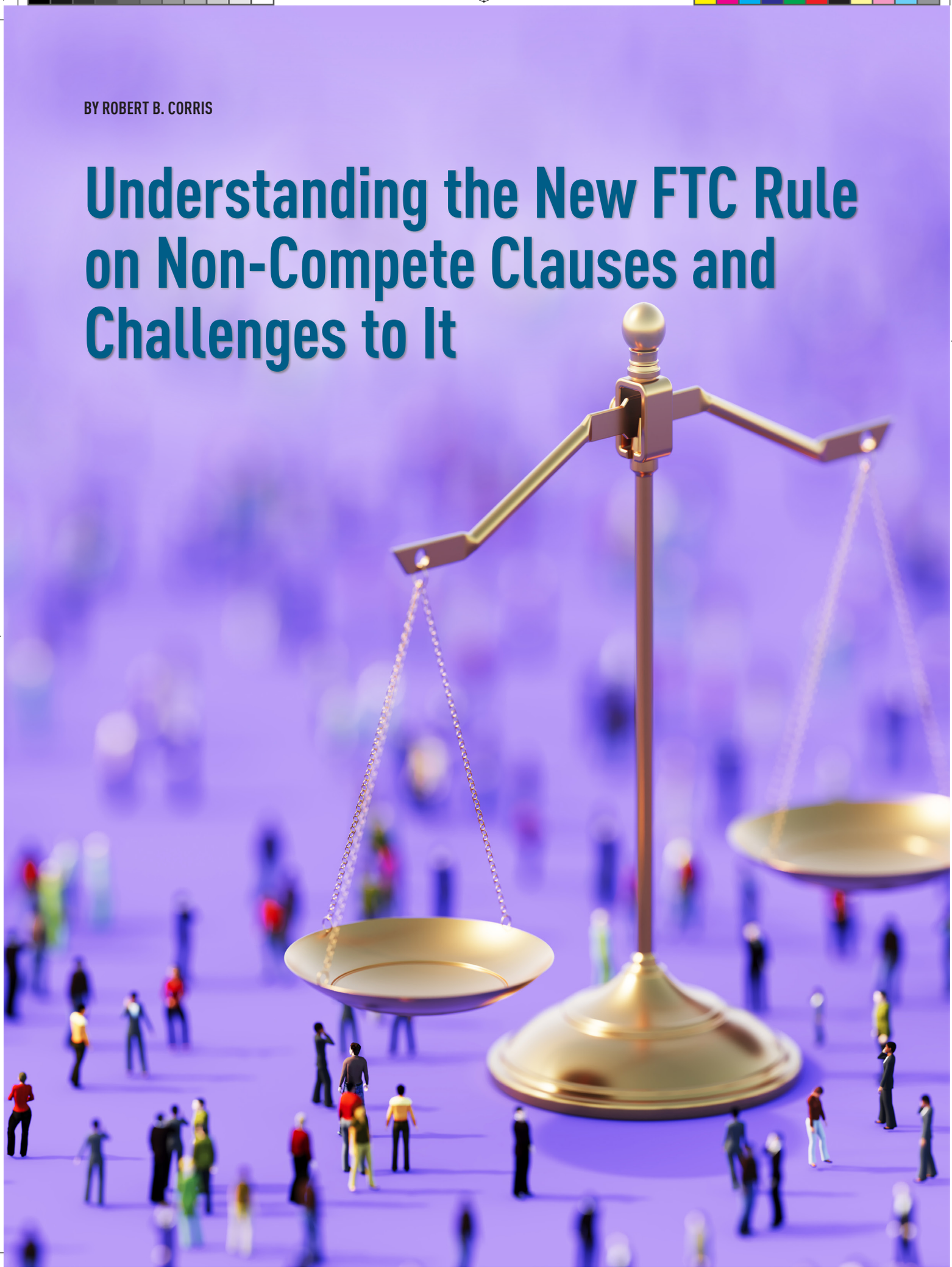
BY ROBERT B. CORRIS

Understanding the New FTC Rule on Non-Compete Clauses and Challenges to It



Given that there might be as many as 30 million non-compete agreements in the United States, the Federal Trade Commission's recent issuance of a final rule banning the use or enforcement of non-compete clauses and agreements with workers could affect countless businesses, employers, and employees.

