AntitrustConnect Blog

SUPREME COURT PREVIEW: Is the Supreme Court about to hand the Federal Trade Commission another enforcement setback?

Jeffrey May (Wolters Kluwer) · Saturday, October 1st, 2022

The U.S. Supreme Court this term will hear arguments in a case questioning whether respondents in a Federal Trade Commission proceeding can challenge the constitutionality of the FTC's procedures and structure in federal district court while an administrative action is pending or whether they must wait for appellate court review of a Commission cease-and-desist order. The case, *Axon Enterprise v. FTC*, Dkt. 21-86, presents a potential threat to FTC enforcement efforts undertaken through what is known as Part 3 litigation. Part 3 or administrative litigation can serve as an alternative to district court litigation as an enforcement mechanism for the FTC, or it can be used in combination with federal litigation as in the case of a preliminary injunction action in federal court against a proposed merger alongside an administrative challenge.

At issue before the Supreme Court is a decision of the U.S. Court of Appeals in San Francisco, holding that a federal district court lacked jurisdiction to hear a constitutional challenge to the FTC Act while the administrative process over the consummated combination of Axon Enterprise, Inc., a manufacturer of tasers and body-worn cameras for law enforcement, and rival Vievu LLC, was pending. Simply put, Axon argues it should be permitted to pursue a federal court action against the agency without waiting for the administrative process to run its course, and the government takes the position that Axon should not.

What is at Stake?

If the Court were to rule against the FTC, the agency would be faced with collateral constitutional challenges to investigations and administrative processes in federal district court. Currently, these issues first must be addressed by an FTC administrative law judge, with an appeal to the five-member Commission, followed by federal appeals court review.

Opening the courthouse doors at the federal district court level to FTC respondents would have a major impact on both the competition and consumer protection missions at the FTC. With an opportunity to raise constitutional challenges in court up-front, targets might be less likely to settle FTC actions. Settlement often seems like the best option for respondents when they fear years of administrative litigation. Correspondingly, the FTC would face delays in pursuing its enforcement efforts and might be more reluctant to pursue Part 3 litigation.

Recent Supreme Court Setback for FTC

If the Supreme Court were to allow district court jurisdiction over constitutional claims by respondents in FTC actions, it would be the second major setback for the agency delivered by the Court in recent years. And that earlier case serves as an example of how a quick legislative "fix" for a Supreme Court decision curtailing enforcement authority is not guaranteed.

The Court's decision to hear the *Axon* case follows an April 2021 decision restricting FTC enforcement powers. In *AMG Capital Management, LLC v. FTC*, the Court rejected the agency's argument that it was authorized to obtain monetary relief directly from courts under Section 13(b) of the FTC Act. That case involved consumer protection claims; however, it has had an impact on the FTC's competition mission as well.

Legislation, known as the proposed Consumer Protection Remedies Act of 2022 (H.R. 2668; S. 4145), is the intended fix to restore the FTC's authority to go directly to federal courts to seek injunctions to obtain monetary compensation and other relief for consumers. Like the bulk of proposed antitrust legislation pending in Congress this term, the bill is stalled. The House version has passed that chamber; however, the Senate version remains pending. Senator Maria Cantwell (D., Wash.), chair of the Senate Committee on Commerce, Science, and Transportation, which oversees the FTC, continues to work to pass the measure. In the meantime, the FTC's efforts to obtain disgorgement or restitution pursuant to Section 13(b) have been hobbled. Thus, a legislative fix to address collateral constitutional challenges against the FTC in federal district court is far from guaranteed.

Not Just the FTC—Related Supreme Court Case Involving Administrative Law

In addition to considering the administrative law issues raised in *Axon* in the context of the FTC, the High Court is taking up a similar question with respect to federal district court jurisdiction to consider Securities and Exchange Commission proceedings in *Securities and Exchange Commission v. Cochran*, Dkt. 21-1239. In that case, the Fifth Circuit, sitting *en banc*, held that the Securities Exchange Act of 1934 did not strip federal district courts of subject-matter jurisdiction to hear a constitutional challenge to SEC ALJ removal protections. The Fifth Circuit decision in *Cochran v. SEC* creates a circuit conflict with the Ninth Circuit decision in the *Axon* case. The government filed a petition for review in the *Cochran* case.

The question presented is whether a federal district court has jurisdiction to hear a suit in which the respondent in an ongoing SEC administrative proceeding seeks to enjoin that proceeding, based on an alleged constitutional defect in the statutory provisions that govern the removal of the administrative law judge (ALJ) who will conduct the proceeding.

