FOLEY & LARDNER LLP

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MAY 9, 2024

The FTC Noncompete Rule

Where Do We Go From Here?

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Agenda

How We Got Here
The build-up to the Noncompete Rule

Where We Are
The FTC’s Noncompete Rule and what it means

What Happens Next?
The legal challenges to the Noncompete Rule

Where Do We Go From Here?
How the legal challenges might play out and what that means for your business

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Background on the Federal Trade Commission

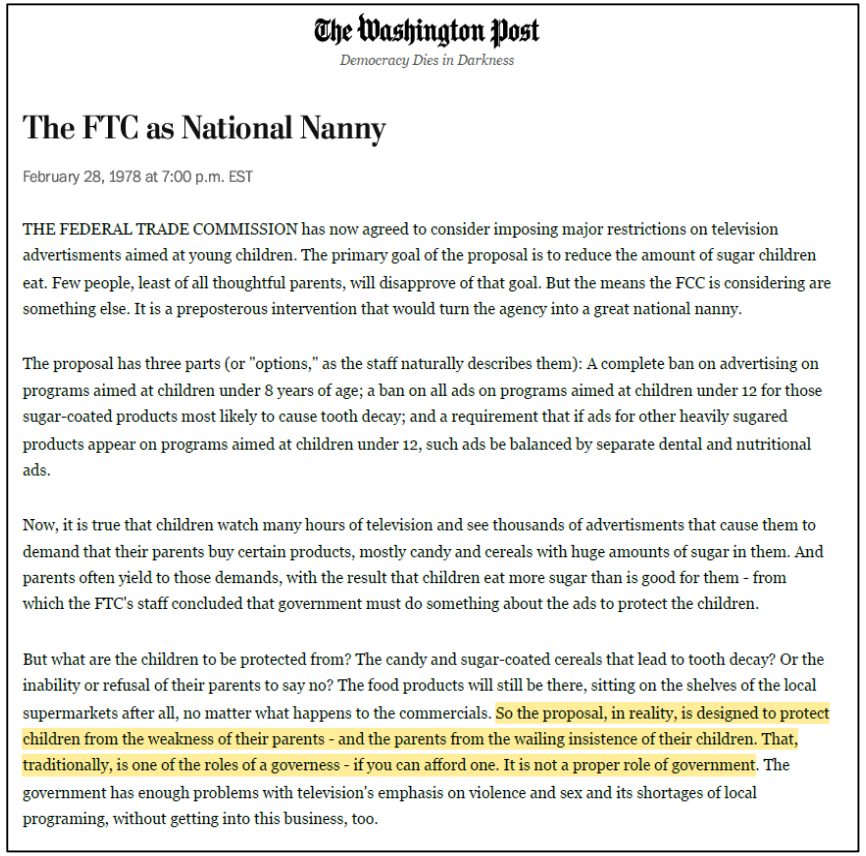
- The Federal Trade Commission (FTC) is a five-member Commission charged with protecting consumers and promoting competition.
  - Commissioners are appointed by the President and confirmed by the Senate. No more than three Commissioners may be from the same political party.
- The FTC shares antitrust enforcement powers with the Department of Justice, State AGs, and private plaintiffs.
- The FTC Act, however, gives the FTC a unique competition power: the prevention of **“unfair methods of competition” (UMC)** — a term that includes **but is also broader than** conduct that violates the antitrust laws.
- The FTC Act also gives the FTC a separate **consumer protection** power to prevent **“unfair or deceptive acts or practices” (UDAP)**.

The FTC in the 1960s-1970s

- Section 6(g) of the FTC Act gives the FTC the power "to make rules and regulations for the purpose of carry out the provisions of this subchapter."
- In the 1960s-1970s, the FTC used its § 6(g) powers to adopt a litany of substantive rules, most of which were adopted using both the FTC's UDAP **and** UMC powers:
  - "Octane Rule" declared it an UDAP and UMC not to disclose octane ratings on gas pumps
  - "Tablecloth Rule" declared it an UDAP and UMC not to disclose "cut" and "finished" sizes
- The FTC only adopted a single substantive rule on a "standalone" UMC basis (i.e., not using its UDAP authority as well): a rule requiring a written plan for disclosing promotional allowances for men's and boy's tailored clothing (the "Tailored Clothing Rule").
  - One year after passing the Tailored Clothing Rule, the FTC adopted general advisory guidelines about promotional allowance disclosures which were broadly applicable to all industries but, importantly, were **non-binding**.
  - The Tailored Clothing Rule was never enforced or litigated. It was repealed in 1994.

FTC Faces Backlash

- In 1975, Congress passed the “Magnuson-Moss Act” (“Mag-Moss”) which imposed onerous procedures before the FTC could adopt substantive UDAP rules. Rules were strengthened in 1980.
  - Mag-Moss does not, however, “affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition.”
- In 1978, the FTC considered a regulation against TV ads for sugary foods aimed at children. The backlash was severe.
- The Chamber of Commerce accused the FTC of trying to become the “second most powerful legislative body in the United States.”
- The Reagan Administration brought new leadership to the FTC.
- In the 1990s, the FTC formally repealed many of its substantive rules.



The Washington Post

Democracy Dies in Darkness

The FTC as National Nanny

February 28, 1978 at 7:00 p.m. EST

THE FEDERAL TRADE COMMISSION has now agreed to consider imposing major restrictions on television advertisments aimed at young children. The primary goal of the proposal is to reduce the amount of sugar children eat. Few people, least of all thoughtful parents, will disapprove of that goal. But the means the FCC is considering are something else. It is a preposterous intervention that would turn the agency into a great national nanny.

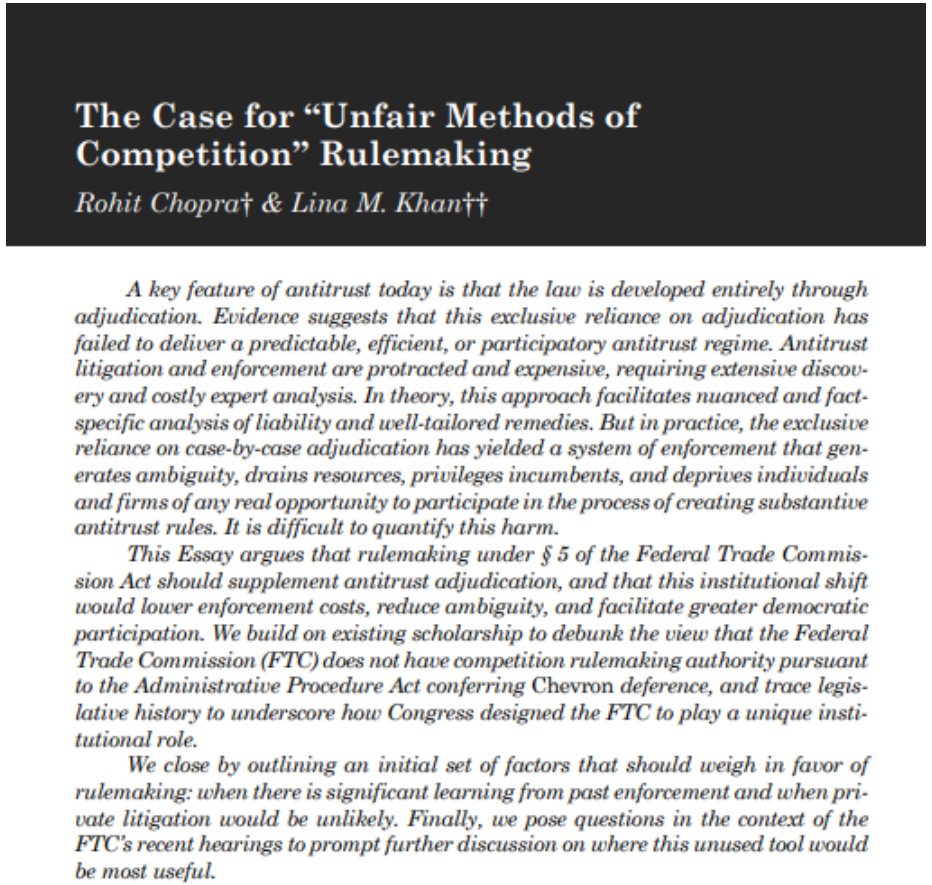
The proposal has three parts (or "options," as the staff naturally describes them): A complete ban on advertising on programs aimed at children under 8 years of age; a ban on all ads on programs aimed at children under 12 for those sugar-coated products most likely to cause tooth decay; and a requirement that if ads for other heavily sugared products appear on programs aimed at children under 12, such ads be balanced by separate dental and nutritional ads.

