ARNOLD & PORTER LLP

CLIENT ADVISORY

March 2009

COMMISSIONER JON LEIBOWITZ NAMED FTC CHAIR

Last week, President Obama designated Commissioner Jon Leibowitz to be Chairman of the Federal Trade Commission. Since the Senate had previously confirmed his nomination to be a Commissioner, no Senate confirmation is required for him to become Chairman.

Chairman Leibowitz, a Democrat, was appointed to the Commission in 2004 by President Bush. His most recent position prior to joining the Commission was Vice President for Congressional Affairs for the Motion Picture Association of America. Prior to that, he had a series of Congressional positions. According to the FTC website:

> He was the Democratic Chief Counsel and Staff Director for the US Senate Antitrust Subcommittee from 1997 to 2000, where he focused on competition policy and telecommunications matters. He served as Chief Counsel and Staff Director for the Senate Subcommittee on Terrorism and Technology from 1995 to 1996 and the Senate Subcommittee on Juvenile Justice from 1991 to 1994. In addition, he served as Chief Counsel to Senator Herb Kohl from 1989 to 2000. Leibowitz worked for Senator Paul Simon from 1986 to 1987.[1]

Because he has been on the Commission for a number of years, many of his positions on key antitrust issues are well-known. With that and Arnold & Porter LLP's substantial dealings with him over the years, we offer some thoughts on the direction in which Chairman Leibowitz is likely to take the Commission.

FOCUS ON HEALTHCARE MATTERS

From the outset, Chairman Leibowitz has urged aggressive enforcement of the antitrust laws and has routinely been in the majority when the Commission has voted to bring an enforcement action. He has been particularly interested in healthcare issues. In the Commission's recent enforcement action against Ovation Pharmaceuticals, Inc., he wrote a particularly strong concurring statement. In that matter, described more fully in our client advisory "Recent FTC Merger Review Developments,"[2] the Commission challenged Ovation's consummated acquisition from Abbott Laboratories of NeoProfen, a drug used to treat a serious congenital heart defect in newborns known as PDA. The FTC's complaint alleges that the acquisition was a merger to monopolize a market for drugs used to treat PDA, and that as a result of the acquisition, Ovation raised prices on its own drug, Indocin, by nearly 1,300%.

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1 *See* http://www.ftc.gov/commissioners/leibowitz/index.shtml.

2 *See* http://www.arnoldporter.com/public_document.cfm?u=RecentFTCMergerReviewDevelopments&id=13940&key=4A0.

There are several noteworthy aspects of Chairman Leibowitz's statement.

First, he makes quite clear that aggressive enforcement in the healthcare area will be a priority. He wrote:

> Ovation's profiteering on the backs of critically ill premature babies is not only immoral, it is illegal. Moreover, the company's behavior is a stark reminder of why America desperately needs healthcare reform and why vigorous antitrust enforcement is as relevant today as it was when the agency was created almost one hundred years ago in 1914. Ensuring that consumers receive the benefits of health care competition will continue to be a priority of this Agency in the next administration.[3]

Second, in passing he indicates, without elaboration, that he would have supported a challenge to Ovation's acquisition of the first PDA drug to enter the market, even though it did not "lessen competition" or "tend to create a monopoly" in the usual sense. Ovation was not in the PDA market at the time of that first acquisition and had no drugs for PDA in development, so the merger was not a horizontal merger involving actual or potential competition. Commissioner Rosch, who laid out in detail the basis for his concern, stated his view that the merger as illegal was implicated because "Merck's sale of Indocin to Ovation had the effect of enabling Ovation to exercise monopoly power in its pricing of Indocin, which Merck could not profitably do prior to the transaction."[4] This is an expansive view of the scope of Section 7 of the Clayton Act.

