

New FTC Pick Could Bring Economic Focus To Privacy Cases

By **Allison Grande**

Law360, New York (September 11, 2012, 9:07 PM ET) -- The White House on Monday nominated law professor and economist Joshua Wright to replace Commissioner J. Thomas Rosch at the Federal Trade Commission, a move attorneys say could make the agency more willing to consider the economic impact of companies' allegedly deceptive disclosures when weighing potential consumer protection and privacy violations.

With Rosch's seven-year term set to expire at the end of September, President Barack Obama nominated Wright, a professor at the George Mason University School of Law who holds a doctorate in economics as well as a law degree from the University of California, Los Angeles. His areas of expertise include antitrust law and economics, consumer protection, empirical law and economics, intellectual property, and the law and economics of contracts, according to his biography on the university's website.

While Wright is widely known as an antitrust scholar, he could also have a significant effect on the agency's consumer protection and privacy enforcement strategy if he's confirmed by the U.S. Senate — which likely wouldn't happen until late 2012 or early 2013 — due to his favoring of empirical data that is often used in antitrust investigations, according to attorneys.

“With him being a trained economist as well as a lawyer, it's expected that he would be more receptive to and interested in information economics and behavioral economics, which are the areas of economics that underpin consumer protection enforcement and analysis,” Morgan Lewis & Bockius LLP partner Stephen Mahinka told Law360 on Tuesday. “Companies being investigated by the FTC in this area should know that this presents the enhanced opportunity to make new and different arguments based on economics that they couldn't have done without this commissioner replacement.”

Although the commission has for decades considered economic evidence in competition cases — such as what the effect on prices would be if a certain merger were allowed — it has been slower to apply this type of analysis to consumer protection cases because information and behavioral economics are newer concepts. Instead, the agency in making its consumer protection determinations has focused on evidence related to how a practice might be deceptive or unfair, or on how the facts of a case compare with its previous actions, according to Mahinka.

But Wright's economics background could shift the agency's approach, forcing it to consider evidence on how allegedly deceptive disclosures affect consumers' behavior or purchasing habits, an analysis that a former trial lawyer like Rosch wouldn't have undertaken, Morgan Lewis partner Thomas Lang said.

“The big difference is that with Rosch, he would focus on evidence that is admissible and make his decisions and evaluate the strength of the case in the way a trial lawyer would,” he said. “As an economist, Wright will be more focused on empirical evidence rather than what would be admissible at trial, and is likely to be more receptive to evaluating a matter based on surveys, pricing data, something that people can feel and measure.”

In taking this approach, Wright is likely to agree with other commissioners more frequently than Rosch, according to Lang, who worked with the commissioner while serving as senior litigation counsel in the FTC's bureau of competition from 2006 to 2008.

“Wright is less likely to think outside the box than Rosch, because it's hard for an economist who's trained in a particular way to approach issues in different sort of ways,” he said, adding that Wright's tenure as inaugural scholar in residence at the FTC's Bureau of Competition from January 2007 to July 2008 likely gave him “a lot of respect for the prior decisions of the institution” that he would be hesitant to oppose.

Wright's more predictable stance may also help him earn respect among his fellow commissioners, Mahinka said.

“He's likely to be more of a team player, which usually ends up giving you more influence and respect,” he said. “Whoever the new commissioner is, he will almost certainly be easier to deal with; it would be hard to be more of a maverick than Rosch.”

In recent months, Rosch has been especially critical of the agency's no-fault settlements, dissenting to the approval of the final agreements resolving privacy violations against both Facebook Inc. and Google Inc. on the grounds that allowing these companies to expressly deny any liability was not in the public interest.

Rosch has also objected to this tactic used in the commission's deceptive marketing case against Circa Direct LLC, filing a March 21 letter cautioning a New Jersey federal judge against merely “rubber-stamping” the agency's proposal to resolve the case for \$11.5 million without forcing the company to admit or deny liability.

While the other commissioners have firmly stood by this settlement strategy, they revealed in their support of the Facebook settlement that “going forward, express denials will be strongly disfavored,” and that the commission planned to “consider in the coming months” whether to take Rosch's suggestion to modify its Rules of Practice to follow the route of agencies of the U.S. Securities and Exchange Commission that allow companies to only “neither admit nor deny” liability in settlements.

The adequacy of the Google settlement is also being challenged in the Northern District of California by Consumer Watchdog, which argues that the settlement is inadequate due to this denial of liability.

While Wright's nomination is unlikely to affect this litigation, Consumer Watchdog's Privacy Project Director John M. Simpson expressed concern Tuesday over the new nominee's links to Google, which include authoring papers with the founder of the International Center for Law & Economics, which has received funding from the search giant, as well as publicly questioning the wisdom of the FTC's current investigation of Google's allegedly anti-competitive search practices, most notably in an article titled “The Case Against the Antitrust Case Against Google.”

“I think that this is an outrageous nomination,” Simpson told Law360. “I'm concerned that he doesn't seem to have any problem stepping into a role like this when Google's practices are one of the biggest issues facing the commission.”

Besides his relationship with Google, Wright's take on the FTC's ability to bring enforcement actions for unfair privacy practices under Section 5 of the FTC Act will also be of particular interest, according to Morrison & Foerster LLP partner and former FTC Bureau of Consumer Protection staff attorney Reed Freeman. Because fair and reasonable privacy practices haven't yet been defined by law, Rosch cautioned against using this authority in privacy matters in his dissent to the commission's March privacy report and Wyndham Hotel & Resorts LLC is challenging it in a federal data security case brought by the FTC.

"How the FTC proceeds now and after the litigation is resolved has implications for FTC enforcement in privacy, data security, and myriad other consumer protection issues," Freeman said.

But no matter how these issues play out and who gets appointed to replace Rosch, the commission's increasingly active enforcement of privacy and consumer protection matters is unlikely to dissipate anytime soon, Jenner & Block LLP privacy and information governance group founder and former Department of Homeland Security Chief Privacy Officer Mary Ellen Callahan added.

"The White House's consumer bill of rights has helped to set the FTC squarely up in that area, and [the agency] will continue to be very active in privacy regardless of who's in the commission," she said.

--Editing by Elizabeth Bowen and Lindsay Naylor.

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