Now, it is true that children watch many hours of television and see thousands of advertisments that cause them to demand that their parents buy certain products, mostly candy and cereals with huge amounts of sugar in them. And parents often yield to those demands, with the result that children eat more sugar than is good for them - from which the FTC's staff concluded that government must do something about the ads to protect the children.

But what are the children to be protected from? The candy and sugar-coated cereals that lead to tooth decay? Or the inability or refusal of their parents to say no? The food products will still be there, sitting on the shelves of the local supermarkets after all, no matter what happens to the commercials. So the proposal, in reality, is designed to protect children from the weakness of their parents - and the parents from the wailing insistence of their children. That, traditionally, is one of the roles of a governess - if you can afford one. It is not a proper role of government. The government has enough problems with television's emphasis on violence and sex and its shortages of local programing, without getting into this business, too.

2020: A Renewed Interest in Rulemaking

- Since the Magnuson-Moss Act, the FTC has only identified and challenged "unfair methods of competition" through a case-by-case, "common law" enforcement action basis.
- In 2020, however, then-Commissioner Rohit Chopra and his then-adviser Lina Khan wrote a law review article arguing that the FTC still had the authority to adopt rules that specifically define the term "unfair methods of competition."
- The article gave the example of a rule about "***when noncompete agreements are permissible or not.***"



The Case for "Unfair Methods of Competition" Rulemaking

Rohit Chopra† & Lina M. Khan††

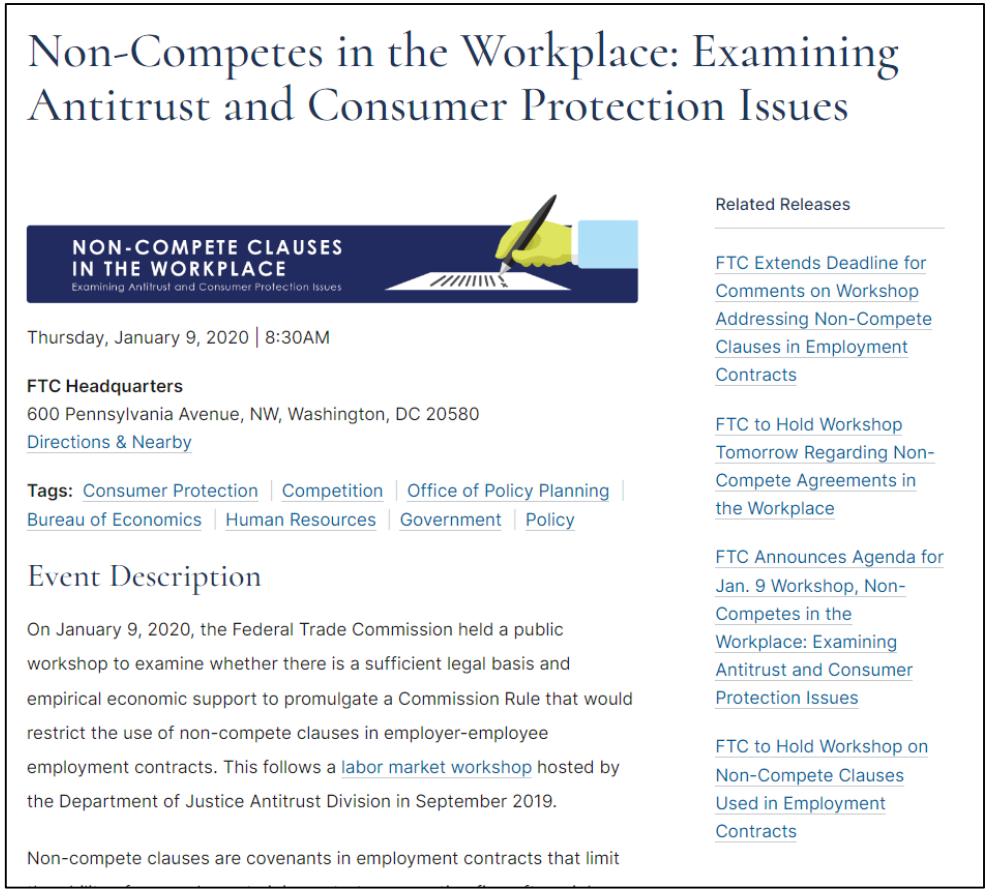
A key feature of antitrust today is that the law is developed entirely through adjudication. Evidence suggests that this exclusive reliance on adjudication has failed to deliver a predictable, efficient, or participatory antitrust regime. Antitrust litigation and enforcement are protracted and expensive, requiring extensive discovery and costly expert analysis. In theory, this approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the exclusive reliance on case-by-case adjudication has yielded a system of enforcement that generates ambiguity, drains resources, privileges incumbents, and deprives individuals and firms of any real opportunity to participate in the process of creating substantive antitrust rules. It is difficult to quantify this harm.

This Essay argues that rulemaking under § 5 of the Federal Trade Commission Act should supplement antitrust adjudication, and that this institutional shift would lower enforcement costs, reduce ambiguity, and facilitate greater democratic participation. We build on existing scholarship to debunk the view that the Federal Trade Commission (FTC) does not have competition rulemaking authority pursuant to the Administrative Procedure Act conferring Chevron *deference, and trace legislative history to underscore how Congress designed the FTC to play a unique institutional role.*

We close by outlining an initial set of factors that should weigh in favor of rulemaking: when there is significant learning from past enforcement and when private litigation would be unlikely. Finally, we pose questions in the context of the FTC's recent hearings to prompt further discussion on where this unused tool would be most useful.

2020: FTC Workshop on Noncompetes

- In early 2020, spurred by interest of then-Commissioner Chopra as well as then-Chair Simons, the FTC held a one-day, public workshop about the issue of noncompetes.
- Speakers discussed both the empirical literature and the jurisdictional question of whether the FTC would have the authority to move forward with some sort of rule, policy statement, or other guidance on noncompetes.
- One economist (cited in CoC lawsuit) opined that noncompete enforceability harms wages but that evidence of effects on "overall welfare" (including business and consumers) is limited.
- Covid hit two months later, sidetracking this project.



Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues

Thursday, January 9, 2020 | 8:30AM

FTC Headquarters
600 Pennsylvania Avenue, NW, Washington, DC 20580
Directions & Nearby

Tags: Consumer Protection | Competition | Office of Policy Planning | Bureau of Economics | Human Resources | Government | Policy

Event Description

On January 9, 2020, the Federal Trade Commission held a public workshop to examine whether there is a sufficient legal basis and empirical economic support to promulgate a Commission Rule that would restrict the use of non-compete clauses in employer-employee employment contracts. This follows a labor market workshop hosted by the Department of Justice Antitrust Division in September 2019.