INCREASED USE OF DISGORGEMENT

Chairman Leibowitz is likely also to press for disgorgement of profits more often in antitrust cases. While disgorgement is used commonly in consumer protection cases, it has been used only rarely in competition cases. In his statement in *Ovation*, Chairman Leibowitz said:

> On these facts, it is also appropriate for the Commission to seek disgorgement of profits from Ovation; after all, malefactors should not keep the ill-gotten gains of their illegal acts. Recent literature on the subject makes a persuasive case for seeking disgorgement more frequently. [*See generally*, Einer Elhauge, "Disgorgement as an Antitrust Remedy," 76 Antitrust L.J. (publication forthcoming 2009).] I strongly agree: the Commission should use disgorgement in antitrust cases more often.

CONTINUED ENFORCEMENT IN PATENT SETTLEMENT CASES

A major focus of Chairman Leibowitz has been to challenge conduct that threatens the entry of generic pharmaceutical products, such as challenging patent settlements involving payments by branded manufacturers to generic manufacturers to delay their entry. The Commission's first foray into litigation in this area was in the *Schering* matter. In that case, the Commission found, under a rule of reason analysis, that Schering's payments to generic manufacturers to settle patent lawsuits in exchange for deferred generic entry violated the antitrust laws.[5] The Eleventh Circuit reversed.[6] The Commission sought *certiorari*; the Solicitor General recommended against the grant, and the Supreme Court declined to hear the case.

In a speech after the *Schering* decision, Chairman Leibowitz noted the adverse effect the *Schering* decision was having:

> For fiscal year 2004—*none* of the fourteen agreements reported between brands and generics contained a payment from the brand to the generic accompanied by deferred generic entry. In other words, parties can—and did—settle patent litigation without money flowing to the generic. For fiscal year 2005…there were sixteen settlements between brands and generics. *Three* had payments to the generic accompanied by an agreement to defer entry. This is not a surprising development—the Eleventh Circuit opinion in Schering came out in March

3 *See* http://www.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf.

4 *See* http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf.

5 In the Matter of Schering-Plough Corporation, Docket No. 9297 (Dec. 18, 2003), *available at* http://www.ftc.gov/os/adjpro/d9297/031218commissionopinion.pdf.

6 *Schering-Plough Corp.*, No. 9297 2003 WL 22989651 (F.T.C. Dec. 8, 2003), *vacated*, *Schering-Plough Corp.* v. *FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 2929 (2006).

2005, midway through the fiscal year.[7]

While commenting that "settlements are usually a good thing," he stated that [i]f pharmaceutical companies increasingly pay generics to stay out of the market, the goal in filing an [abbreviated new drug application (ANDA)] won't be to work hard to be first to market. Instead, it will be to work hard to position yourself to be first to settle."[8]

Chairman Leibowitz has made clear that despite the *Schering* decision and other unfavorable court rulings,[9] the Commission will "continue to challenge patent settlements that are anticompetitive and force consumers to pay more for much needed drugs."[10] In this regard, he has frequently discussed a two-prong approach. The first prong is to find a favorable circuit court and force a clear split so that the Supreme Court will grant *certiorari*, hopefully resolving the issue favorably to the Commission. Indeed, the Commission's latest case, challenging Solvay's settlements with Watson and Barr, was brought in California, where any appeal will be heard by the Ninth Circuit.

A second goal is to push legislation that would outlaw these so-called "pay-for-delay" deals. Currently, there are House and Senate versions of bills that would make unlawful a Hatch-Waxman patent settlement in which "anything of value" is given by the patent holder (i.e., the Brand) to the ANDA filer and the ANDA filer agrees to delay entry by any amount of time.[11] The bills differ in a number of respects (*e.g.*, whether they contemplate any exceptions to the "per se rule" embodied in the statue and whether the legislation becomes part of the FTC Act or of other statutes), which affects who can enforce the statute and whether there is a private right of action. Any legislation would likely leave it to the FTC to promulgate specific rules thereunder.

At her confirmation hearing on March 10, 2009, Christine Varney, who has been nominated to lead the Antitrust Division, committed to "work with the Department of Justice to align the Federal Trade Commission and the DOJ on the reverse-payment issue," noting that "if the courts continue to not reach the result that you and your committee thinks is appropriate, then legislation may be necessary."

