Comment: US FTC's constitutional defenses in Illumina-Grail case may help it delay 'generational' increase in skepticism of agencies

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By Ben Brody

The US Federal Trade Commission's brief in Illumina and Grail's appeal of its move to unwind their deal shows the agency using long-standing precedent to defend itself against claims that its structure and procedures violate aspects of the Constitution — claims that are increasing in number and that could be a potential existential threat. The effort may help the agency delay or narrow rulings about its constitutionality from an appeals court — at least until the Supreme Court makes a decision on similar issues.

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The agency filed its brief earlier this month with the US Court of Appeals for the Fifth Circuit, which is hearing Illumina's appeal (see here). The companies are appealing the commission's decision against them, which itself overturned a ruling from the FTC's administrative law judge in their favor (see here).

Experts say the FTC is facing what appears to be a rare increase in federal courts' skepticism of the constitutionality of various aspects of independent agencies, ultimately imperiling some of the FTC's current powers and practices.

"There is a sort of generational opportunity that I think practitioners recognize with the current Supreme Court, which obviously has a conservative leaning, to reconsider past precedents, including those precedents that concern the administrative state and how our executive branch functions," said Dan Wolff, a partner at Crowell & Moring who specializes in administrative law.

Yet, the FTC's efforts to defend its constitutionality — particularly its emphasis on the long-standing precedents underlying its current form and function — may work well enough to help the agency delay or narrow adverse rulings about its constitutionality from the circuit court, at least until the Supreme Court makes a decision on some of the issues.

The filing comes after stinging FTC losses at the Supreme Court. In 2021, the justices trimmed the FTC's ability to quickly secure money for victims of frauds, and in a decision this year they allowed merging parties to challenge the agency's internal administrative process in federal court without having to wait for the completion of the commission's efforts (see here and here).

The FTC could also be about to face further tough days at the Supreme Court, which in July agreed to take up SEC v. Jarkesy, a case on appeal from the Fifth Circuit that challenges the constitutionality of aspects of the Securities and Exchange Commission that the FTC shares (see here).

The FTC seems well aware of the threat. In a July motion to strike constitutional issues from another case, it noted merging parties were lodging "claims that, if well-founded, would essentially abolish the FTC's administrative processes—if not the agency in its entirety—and thus halt the agency's efforts to enforce American competition law" (see here).

— Removal protections —

In its brief in the Illumina appeal, the FTC addressed claims that it exercises authority that Congress did not properly delegate, that the job protections for commissioners violate presidential appointment powers, that in-house adjudication violates due process, and that the clearance process that determines whether the FTC or Justice Department handles a matter violates equal protection rights.

Thanks in part to these arguments, the FTC may be able to dodge some or all of the potential adverse rulings for a time. One particular strength was the agency's reliance on long lines of cases upholding its current modus operandi, said Tad Lipsky, director of the Competition Advocacy Program at the Global Antitrust Institute of George Mason University's law school.

“In their brief, they remind the appeals court: ‘Hey, you don't change this stuff. Even if you think that the Supreme Court would, you don't, so you just stick to the old stuff that we like,’” said Lipsky, who served in the Reagan-era Justice Department's antitrust division and the Trump-era FTC.

Lipsky was highly critical of the agency’s competitive analysis in Illumina-Grail, but said the agency’s gathering of decades of precedent might persuade the appeals court panel not to get ahead of the Supreme Court, even though the circuit is seen as being especially antagonistic to independent agencies. “You'd have to be pretty bold to go against some of these old precedents as an appellate court,” he said.

The FTC, for instance, discussed Illumina and Grail’s focus on the job protections for FTC commissioners, which mean that they can only be removed for cause. The companies have said this scheme is at odds with the constitutional provision that the president appoints certain top government officials — a power that the courts have often construed as requiring that the White House be able to remove those officials on a whim (see here). But the FTC said the 1935 Supreme Court decision in Humphrey’s Executor v. US upheld the removal protections for FTC commissioners, “squarely barred” the claim.

— Due process —

The FTC brief further took on the claims that its in-house adjudication process violates the firms’ due process rights. This notion originates in the combination of the FTC staff acting comparably to prosecutors in that forum with the commissioners’ responsibility for final decisions. The FTC, however, cited precedents affirming that various forms of in-house adjudication do not violate due process.

“To establish a due process violation, a party must show that the decisionmakers’ minds were ‘irrevocably closed’ to its position,” the FTC wrote, quoting the 1948 Supreme Court decision in FTC. v. Cement Institute.

If ruling against the agency while still respecting these precedents sounds thorny, the Fifth Circuit panel’s judges also could side-step them as long as they agree with the companies’ analysis of the competitive issues. The panel could then find in favor of the merging parties and dismiss the FTC's ruling without having to address the constitutional challenges.

“That would certainly be the cleaner, more traditional way to go, assuming the court actually agrees with Illumina's position on the merits,” said Wolff. He suggested that the judges might be less tempted to reach the constitutional issues, as the court already teed up similar issues for the Supreme Court in Jarkesy.

Wolff added he didn’t see Illumina and Grail’s legal argument on due process and equal protection concerns as particularly strong because they seemed out-of-step with the issues that the justices seem eager to explore.

“I haven't seen anything that indicates that the Supreme Court’s, you know, really chomping at the bit to reconsider its analytical approach to these questions,” he said. Jarkesy, for instance, focuses on other issues rather than due process or equal protection.

— Eyes on the Supreme Court —

Despite the threats coming from Illumina’s appeal and the Supreme Court, the FTC may be getting somewhat of a reprieve. Illumina has raised constitutional objections to the agency, as has Amgen in its proposed acquisition of Horizon Therapeutics. Two other sets of merging parties, however, have dropped their constitutional challenges: Microsoft, in January, withdrew such claims from its response to the FTC’s administrative move to block the company’s acquisition of Activision Blizzard (see here). And the FTC, Intercontinental Exchange and Black Knight all agreed this month to dismiss without prejudice the agency’s effort to block the companies’ merger in federal court (see here).

In addition, of those merging parties, only Illumina and Grail went through an administrative trial and subsequent commission decision that allowed them to appeal to the circuit court of their choice. That’s relatively rare. Most dealmakers find themselves in a federal district court of the agency’s choosing, a potentially less advantageous forum that’s procedurally farther away from the Supreme Court.

Stanford Law School scholar-in-residence Doug Melamed said Illumina and Grail had a fairly standard experience in the FTC’s administrative adjudication process. He also believed the antitrust analysis was correct and noted then-Commissioner Christine Wilson, a Republican, agreed. Those two facts might restrain a majority of the Supreme Court, he said, if the case ever gets there.

“This is not something where a conservative justice is going to say, ‘Oh, this is an outrage what they're doing here to

Illumina and Grail in their merger. We have to use this as an occasion to make some new constitutional law to rein in this rogue agency,'" said Melamed, who previously held a top role at the DOJ's antitrust division during the Clinton administration.

Still, while he thought the justices might stop short of declaring these agencies unconstitutional in other cases because of how disruptive it would be, Melamed was clear that there's a significant threat to the FTC and other key parts of the regulatory state.

"There's going to be some chipping away at these agencies," he said.

—Additional reporting by Serafina Smith.

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