

2 Years In, Tech Division Makes FTC 'Far More Efficient'

By **Bryan Koenig**

Law360 (April 9, 2021, 3:44 PM EDT) -- Two years after it was created as a task force, the Federal Trade Commission's now-permanent Technology Enforcement Division has become a key tool for probes of online platforms, the FTC's most recent competition chief told Law360 in an interview.

Ian Conner, now a Latham & Watkins LLP partner, spoke with Law360 about his experiences with the FTC's Bureau of Competition, which he joined as deputy director in September 2017 and left in February as chief.

In addition to praising the flexibility and hard work of staffers who've managed to adapt to full-time telework, a massive caseload and a precipitous spike in merger filings, Conner touched on the technology division, referred to as TED for short, and its role in directing FTC probes since the task force was launched in February 2019.

"Its entire purpose was to understand and internalize in a single unit within the bureau how the tech platforms and the tech industry operates. With an incredibly fast-moving industry, making sure that there was a group within the bureau that stayed on top of those changes and understood how those businesses work was imperative," he said.

The division's most prominent work to date is the investigation, and now lawsuit, against Facebook, a case Conner could not discuss because Latham represents the social media giant — at Latham he's recused from any matter he worked on at the FTC. Facebook, alongside Google, is bearing the brunt of the backlash against online platforms, with five state and federal enforcer actions against the two companies and numerous private suits.

Conner could, however, discuss TED's importance more broadly as the FTC looks at a rapidly evolving industry that's become vitally important to virtually every aspect of American life.

"Having a single unit that was focused on tech certainly makes it far more efficient within the bureau. Because there are a lot of people that have expertise in tech platforms across the different shops," Conner said.

TED also helps ensure that the FTC "is in a very strong position" to continue its scrutiny of online platforms more broadly, according to Conner.

Activity, Activity, Activity

For Conner, having spent nearly the entire Trump administration at the FTC, the agency's defining characteristic of the last four years was a frenetic and virtually unprecedented pace of antitrust actions.

Last year, the FTC initiated nine merger challenges, brokered 12 settlements and saw 10 deals abandoned in the face of an agency investigation — a level of activity matched across Conner's tenure.

"It is just an incredible volume of enforcement action," he said.

Of course, the FTC's merger review docket is dictated by the pace of transactions coming its way.

The FTC and its peers at the U.S. Department of Justice's Antitrust Division have seen a massive spike in merger notifications, a spike that contributed to the early February decision to temporarily halt early go-aheads to deals still subject to a 30-day waiting period, pending a review of the early go-ahead procedure.

Conner attributes the FTC's ability to continue bringing cases and reviewing mergers during the pandemic and the filings spike, as well as government shutdowns, to its staff.

"We had just the most remarkable staff. They took every challenge and overcame it without issue," Conner said.

He said the FTC had to work hard to create a flexible work-from-home environment that involved many emails and late-night calls after children's bedtimes.

The pandemic also threw up speed bumps for the cases on the FTC's docket, Conner said, especially when it comes to depositions.

"At the front end of the pandemic, companies and — especially in the health care industry — parties and third parties were rightfully focused on their businesses and caring for people who needed health care," he said. "They were not as focused on responding to FTC requests."

Adapting to Challenges

The FTC has more control over the pace of conduct cases, but that flexibility has come under constraint due to a February 2019 Third Circuit decision dismissing the commission's case accusing Shire ViroPharma of illegally delaying generic competition for a gastrointestinal infection drug.

There, the appellate court essentially ruled that the FTC cannot go after conduct in federal court if the activity has already ceased, pointing to language in Section 13(b) of the FTC Act.

The decision, Conner said, means the FTC must bring conduct cases more quickly.

"Even under conduct cases, we don't completely control our docket. Because we have to bring them in order to make sure that the bureau is not susceptible to a ViroPharma argument," Conner said. "And so you did see a high number of both conduct and merger cases over the last 18 months of my time there."

Conner said the agency will be able to keep up so long as it has the resources — funding constraints

have been a major topic for years among FTC leadership and lawmakers.

The FTC and DOJ Antitrust Division have already gotten a modest boost, and among the raft of antitrust overhaul proposals currently on the table for lawmakers, a funding increase likely has one of the best chances of passing Congress.

Without sufficient funding, the agencies will have trouble maintaining current enforcement efforts, he said. "Obviously every case you bring has to be backed by team members that are able to go to trial. And you can't bring a case with three people hoping that another 10 or 12 may materialize," Conner said.

One Merger Challenge, Many Followers

The most impactful FTC case of Conner's tenure, he said, was the agency's challenge of Illumina Inc.'s planned \$1.2 billion purchase of fellow DNA sequencing company Pacific Biosciences, abandoned at the beginning of 2020, weeks after the commission alleged the deal was an attempt to eliminate "a nascent competitive threat."

The case, Conner said, was the first FTC merger challenge under both the normally invoked Section 7 of the Clayton Act as well as Section 2 of the Sherman Act, which prohibits monopolization.

Until that point, the Sherman Act had rarely been tapped for merger challenges, but it subsequently played a role in additional challenges brought last year.

"If you look at some of the cases that would follow in 2020, you can see the beginnings of the theory that underpins those and the structure in the Illumina-Pacific Biosciences case," Conner said.

In that case's wake came the FTC's bid to unwind Altria's \$12.8 billion purchase of a 35% stake in private equity-backed e-cigarette startup Juul, the dual FTC and state attorneys general lawsuits alleging Facebook's WhatsApp and Instagram purchases were part of a pattern of anticompetitive conduct that includes scooping up would-be rivals, and the U.S. Department of Justice lawsuit challenging Visa's \$5.3 billion purchase of Plaid, a deal abandoned at the beginning of 2021. All of those cases include Sherman Act claims.

However, Conner cautioned not to expect Sherman Act allegations in every case going forward, saying specific claims are decided case by case.

"Each case is going to be very fact specific," Conner said, pointing to a speech in which he called on enforcers to use every tool they have.

"I do think enforcers are looking at all of the various statutes that they have at their disposal as they look to bring cases," he said, noting that bringing challenges against nascent competition is particularly difficult "because you are trying to prove something that might happen," Conner said. "Unlike an existing horizontal merger case, where you have present competition and you are forecasting the loss of that present competition, in nascent or potential competition cases, you are forecasting not only the loss of future competition but the success of the potential or nascent competitor."

More Than Cases

Conner notes that his time in the bureau wasn't only defined by the cases it brought. On the policy

front, he also points to the first update to the vertical merger guidelines since 1984, issued jointly with the DOJ, as well as an extensive reexamination of the rules under which mergers are notified to the antitrust enforcers.

"We'll see where they're taken," Conner said, noting the vertical guidelines are only valuable to the extent they're adopted by courts.

But Conner argued those guidelines, while derided by the commission's new Democratic leadership, offered much clearer insight into how enforcers look at deals with vertical aspects, replacing badly outdated guidelines that have long since stopped reflecting actual agency practice.

"That's important because you are starting to see more vertical mergers and vertical merger challenges," he said.

--Additional reporting by Khorri Atkinson, Matthew Perlman, Dave Simpson, Mike LaSusa and Hailey Konnath. Editing by Marygrace Murphy.