Non-compete clauses are covenants in employment contracts that limit

Related Releases

FTC Extends Deadline for Comments on Workshop Addressing Non-Compete Clauses in Employment Contracts

FTC to Hold Workshop Tomorrow Regarding Non-Compete Agreements in the Workplace

FTC Announces Agenda for Jan. 9 Workshop, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues

FTC to Hold Workshop on Non-Compete Clauses Used in Employment Contracts

Noncompetes Become a Campaign Issue

- In a 2018 keynote address at the Brookings Institution on “The Future of the Middle Class,” then-citizen Biden identified noncompete clauses as a restraint on worker growth.
  - “You know, 40 percent of all the workers in the United States will during their careers have to sign a non-compete clause. Sandwich makers, not a joke. Sandwich makers.”
- Then, at the very first kickoff rally for his Presidential campaign, President Biden called for a ban on noncompete agreements for low-wage workers.

Executive Order 14036

- In 2021, after President Biden took office, he appointed Commissioner Chopra to serve as Director of CFPB. He also appointed Lina Khan to serve as Chair of the FTC.
- On July 9, 2021, President Biden signed Executive Order 14036, “On Promoting Competition in the American Economy”:
  - “[T]he Chair of the FTC is encouraged to consider working with the rest of the Commission **to exercise the FTC’s statutory rulemaking authority** under the Federal Trade Commission Act to **curtail the unfair use of non-compete clauses** and other clauses or agreements that may unfairly limit worker mobility.”

2023: First-Ever FTC Enforcement Actions

- On January 4, 2023, the FTC announced enforcement actions against three companies, alleging that their noncompetes with employees were an “unfair method of competition” in violation of the FTC Act.
  - “[T]hese actions mark the first time that the [FTC] has sued to halt unlawful non-compete restrictions.”
  - One company required security guards to sign two-year/100-mile noncompetes, which a Michigan court had previously found to be unlawful under state law.
  - All three companies settled by consent decree, basically agreeing not to do it again.

For Release

FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers

Agency action eliminates noncompetes covering thousands of workers, promoting greater economic opportunity and competition

January 4, 2023

Tags: Competition | Bureau of Competition | Unfair Methods of Competition

The Federal Trade Commission has taken legal action against three companies and two individuals, forcing them to drop noncompete restrictions that they imposed on thousands of workers. Drawing from the FTC's substantial expertise in this space, these actions mark the first time that the agency has sued to halt unlawful noncompete restrictions.

Related Cases

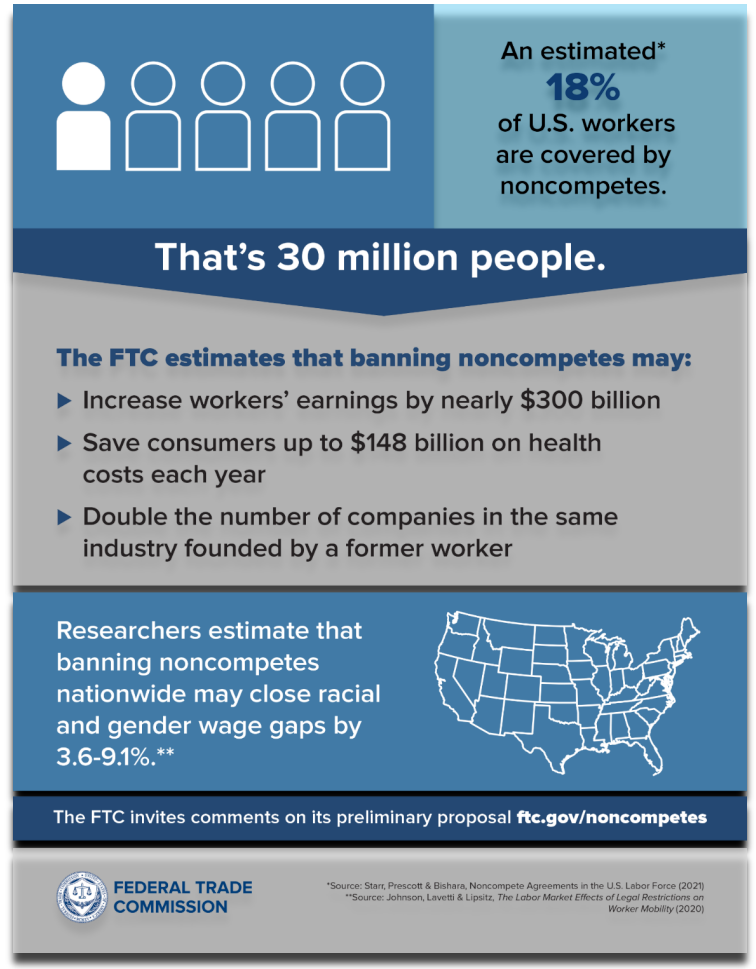
Prudential Security, et al., In the Matter of

O-I Glass, Inc., In the Matter of

Ardagh Group, et al., In the Matter of

The Next Day: Proposed Noncompete Rule

- The very next day, the FTC proposed its regulation that would declare virtually all employee noncompete agreements to be an "unfair method of competition" in violation of the FTC Act.
  - The FTC released a 216-page notice of proposed rulemaking, surveying the academic literature on noncompetes.
  - The FTC preliminarily found that noncompetes suppress wages, both for workers who are subject to them **and** for workers who are not.
  - The FTC also found that noncompetes raise consumer prices, increase market concentration, and discourage entry by new competitors.
- The FTC opened a 90-day window for public comments. Over 26,000 comments were submitted — >25,000 of which supported a ban.



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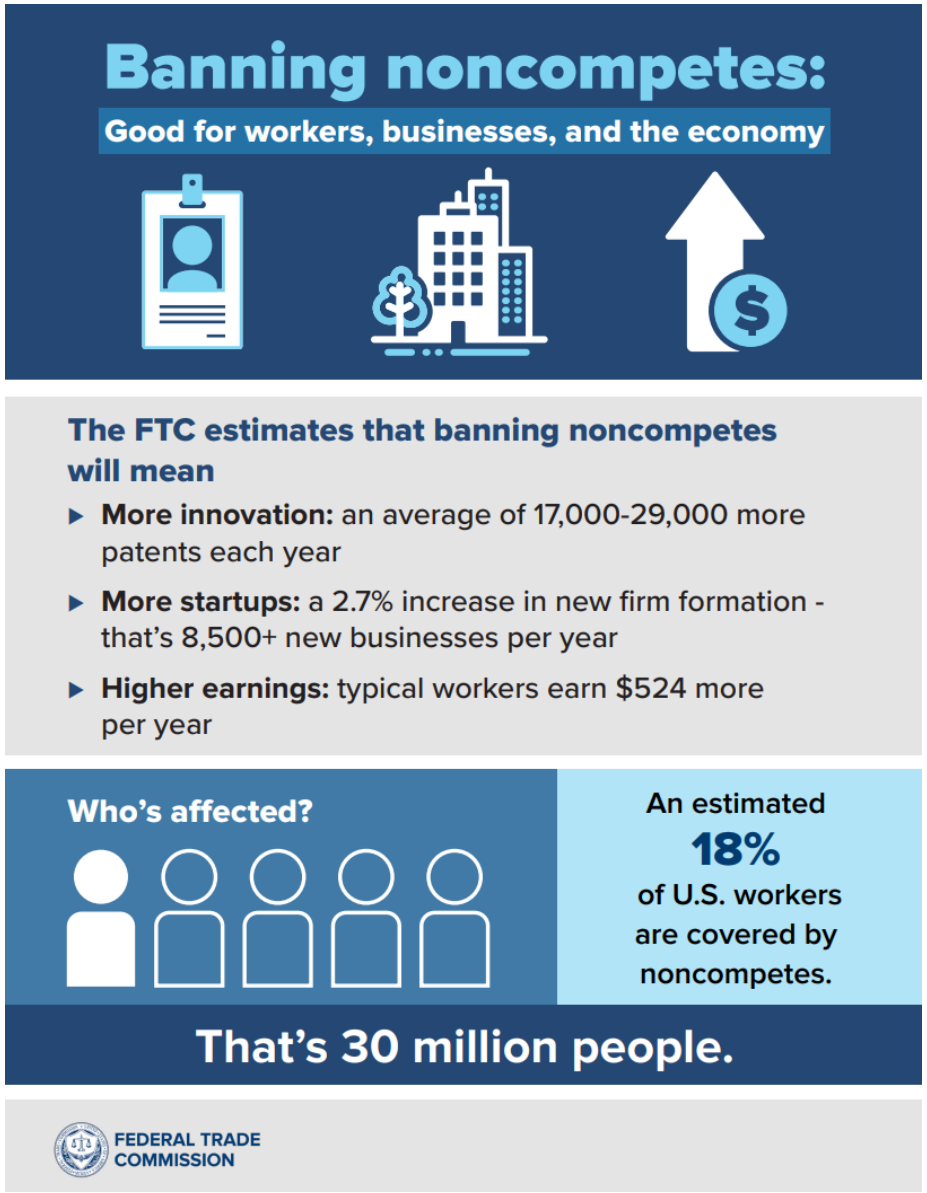
Final FTC Findings