On April 23, 2024, the Federal Trade Commission issued a final non-compete clause rule (hereinafter the Rule), effective Sept. 4, 2024, that with limited exceptions creates a nationwide ban on the use or enforcement of non-compete clauses with workers. Ryan LLC immediately filed suit in federal court in the Northern District of Texas and moved to stay the effective date of and preliminarily enjoin the Rule. The U.S. Chamber of Commerce has intervened in the *Ryan* lawsuit, joining in the motion to stay and for preliminary injunction. Numerous amici have filed briefs.

This article discusses the arguments for and against the motions, with the understanding that however the district court decides the motions, the arguments are likely to be presented on appeal. The author also questions the practical effect of the Rule in Wisconsin because the FTC Act does not include a private right of action.

Background

Perhaps people who oppose the Rule can blame Jimmy John's, which required its sandwich makers and other low-wage workers to agree "that, during his or her employment with the Employer and for a period of two (2) years after … he or she will not have any direct or indirect interest in or perform services for … any business which derives more than ten percent (10%) of its revenue from selling submarine, hero-type, deli-style, pita and/or wrapped or rolled sandwiches and which is located within three (3) miles of either [the Jimmy John's location in question] or any such other Jimmy John's Sandwich Shop." According to the plaintiff's attorney in a class action against Jimmy John's, the effective blackout area for a former Jimmy John's worker would have covered 6,000 square miles in 44 states and the District of Columbia.

The Illinois and New York attorneys general obtained consent orders eliminating the non-competes. Stories surfaced of similar non-compete clauses for low-wage workers. Since then, several states banned non-competes for low-wage workers or completely. (In Wisconsin, a bill to ban most non-competes, Assembly Bill 481, was referred to committee, but it failed to pass in the legislature's 2023-24 regular session.) The National Labor Relations Board (NLRB) general counsel issued a memo stating that the proffer, maintenance, and enforcement of non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act except in limited circumstances.

Executive Order 14036 (2021) encouraged the chair of the Federal Trade Commission (FTC) to consider working with the FTC to exercise the FTC's statutory rulemaking authority to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility. The FTC conducted several workshops and hearings and published a proposed rule in January 2023. According to the FTC, more than 25,000 of the over 26,000 comments received supported the proposed rule.[1]

Summary of the Rule and Issues

The Rule declares most existing non-competes unenforceable, subject to an exception for certain senior executives, and bans the future use of most non-competes.[2]

The Rule does not apply to non-solicitation or non-disclosure clauses unless the clause functions as a non-compete.

While the *Ryan* plaintiffs presented several issues, discussed below, they emphasized two. First, Congress did not grant the FTC substantive rulemaking authority to prevent "unfair methods of

competition," only authority to prevent such methods on an adjudicatory, case-by-case basis, in contrast to Congress' express grant of rulemaking authority to prevent deceptive and unfair practices. The resolution of this issue will involve an analysis of the interplay between sections 5 and 6(g) of the FTC Act. Second, the plaintiffs invoked the Supreme Court-made "major-questions" doctrine in support of an argument that Congress did not clearly grant authorization to the FTC to issue the Rule, given the vast economic and political significance of the Rule. The major-questions doctrine will involve an analysis of the history of the FTC Act, sections 5 and 6(g), and prior examples of rulemaking related to unfair methods of competition.

