ARTICLE

Fifth Circuit Addresses Constitutional Challenges to FTC Authority in Illumina-Grail

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Introduction

On December 15, 2023, the U.S. Court of Appeals for the Fifth Circuit issued its decision in *Illumina, Inc. v. FTC*. [1] Although the court vacated and remanded the Commission's order to divest Grail based on the Commission's treatment of the merging parties' rebuttal evidence, it largely upheld the Commission's decision. On December 17, 2023, after losing at the Fifth Circuit and following an EU order to unwind the merger, [2] Illumina announced that it would divest Grail. [3]

Although notable for its application of substantive vertical merger law, the Fifth Circuit also grappled with what has become an increasingly common feature of administrative law: challenges to the constitutionality of administrative proceedings. After the Supreme Court's decision in *Axon Enterprise, Inc. v. FTC* to allow constitutional challenges to be brought in district court without first exhausting agency review procedures, [4] such challenges are becoming more common.

Although the Fifth Circuit quickly dispensed with the parties' four constitutional arguments in a relatively short portion of the opinion, the decision is unlikely to provide any kind of definitive answer or analysis of these claims. Many of the challenges the parties advanced are likely to be resolved in cases involving other administrative agencies. But, especially given the FTC's recent statements regarding its regulatory authority, [5] we can also expect to see broader, FTC-specific constitutional challenges that will go beyond the claims advanced in *Illumina*. This article analyzes those challenges from a constitutional and administrative law perspective, and offers insight into how courts may resolve these difficult questions.

Background

The Illumina-Grail merger involved "next-generation" DNA sequencing technology ("NGS") that is used in cancer detection testing. Illumina has developed a principal NGS testing platform that underlies cancer detection tests. [6] In 2015, Illumina founded Grail as a wholly owned subsidiary that would use Illumina's NGS platform as the basis for a multi-cancer early detection ("MCED") test. [7] In 2017, Illumina spun off Grail to raise capital, reducing its ownership to only 12% of Grail. [8] In September 2020, Illumina agreed to reacquire Grail, and the FTC challenged the acquisition as a violation of section 7 of the Clayton Act. [9] The crux of the FTC's challenge was that Illumina's underlying NGS testing platform is necessary for a number of MCED tests that could compete with Grail's test, and that the vertical integration between Illumina, which controls the dominant NGS technology, and Grail, which has an MCED test based on that technology, would

potentially foreclose competition from rival MCED tests. [10] The FTC's administrative law judge (ALJ) determined that such foreclosure was speculative because no other MCED tests were on the market. Judge Chappell also found foreclosure unlikely, both because other tests were not substitutes for Grail's test and because it would jeopardize Illumina's revenue from the NGS technology itself. [11] The Commission reversed the ALJ decision, and Illumina appealed the Commission's decision to the Fifth Circuit. [12]

In addition to challenging the Commission's determinations on the substantive law, the parties advanced four different constitutional challenges to the Commission's proceedings:

1. The Federal Trade Commission Act ("FTC Act") contained an unconstitutional delegation of legislative power to the FTC, not in the substantive standard to apply but in choice of *procedure* to apply, specifically the choice between using an administrative proceeding under section 5(b) of the FTC Act or a district court enforcement action under section 13(b) of the FTC Act. [13] The parties argued that the only guidance Congress offered the FTC in choosing between administrative adjudication (section 5(b)) and district court enforcement (section 13(b)) – "in the interest of the public" – failed to provide the "intelligible principle" [14] necessary to prevent congressional delegations of authority from being unconstitutionally vague, especially since the same standard appears in both provisions. [15]

2. The FTC is unconstitutionally configured because Commissioners are not removable at will by the President, [16] a re-assertion of the challenge rejected in *Humphrey's Executor v. United States*. [17]

3. The structure of FTC investigation and prosecution violates due process because the FTC serves as "both prosecutor and judge," leading to a biased proceeding. [18]

4. The division of antitrust enforcement authority between the Department of Justice and the FTC [19] lacks a rational basis, and therefore violates equal protection. [20]

The Fifth Circuit dispensed with the constitutional claims relatively quickly – using fewer than 1,000 words and relying on the application of what the court took to be clear precedent. The first claim, the court held, was inconsistent with the panoply of cases holding that the "public interest" standard provides a principle sufficiently intelligible to survive a nondelegation challenge, [21] the second conflicted with *Humphrey's Executor*

itself (which, although limited in recent years, the Supreme Court has not overruled [22]), the third was irreconcilable with both Supreme Court and Fifth Circuit precedent upholding the FTC's institutional structure, [23] and the fourth could not be squared with the exceedingly permissive standard for governmental rationality, which the Fifth Circuit held was satisfied by the "interagency clearance process" by which the DoJ and FTC agree between themselves as to which of the two agencies will lead enforcement as to any particular antitrust violation. [24]

This will not be the last constitutional challenge to agency authority given the Supreme Court's holding in *Axon*.. The parties' choice-of-procedure claim mirrors one currently pending against the Securities and Exchange Commission in the Supreme Court, [25] and it was hardly a surprise when Meta recently filed an *Axon*-enabled lawsuit in federal court to enjoin FTC's administrative proceedings on constitutional grounds, including a number of theories advanced by the parties in the *Illumina* case. [26]