- After a year-long process of reviewing and responding to comments, on April 23, 2024, the FTC voted, 3-2, to adopt the final Noncompete Rule.
- As factual support for the rule, the FTC found that banning noncompetes would result in:
  - Between $400-$488 billion in increased wages over the next decade, averaging $524 per worker per year
  - An additional 8,500 new businesses being created each year
  - An additional 17,000-29,000 more patents per year
  - A reduction in $74-$194 billion in spending on physician services over the next decade



The Noncompete Rule: Overview

- For >99% of workers, the Noncompete Rule declares it an "unfair method of competition" to enter into, enforce, or represent that a worker is subject to a noncompete clause.
  - "Worker" is defined broadly to include current or former employees, interns, volunteers, independent contractors, or sole proprietors.
  - "Non-compete clause" is defined as any term or condition that prohibits, penalizes, or functions to prevent a worker from either (i) seeking or accepting a job in the U.S. with a different employer or (ii) operating a business in the U.S. after the end of their employment.
- For the <1% of workers who are "senior executives," the Noncompete Rule declares it an "unfair method of competition" to enter into, enforce, or represent that a worker is subject to a noncompete clause **if** that noncompete clause was entered into **after the effective date** of the Rule.
  - "Senior executives" is defined narrowly to mean persons who (i) have officer-level "policy-making authority" for a business entity (i.e., final authority over significant organization-wide decisions) **and** (ii) earned at least $151,164 in the preceding year.

Notice Requirement

- For any noncompete clause subject to the ban, the Rule requires that employers give notice to workers that their noncompete clause will not be — and cannot be — enforced.
- The Rule includes model language for providing this notice, but employers may choose other forms of notice so long as it meets the requirements of the Rule.
- Notice may be provided by hand, mail, email, or text, at a worker's last known street address, email address, or phone number.
- If any employer has no record of a street address, email address, or phone number, then notice is not required.
- Notice must be provided in English, with an option for providing additional notice in other languages.

A new rule enforced by the Federal Trade Commission makes it unlawful for us to enforce a non-compete clause. As of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE], [EMPLOYER NAME] will not enforce any non-compete clause against you. This means that as of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE]:

- You may seek or accept a job with any company or any person—even if they compete with [EMPLOYER NAME].
- You may run your own business—even if it competes with [EMPLOYER NAME].
- You may compete with [EMPLOYER NAME] following your employment with [EMPLOYER NAME].

The FTC's new rule does not affect any other terms or conditions of your employment. For more information about the rule, visit [*link to final rule landing page*]. Complete and accurate translations of the notice in certain languages other than English, including Spanish, Chinese, Arabic, Vietnamese, Tagalog, and Korean, are available at [URL on FTC's website].

Exceptions

- The Noncompete Rule has three explicit exceptions:
  - It does not apply to a noncompete "entered into by a person pursuant to a bona fide sale of a business entity." This exception includes the sale of "the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets."
    - "Business entity" is defined to include subsidiaries and "divisions." But, oddly, "policy-making authority" does not include merely having authority over a "subsidiary" or "affiliate."
  - The Rule does not apply "where a cause of action related to a non-compete clause accrued prior to the effective date." In other words, the Rule does not provide a defense for breach of a noncompete agreement that occurred prior to the Rule's effective date.
  - The Rule does not apply to the enforcement of, or representations about, a noncompete "where a person has a good-faith basis to believe" that the Rule does not apply. This exception serves, for example, to protect attempts to enforce noncompetes in court so long as there is a "good-faith" basis for doing so.

Additional Provisions

- The Noncompete Rule is slated to go into effect 120 days from publication in the *Federal Register* (so, September 4, 2024).
- The Rule "supersedes [state] laws to the extent … that such laws would otherwise permit … a person to engage in conduct that is an unfair method of competition" under the Rule.
- The Rule includes a "severability" clause, so that "If any provision … is held to be invalid or unenforceable … the provision shall be construed so as to continue to give maximum effect of the provision permitted by law."

FEDERAL REGISTER

The Daily Journal of the United States Government

What “Noncompetes” Are Covered?

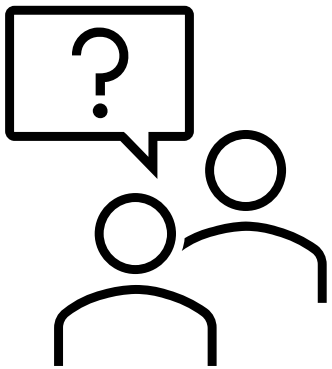
- The Rule defines a noncompete as any “term or condition” that “prohibits,” “penalizes,” or “functions to prevent” a worker from seeking a new job or starting/operating a new business.
- This definition has a few important implications:
  - Other forms of restrictive covenants, e.g., nondisclosure agreements, non-solicitation agreements, or “no business agreements,” will generally fall outside this definition. But the FTC says this is a “fact-specific inquiry,” giving the example of a NDA that bars a worker from using publicly available information. And, in any event, NDAs, non-solicits, etc., are always subject to the FTC’s general powers to prevent unfair methods of competition.
  - The Rule is not limited to freestanding “Noncompete Agreements.” Instead, for example, a discrete noncompete clause included within a larger “Nondisclosure Agreement” is subject to the Rule. But the Rule only prohibits entering into, enforcing, or representing that a worker is subject to a noncompete. Therefore, there is no requirement that pre-existing contracts be rescinded or reformed to comply with the Rule.

The Rule for “Senior Executives”

- The FTC found that most noncompete agreements are “exploitative and coercive” because they reflect “unequal bargaining power” between workers and employers.
- With respect to “senior executives,” however, the FTC found that noncompetes **do not** reflect unequal bargaining power. Instead, the rationale for regulating noncompetes with senior executives is that these noncompetes inhibit the formation of new businesses because senior executives are the most likely people to either form or lead new businesses.
  - Oddly, the FTC suggested that noncompetes with senior executives may pose a **greater** overall harm to competition than other noncompetes pose.
- Therefore, the Noncompete Rule only bans noncompetes with senior executives that are made **after** the effective date of the Rule.
- Again, “senior executive” is defined very narrowly: it captures a business entity’s president, CEO, officers with policy-making authority, or similar persons. It excludes merely “advising or exerting influence” over policy. And it excludes mere authority over a subsidiary or an affiliate.