The Rule

Section 5 of the FTC Act, as amended, declares that "unfair methods of competition in or affecting commerce" are "unlawful" and "empowered and directed" the FTC "to prevent" entities subject to its jurisdiction from "using such methods."[3] The Rule with Supplementary Information runs 158 pages in the Federal Register and adds a new subchapter J,[4] consisting of part 910, to chapter I in title 16 of the Code of Federal Regulations.

Section 910.01(1) defines a non-compete clause as "[a] term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from: (i) [s]eeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (ii) [o]perating a business in the United States after the conclusion of the employment that includes the term or condition." Under section 910.2(a)(1), with respect to a worker other than a "senior executive," it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete clause, to enforce or attempt to enforce a non-compete clause, or to represent that the worker is subject to a non-compete clause.[5] A term or condition includes, but is not limited to, a contractual term or workplace policy, whether written or oral.[6]

Although the definition of a non-compete "does not categorically prohibit other types of restrictive employment agreements, for example, NDAs, TRAPs, and non-solicitation agreements,"[7] the phrase "functions to prevent" in the definition of a non-compete "clarifies that, if an employer, adopts a term or condition that is so broad or onerous that it has the same functional effect as a term or condition prohibiting or penalizing a worker from seeking or accepting other work or starting a business after their employment ends, such a term is a non-compete clause under the final rule."[8]

The Rule protects "workers" and is not limited to "employees." By definition, a *worker* is a natural person without regard to the worker's title or status under any other state or federal law, and the term includes an employee, an independent contractor, an extern, an intern, a

PRACTICE TIPS:
What Attorneys Who Represent Employers and Workers Should Do

Employers' attorneys should:

- Notify clients
- Inventory clients' agreements with employees and other workers
- Identify "senior executives"
- Prepare safe-harbor notice to current and former workers
- Review nondisclosure agreements, nonsolicitation agreements, and customer clauses for reasonableness under the Rule and state law
- Review non-compete agreements under state law
- Review clients' measures to protect trade secrets
- Consider separate agreements
- Monitor *Ryan LLP* and *ATS* cases
- Continue to advise clients about potential non-contractual causes of action

Workers' attorneys should:

- Review workers' agreements
- Advise workers not to violate non-compete clauses or agreements before effective date of the Rule
- Advise workers of risks of violating non-compete clauses or agreements if FTC Rule is stayed or enjoined
- Evaluate applicability of exceptions in the Rule
- Monitor *Ryan LLP* and *ATS* cases
- Continue to review clients' non-compete agreements, nondisclosure agreements, nonsolicitation agreements, and customer clauses under state law and advise client
- Continue to advise clients about potential noncontractual causes of action **WL**

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volunteer, an apprentice, or a sole proprietor who provides a service to a person.[9]

The Rule carves out a limited exception for "senior executives" who have "policy-making authority" and received total annual compensation of at least $151,164 in the preceding year (or annualized under specific circumstances).[10] Policy-making authority means final authority to make policy decisions that control significant aspects of a business entity or common enterprise and does not include authority limited to advising or exerting influence over such policy decisions or having final authority to make policy decisions for only a subsidiary or an affiliate of a common enterprise.[11]

With respect to workers other than senior executives, section 910.2(a)(1) of the Rule makes it an unfair method of competition to do any of the following after the effective date: enter into or attempt to enter into a non-compete clause, enforce or attempt to enforce a non-compete clause, or represent that the worker is subject to a non-compete clause.

With respect to a senior executive, section 910.2(a)(2) makes it an unfair method of competition for a person to enter into or attempt to enter into a non-compete clause, to enforce or attempt to enforce a non-compete clause entered into after the effective date, or to represent that the worker is subject to a non-compete clause if the non-compete clause was entered into after the effective date.

In other words, as to all workers other than "senior executives," the Rule prohibits enforcement of existing non-competes but does not prohibit enforcement of pre-effective date non-compete clauses with a "senior executive."

