AntitrustConnect Blog

FTC's Winning Streak Is Over

David Balto (Law Offices of David A. Balto) · Wednesday, February 12th, 2014

Six months ago in Can the FTC Be a Fair Umpire? I wrote about the concerns arising from the Federal Trade Commission's dual role as prosecutor and final decision maker in its administrative litigation. I noted that for 19 years in every case brought by the Commission it had found an antitrust violation. I observed "One must wonder about fairness when the pitcher is also the umpire – – and is always calling strikes." This winning streak did not mean a perfect record – indeed in the cases appealed to Courts of Appeal the FTC was reversed 20 percent of the time (compared to a 5 percent reversal rate for federal court judges).

Congress noticed. In two antitrust oversight hearings last fall the FTC was questioned about their "perfect" record. As the Chairman of the House Judiciary antitrust subcommittee Spencer Bachus (R-Ala.) said "With this kind of record and an unbeaten streak that Perry Mason would envy, a company might wonder whether it is worth putting up a defense at all in a system in which the FTC brings a complaint, the case is tried before an administrative law judge at the FTC, and the FTC holds the authority to overturn a decision adverse to the agency."

Last week, that winning streak ended. In a case involving McWane, a firm that manufactures ductile iron pipe fittings, the Commission dismissed all of the complaint counts alleging collusion and all but one of the counts alleging monopolization. (The Commission deadlocked 2-2 on party lines on two conspiracy counts).

The Commission did find that exclusive dealing by McWane violated the antitrust laws. On that count, the Commission divided 3-1, with a blistering exhaustive 52-page dissent by Commissioner Joshua Wright.

What is the significance of the Commission's decision?

First, this is an example of good government and common sense. The FTC's generation long winning streak was indefensible and undermined the credibility of the Commission. Courts were increasingly skeptical of the FTC's administrative process. This decision begins to restore a sense of procedural fairness and substantive rationality.

Second, the dissent is the main course. The most compelling jurisprudence is in Commissioner Wright's dissent. He marshaled the case law, economic theory, antitrust policy and a copious recitation of the facts to demonstrate there was no illegal monopolization. His dissent demonstrates that the basics of any antitrust case – higher prices, less output or choice, or greater barriers to entry are simply missing. Indeed, the most probative evidence – the successful entry of a rival –

suggested there was no harm to the market.

Third, don't bet on the FTC on appeal. As mentioned earlier, when the FTC finds a violation they are often reversed by the appellate courts (at a much higher rate than other agencies of district courts). In this case the Commission not only has to overcome the increasing skepticism of the courts about fairness in FTC administrative litigation but also Commissioner Wright's dissent which provides a detailed roadmap to reversal. Commissioner Wright's dissent will be even more compelling because he was one of the leading authorities on the new learning on exclusive dealing before he went to the Commission.

Fourth, reforms matter. Probably no one noticed when in the last month of the Bush II Administration the FTC implemented procedural reforms to streamline administrative litigation under the leadership of former Chairman Bill Kovacic. One of the reforms was to require the Commission to issue decisions in 180 days after the ALJ initial decision. But for the time limit the Democratic Commissioners could have delayed the decision in this case until the fifth Commissioner (a Democrat) took office and they had a majority on the collusion counts. That might have been expedient but it would have been poor public policy and further diminished the credibility of the agency.

Finally, Congress matters. The FTC turns 100 years old this year. When its creation was proposed Louis Brandeis, one of the authors of the Federal Trade Commission Act said "sunlight is said to be the best of disinfectants." In this case Congressional sunlight on the FTC administrative process helped set the Commission on a more prudent course. That's a valuable lesson for everyone.

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