Frequently Asked Questions

- Under what circumstances might a NDA/non-solicit rise to the level of a noncompete?
- What about a training repayment agreement?
- What about an incentive program that requires working for a period of time (e.g., vesting schedule for stock options)?
- Does the Rule apply to owners/partners in a business (e.g., springing noncompete arising out of repurchase rights)?
- What about “garden leave” agreements?



Limits on FTC Jurisdiction

- The FTC Act imposes jurisdictional limits on the FTC's ability to prevent "unfair methods of competition" when done by certain forms of businesses:
  - *"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."*
- Additionally, the FTC Act defines "corporations" in a specific way:
  - *"'Corporation' shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members…"*

Unpacking the FTC's Nonprofit Exemption

- The FTC **has** previously had success asserting "unfair methods of competition" jurisdiction over certain nonprofits, e.g., a nonprofit trade association, or a nonprofit physician-hospital organization that negotiated managed care contracts on behalf of private, for-profit medical practices.
- The FTC uses a two-part test for evaluating the nonprofit exemption:
  1. There needs to be an "adequate nexus" between the organization's activities and its public purposes; and
  2. The organization's net proceeds must be properly devoted to bona fide public, rather than private, interests.
- The FTC also notes that some nonprofits may have for-profit subsidiaries or staffing companies, which would be subject to the Noncompete Rule.
  - E.g., if a nonprofit healthcare system employs doctors through a for-profit medical group or through a for-profit staffing company, then those doctors would be subject to the Rule.

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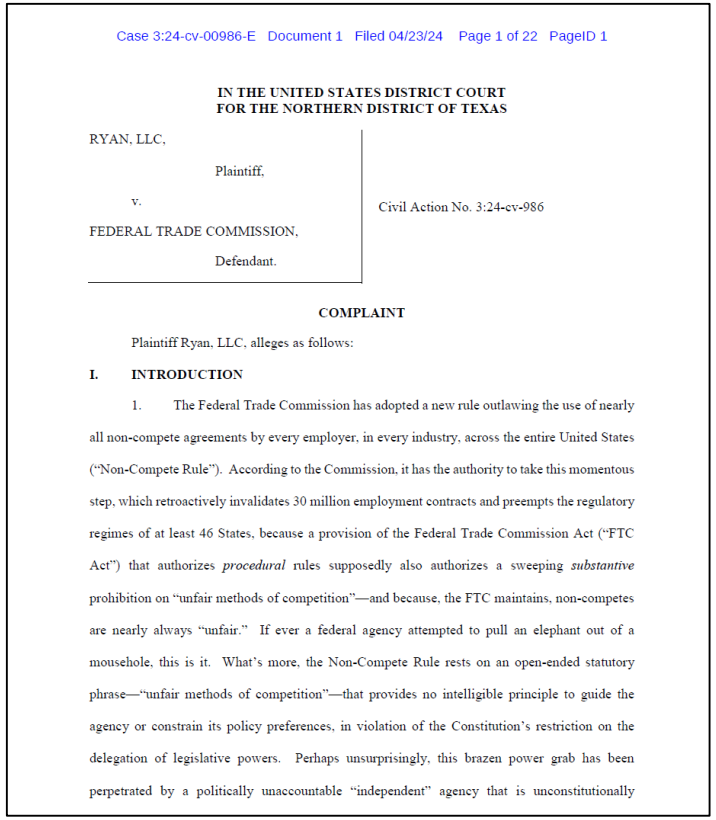
Three Lawsuits Filed Within Three Days



Case 3:24-cv-00986-E Document 1 Filed 04/23/24 Page 1 of 22 PageID 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

RYAN, LLC,

Plaintiff,

v.

FEDERAL TRADE COMMISSION,

Defendant.

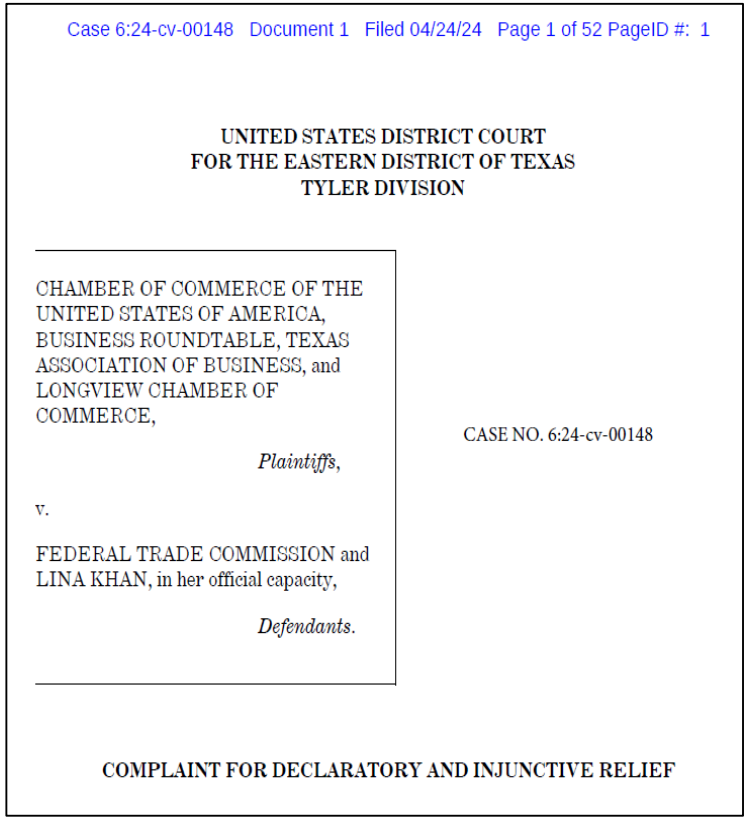
Civil Action No. 3:24-cv-986

COMPLAINT

Plaintiff Ryan, LLC, alleges as follows:

I. INTRODUCTION

1. The Federal Trade Commission has adopted a new rule outlawing the use of nearly all non-compete agreements by every employer, in every industry, across the entire United States ("Non-Compete Rule"). According to the Commission, it has the authority to take this momentous step, which retroactively invalidates 30 million employment contracts and preempts the regulatory regimes of at least 46 States, because a provision of the Federal Trade Commission Act ("FTC Act") that authorizes *procedural* rules supposedly also authorizes a sweeping *substantive* prohibition on "unfair methods of competition"—and because, the FTC maintains, non-competes are nearly always "unfair." If ever a federal agency attempted to pull an elephant out of a mousehole, this is it. What's more, the Non-Compete Rule rests on an open-ended statutory phrase—"unfair methods of competition"—that provides no intelligible principle to guide the agency or constrain its policy preferences, in violation of the Constitution's restriction on the delegation of legislative powers. Perhaps unsurprisingly, this brazen power grab has been perpetrated by a politically unaccountable "independent" agency that is unconstitutionally



Case 6:24-cv-00148 Document 1 Filed 04/24/24 Page 1 of 52 PageID #: 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, TEXAS ASSOCIATION OF BUSINESS, and LONGVIEW CHAMBER OF COMMERCE,