Thus, despite the unfavorable rulings of several Circuit courts, we can expect these patent settlement challenges to continue under Chairman Leibowitz.

EXPANDED USE OF SECTION 5 OF THE FTC ACT

Chairman Leibowitz is likely to continue the FTC's recent efforts to apply Section 5 of the FTC Act (which outlaws "unfair methods of competition") in cases where the conduct would not necessarily run afoul of traditional Sherman Act standards. After the courts rejected several attempts by the Commission to challenge conduct under Section 5 in the 1970s and early 1980s, the Commission had until recently limited its standalone Section 5 efforts to cases involving so-called "invitations to collude" (where there is no violation of Section 1 because there is no agreement).[12]

In the *Rambus* standard-setting case, Chairman Leibowitz issued a concurring statement in which he argued that Rambus's conduct "might well have been challenged solely as a pure Section 5 violation," noting that he was "writ[ing] separately to discuss and reemphasize the broad reach and unique role of Section 5."[13] The Leibowitz concurrence rejected what he characterized as "cramped or confused views" that saw Section 5 as generally limited to violations of the Sherman or Clayton Acts, concluding that "a review of Section 5's legislative history, statutory language, and Supreme Court interpretations reveals a Congressional purpose that is unambiguous and an Agency mandate that is broader than many realize."[14] His statement noted that he hoped his detailed review of the legislative history of Section 5 and relevant precedent would "encourage the Commission

7 Exclusion Payments to Settlement Pharmaceutical Patent Cases: They're B-a-a-a-ck! Remarks by Jon Leibowitz, Second Annual In-House Counsel's Form on Pharmaceutical Antitrust, April 24, 2006, *available at* http://www.ftc.gov/speeches/leibowitz/060424PharmaSpeechACI.pdf.

8 *Id.*

9 *See, e.g.*, In re Tamoxifen Citrate Antitrust Litig., 429 F.3d 370 (2d Cir. 2005); *In re Ciprofloxacin Hydrochloride Antitrust Litigation,* No. 08-1097, 2008 WL 4570669 (Fed. Cir. Oct. 15, 2008).

10 *Id.*

11 H.R. 1902, 110th Cong. §2.; S. 316, 110th Cong. §3.

12 *See, e.g.*, Valassis Commc'ns, Inc., FTC File No. 051-0008 *available at* http://www.ftc.gov/os/caselist/0510008/0510008.htm.

13 Rambus, Inc., FTC Docket No. 9302 (2006), Concurring Statement of Commissioner Leibowitz, *available at* http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf.

14 *Id.*

(and its staff) to develop further and employ more fully this critical and unique aspect of our statutory mandate" and "use all the arrows in [its] jurisdictional quiver to ensure that competition is robust, innovative, and beneficial to consumers."[15]

The only case to date in which the Commission has pursued a standalone Section 5 violation along the lines described by Chairman Leibowitz in his *Rambus* concurrence is last year's consent decree in *Negotiated Data Solutions*.[16] As we described in an earlier client advisory,[17] in *Negotiated Data* the Commission challenged an IP owner's breach of its predecessor's promise to a standard setting organization that it would license patents for $1,000 to any firm that implemented the standard. Unlike the FTC's other standard setting cases, there was no claim that the respondent had acquired or maintained its alleged monopoly power anticompetitively, only that it had exercised that power in a way that its predecessor in interest had promised it would not. Because there was no violation of Section 2, the Commission's complaint and consent decree, which Commissioner Leibowitz supported over the dissent of then-Chairman Majoras and Commissioner Kovacic, was based on a pure Section 5 theory.