The Court granted the petition in May 2022. In light of the overlapping issues with the *Axon* case, briefing was consolidated in both cases. There will be separate arguments, however. Arguments in both cases will be heard on November 7, 2022.

The Dispute Before the Court in the *Axon* Case

In January 2022, the Supreme Court agreed to take up the issue of whether federal district courts have jurisdiction over suits challenging the constitutionality of the FTC's procedures and structure while an administrative action is pending. The underlying action was brought by taser/body-worn camera maker Axon. The company filed a federal district court action, seeking to block an FTC administrative action over the company's acquisition of Vievu, described by Axon as "an essentially insolvent competitor." Shortly after the company brought the federal district court

action, the FTC announced an administrative complaint challenging the consummated acquisition. The district court dismissed Axon's complaint for lack of subject matter jurisdiction, ruling that the FTC's statutory scheme required Axon to raise its constitutional challenge first in the administrative proceeding. A divided Ninth Circuit panel affirmed, concluding that, although the FTC Act is silent on the subject, Congress impliedly stripped the district courts of jurisdiction to hear such cases and required parties to move forward first in the agency proceeding. Because Axon could raise its constitutional claims to the federal court of appeals if necessary, it would have meaningful judicial review of its claims under the Supreme Court's decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), according to the Ninth Circuit. A dissent, on the other hand, took the position that "challenges to an agency's structure, procedures, or existence, rather than to an agency's adjudication of the merits on an individual case, may be heard by a district court." A petition for rehearing en banc was denied.

Petition for review by the Supreme Court. In its petition for review, Axon raised two questions to the Supreme Court: (1) whether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the FTC's structure, procedures, and existence by granting the courts of appeals jurisdiction to "affirm, enforce, modify, or set aside" the Commission's cease-and-desist orders; and (2) whether the structure of the FTC, including the dual-layer for-cause removal protections afforded its ALJs is consistent with the Constitution.

Axon received support for its petition from friends-of-the-court, including the U.S. Chamber of Commerce, the Americans for Prosperity Foundation (AFPF), and the Washington Legal Foundation. According to the Chamber of Commerce, the "Petitioner is the tip of the iceberg of private litigants facing the prospect of having to endure unconstitutional FTC adjudicatory proceedings now just to obtain judicial review later."

The appellate court departed from the plain text of the FTC Act, which provides for direct appellate court review for "an order of the Commission to cease and desist from using any method of competition or act or practice," the AFPF contended. In addition, the advocacy group said the Ninth Circuit made the "all-too-common" mistake of "overreading" *Thunder Basin.*

The Washington Legal Foundation took the position that: "the Ninth Circuit's decision … bars meaningful judicial review of Axon's meritorious constitutional claims. It allows a non-Article III tribunal—the FTC—to decide this issue. That violates Article III's clear command."

Petition granted as to jurisdictional issue. The justices agreed to take up the first question only. With respect to the jurisdictional issue, Axon argues that it should be allowed to raise the question in federal court prior to the end of the administrative process because the FTC Act did not specifically exclude federal oversight of questions of the agency's constitutionality. "When there is an ongoing, glaring violation of the Constitution of the kind Axon is enduring, only the clearest of textual prohibitions on judicial review could potentially preclude judicial review. Nothing in the FTC Act comes close," the company argued.

In its brief, Axon contends that it faces the prospect of years of proceedings before "an unaccountable and unconstitutionally structured agency," and that the primary adjudicator, the ALJ, is accountable to "neither the Federal Trade Commission (FTC) nor the President." The company said that its transaction was subject to a "black-box system" in which some cases are reviewed pursuant to an FTC administrative process and some by the Department of Justice and federal courts. It suggests that the criteria for the sorting are unarticulated.

Additionally, Axon argues that Congress did not "consign [it] to suffer through an administrative proceeding overseen by unconstitutional actors" before it could challenge the FTC's "structure, procedures, or existence." Rather, Congress vested federal district courts with jurisdiction to resolve "unconstitutional actions before the damage is irreparably done."

Axon points out that the FTC Act does not say anything about "divesting district courts of jurisdiction over constitutional challenges," and that such a challenge to an agency existence is "not a challenge to a cease-and desist order." These collateral claims are arguably not the type intended to be reviewed under the current statutory structure. According to Axon, "[s]tructural constitutional claims are the bread and butter of Article III courts, not Article II agencies." Moreover, the FTC Act does not equip federal appellate courts with "the tools to address constitutional challenges to an agency's structure, procedures, and existence."