Plaintiffs,

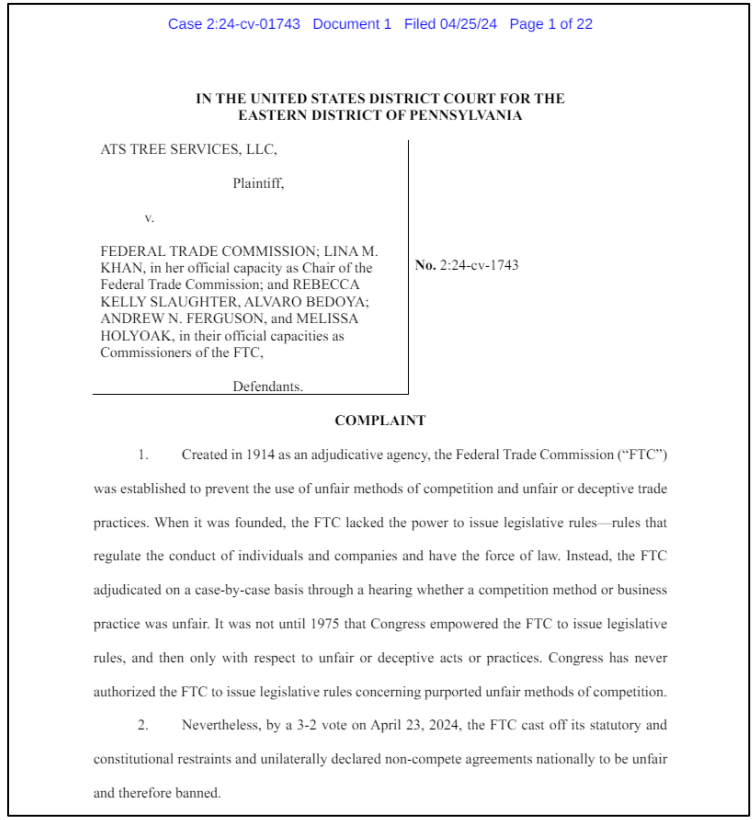
v.

FEDERAL TRADE COMMISSION and LINA KHAN, in her official capacity,

Defendants.

CASE NO. 6:24-cv-00148

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF



Case 2:24-cv-01743 Document 1 Filed 04/25/24 Page 1 of 22

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

ATS TREE SERVICES, LLC,

Plaintiff,

v.

FEDERAL TRADE COMMISSION; LINA M. KHAN, in her official capacity as Chair of the Federal Trade Commission; and REBECCA KELLY SLAUGHTER, ALVARO BEDOYA; ANDREW N. FERGUSON, and MELISSA HOLYOAK, in their official capacities as Commissioners of the FTC,

Defendants.

No. 2:24-cv-1743

COMPLAINT

1. Created in 1914 as an adjudicative agency, the Federal Trade Commission ("FTC") was established to prevent the use of unfair methods of competition and unfair or deceptive trade practices. When it was founded, the FTC lacked the power to issue legislative rules—rules that regulate the conduct of individuals and companies and have the force of law. Instead, the FTC adjudicated on a case-by-case basis through a hearing whether a competition method or business practice was unfair. It was not until 1975 that Congress empowered the FTC to issue legislative rules, and then only with respect to unfair or deceptive acts or practices. Congress has never authorized the FTC to issue legislative rules concerning purported unfair methods of competition.

2. Nevertheless, by a 3-2 vote on April 23, 2024, the FTC cast off its statutory and constitutional restraints and unilaterally declared non-compete agreements nationally to be unfair and therefore banned.

Primary Grounds for Challenges

- The *Ryan* lawsuit — the case that appears to be moving the fastest — contains six separate claims for relief:
  - **Count I:** the Noncompete Rule exceeds the FTC's statutory authority
  - **Count II:** if the FTC has substantive rulemaking authority, then that is an unconstitutional delegation of Congress's legislative powers
  - **Count III:** FTC's structure is unconstitutional*
  - **Count IV:** rule is arbitrary and capricious
  - **Count V:** retroactivity/Takings Clause
  - **Count VI:** Declaratory Judgment Act

COUNT ONE

ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706
(NO STATUTORY AUTHORITY)

66. Ryan incorporates by reference the allegations of the preceding paragraphs.

67. The Non-Compete Rule declares virtually all non-compete agreements to be unfair methods of competition under Section 5 of the FTC Act. The Commission has no statutory authority to promulgate such a rule.

68. To start, the Commission does not have statutory authority to promulgate substantive rules regarding unfair methods of competition at all.

Plaintiff Arguments:

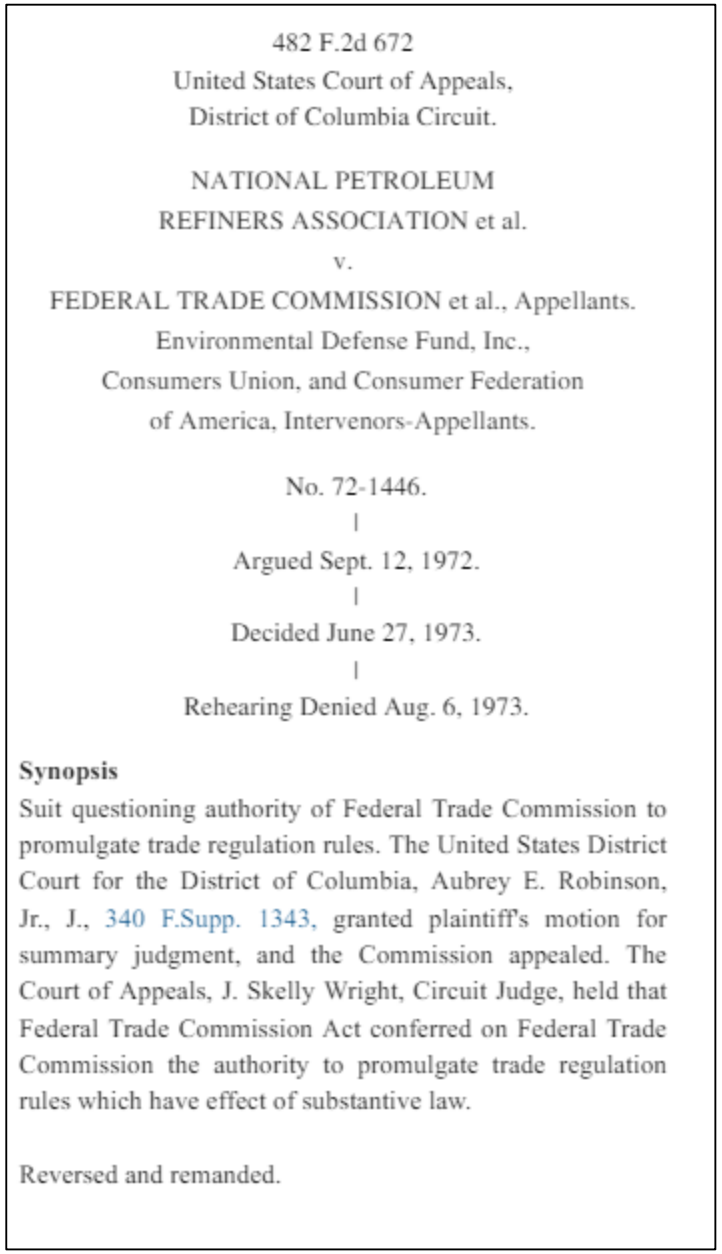
- Section 6(g) is a carryover from the 1914 Congressional debates about the FTC Act.
- House envisioned that the FTC would only have "investigative" powers; therefore, included statute giving FTC various **procedural** powers, including power "[f]rom time to time [to] classify corporations and … to make rules and regulations for the purpose of carrying out the provisions of this subchapter."
- FTC has **never** before enforced a standalone UMC rule adopted under Section 6(g).
- In 1975, Mag-Moss Act specifically restricted the FTC's rulemaking power for UDAP rules.