The Rule requires "clear and conspicuous" notice by the effective date to every worker who is subject to an existing non-compete clause that it is an unfair method of competition to enforce or attempt to enforce the worker's non-compete and that the worker's non-compete will not be and cannot legally be enforced against the worker.[12] The Rule provides specifics on what must be in the notice and the method of delivery. The Rule also provides model language and a safe harbor for persons who use the model language.[13]

Section 910.3 of the Rule sets forth three exceptions to the requirements of section 910. First, the requirements do not apply "to a non-compete clause that is entered into by a person pursuant to a bona fide sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets." Second, the requirements do not apply if a cause of action related to a non-compete accrued before the effective date. Third, there is a good-faith exception when a person enforces or attempts to enforce a non-compete clause or makes a representation about a non-compete clause when a person has a good-faith basis to believe that part 910 is inapplicable.[14]

The Rule contains a severability provision. If any provision is held to be

invalid or unenforceable by its terms or as applied to any person or circumstance or is stayed pending further agency action, the provision must be construed so as to continue to give to the provision the maximum effect permitted by law.[15]

In the supplementary information, the FTC discussed its jurisdiction over entities claiming nonprofit status under the FTC Act and responded to comments from the health-care industry. An entity is a "corporation" (as that term is used in I.R.C. § 501(c)(3)) only if it is "organized to carry on business for its own profit or that of its members."[16] The FTC looked to both the source of the income and to the destination of the income, that is, "to whether either the corporation or its members derive a profit."[17] The FTC provided several examples of its exercise of jurisdiction over health-care organizations or associations that were engaged in business on behalf of for-profit physician members.[18]

Rule's Effect on Wisconsin Law

Section 910.4 of the Rule provides that part 910 will not be construed to annul, or exempt any person from complying with, any state statute, regulation, order, or interpretation applicable to a non-compete clause, including but not limited to state antitrust and consumer protection laws and state common law, except that part 910 supersedes such laws to the extent that state law would permit a person to engage in conduct that is an unfair method of competition under the Rule.

Wisconsin Statutes section 103.465 prohibits enforcement of unreasonable restrictive covenant agreements between employers and employees or principals and agents. The statute applies to non-compete agreements ("business clauses"), customer clauses, non-disclosure agreements,[19] and employee anti-poaching agreements.[20] Wisconsin is a "red pencil" state; the statute provides that a restrictive covenant "imposing an unreasonable restraint is illegal, void and unenforceable even as to so much of the covenant or performance as would be a reasonable restraint."

The Rule does not apply to customer non-solicitation, non-disclosure, or anti-poaching agreements, except when the scope of the agreement functions as a non-compete. Some unanswered questions, discussed below, relate to the fact that the FTC Act does not create a private right of action. Therefore, it is possible that the Rule will not prevent the enforcement of non-competes in Wisconsin if the FTC does not bring adjudicatory enforcement actions against persons who violate the Rule.

Ryan's Challenge to the Rule

Ryan, the plaintiff that filed the challenge against the Rule, argues that Congress did not grant the FTC the statutory authority to issue the Rule because the FTC Act did not grant the FTC substantive rule-making authority to prevent unfair methods of competition.[21] According to Ryan, section 5 of the FTC Act empowered the FTC to prevent the use of unfair methods of competition through case-by-case adjudication (hold a hearing, issue a cease-and-desist order, impose penalties for violating such an order).

In 1938, Congress amended section 5 to give the FTC the power and responsibility to prevent unfair or deceptive acts or practices (UDAPs). Section 6(g) granted the FTC the power to "classify corporations … to make rules and regulations for the purpose of carrying out the provisions of this subchapter." Ryan argues that until 1962, the FTC did not invoke section 6(g) as a grant of substantive rule-making authority. In the 1960s and 1970s, the FTC promulgated several rules declaring certain actions to be unfair acts or practices, citing section 6(g). Some of these rules also declared the same actions to be unfair methods of competition.

