffs alleging predatory pricing to prove that the defendant could “recoup” any profits lost as a result of pricing below cost, a very difficult standard for plaintiffs to meet.

Although the FTC’s Complaint separately charges violations of both the Sherman Act and Section 5 of the FTC Act, it clearly intends its Section 5 claims to extend beyond the scope of—and limitations attendant to—its Sherman Act Section 2 claims. For instance, as to its predatory pricing claims, the Complaint explicitly alleges that “recoupment” of lost profits is “not a necessary element of a Section 5 claim.” Consequently, the FTC itself—and likely later the federal courts—will necessarily be required to decide the limits and scope of Section 5, and how those limits and scope differ from the Sherman Act. Concurring statements by Chairman Leibowitz and Commissioner J. Thomas Rosch make clear that one of the policy goals of the *Intel* case is to push the limits of current antitrust standards.

Other aspects of the Complaint, and the attendant statements of Chairman Leibowitz and Commissioner Rosch, suggest additional considerations companies should heed when facing potential FTC enforcement. For example, the case was not filed in federal court. Rather, it was brought in front of an FTC Administrative Law Judge at least in part to achieve a speedier resolution of the action. Under new FTC administrative litigation rules, trial is set to begin nine months from the date of the complaint, with a final commission decision due in 20 months—a much faster timeline than typical federal court antitrust litigation.

Under Chairman Leibowitz, one can anticipate the FTC will continue to push the boundaries of existing antitrust standards through stand-alone Section 5 claims. What standards the FTC will propose remains to be seen, though the *Intel* case suggests that the FTC is likely to be aggressive in its interpretation. The federal courts will also have a say, either in an appeal in the *Intel* case or in future stand-alone Section 5 cases.

Moreover, it is likely that private plaintiffs will follow the FTC’s lead and pursue more expansive theories of antitrust liability. Although the federal FTC Act does not include a private right of action, virtually every state has a “little FTC Act,” patterned on Section 5 of the federal FTC Act, that permits private parties to sue for damages. Until the limits and scope of Section 5 antitrust liability are worked out through the litigation and appeal process, however, caution is likely in order for companies as they consider potential competitive strategies.

If you have any questions or would like more information on any of the issues presented in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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