Government consolidated response. According to the consolidated response brief of the federal parties filed in August 2022 (filed pursuant to the decision to have consolidated briefing in the two cases), both the FTC Act and Securities Exchange Act set out detailed schemes for judicial review of orders issued by the commissions during administrative adjudications and neither Axon nor Cochran may "short-circuit the review schemes established by Congress" and evade those limits by suing the commissions in district court before agency proceedings conclude.

The government contends that this view is supported by both the express terms of the Administrative Procedure Act and by precedent. "Until the Fifth Circuit's decision in *Cochran*, the courts of appeals had uniformly agreed that the FTC Act and Exchange Act preclude district-court review of ongoing FTC and SEC administrative proceedings," it was argued. The government takes the position that the parties to the proceedings must seek judicial review in the courts of appeals following the conclusion of agency proceedings. One rationale for this is that allowing judicial intervention each time the Commission or an ALJ takes one of the "myriad preliminary steps on the way to a final order" would interfere with the orderly and efficient conduct of the proceeding. The government also rejects the petitioners' arguments that their claims lie outside the Acts' review schemes because they are challenging the lawfulness of the Commission proceedings themselves, which impose significant burdens on them that reviewing courts cannot undo once the proceedings conclude.

Axon reply. "Allowing unconstitutionally unaccountable agencies to exercise virtually unfettered power with little prospect of judicial review is a recipe for separation-of-powers disaster," Axon contends in its reply brief. Axon notes the Commission's winning record in administration litigation and says that the "decks are … heavily stacked in the FTC's favor." It points to resulting "lopsided settlements disconnected from the merits" in the face of FTC administrative litigation. The company adds that in negotiations with the FTC, the agency even rejected the company's offer to walk away altogether from the supposedly offending transaction.

Axon goes on to say that "there is nothing to fear in allowing challenges like Axon's to proceed in district court beyond a reaffirmation of the Framers' vision."

"If the current structures conform to the Framers' design, then the courts will confirm as much, and the scope for further structural challenges will be minimal and manageable," according to Axon. "But if the current structures are, in fact, unconstitutional, the governed deserve to know as much before they are forced to endure constitutional injuries before unconstitutional and unaccountable government officials."

A friend-of-the-court brief offered by the American Antitrust Institute (AAI) questions Axon's "zeal to impugn the agency with self-serving misrepresentations that further their strategic litigation objectives." AAI seems to turn Axon's argument back on the company. Axon argues that the current process allows the FTC to "draw out investigations and inflict mounting costs." AAI takes the position that parties to a consummated merger like Axon would initiate district court proceedings if allowed in order to "delay enforcement proceedings and perpetuate what is an ongoing injury to the public but an ongoing profit center for the firms."

Cochran reply in related SEC case. Michelle Cochran, petitioner in the related SEC action, took issue with the government's justifications for denying district court jurisdiction. In that case, Cochran—a certified public accountant—was fined for violating the Exchange Act for failing to comply with auditing standards issued by the Public Company Accounting Oversight Board. Ultimately, the Fifth Circuit decided that a federal district court had jurisdiction to hear a constitutional challenge to SEC ALJ removal protections. In her reply brief, Cochran makes the simple argument that district courts have jurisdiction over all civil actions arising under the Constitution pursuant to 28 U.S.C. §1331, and the Exchange Act's grant of jurisdiction to courts of appeals over final SEC orders does not strip district courts of the jurisdiction granted by Section 1331 over structural constitutional claims that are not tied to any final SEC order. Cochran goes on to say that the Supreme Court's 2010 decision in *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477—another implied preclusion case—"rejected the government's argument that Section 78y [of the Securities Exchange Act] explicitly or implicitly ousts district courts of their jurisdiction over the kind of claims at issue here." Cochran urges the Court to apply its reasoning in *Free Enterprise Fund v. PCAOB* to allow federal district courts to rule on the constitutionality question without first forcing the accused party to undergo the lengthy and expensive administrative process.

The Court is scheduled to hear arguments in both cases on November 7. A decision is anticipated to come some time in 2023 before the end of the Court's current term.

Other Pending Supreme Court Petitions in Antitrust Cases

As the Court starts its new term, *Axon v FTC* is the only antitrust case currently scheduled to be heard. However, there are a handful of other petitions on the docket of interest to antitrust practitioners.