After the U.S. Court of Appeals for the D.C. Circuit upheld the FTC's rule-making authority in 1973 in *National Petroleum Refiners*,[22] Congress passed the Magnuson-Moss Warranty Federal Trade Commission Act. Magnuson-Moss empowered the FTC to promulgate rules that define with specificity acts or practices that are UDAPs in or affecting commerce but did not confer authority on the FTC to adopt rules regarding unfair methods of competition.

In essence, Ryan contends that when Congress amended section 6(g), Congress did so in response to *National Petroleum*, expressly granted rule-making authority with respect to and under specific procedures for UDAPs, and, by exclusion, clarified that it did not grant rule-making authority with respect to unfair means of competition.

Ryan also argues that the major-questions doctrine confirms that the FTC lacks authority to issue the Rule.[23] That doctrine applies when an agency seeks to effectuate "fundamental revision of [a] statute, changing it from one sort of scheme or regulation into an entirely different kind."[24] According to the doctrine, courts should not defer to agency interpretations of statutes that give those agencies authority over questions of "vast economic and political significance," absent a clear statement of authorization from Congress.[25] Ryan also argues that the Rule intrudes into an area that is the domain of state law.

Ryan asserts that it would be an unconstitutional delegation of legislative power if section 6(g) did grant the FTC the power to issue substantive unfair competition rules. The U.S. Constitution vests all legislative powers in Congress, Congress cannot abdicate or transfer to others the essential legislative functions with which it is vested, and Congress can delegate power to an agency only if it provides an "intelligible principle" by which the agency can exercise it. Ryan relies on *Schechter Poultry*,[26] a 1935 case in which the U.S. Supreme Court held that the National Industrial Recovery Act unconstitutionally authorized the president to adopt "codes of fair competition." Ryan also preserves an argument that the FTC is not accountable to the president, questioning the vitality of *Humphrey's*

Executor,[27] which had held that the FTC did not exercise executive power.

Intervenors' Challenge to the Rule

The Chamber of Commerce and other entities filed suit the day after Ryan, and the *Ryan* court granted leave to intervene. The intervenors argue many of the same points as Ryan and also argue that courts have consistently required the FTC to prove in each case that the challenged conduct 1) produces anticompetitive effects and 2) is not offset by legitimate procompetitive justifications.[28] The intervenors assert that "[u]nder this settled interpretation of Section 5, in order to show that *all* noncompetes constitute 'unfair methods of competition,'" the FTC had to show that every noncompete causes competitive harm that is not outweighed by procompetitive benefits.[29] The intervenors allege that the FTC did not even try to show that all noncompete agreements do more competitive harm than good and criticize the FTC for arguing that non-competes harm competition "in the *aggregate*."[30] Citing cases, the intervenors argue that if some non-compete agreements harm competition and others do not, only the non-compete agreements that harm competition are unfair methods of competition.[31] According to the intervenors, the FTC has not offered a reasoned basis for "painting with a broad brush rather than targeting those noncompete agreements that are actually harmful."[32]

The FTC's Response

Section 5's directive to prevent "unfair methods of competition" confers on the FTC "broad powers to declare trade practice unfair."[33] The FTC Act encompasses conduct beyond that which violates the antitrust laws.[34] Unfair competition goes beyond competition on the merits, which requires both of two key criteria: 1) whether the conduct is "coercive, exploitative, collusive, abusive, deceptive, predatory" or "otherwise restrictive or exclusionary"; and 2) whether the conduct "tend[s] to negatively affect competitive conditions."[35] Section 5 authorizes adjudicatory enforcement actions governed by the Administrative Procedures Act. Section 6, the FTC argues, contains additional powers, including significant investigative authority and rulemaking authority "pertaining to any provision of the Act."[36]