Likely FTC Responses:

- In 1973, the D.C. Circuit considered a similar challenge to the Octane Rule (which, recall, was adopted under both UDAP and UMC powers). The Court squarely held:
  - "'[R]ules and regulations' in Section 6(g) should be construed to permit the Commission to promulgate binding substantive rules as well as rules of procedure." *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).
- Mag-Moss does not limit "any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition."

Likely Plaintiff Replies:

- *National Petroleum Refiners* makes clear that the FTC's "regulatory authority is not absolute."
  - "The Commission is hardly free to write its own law of consumer protection and antitrust since the statutory standard which the rules may define with greater particularity [UMC and UDAP] is a legal standard."
- It would be anomalous to read the Mag-Moss Act to authorize regulations like the Octane or Tablecloth Rule so long as the FTC only used its UMC powers, not its UDAP powers.
- In any event, *National Petroleum Refiners* is 50 years old and does not reflect modern-day jurisprudence on agency rulemaking.



482 F.2d 672
United States Court of Appeals,
District of Columbia Circuit.

NATIONAL PETROLEUM
REFINERS ASSOCIATION et al.
v.
FEDERAL TRADE COMMISSION et al., Appellants.
Environmental Defense Fund, Inc.,
Consumers Union, and Consumer Federation
of America, Intervenors-Appellants.

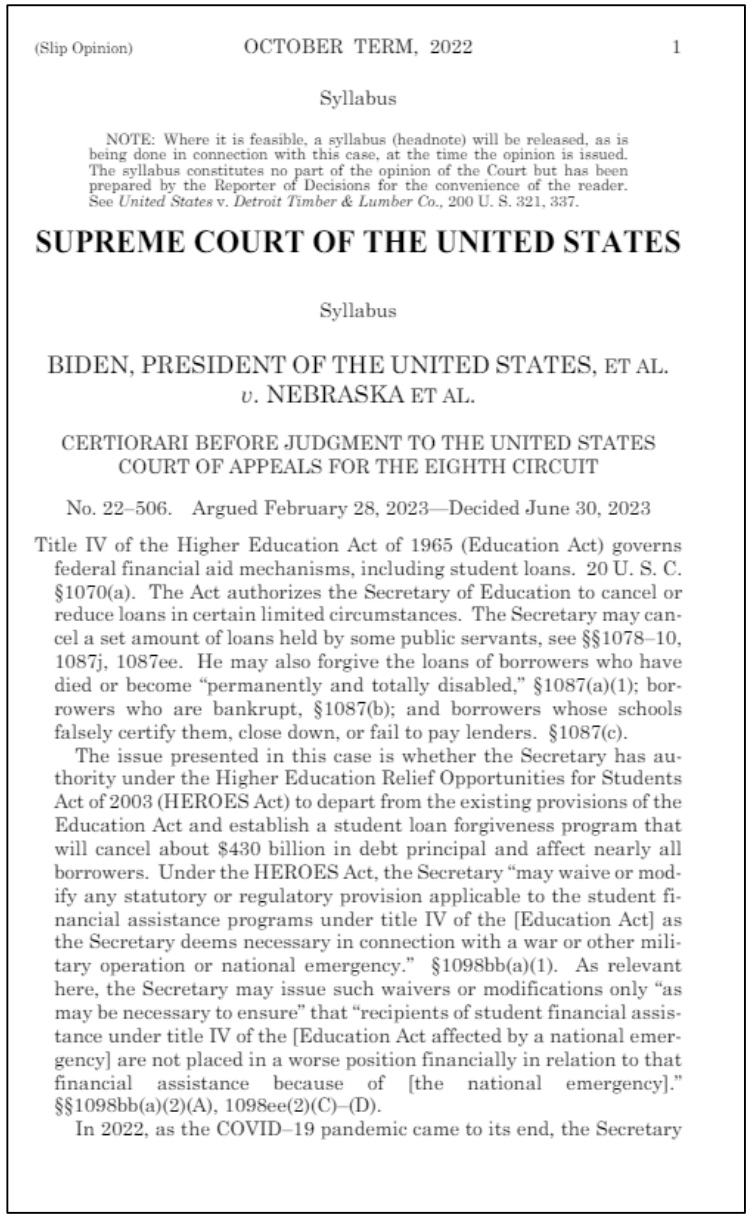
No. 72-1446.
|
Argued Sept. 12, 1972.
|
Decided June 27, 1973.
|
Rehearing Denied Aug. 6, 1973.

Synopsis
Suit questioning authority of Federal Trade Commission to promulgate trade regulation rules. The United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., J., 340 F.Supp. 1343, granted plaintiff's motion for summary judgment, and the Commission appealed. The Court of Appeals, J. Skelly Wright, Circuit Judge, held that Federal Trade Commission Act conferred on Federal Trade Commission the authority to promulgate trade regulation rules which have effect of substantive law.

Reversed and remanded.

The “Major Questions Doctrine”

- Over the past three years, the Supreme Court has repeatedly invoked the “major questions doctrine” to invalidate certain major rulemakings:
  - Regulating CO_2 under EPA power to regulate emissions; canceling student debt during Covid under the Department of Education power to waive or modify loans in connection with certain emergencies
- Factors relevant to the “major questions doctrine” include whether:
  - Agency has “claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority;”
  - The agency “located that newfound power in the vague language of an ancillary provision of the [enabling] Act;” and
  - “[T]he Agency’s discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.”



(Slip Opinion) OCTOBER TERM, 2022 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BIDEN, PRESIDENT OF THE UNITED STATES, ET AL.
v. NEBRASKA ET AL.

CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 22–506. Argued February 28, 2023—Decided June 30, 2023

Title IV of the Higher Education Act of 1965 (Education Act) governs federal financial aid mechanisms, including student loans. 20 U. S. C. §1070(a). The Act authorizes the Secretary of Education to cancel or reduce loans in certain limited circumstances. The Secretary may cancel a set amount of loans held by some public servants, see §§1078–10, 1087j, 1087ee. He may also forgive the loans of borrowers who have died or become “permanently and totally disabled,” §1087(a)(1); borrowers who are bankrupt, §1087(b); and borrowers whose schools falsely certify them, close down, or fail to pay lenders. §1087(c).

The issue presented in this case is whether the Secretary has authority under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to depart from the existing provisions of the Education Act and establish a student loan forgiveness program that will cancel about $430 billion in debt principal and affect nearly all borrowers. Under the HEROES Act, the Secretary “may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency.” §1098bb(a)(1). As relevant here, the Secretary may issue such waivers or modifications only “as may be necessary to ensure” that “recipients of student financial assistance under title IV of the [Education Act affected by a national emergency] are not placed in a worse position financially in relation to that financial assistance because of [the national emergency].” §§1098bb(a)(2)(A), 1098ee(2)(C)–(D).

In 2022, as the COVID–19 pandemic came to its end, the Secretary

Additional Claims

- The Constitution does not allow Congress to delegate to an agency the power to make legislative rules based on notions of “unfairness.”
- The whole FTC is unconstitutional because the President cannot remove Commissioners except for “inefficiency, neglect of duty, or malfeasance in office.”
  - This claim is foreclosed by recent Fifth Circuit precedent but is being preserved for potential Supreme Court review.
- Even if the FTC has rulemaking authority, it does not have authority to ban contracts **retroactively**.
- The Commission failed to adequately weigh the empirical evidence; failed to adequately consider the benefits of noncompetes; failed to properly consider the costs of the Rule (e.g., increased trade secret litigation); failed to consider reasonable alternatives (e.g., excluding forfeiture-for-competition or reasonable liquidated damages clauses); and failed to respond to certain comments.