Moreover, substantive developments in administrative law are likely to embolden defendants on these issues. There has been a trend in the Supreme Court toward stricter constitutional separation of powers law related to agencies. After *Humphrey's Executor* upheld removal limitations for agencies exercising "quasi-judicial and quasi-legislative" powers like the FTC, the Court expanded the scope of permissible removal limitations to some even purely executive officers in 1988's *Morrison v. Olson*. [27] But the period since *Morrison* has seen a shift back toward invalidating removal limitations, most recently in and 2020's *Seila Law*, which invalidated removal limitations for single-administrator agencies like the Consumer Finance Protection Bureau. [28]

At the same time, the Court has announced restrictions on its approach to *statutory* questions of agency power. Since the 1984 *Chevron* decision, agencies have received considerable deference in the interpretation of their organic statutes. [29] In 2000, the Supreme Court introduced the "major questions doctrine," limiting *Chevron* deference when doing so would seemingly grant agencies extraordinary interpretive authority, [30] and in 2022 the Court applied the doctrine to limit the EPA's interpretation on the Clean Air Act. [31] On January 17, 2024, the Court will hear oral argument in two cases seeking to overturn *Chevron* entirely. [32]

The FTC has hardly been immune from challenges over its authority, both constitutional and interpretive. As the Fifth Circuit pointed out, one of the leading cases in constitutional administrative law pertains to the FTC: *Humphrey's Executor v. United States*. Questions about the FTC's authority to interpret and enforce the antitrust laws go well beyond its constitutional structure, and such questions have been raised about the FTC since its

inception. When the FTC was established, there was no clear precedent or guidance for an agency of this kind. In the course of conversations during the Wilson Administration over the initial formation and ultimate role of the FTC, Louis Brandeis himself had doubts about the possibility that the FTC would exercise any kind of interpretive or adjudicatory authority, seeing that as a matter for lawyers and judges, not the kind of economic and industry experts he pictured occupying the FTC. Instead, he saw the FTC as more of a "sunshine" agency that would enable information sharing among industry participants. [33]

In the 1920 case of *FTC v. Gratz*, the FTC's interpretive authority was challenged, with the Supreme Court rejecting an FTC interpretation of "unfair methods of competition" to include an early version of tying. [34] In that case, Justice Brandeis dissented, in a way that actually connects to one of the challenges advance by the parties in *Illumina*. He likened the FTC Act's "unfair methods of competition" to the "just and reasonable" standard applied to railroad rates by the Interstate Commerce Commission, [35] a standard with close ties to the "public interest" standard the court invoked to refute the parties nondelegation challenge in *Illumina*.

On the question of interpretation, the FTC has recently changed its position on deference. The FTC has not previously asked for deference, and FTC determinations are currently reviewed *de novo* on matters of law and under the "substantial evidence" standard for questions of fact. [36] But in 2022, the FTC issued a Policy Statement asserting just such a claim for deference from courts, [37] while simultaneously suggesting substantial expansion of its interpretation of section 5 of the FTC Act to cover a variety of competitive practices beyond those that would violate the Sherman Act. [38]

The degree and speed of change in administrative law makes it difficult to predict just how such claims like those advanced in *Illumina* will be handled in the future. For one thing, the range of claims advanced in *Illumina* span a wide array of constitutional doctrines, from nondelegation to removal limitations to due process to equal protection. The Fifth Circuit understandably eschewed any kind of thorough constitutional analysis in favor of what it considered to be clear precedent. But future courts, and certainly the Supreme Court, which has shown itself open to such arguments, will not necessarily dismiss such claims so quickly, and there are other reasons to think that *Illumina* itself will not serve much precedential effect in limiting similar claims.

For instance, the parties' nondelegation claim was extremely limited – it pertained only to a choice between two procedures for handling a case. Similarly, the rational basis claim pertained not to the substance of the FTC determination or even to the FTC's decisionmaking process but instead to the FTC and DOJ's joint choice as to how to allocate

cases between them. To the extent that claims challenging FTC authority depend on constitutional separation of powers, the very narrow nature of the harms alleged in *Illumina* might itself affect whether there is in fact a constitutional problem. intervention to be corrected.

In *United States v. Morrison*, for instance, the Court authorized a removal limitation on the independent counsel in part because the independent counsel's prosecutorial authority was so limited. [39] In *Seila Law*, the Court held that a removal limitation on a single director was invalid *because* the director's power was so broad, distinguishing *Morrison* on this very ground. [40] When it comes to separation of powers claims, the greater the power, the less willing the Court has been to accommodate deviations from the normal constitutional allocation of power. This means that the fairly narrow claims advanced in *Illumina* (with the exception of the wholesale structural claims foreclosed by *Humphrey's Executor* itself) might provide only limited guidance as to how courts will handle such claims when the stakes are higher, such as when the allocation of authority to a particular decisionmaker could potentially lead to a different substantive outcome.

In this way, there is the potential for interplay between the Court's evolving separation of powers and *Chevron*/statutory interpretation lines of cases. That was the message in *West Virginia v. EPA*, in which Chief Justice Roberts cited separation of powers principles as a reason for limiting the scope of agency interpretive authority under the Administrative Procedure Act. [41] The converse is also likely to be true: the broader the power asserted, the more sensitive the Court will be to constitutional limits on the exercise of that authority.

Conclusion

Illumina's decision to unwind the merger brought an end to both its substantive and constitutional challenges to the Commission's ruling, but the Fifth Circuit decision in *Illumina* is unlikely to be the last word on either point. The growing sense among litigants that the Supreme Court is open to constitutional challenges to agency authority is coming at exactly the same time that the FTC is asserting historically broad interpretive authority. After *Axon*, we can expect constitutional challenges to agency authority to become a regular feature of parties' litigation strategies in cases involving the FTC. What remains to be seen is precisely what form those challenges will take, and how courts will respond.

Endnotes

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