Regarding Congress' empowering the FTC to promulgate substantive rules for unfair methods of competition, the FTC argues the following: The D.C. Circuit in *National Petroleum Refiners* upheld the rule at issue there (the "Octane Rule") as a proper exercise of the FTC's power under section 6(g) to make rules regulating both unfair methods of competition and UDAPs. The Seventh Circuit incorporated by reference the lengthy discussion in *National Petroleum Refiners*, stating, "Congress considered the controversy surrounding the Commission's substantive rulemaking power under section 6(g) to have been settled by the *Octane Rating* case."[37]

When Congress then passed the Magnuson-Moss Act, it enacted a new section 18 introducing special procedures for promulgating rules for UDAPs and eliminated the FTC's authority to issue rules for UDAPs under section 6(g) but "pointedly chose not to restrict the Commission's authority to promulgate rules regulating unfair methods of competition under section 6(g)."[38] Congress expressly considered but rejected an amendment that would have prohibited the FTC's authority to prescribe such rules.[39]

The FTC argues that section 18 confirmed and preserved the FTC's authority to make rules with respect to unfair methods of competition under section 6(g).[40] The FTC asserts that the plaintiffs' reading of the statute is "at odds with one of the most basic interpretive canons" because it would render language in sections 6(g) and 18(a)(2) "inoperative or superfluous."[41] The 1975 amendments narrowed the FTC's preexisting authority to issue rules regarding UDAPs but did not limit its authority to issue rules regarding unfair methods of competition. When Congress revisited the FTC's rulemaking authority in 1980, it left unchanged section 6(g) as well as the language in section 18 preserving the FTC's authority to regulate unfair methods of competition.

The FTC describes the major-questions doctrine as teaching that "there are extraordinary cases … in which the

history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."[42] In contrast, the FTC's authority underlying the Rule rests on a firm, 60-year-old historical footing. Congress has not "conspicuously and repeatedly" declined to grant the FTC the claimed power under section 6(g).[43]

The FTC says that this is not an "extraordinary case" and is not a "transformative expansion of [the FTC's] regulatory authority."[44] Congress directed the FTC to "prevent" unfair methods of competition, and "agencies typically enjoy very broad discretion in deciding whether to proceed by way of adjudication or rulemaking."[45] The Rule is consistent with the FTC's purpose in preventing unfair methods of competition.[46]

The FTC says that it is not claiming the authority to regulate employer-employee relationships writ large or wading outside its expertise in competition.[47] The scale of the FTC's action does not determine whether this case should be analyzed under the major-questions doctrine. The FTC was designed to protect unfair methods of competition affecting commerce.[48] The argument that the major-questions doctrine applies when an agency intrudes into an area that is the particular domain of state law does not apply: regulation of unfair methods of competition is clearly not the particular domain of state law given Congress' delegation of authority to the FTC to prevent such acts.[49]

The FTC says that it rejects the plaintiffs' argument that even if many or most non-competes are exploitative and reduce competition, some individual non-competes may have positive effects on competition. Section 5 reaches incipient acts and conduct with a "dangerous tendency ... to hinder competition."[50] The FTC properly determined that non-competes, as a class, tend to and do have current anticompetitive effects in labor, product, and service markets; an additional showing of such effects for every individual non-compete agreement that the Rule covers is not required.[51] The use of *any* non-compete is an unfair method of competition because non-competes, by definition, hinder competition and impose negative externalities beyond one individual agreement.[52] The FTC thoroughly considered the possible procompetitive justification of non-competes and ultimately concluded that the harm outweighed any benefits.[53]

The FTC argues that Congress lawfully delegated authority to the FTC. Section 5's directive that the FTC prevent "unfair methods of competition in or affecting commerce" meets the "intelligible principle" test. For many decades, the Supreme Court has approved Congress' delegation of authority to the FTC to regulate "unfair methods of competition."[54] Distinguishing *Schechter*, the FTC argues that Ryan has identified no case supporting its "novel theory that a statutory phrase can constitute a lawful delegation in the context of an adjudication but an unlawful delegation with respect to rulemaking."[55] The Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[56] Courts have rejected the argument that a practice legal under local law could not be banned under section 5.[57]