Agenda

How We Got Here
The build-up to the Noncompete Rule

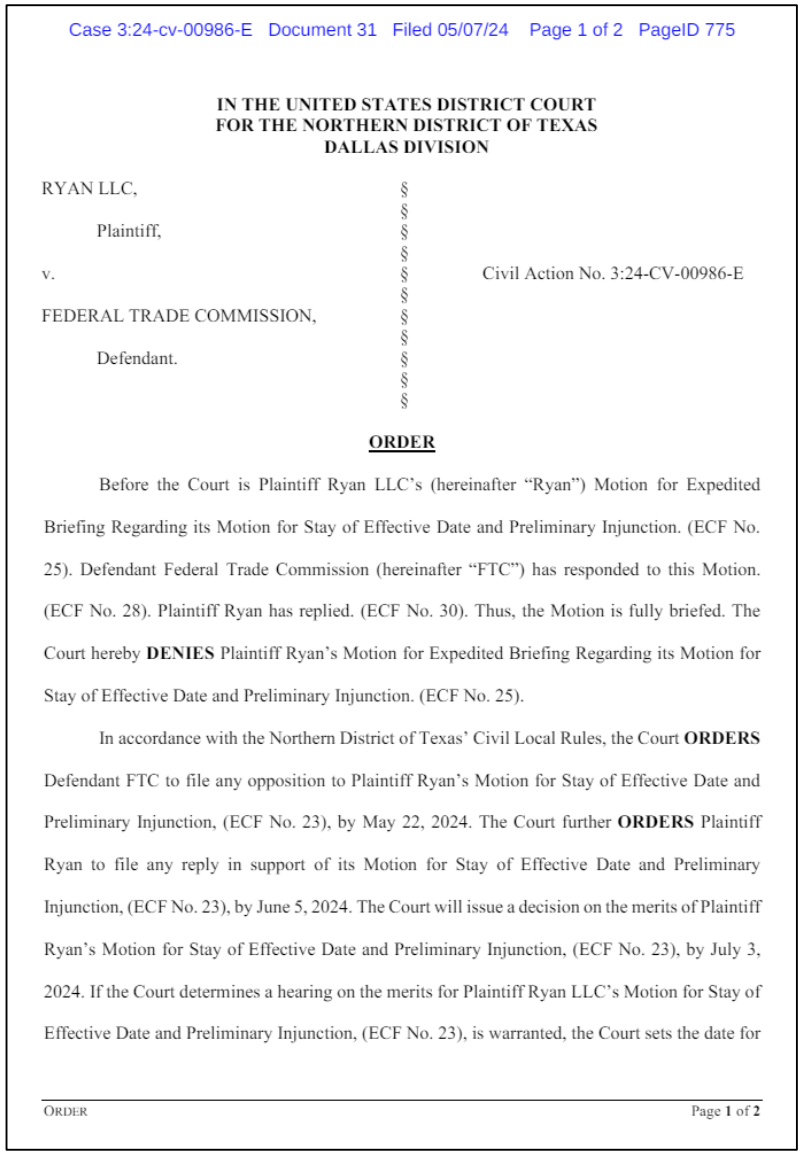
Where We Are
The FTC's Noncompete Rule and what it means

What Happens Next?
The legal challenges to the Noncompete Rule

Where Do We Go From Here?
How the legal challenges might play out and what that means for your business

Ryan Briefing Schedule

- Ryan has moved for a stay of effective date and a preliminary injunction against the Rule. Court has entered a scheduling order on this motion.
- The FTC has until May 22, 2024, to file opposition
- Plaintiff has until June 5, 2024, to file a reply
- If Court determines a hearing is necessary, hearing will be on June 17, 2024
- The Court will issue a decision on the merits by **July 3, 2024**



Case 3:24-cv-00986-E Document 31 Filed 05/07/24 Page 1 of 2 PageID 775

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RYAN LLC, §
§
Plaintiff, §
§
v. § Civil Action No. 3:24-CV-00986-E
§
FEDERAL TRADE COMMISSION, §
§
Defendant. §

ORDER

Before the Court is Plaintiff Ryan LLC's (hereinafter "Ryan") Motion for Expedited Briefing Regarding its Motion for Stay of Effective Date and Preliminary Injunction. (ECF No. 25). Defendant Federal Trade Commission (hereinafter "FTC") has responded to this Motion. (ECF No. 28). Plaintiff Ryan has replied. (ECF No. 30). Thus, the Motion is fully briefed. The Court hereby **DENIES** Plaintiff Ryan's Motion for Expedited Briefing Regarding its Motion for Stay of Effective Date and Preliminary Injunction. (ECF No. 25).

In accordance with the Northern District of Texas' Civil Local Rules, the Court **ORDERS** Defendant FTC to file any opposition to Plaintiff Ryan's Motion for Stay of Effective Date and Preliminary Injunction, (ECF No. 23), by May 22, 2024. The Court further **ORDERS** Plaintiff Ryan to file any reply in support of its Motion for Stay of Effective Date and Preliminary Injunction, (ECF No. 23), by June 5, 2024. The Court will issue a decision on the merits of Plaintiff Ryan's Motion for Stay of Effective Date and Preliminary Injunction, (ECF No. 23), by July 3, 2024. If the Court determines a hearing on the merits for Plaintiff Ryan LLC's Motion for Stay of Effective Date and Preliminary Injunction, (ECF No. 23), is warranted, the Court sets the date for

ORDER Page **1** of **2**

A Fork in the Road

Scenario 1

Court invalidates Rule in its entirety, in which case we go back to status quo.

Scenario 2

Court upholds Rule in its entirety, in which case noncompetes go away.

Scenario 3

Court invalidates Rule only in part or some other court issues a contradictory decision. Chaos ensues.

So, Where Do We Go From Here?

- In the opinion of your presenters, the most likely outcome is Scenario 1: complete invalidation of the Noncompete Rule. However, we cannot rule out either Scenarios 2 or 3.
- Under Scenarios 2 or 3, where the Rule survives in whole or part, the next steps would be:
  - For non-senior executives, prepare the required notice to employees.
    - Requires information about worker addresses/emails/phone numbers
    - Note that employer must be identified by name
  - Identify “senior executives” as defined in the Rule
    - Consider renewing/extending noncompetes for “senior executives” prior to Rule’s effective date

So, Where Do We Go From Here?

- Under Scenarios 2 or 3, where the Rule survives in whole or part, consider alternative forms of protecting company interests:
  - E.g., reasonably tailored nondisclosure agreements, non-solicitation agreements, no-business agreements, fixed-duration employment agreements
  - Consider whether any changes should be made to limit certain employees' access to company trade secrets or customer relationships
- Prepare for likelihood of increased trade secret litigation when employees leave the company

So, Where Do We Go From Here?

- Under **any** of the Scenarios, be prepared for noncompetes to be more difficult to implement/enforce going forward.
  - The Federal Trade Commission has found that noncompetes violate public policy. Expect litigants to use that fact to their advantage — and at least some judges to follow it.
  - Think about publicity. Noncompetes are a hotter issue today than they have ever been; expect increased public and political attention on individual businesses' noncompete practices.
  - Even if the FTC's Noncompete Rule goes nowhere, the FTC will still have the power to challenge individual companies' practices on a case-by-case basis. Therefore, expect heightened enforcement of noncompete practices, particularly with respect to non-senior executives.

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