The Commission's efforts to reinvigorate Section 5 have generated controversy and concern, and in a speech last October as part of the Commission's Section 5 workshop, Commissioner Leibowitz assured participants that the Commission was not seeking to "resurrect a statutory zombie worthy of 'Tales from the Crypt,'" noting:

> [I]t is instructive to think about the "monster" that many believe was created the last time we systematically tried to enforce Section 5 beyond the Sherman Act—the late 1970s, in an effort that culminated in Commission losses in circuit courts in *Ethyl, Boise Cascade* and *Official Airline Guides.* Of course, one reason I think we should learn from these cases is that many in the corporate antitrust bar—and in the audience—seem to have flash-backs to "the lessons of the 1970s" whenever we talk about Section 5. I hope it will give comfort to many of you to know that we do read those cases and understand their excesses.[18]

In the speech Chairman Leibowitz noted that the Supreme Court has in recent years cut back on the scope of antitrust liability, based on what he characterized as a "justifiable concern about the toxic combination of treble damages and class actions." As a result of these decisions, however, he believes that "some anticompetitive behavior is not being stopped—in part because the FTC and DOJ are saddled with court-based restrictions that are designed to circumscribe private litigation." Recognizing that "[b]usinesses deserve, if not certainty, then at least a sense of what behavior we are trying to reach," Chairman Leibowitz said that in his view "Section 5 is only violated by conduct that is not 'normally acceptable business behavior'" and that also harms consumers. He would not use Section 5 in merger cases or "whenever we think we can't win an antitrust case." His speech provides a number of examples of situations where application of a standalone Section 5 theory may be appropriate, including standard setting, pharmaceutical "ever-greening" to foreclose generics, and loyalty or bundled discounts that harm consumers by foreclosing competitors that constrain prices, even if those competitors are not "equally efficient."[19]

CONTINUED USE OF ADMINISTRATIVE LITIGATION IN MERGER ENFORCEMENT

A recent trend at the FTC has been the increasing use or threatened use of administrative litigation before the Federal Trade Commission to challenge merger matters, including in circumstances where the FTC has litigated a preliminary

15 *Id.* at 2, 21.

16 Decision & Order, Negotiated Data Solutions, LLC, FTC File No. 0510094 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122do.pdf.

17 *See* http://www.arnoldporter.com/public_document.cfm?u=FederalTradeCommissionAppliesNewLiabilityTheoryToStandardSettingConduct&id=10302&key=13C2.

18 "Tales from the Crypt." Episodes '08 and '09: The Return of Section 5 ("Unfair Methods of Competition in Commerce are Hereby Declared Unlawful"), Remarks by Commissioner Leibowitz at the FTC Workshop: Section 5 of the FTC Act as a Competition Statute, Oct. 17, 2008, *available at* http://www.ftc.gov/speeches/leibowitz/081017section5.pdf.

19 *Id.*

injunction challenge.[20] The FTC recently promulgated new administrative rules to expedite administrative merger challenges. While Chairman Leibowitz has not been particularly outspoken on this issue, he has voted with the majority both to challenge mergers in administrative proceedings and to issue new administrative rules. One issue that he will need to confront early is the criticism that this approach by the FTC creates considerable uncertainty for merger parties and represents a significant divergence with the litigation posture of the Antitrust Division in merger cases.

CONSUMER PROTECTION MATTERS

We expect to see consumer protection kicked up at least a notch or two under Chairman Leibowitz's leadership. In particular, expect to see less emphasis on self-regulation and more consistent imposition of consumer redress. Commissioner Leibowitz expressed his disagreement more than once over his colleagues' clear focus on self-regulation to cure a variety of perceived harms. We do not predict he will replace self-regulation with enforcement in all areas, but we expect the two will not be mutually exclusive under his leadership. He has expressed his discomfort with relying entirely on self-regulation most recently in connection with the FTC Staff Report on Self-Regulatory Principles for Online Behavioral Advertising, warning that "to date data security has been too lax, privacy policies too incomprehensible, and consumer tools for opting out of targeted advertising too confounding…Put simply, this could be the last clear chance to show that self-regulation can—and will—effectively protect consumers' privacy in a dynamic online marketplace."[21] Chairman Leibowitz offered similar reservations about the effectiveness of self-regulation in his statement concurring with the FTC's July 2008 report on Marketing Food to Children and Adolescents, noting that while some companies had voluntarily taken steps to help curb the obesity epidemic that "others need to strengthen their voluntary measures…[because] a failure of self-regulation may make the next Congress—and next administration—more inclined towards government regulation."[22] Commissioner Harbour has agreed with this view, so when President Obama appoints a fifth Commissioner, this may be a majority view.

