Dissenting Statement of Commissioner J. Thomas Rosch

United States of America v. Google Inc.
(United States District Court for the Northern District of California)
In the Matter of Google Inc., FTC Docket No. C-4336

August 9, 2012

As I have said before, our basic statute, Section 5 of the FTC Act, obliges us to determine whether there is both "reason to believe" there is liability and whether the complaint is in the "public interest" before we vote out any complaint, whether it be a litigation complaint or a consent decree.[1] There is no question in my mind that there is "reason to believe" that Google is in contempt of a prior Commission order. However, I dissent from accepting this consent decree because it arguably cannot be concluded that the consent decree is in the public interest when it contains a denial of liability.

First, the Stipulated Order for Permanent Injunction and Civil Penalty Judgment provides that "Defendant denies any violation of the FTC Order, any and all liability for the claims set forth in the Complaint, and all material allegations of the Complaint save for those regarding jurisdiction and venue."[2] Yet, at the very same time, the Commission supports a civil penalty of $22.5 million against Google for that very same conduct. Condoning a denial of liability in circumstances such as these is unprecedented.

Second, in the *Circa Direct* case, the Court ordered the Commission to explain why a consent decree was in the public interest when there was a denial of liability.[3] Here, far from explaining why this settlement is in the public interest despite Google's denial of liability, the Commission merely asserts in its accompanying Reasons for Settlement that the "Commission believes that the settlement by entry of the attached final order is justified and well within the public interest."

Third, this is not the first time the Commission has charged Google with engaging in deceptive conduct. This is Google's second bite at the apple. The Commission accuses it of violating the Google Buzz consent order by "misrepresent[ing] the extent to which users may exercise control over the collection or use of covered information" and accordingly, seeks civil penalties for those violations. In other words, the Commission charges Google with contempt.

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[1] *See, e.g.*, Dissenting Statement of J. Thomas Rosch, *In the Matter of Pool Corporation, FTC File No. 101-0115* (Nov. 21, 2011) *available at* http://www.ftc.gov/os/caselist/1010115/111121poolcorpstatementrosch.pdf.

[2] Order, Stipulated Fact 2.

[3] *FTC v. Circa Direct LLC*, 2012 U.S. Dist. LEXIS 81878, *14 (D.N.J. June 13, 2012). Our sister agency, the Securities and Exchange Commission, has interpreted this language used in *Circa Direct* to be tantamount to a denial of liability. 17 C.F.R. § 202.5(e).

This scenario – violation of a consent order – makes the Commission's acceptance of Google's denial of liability all the more inexplicable.

Fourth, it may be asserted that a denial of liability is justified by the prospect of a $22.5 million civil penalty. But $22.5 million represents a *de minimis* amount of Google's profit or revenues. Beyond that, the Commission now has allowed liability to be denied not only in this matter but also in the *Facebook* settlement where Facebook simply promised to "go and sin no more" (unlike Google, Facebook was not previously under order). There is nothing to prevent future respondents with fewer resources than Google and with lower profiles than Google and Facebook from denying liability in the future too.

Fifth, it may also be asserted that a denial of liability is warranted here because Google is being sued for the same conduct in other fora. But, I see no reason why the more common "neither admits nor denies liability" language would not adequately protect Google from collateral estoppel in those lawsuits.

For the foregoing reasons, I dissent from the Commission's decision to accept this consent decree.