

Federal Court Denies ATS Tree Services' Bid to Delay FTC Rule Implementation

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On July 23, 2024, U.S. District Judge Kelley Brisbon Hodge, serving the Eastern District of Pennsylvania, rejected ATS Tree Services LLC's request to delay the Federal Trade Commission's (FTC) final rule, set to take effect on September 4, 2024. ATS also sought a preliminary injunction against the rule. Still, Judge Hodge also denied this request, concluding that ATS had not shown that the rule would cause irreparable harm or that it could establish a likelihood of success on the merits. This decision followed shortly after U.S. District Judge Ada Brown of the Northern District of Texas issued a preliminary injunction blocking the FTC from enforcing the rule against Ryan, LLC, a tax preparation company, and certain intervenors.

Judge Hodge's denial of ATS's motion was based on a determination that ATS had failed to prove it would suffer irreparable harm because of the rule. The court found that ATS's claims of irreparable harm—such as nonrecoverable compliance costs and the potential loss of contractual benefits—were based upon either a choice or a “speculative risk,” which did not rise to the level of irreparable and immediate harm required for an injunction. The court cited Third Circuit precedent, stating that nonrecoverable compliance costs, such as monetary losses or business expenses, do not constitute irreparable and immediate harm required for an injunction. Additionally, the court held that ATS offered no binding precedent to support its argument that the loss of contractual rights is an irreparable harm, reiterating that such determinations must be on a case-by-case basis.

Even if ATS could establish irreparable harm, the court found that it had not demonstrated a likelihood of success on the merits. Judge Hodge's opinion included a detailed analysis of the FTC's authority to issue substantive rules regarding unfair methods of competition. The court confirmed that the FTC has such authority, noting that Section 6 of the FTC Act does not limit the FTC to procedural rules alone. The use of the term “prevent” in Section 5 of the Act supports the FTC's ability to make rules to prevent harm before it occurs rather than merely remedying it. The court also referenced prior circuit court decisions and Congressional actions, such as the Magnuson-Moss Act, which affirmed the FTC's rulemaking authority.

The court also addressed ATS's other challenges to the rule. It upheld the FTC's authority to broadly regulate non-compete clauses as unfair methods of competition, rejected claims that regulation of non-competes is solely a state matter, and found that the Major Questions Doctrine does not apply to the rule. Additionally, the court dismissed ATS's nondelegation challenge, affirming that Congress had provided a clear guiding principle for the FTC's rulemaking authority under the FTC Act. Given these findings, the court did not need to evaluate the balance of equities or public interest considerations.

This ruling is significant for several reasons. It contrasts with the earlier decision in *Ryan LLC v. Federal Trade Commission*, where Judge Brown granted a preliminary injunction, suggesting the plaintiffs would likely succeed on the merits. The Texas court has indicated it will decide on the enforceability of the FTC rule by August 30, 2024. While Judge Hodge's decision represents a victory for the FTC, it may be temporary. The Texas court's preliminary injunction in *Ryan LLC* hinted at potential future invalidation of the rule based on arguments that the FTC lacked statutory authority or that the rule was arbitrary and

capricious under the Administrative Procedure Act (APA). If the Texas court rules against the FTC, it might vacate the rule entirely or issue a permanent injunction, though the specifics are yet to be determined.

In the meantime, businesses should continue to assess and document their use of non-competes and explore alternative protections like non-disclosure agreements, invention protection, non-solicits, training repayment programs, garden leaves, and non-competes related to business sales. The FTC's guidance suggests that if properly structured, these alternatives should comply with the new rule. Additionally, state legislation and actions by other federal agencies, like the National Labor Relations Board (NLRB), may further influence the legal landscape regarding non-competes.