The FTC counters the plaintiffs' argument that the Rule is not arbitrary and capricious. The FTC considered the relevant issues and reasonably explained the decision. The FTC's decision to adopt a bright-line prohibition against non-competes – subject to a narrow exception for existing non-competes binding senior executives – readily satisfies the standard.[58] The FTC offers what it refers to as "compelling" justifications for a bright-line rule rather than a case-by-case, multifactor standard.[59]

Conclusion

The FTC's Rule, which will take effect on Sept. 4, 2024, will prohibit all non-compete clauses, with limited exceptions, and supersede Wisconsin law to the extent that Wisconsin law would permit a person to engage in conduct that is prohibited under the Rule.

It is possible that the motion to stay the effective date and preliminarily enjoin the Rule will have been decided at the district court level by the time

this article appears. Regardless of the decision, the issues are likely to be presented to the Fifth Circuit and then be appealed to the U.S. Supreme Court. Many of the arguments set forth above will likely be advanced during the appellate process.

The FTC Act does not authorize a private right of action. The FTC has the authority to enforce the Rule. To be enforceable under Wisconsin law, a restrictive covenant must 1) be necessary for the protection of the employer, that is, the employer must have a protectable interest justifying the restriction imposed on the activity of the employee; 2) provide a reasonable time limit; 3) provide a reasonable territorial limit; 4) not be harsh or oppressive as to the employee; and 5) not be contrary to public policy.[60]

Regardless of whether the courts uphold or invalidate the Rule and even though the FTC Act does not authorize a private right of action, can the FTC Rule provide a defense in state court? Can the FTC's public-policy findings and statements lead to a change in Wisconsin case law interpreting Wis. Stat. section 103.465 and a holding that all non-competes (that is, business clauses) in Wisconsin are per se unreasonable and unenforceable?[61] Aside from Wis. Stat. section 103.465, what is to stop an employer from enforcing a non-compete in Wisconsin if the FTC does not bring an adjudicatory action to enforce the Rule against that employer? Given the number of non-competes in the U.S. (the FTC estimates there are 30 million), the FTC likely will not bring adjudicatory actions to enforce the Rule against all employers. These and perhaps other questions remain. **WL**

UPDATE

On July 3, the *Ryan* court preliminarily enjoined the Rule as to plaintiffs (not nationwide). Sec. 6(g) did not authorize substantive rule-making, the Rule is arbitrary and capricious (unreasonably broad without reasonable explanation), and the FTC did not sufficiently consider alternatives. [Details will be discussed in the July 22 PINNACLE webcast.] In *ATS Tree Services*, No. 24-cv-1743 (E.D. Pa.), the court will rule on a similar motion.

