

Antitrust Law Daily Wrap Up, ACQUISITIONS & MERGERS NEWS: Axon seeks certiorari to challenge FTC legitimacy in merger case involving proposed competitor, (Jul. 26, 2021)

Antitrust Law Daily Wrap Up

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By Robert B. Barnett Jr., J.D.

Axon seeks Supreme Court review of a Ninth Circuit decision denying it the right to challenge the FTC's legitimacy prior to the end of the administrative process.

Axon Enterprise, Inc., has [asked](#) the U.S. Supreme Court to grant certiorari in a case in which the Ninth Circuit [upheld](#) a lower court ruling that the federal courts lacked jurisdiction to hear structural constitutional challenges to the FTC Act while the administrative process was pending. Axon argued that federal jurisdiction to hear challenges to the FTC itself should be distinguished from challenges to FTC opinions and rulings. The certiorari writ contended that no party should be subjected to an unconstitutional administrative procedure before being allowed to contend that the procedure itself was unconstitutional because the injury exists now rather than at some later point when the administrative process ends (*Axon Enterprise, Inc. v. FTC*, [Dkt. 21-86](#)).

Axon manufactures body-worn cameras for law enforcement. In 2018, it acquired Vieu LLC, which the writ described as "an essentially insolvent competitor." The FTC intervened, raising antitrust concerns. While the contentious process was pending, Axon sued the FTC, challenging the constitutionality of the FTC itself. The complaint alleged that (1) combining investigatory, prosecutorial, adjudicative, and appellate functions within a single agency deprived Axon of due process and (2) administrative law judges were improperly protected from Executive Branch oversight. The FTC almost immediately filed an administrative complaint challenging the acquisition.

Axon asked the federal district court for a preliminary injunction halting all administrative proceedings until the constitutional claims could be settled. The district court, however, dismissed Axon's complaint for lack of subject matter jurisdiction on the ground that the FTC Act limits federal court jurisdiction to federal appeals court review of cease-and-desist orders. Axon appealed to the Ninth Circuit, which affirmed the decision in what the writ characterized as a "divided opinion." The majority decision was largely based on a determination that Axon had a meaningful judicial review of the statutory scheme at the conclusion of the administrative process.

In seeking certiorari, the writ raised two questions. The first was whether the FTC Act's provision limiting federal court review of FTC actions to the court of appeals jurisdiction over cease-and-desist orders effectively stripped the federal courts of jurisdiction over constitutional challenges to the FTC itself. The second was whether the FTC's dual-layer-for-cause removal protections for administrative law judges violated the Constitution.

Federal court review. Axon characterized the Ninth Circuit opinion as holding "that no court can remedy the 'here-and-now injury' until Axon endures the unconstitutional process and suffers injury in the here and now." According to Axon, however, the only time the Court was called on to decide whether district courts were stripped of jurisdiction over constitutional challenges, in a case involving the SEC (*Free Enterprise Fund v. Pub. Co. Acct. Oversight Board*, 561 U.S. 477 (2010)), the Court ruled that federal courts were not stripped of such a jurisdictional right. The writ then asked the Court to apply its reasoning in *Free Enterprise Fund* to this case and allow the federal courts to rule on the constitutionality question without first forcing the accused party to undergo the lengthy and expensive administrative process.

The writ asked the Court to rule that the Ninth Circuit erred when it inferred that the federal court authority did not exist because the FTC Act limited federal court oversight to rulings on cease-and-desist orders. Federal court oversight should be ruled to exist, the writ argued, in all cases unless the act specifically excluded it. Thus,

because the FTC Act did not specifically exclude federal oversight of questions of the agency constitutionality, Axon should be allowed to raise the question in federal court prior to the end of the administrative process.

Unconstitutional insulation. The second argument went to the merits of whether the FTC Act was constitutional. The writ contended that the FTC Act unconstitutionally protected administrative law judges from Executive Branch oversight. The President appoints member of the Merit System Protection Board (MSPB), who can be removed only for good cause shown. The MSPB members then appoint the administrative law judges, who can be removed for good cause shown. Because the President, as head of the Executive Branch, does not get to determine good cause shown for the administrative law judges, they are double-insulated from review, the writ charged, which violates the Due Process Clause. Those dual-layer protections, Axon argued, are unconstitutional under *Free Enterprise Fund*.

The writ also argued that the antitrust enforcement decision—that is, whether to pursue the matter through the Justice Department or through the FTC—operates in a black box without transparency. That decision, the writ contended, has momentous implications for the party targeted because the Justice Department path offers recourse to the federal courts and its protections, while the FTC path offers administrative rulings that deprive the targeted party of its constitutional rights. As a result, the writ argued, the targeted party should have the right to challenge that unconstitutional path without first having to be subjected to its deprivations.

For details about these and other petitions and cases pending before the Supreme Court, please consult the *Antitrust Law Daily Supreme Court Docket* [chart](#).

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