Standing to challenge National Football League team relocation. The City of Oakland asked the U.S. Supreme Court to consider a decision of the U.S. Court of Appeals in San Francisco rejecting its antitrust claims against the Oakland Raiders football team on antitrust standing grounds. Oakland sued the Raiders, the National Football League, and the other 31 NFL teams for violating federal antitrust law in connection with the Raiders' decision to move to Las Vegas and the NFL's approval. Oakland alleged that the defendants created artificial scarcity in their product of NFL teams, and then used that scarcity to demand supracompetitive prices from host cities. When Oakland could not pay, defendants punished it by allowing the Raiders to move to Las Vegas. Oakland alleged that the defendants' conduct was an unlawful horizontal price fixing scheme. The Ninth Circuit held that the city established Article III standing, but its price fixing claim failed for lack of antitrust standing. Oakland's injuries were less direct than those of actual purchasers, such as the cities of Las Vegas and Los Angeles, each of which recently acquired NFL teams, presumably by agreeing to supracompetitive prices, according to the appellate court. Further, the city's contention that, in the absence of the defendants' challenged practices, it would

have retained the Raiders was deemed too speculative to establish antitrust standing. The question presented in the city's petition for review is whether a court may deny a plaintiff with an antitrust injury proximately caused by a defendant's antitrust violation a Clayton Act cause of action based on a multifactor, prudential balancing test of "antitrust standing." The petition is *City of Oakland v. Oakland Raiders*, Dkt. 21-1243.

International comity considerations in the context of an alleged vitamin price fixing conspiracy. Vitamin C purchasers have asked the Supreme Court to review a decision of a divided U.S. Court of Appeals in New York City, rejecting an antitrust case against Chinese vitamin C manufacturers on international comity grounds. The vitamin C purchasers argue that the appeals court's approach violated both Supreme Court precedent and the Court's direct instructions. The appellate court concluded that the Chinese government required its manufacturers to collude on the export prices and quantities of Vitamin C, making it impossible for the manufacturers to comply with both Chinese regulations and U.S. antitrust law. In their petition for review, the purchasers have asked the Supreme Court to determine whether courts may reinterpret the same text of the Sherman Act case by case using a discretionary ten-factor balancing test under the doctrine of prescriptive comity, and whether a court interpreting the meaning of foreign law under Federal Rule of Civil Procedure 44.1 is limited to the "face" of written legal materials or may also consider evidence as to how foreign law is implemented and enforced that would be relevant to the interpretive inquiry in the foreign legal system.

The petitioners have the support of the U.S. Chamber of Commerce. According to the Chamber's friend-of the-court brief, the Second Circuit erred in "subordinating the plain meaning of U.S. law to a policy-laden substantive canon largely of its own creation." The Chamber of Commerce argues that the Second Circuit's test was a departure from prior holdings on comity and would materially restrict the scope of substantive review that U.S. courts typically exercise when applying the doctrine. Therefore, the ruling threatens to upend many vital areas of law that call on courts to balance foreign and domestic interests under the rubric of international comity.

The petition is *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, Dkt. 21-1283.

The fate of these two petitions could come as early as the first Monday in October or shortly thereafter. Both petitions are set to be considered by the justices on September 28.

Challenge to multiple listing service rules. Word from the Court on whether it will take up an antitrust petition filed on September 27, 2022, by the National Association of Realtors (NAR) will come later in the term. The NAR, a trade association for real estate professionals, which establishes rules for multiple listing services (MLSs), seeks review of a decision of the U.S. Court of Appeals in San Francisco reviving an action brought by The PLS.Com, LLC. PLS challenges an NAR policy that required members of an NAR-affiliated MLS, who chose to list properties on the PLS real estate database, also to list those properties on an MLS. PLS, whose business model utilizes "pocket listings" in the home buying process and is purportedly harmed by the MLS rule, alleges that the policy effectuates a group boycott and thereby prevents PLS from entering the market for online real estate listings.

The NAR contends that the Ninth Circuit failed to follow the Supreme Court's landmark decisions in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) ("*Amex*"), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) ("*Illinois Brick*"), "sowing confusion and inviting future courts to

ignore or misapply fundamental principles of antitrust law." The petition asks: (1) whether courts, in defining the relevant antitrust market for a two-sided platform with indirect network effects, may simply elect not to analyze both sides of the market, notwithstanding this Court's command that they "must" do so in *Amex*; and (2) whether a competitor can establish standing based on harm to alleged members of a conspiracy where *Illinois Brick* established the "indirect purchaser" rule such that the first party outside the conspiracy has standing to sue. The petition is *National Assn. of Realtors v. The PLS.com, LLC*, Dkt. 22-289.

Court watchers waiting for a decision in the *Axon* case can expect more antitrust questions to be raised to the Court over the course of its October 2022 term.

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