

## Supreme Court rejects FTC's Rambus appeal

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**The US Supreme Court has declined to hear the US Federal Trade Commission's suit against technology company Rambus, ending a long-running antitrust battle.**



The Supreme Court announced its decision today. The FTC asked the court to take the case in November, after the US Appeals Court in Washington, DC, last year overturned the FTC's 2006 ruling that Rambus illegally monopolised the market for technology used in memory chips in its dealings with an industry standard-setting group in the 1990s.

Rambus does not manufacture memory chips, but relies on developing patented technology to enhance chip performance and then licenses this to other businesses.

The FTC ruled that in 1999, Rambus "ambushed" the industry's standard-setting body, the Joint Electron Device Engineering Council, and other memory chip manufacturers, by not disclosing patents on technology that was later adopted as an industry standard - effectively forcing anyone who wanted to develop a dynamic random access memory chip to license technology from Rambus, or face potential litigation.

David Wales, acting head of the FTC's competition bureau, says today's decision "was not the decision we were hoping for, and we are now reviewing our options."

A Douglas Melamed, partner at Wilmer Cutler Pickering Hale & Dorr LLP in Washington, DC, represented Rambus in the case. "I'm very pleased. I think the Supreme Court did the right thing," he says. "Eleven DC Circuit judges examined the FTC's case, and not one supported it in any way. The solicitor general did not support the FTC's petition for certiorari."

Melamed adds: "On the threshold question whether Rambus had a duty to disclose its patent interests, the Federal Circuit, a jury in the Northern District of California, the FTC's own administrative law judge and (with respect to the more important of the two standards) the Eastern District of Virginia - all ruled that Rambus had no such duty. The DC Circuit in extended dicta made clear that it agreed with that conclusion. The FTC is an outlier. It is time for this case to end."

Geoffrey D Oliver, partner at Jones Day in Washington, DC, has worked at the FTC and argued the Rambus case before the commission. "I wasn't expecting the Supreme Court to take the case, simply because it takes so few cases," he says. "One unfortunate consequence of the DC Circuit decision and the Supreme Court's denial of the petition for certiorari may be to encourage the FTC to rely more heavily on section 5 of the FTC Act instead of section 2 of the Sherman Act in future matters."

Section 5 of the FTC Act allows the commission to bring cases under an ‘unfair methods of competition’ standard. Section 2 of the Sherman Act requires the FTC show that a company has ‘monopolised, or attempted to monopolise’ a market.

Jeffrey Schmidt, former director of the FTC’s competition bureau, and partner at Linklaters LLP in New York, says he doesn’t expect the decision “to slow down the commission’s efforts to address what it sees as misconduct in the standard-setting context.”

Richard Wolfram is an independent practitioner in New York, who has been following the Rambus case closely. “This is an outcome that makes no sense under antitrust jurisprudence,” he says. “If the FTC had filed its cert petition under the new administration, with a different [assistant attorney general of the US Department of Justice’s antitrust division] and a new solicitor general, I think they would have weighed in with their support and we might have had a different outcome.”

Wolfram says “there’s room still for the application of section 2 for abuse of standard setting through deceptive or other conduct, and there’s also the option of applying section 5. We could see a reinvigoration of section 5 enforcement.”

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