Supreme Court Denies FTC Request to Review Rambus, Inc. v. F.T.C.

On February 23, 2009, the Supreme Court denied the Federal Trade Commission's (FTC) *petition for certiorari* seeking to overturn last year's D.C. Circuit decision in *Rambus, Inc. v. F.T.C.*

The *Rambus* Decision

The *Rambus* dispute arose from the Joint Electronic Device Engineering Council's (JEDEC) efforts in the 1990s to develop standards for a new generation of personal computer memory. JEDEC required participating members to disclose patents and patent applications implicated by the standard and to commit to "reasonable and non-discriminatory" (RAND) licensing in the event a patented technology was essential to practice the adopted standard. Rambus initially participated in JEDEC's standard setting but withdrew prior to the final adoption of the standards, stating that its plans regarding licensing "may not be consistent" with JEDEC standards. Following JEDEC's adoption of the standards, Rambus notified manufacturers of its patent rights and sought to enter into licenses for both SDRAM and DDR SDRAM products.

The D.C. Circuit's opinion, which the Supreme Court declined to review, had struck down the FTC's challenge on the grounds that the FTC failed to satisfy the requirements for establishing monopolization under Section 2. To establish monopolization under Section 2 of the Sherman Act, the challenger must establish (i) the existence of monopoly *and* (ii) conduct that must have either created or reinforced the monopolist's market power by raising entry barriers or excluding competitors.

Although the D.C. Circuit appeared to have accepted the FTC's assertion that Rambus's 90 percent post-standard market share satisfied the first prong of the analysis, it held that the Commission had failed to demonstrate that Rambus's conduct "created or reinforced" that market power. Specifically, the court held that the FTC had not demonstrated that the standard-setting organization would have selected an alternative standard "but for" Rambus's allegedly deceptive course of conduct.

In the court's view, the flaw in the FTC's case was reflected in its admission that as an alternative to adopting a technology other than that protected by the Rambus patents, JEDEC could have demanded that Rambus license the technologies at issue on RAND terms. This admission, in the court's view, tacitly acknowledged that even if JEDEC had been aware of Rambus's work in the area, it might well have nonetheless adopted the standard. Thus, the causation required of a Section 2 violation could not be proven. In the court's view this left open the question of whether Rambus acquired its monopoly position *unlawfully*.

In reaching this decision, the D.C. Circuit distinguished the Third Circuit's decision in *Broadcom Corp. v. Qualcomm Inc.* Noting that *Broadcom* was decided on appeal from a successful motion to dismiss and was thus confined to the issue of pleading standards, the D.C. Circuit pointed out that Broadcom pled that the Qualcomm's intentionally false promise to a standard-setting organization (SSO) coupled with the SSO's reliance on that promise when it included the technology in question in the standard "increased 'the likelihood that the patent rights held by the defendant would confer monopoly power on the patent holder.'" Thus proof consistent with these pleadings—that "deceit lured the SSO away from non-proprietary technology"—would be sufficient to satisfy the causation requirement of Section 2.

The FTC's petition to the D.C. Circuit for rehearing *en banc* was denied, and the FTC's *petition for certiorari* was filed with the Supreme Court in November 2008. Notably, the U.S. Department of Justice did not join the FTC in seeking Supreme Court review.

Implications of the Case

The FTC has given significant attention to the subject of patent holders participating in regulatory or quasi-regulatory proceedings and, with respect to standard-setting organizations, has taken the view that a patent holder's failure to disclose its patent position or adhere to the organization's licensing obligations constitutes a violation of Section 2. The D.C. Circuit's decision in *Rambus* holds that vague allegations of unfairness will not suffice to establish a violation of Section 2. By declining review, the Supreme Court may have dampened the FTC's ambitions in this area.

By narrowing the potential application of Section 2, *Rambus* refocuses attention on the licensing obligations that standard-setting organizations place on members and participants. Companies planning on participating in standard-setting activities should carefully review the FRAND/RAND licensing obligations adopted by the standard-setting organization and ensure that the licensing requirements are enforceable and sufficiently broad and rigorous for those who would ultimately make use of the standard to be adopted. In this regard, we also anticipate that *Rambus* will cause the antitrust agencies to pay greater attention to these issues as they respond to requests for business review letters and advisory opinions that are routinely sought by the standard setting organizations at the preliminary stages of the standard setting process.

Importantly, *Rambus* does not provide *carte blanche* to game the standard-setting processes. Participants in a standard-setting process and patent holders whose technology is being considered for incorporation in the standard should continue to adhere carefully to both licensing and disclosure requirements. While *Rambus* does hold that Section 2 liability in this area is not unbounded, it remains that a properly pled Section 2 complaint would likely withstand a motion to dismiss. Moreover, in addition to Section 2 claims, plaintiffs may attempt to add counts under common law contract theories and specialized business tort statutes, such as Massachusetts General Laws Section 93A and California's Cartwright Act.

It should also be noted that *Rambus* may well not be the last word on the issue of Section 2. Jon Leibowitz, the FTC Chairman-designate for the Obama administration, reacted to the Supreme Court's declining review, stating "Obviously, it's disappointing because we continue to believe that the D.C. Circuit got it wrong." Consequently, it is quite likely that the federal antitrust agencies will continue to look for cases with more favorable facts in order to continue this discussion with the courts.

For more information regarding the *Rambus* decision and how it may impact standard-setting activities, please contact your usual Ropes & Gray attorney.

Additional Resources

Ropes & Gray's Alert on the D.C. Circuit Court's Opinion

The D.C. Circuit's Opinion

The FTC's *Petition for Certiorari*

Rambus's Opposition to the *Petition for Certiorari*