Can the FTC Be a Fair Umpire?

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Nearly 100 year ago, Congress established the Federal Trade Commission to protect consumers against unfair, deceptive and anticompetitive practices. Part of the reason for its creation was to create an independent, fair and expert body to resolve complex antitrust claims, because the federal courts seemed incapable of enforcing the antitrust laws. So Congress enabled the FTC to adjudicate its own cases in an administrative process.

Over the century, the Commission had many successes, but its power to adjudicate cases has always been controversial. The FTC issues complaints which are adjudicated before an FTC Administrative Law Judge and that decision can be appealed to the Commission. (Only after a Commission decision can a business appeal to a federal appellate court). So the FTC serves as both prosecutor and judge.

Businesses, the American Bar Association, and former Commissioners have questioned how it can be fair that the FTC serves as both judge and prosecutor.

Now that issue has become more controversial. For most of the past century the Commission frequently dismissed complaints after a trial – from 1950-1990 about 20 percent of the time. But since 1995, it hasn't happened once in over 20 cases. Since 1995, the FTC has found a violation in every case in which it has voted on a complaint. In other words, in spite of numerous administrative trials, including some trials in which the ALJ held for the defendant, the FTC has found that it has been right 100 percent of the time.

One must wonder about fairness when the pitcher is also the umpire – – and is always calling strikes.

Indeed, sometimes the FTC gets it wrong. FTC decisions can be appealed to the courts of appeal, and the FTC's perfect record has not been so perfect on appeal. For example, between 1976 and 2010, Commission opinions in antitrust cases were reversed by appellate courts 20 percent of the time (in comparison, decisions in antitrust cases by Article III judges were reversed only 5 percent of the time).

The two most prominent recent examples involve pharmaceutical patent settlements and standard essential patents, both areas which were the subject of Senate Judiciary Committee hearings in the past month. In both cases the ALJ found no violation, the Commission reversed the ALJ and the Court of Appeals reversed the Commission.

In *Schering-Plough*, a pharmaceutical patent settlement case, the FTC took a very different view of the underlying facts than the ALJ. On appeal, the 11th Circuit was much more solicitous to the ALJ's interpretation of the facts and it noted "it would seem as though the Commission clearly made its decision before it considered any contrary conclusion."

Similarly in the *Rambus* case, the FTC challenged deceptive conduct involving a standard essential patent. Once again, the ALJ found no violation but the FTC reversed. The D.C. Circuit reversed the FTC expressing its "serious concerns about the sufficiency of the evidence" and noting "once again the Commission has taken an aggressive interpretation of rather weak evidence."

In other words the Commission's recent "perfect record" isn't so perfect and this trend of always finding a violation raises serious concerns about its role as both prosecutor and judge.

There are four reasons why this raises substantial concerns. First, it brings into question whether respondents are afforded the right to due process and fundamental fairness. The legal process only works if parties receive the due process rights that they are due.

Second, the administrative process is credible only to the extent that it is impartial

and there is a sense of fairness. FTC adjudication is not only important for an individual case, but in interpreting the law and establishing precedent. For example, in a private case brought while the FTC Rambus decision was on appeal, a district court specifically rejected the FTC's findings because of "the FTC's lack of independence given the fact that the FTC essentially acts as both the complainant and the decision maker."

Third, the FTC adjudicative process is tremendously expensive. Fundamentally, if businesses know that they will not be able to appear before a truly independent adjudicator until they can appeal an FTC decision to a court of appeals, this will significantly raise the cost of the FTC process and often force companies into a settlement simply to avoid those costs.

Finally, the Antitrust Division of the Justice Department must bring its cases in federal court before a generalist federal judge. This creates a fundamental unfairness between those companies who are subject to the jurisdiction of the Justice Department and those companies that are subject to FTC jurisdiction, since those companies subject to DOJ enforcement can have their day in court sooner.

The FTC has tremendous promise as a competition and consumer protection enforcer. Calling balls and strikes accurately is essential to its credibility. And Congress needs to examine whether it can be a fair umpire.

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