ENDNOTES

[1]89 Fed. Reg. 38342, 38344 (May 7, 2024).
[2]Defendant's Consolidated Brief in Response to Plaintiffs' Motions For Stay of Effective Date and Preliminary Injunction, *Ryan LLC v. F.T.C.*, No. 3:24-cv-00986-E (N.D. Tex), doc. 82 at 2. Page citations are to the numbered pages of the brief, not to the file-stamped legend created by the ECF system.
[3]Rule, Supplementary Information, II, A, 89 Fed. Reg. at 38348.
[4]*Id.* at 38502-06.
[5]*Id.* at 38502-03.
[6]*Id.* at 38502.
[7]A "TRAP" is a training repayment agreement.
[8]89 Fed. Reg. at 38364.
[9]*Id.* at 38502.
[10]*Id.*
[11]*Id.*
[12]Rule § 910.2(b)(1), 89 Fed. Reg. at 38503.
[13]Rule § 910.2(b)(4), (5), 89 Fed. Reg. at 38503-04.
[14]89 Fed. Reg. at 38504.
[15]*Id.* at 38505.
[16]15 U.S.C. § 44.
[17]The FTC states that this test reflects the 8th Circuit's analysis in *Community Blood Bank of Kansas City Area Inc. v. Federal Trade Comm'n*, 405 F.2d 1011 (8th Cir. 1969).
[18]*See, e.g.*, 89 Fed. Reg. at 38357. See also the discussion of the health-care industry at 89 Fed. Reg. at 38447-451.
[19]*See Star Direct Inc. v. Dal Pra*, 2009 WI 76, 319 Wis. 2d 274, 767 N.W.2d 898.
[20]*See Manitowoc Co. v. Lanning*, 2018 WI 6, 379 Wis. 2d 189, 906 N.W.2d 130.
[21]*Ryan LLC*, No. 3:24-cv-00986-E, doc. 24.
[22]*National Petroleum Refiners Ass'n v. Federal Trade Comm'n*, 482 F.2d 672 (D.C. Cir. 1973).
[23]*See West Va. v. Environmental Prot. Agency*, 597 U.S. 697 (2022).
[24]*Id.* at 728 (citation omitted).
[25]*Id.* at 716.
[26]*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
[27]*Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).
[28]*Ryan LLC*, No. 3:24-cv-00986-E, doc. 47 at 20.
[29]*Id.*
[30]*Id.*
[31]*Id.* at 20-21.
[32]*Id.* at 26.
[33]*Id.*, doc. 82 at 3.
[34]*Id.* at 4.
[35]*Id.* at 4 (citing a "Section 5 Policy Statement"and 89 Fed. Reg. at 38358-59). The Section 5 Policy Statement is available at https://perma.cc/2G3F-2UW9 (synthesizing case law).
[36]*Ryan LLC*, No. 3:24-cv-00986-E, doc. 82 at 5.
[37]*United States v. JS & A Grp. Inc.*, 716 F.2d 451, 454 (7th Cir. 1983).
[38]89 Fed. Reg. at 38350.
[39]*Id.*
[40]Section 18(a)(2) provides, "The Commission shall have no authority under [the Act], other than its authority under this section, to prescribe any rule with respect to [UDAPs].... *The preceding sentence shall not affect any authority of the Commission to prescribe rules ... with respect to unfair methods of competition.*" *Ryan LLC*, No. 3:24-cv-00986-E, doc. 82 at 8 (citing 15 U.S.C. § 57a(a)(2) (emphasis added).
[41]*Ryan LLC*, No. 3:24-cv-00986-E, doc. 82 at 18 (citing cases).
[42]*Id.* at 21 (quoting *West Va.*).
[43]89 Fed. Reg. at 38353.
[44]*Ryan LLC*, No. 3:24-cv-00986-E, doc. 82, at 21-22.
[45]*Id.* at 22 (citation omitted).
[46]*Id.* at 23.
[47]*Id.*
[48]*Id.* at 24.
[49]*Id.* at 24-25.
[50]*Id.* at 25-26 (citation omitted).
[51]*Id.* at 26.
[52]*Id.* (citing 89 Fed. Reg. at 38407, 38428).
[53]*Id.* at 28.
[54]*Id.* at 29.
[55]*Id.* at 31.
[56]*Id.* (citation omitted).
[57]*Id.* at 32.
[58]*Id.* at 33-34.
[59]*Id.* at 35 (citing 89 Fed. Reg. 38458, 38462-63, 38463-64).
[60]*Star Direct*, 2009 WI 76, ¶ 20, 319 Wis. 2d 274.
[61]In *Tetra Tech EC Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 914 N.W.2d 21, the Wisconsin Supreme Court ended its practice of deferring to administrative agencies' conclusions of law. On judicial review pursuant to Wis. Stat. section 227.57(10), the court will give "due weight" to the experience, technical competence, and specialized knowledge of an administrative agency in evaluating the persuasiveness of the agency's argument. *Id.* **WL**