Chairman Leibowitz will likely embrace and may even seek out expanded authority from Congress. He has led the charge to obtain authority from Congress to amend the FTC Act to prohibit aiding or abetting a violation of any consumer protection statute enforced by the FTC.[23] The Commission unanimously urged the repeal of the exemption for telecommunications companies regulated by the FCC Act, expressing its frustration to Congress at the difficulties this exemption has caused when the FTC tries to investigate and seek remedies against all wrongdoers in, for example, the prepaid calling card and mobile content marketing industries.[24]

We will see an increase in remedies both in amounts paid generally and in monetary redress required for first-time violators to settle with a consent order. Chairman Leibowitz has regularly spoken out about the need to punish Section 5 violators with more than an equitable remedy. His concurrence in the Kmart case related to dormancy fees and expiration dates on store gift cards made clear he agreed with the injunctive result but thought the company should have disgorged ill-gotten profits and provided

20 This trend is discussed in an Arnold & Porter client advisory. *See* http://www.arnoldporter.com/public_document.cfm?u=RecentFTCMergerReviewDevelopments&id=13940&key=4A0.

21 FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising, Concurring Statement of Commissioner Jon Leibowitz (Feb. 2009), *available at* http://www.ftc.gov/os/2009/02/P085400behavadleibowitz.pdf.

22 Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation, Concurring Statement of Commissioner Jon Leibowitz (July 29, 2008), *available at* http://www.ftc.gov/speeches/leibowitz/080729foodmarketingtochildren.pdf.

23 Oral Statement of Commissioner Jon Leibowitz before the Senate Committee on Commerce, Science, and Transportation on the Federal Trade Commission Reauthorization Act of 2008 (Apr. 8, 2008), *available at* http://www.ftc.gov/speeches/leibowitz/080408oral.pdf.

24 Prepared Statement of the Federal Commission before the Senate Committee on Commerce, Science, and Transportation (Apr. 8, 2008), *available at* http://www.ftc.gov/os/testimony/P034101reauth.pdf.

consumer redress.[25] Chairman Leibowitz has been vocal before Congress regarding his belief that the FTC should have the power to seek civil penalties for all violations of the FTC Act rather than only in cases where there are violations of existed orders or in cases where statutes the FTC enforces authorized penalties, such as the CAN-SPAM Act. In his testimony in support of the FTC Reauthorization that would have expanded the FTC's civil penalty powers, he said "Speaking for myself, I strongly support…the additional civil penalty authority. Your bill, I believe, will help give us the critical tools we need to successfully confront the antitrust and consumer protection challenges of the 21st century."[26]

Based on President Obama's priorities, we can expect to see the FTC Consumer Protection Bureau continuing its focus on consumer privacy and data security through both enforcement and policy making. Additionally, with the current financial crisis, the FTC has and will continue to focus on investigations in the subprime market and mortgage lending industry, as well as investigating those who prey on consumers through fraudulent mortgage rescue and debt collection relief schemes. With the expected revision to the Green Guides, we also expect to see enforcement activity related to environmental marketing claims.

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25 *In re Matter of Kmart Corp*, File No. 062-3088, Statement of Commissioners Pamela Jones Harbour and Jon Leibowitz Concurring in Part and Dissenting in Part (Aug. 14, 2007) *available at* http://www.ftc.gov/os/caselist/0623088/0623088commentimg.pdf.

26 Oral Statement of Commissioner Jon Leibowitz before the Senate Committee on Commerce, Science, and Transportation on the Federal Trade Commission Reauthorization Act of 2008 (Apr. 8, 2008), *available at* http://www.ftc.gov/speeches/leibowitz/080408oral.pdf.