

AntitrustConnect Blog

FTC Chairman Jon Leibowitz to Leave Agency This Month

Jeffrey May (Wolters Kluwer) · Sunday, February 3rd, 2013

The Federal Trade Commission [announced](#) on Friday that Chairman Jon Leibowitz is planning to leave the Commission effective February 15. Leibowitz has chaired the agency since March 2009 and has been a commissioner since September 2004. Leibowitz did not offer any details of his plans following his departure from the agency.

When Leibowitz began serving as chairman, he anticipated continuity at the agency. He told attendees of the American Bar Association's Section of Antitrust Law Spring Meeting in Washington, D.C. in March 2009 that he intended to build on the accomplishments of past FTC chairs.

Leibowitz's tenure was marked by consistency. There were a number of significant accomplishments, but there was no dramatic shift in agency policy. However, he did advocate for a broad reading of the FTC's authority under Section 5 of the FTC Act to prohibit unfair methods of competition.

Unfair Methods of Competition

The FTC had pursued enforcement actions under Section 5 of the FTC Act without reference to traditional antitrust laws in so-called invitation to collude cases. In these cases, the conduct at issue was the unilateral attempt to enter into an agreement, as opposed to an agreement itself that could be reached under Section 1 of the Sherman Act.

A broader application of Section 5 was seen in the FTC's 2009 [action against Intel Corporation](#) for restraining competition in the market for computer chips. The FTC, under Leibowitz's leadership, voted unanimously to pursue a "stand-alone" violation of Section 5 of the FTC Act—an unfair method of competition independent of the Sherman Act—against the chip maker. Intel eventually agreed to settle the matter in August 2010.

Leibowitz's strong views on Section 5 enforcement authority in the competition area were evident even before he became chairman. He was one of three members who supported a 2008 [complaint and settlement](#) with Negotiated Data Solutions LLC (N-Data) for allegedly engaging in unfair methods of competition and unfair acts or practices regarding its enforcement of certain patents against makers of equipment employing Ethernet, a computer networking standard used in computers.

Then-Chairman Deborah Platt Majoras and Commissioner William E. Kovacic dissented. "The

facts do not support a determination of antitrust liability,” Majoras said in her dissent. “The preconditions for use of stand-alone Section 5 authority to find an ‘unfair method of competition’ are not present.”

Leibowitz contended that the FTC Act’s unfair methods of competition provision was meant to reach beyond traditional Sherman Act violations. It was important to utilize this additional authority granted by Congress to protect competition and consumers, as courts have taken a more restrictive view of the antitrust laws in recent years, according to Leibowitz.

It had been speculated that the FTC might bring a case against Google under the agency’s stand-alone Section 5 authority challenging alleged “search bias.” Ultimately, the agency closed the investigation and accepted [commitments](#) from Google to change some of its business practices. The broad Section 5 case never materialized. The FTC’s Google investigation itself prompted criticism from a number of federal lawmakers. Both Democrats and Republicans questioned the agency’s handling of the matter and a series of purported leaks about the investigation and the settlement.

The future of stand-alone Section 5 cases is uncertain. The FTC’s newest member, Joshua D. Wright, has expressed skepticism of the approach.

“Pay-for-Delay” Settlements

Leibowitz is leaving the agency just as the U.S. Supreme Court is taking up the legality of “pay-for-delay” agreements or reverse-payment settlements in patent disputes between branded and generic drug companies. Despite a number of setbacks, Leibowitz has made challenging these agreements one of his top competition priorities. He also has supported federal legislation barring such conduct.

In December 2012, the Supreme Court granted the FTC’s [petition](#) for review of a [decision](#) of the U.S. Court of Appeals in Atlanta (677 F.3d 1298, 2012-1 Trade Cases ¶77,865), affirming dismissal of an FTC action challenging patent litigation settlements concerning testosterone-replacement drug AndroGel. The FTC argues that the agreements should be treated as presumptively unlawful under a “quick look” rule of reason analysis. Under Eleventh Circuit precedent, “absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent.” The Court could resolve a split among the circuits by accepting the “scope of the patent” approach or the approach advocated by the FTC and adopted by the [Third Circuit](#).

Also in the competition area, the FTC, with the Department of Justice Antitrust Division, revised the Horizontal Merger Guidelines while Leibowitz was chairman. The guidelines were updated to more accurately reflect the way the FTC and Justice Department conduct merger reviews.

Consumer Protection

On the consumer protection front, Leibowitz leaves behind a number of accomplishments. During his tenure, the agency placed special emphasis on consumer privacy and financial fraud, including so-called “last dollar” scams targeting consumers in financial distress.

This entry was posted on Sunday, February 3rd, 2013 at 7:51 pm and is filed under [FTC Enforcement](#). You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can skip to the end and leave a response. Pinging is currently not allowed.