Weil Alert

Weil

July 25, 2024

Philadelphia Judge Breaks from Dallas Judge and Declines to Stay Non-Compete Rule

By John Barry, Eric Hochstadt, Jeffrey Perry, Mark A. Perry, Celine Chan, Josh Wesneski, Daniel Baquet and Artem Khrapko

On July 23, 2024, federal Judge Kelley Brisbon Hodge of the Eastern District of Pennsylvania denied a motion to preliminarily enjoin the Federal Trade Commission's ("FTC") rule prohibiting nearly all non-compete clauses in employment contracts nationwide. *ATS Tree Services, LLC v. FTC,* No. 24-CV-1743 (E.D. Pa.). This decision stands in opposition to a decision by Judge Ada Brown of the Northern District of Texas on July 3, preliminarily enjoining the same FTC rule as to the parties before her. *Ryan LLC v. FTC,* No. 24-CV-986 (N.D. Tex.).

Judge Hodge denied the motion based on the plaintiff's failure to establish both irreparable harm and a likelihood of success on the merits. With respect to irreparable harm, Judge Hodge observed that the plaintiff was a small tree care service with only 12 employees, and that it had not offered any firm evidence that it faced an imminent departure of employees that would harm its business if the rule were not enjoined. Judge Hodge also rejected the plaintiff's contention that the costs of compliance were sufficient to establish irreparable harm, pointing to binding Third Circuit precedent.

On the merits, Judge Hodge ruled that the FTC likely had statutory authority to issue substantive rules defining unfair methods of competition. Judge Hodge rejected the plaintiff's contention that Section 6(g) of the FTC Act—which authorizes the FTC to "make rules and regulations for the purpose of carrying out the provisions of" the FTC Act, but appears in a section of the statute related to the classification of corporations—could not be read, as the plaintiff urged, to authorize only procedural rules. Instead, the plain text of Section 6(g) was sufficient. Judge Hodge also pointed to the history and structure of Section 6(g), including other statutory provisions referencing the FTC's rulemaking authority, as informative.

Judge Hodge also rejected the plaintiff's arguments that the FTC lacked the authority to categorically ban all non-competes nationwide. Judge Hodge disagreed that the FTC's powers were limited to declaring non-competes anticompetitive only on a "case-by-case" basis, and that instead the FTC may prospectively declare broad methods of competition unfair. She further rejected the plaintiff's arguments that non-competes are historically regulated by the States and therefore beyond the power of the FTC, that the major questions doctrine applied, or that Congress had unconstitutionally delegated authority to the FTC without an adequate intelligible principle.

The immediate impact of Judge Hodge's ruling is limited—it reaches only the parties to the litigation, it is not a final judgment, and it does not affect Judge Brown's ruling in Texas. If and when the order or Judge Hodge's final judgment is appealed, the Third Circuit will undertake its own review of the legal questions *de novo*. Moreover, although Judge Brown preliminarily enjoined the rule only as to the plaintiffs in the case before her, the rule in the Fifth Circuit is that upon final *judgment*, if a court finds that an agency rule is unlawful or arbitrary, it should vacate the rule as to all affected parties (not just the immediate litigants). The government has long opposed that rule, but it is for now the settled practice in the Fifth Circuit. And finally, the plaintiff in *ATS Tree Services* did not argue in its motion for a preliminary injunction that the rule was arbitrary and capricious, which was one of the grounds on which Judge Brown relied.

Nevertheless, Judge Hodge's decision is a potential roadmap for other judges who may be disinclined to enjoin or vacate the rule. And the parallel litigations and diverging approaches and outcomes increases the likelihood that this dispute could be headed to the Supreme Court. An appeal in *ATS Tree Services*, however, is not a certainty, and the plaintiff there may be content to wait and receive the benefit of Judge Brown's final decision, which will be issued by August 30.

* * *

If you have questions concerning the contents of this Alert, please speak to your regular contact at Weil or to an author listed below:

Authors

John Barry (New York)	View Bio	john.barry@weil.com	+1 212 310 8150
Eric Hochstadt (New York)	View Bio	eric.hochstadt@weil.com	+1 212 310 8538
Jeffrey Perry (Washington, D.C.)	View Bio	jeffrey.perry@weil.com	+1 202 682 7105
Mark A. Perry (Washington, D.C.)	View Bio	mark.perry@weil.com	+1 202 682 7511
Celine Chan (New York)	View Bio	celine.chan@weil.com	+1 212 310 8045
Josh Wesneski (Washington, D.C.)	View Bio	joshua.wesneski@weil.com	+1 202 682 7248
Daniel Baquet (Washington, D.C.)	View Bio	daniel.baquet@weil.com	+1 202 682 7102
Artem Khrapko (New York)	View Bio	artem.khrapko@weil.com	+1 212 310 8321