

Knotty FTC Adjudication Risks Becoming Even More Tangled

By **Nikhil Singhvi, John Graubert and Andrew Smith** (May 19, 2022, 6:16 PM EDT)

The Federal Trade Commission is having a dizzying time at the U.S. Supreme Court, and its administrative docket could get messy.

The Supreme Court held in its 2021 decision in *AMG Capital Management v. FTC*[1] that the agency could not seek monetary relief in federal district courts pursuant to Section 13(b) of the FTC Act, effectively steering the FTC's enforcement caseload toward litigation in the agency's own administrative tribunal.

The FTC has dutifully pivoted in that direction, filing more contested consumer protection cases in its administrative court — a forum previously dominated by antitrust matters — and, for the first time in recent memory, opening a round of administrative law judge hiring.

The administrative process at the FTC, however, is decidedly not for the timid: It's incredibly fast and allows the commission to bring and decide actions.

Administrative adjudication at the FTC — often referred to as Part 3 because the governing rules are found in Title 16 of the Code of Federal Regulations, Part 3 — moves at warp speed. To start, the evidentiary hearing will be scheduled to take place eight months after issuance of the complaint, or five months after issuance of the complaint if the commission seeks preliminary relief in federal district court.[2]

With only a matter of months from the filing of the complaint through the start of the trial, pretrial procedures are accelerated by necessity. For example, the parties meet to discuss scheduling and exchange initial disclosures within five days of the filing of the answer, the ALJ convenes a scheduling conference within 10 days of the filing of the answer, and the ALJ enters a scheduling order two days after the conference.[3]

Motions practice in Part 3 moves quickly too. A discovery motion must be answered within 10 days, and the ALJ must rule within 14 days thereafter.[4] A motion for summary decision must be fully briefed less than 20 days after it is filed, with a decision due from the commission 45 days later.[5]

With compulsory pre-complaint discovery at its disposal, FTC staff can largely set its own investigation



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pace in advance of an administrative proceeding. Respondents in Part 3, on the other hand, need to conduct their own discovery expeditiously and brace themselves for a summary decision motion that has likely been many months in the works.

Indeed, the rules permit staff to make a summary decision motion as soon as 20 days after issuing the complaint, setting up staff nicely for an ambush against flat-footed respondents.[6]

The timing imbalance is even more dire when the commission seeks preliminary relief. Section 13 of the FTC Act permits the commission to seek a temporary restraining order or preliminary injunction to accompany an administrative complaint.[7] The commission often does not engage in presuit discussions with targets against whom it seeks preliminary injunctive relief.

This means that a target may first learn of an FTC matter when served with a preliminary injunction motion in federal court and an administrative complaint in Part 3, in which case it must quickly and simultaneously oppose the motion and answer the complaint. When the dust settles from the preliminary injunction motion, the mad dash to a trial within five months will be on, with the lurking possibility that staff could file a summary decision motion at any moment.

Furious pace aside, the commission's dual role as prosecutor and adjudicator often means that the very same commission that votes to authorize the filing of a complaint will ultimately sit in judgment of its merits.

Specifically, the adjudicative proceeding commences when the commission votes to issue the complaint, and the commission typically decides motions to dismiss, motions to strike, and motions for summary decision.[8]

The ALJ usually presides over the hearing (if the matter makes it to that stage), but the commission, or any individual commissioner, can take the ALJ's place as the presiding officer.[9] Part 3 rules acknowledge basic concepts like relevance and prejudice, but hearsay evidence may be admitted and the full suite of federal evidentiary rules are not applicable.[10] And, most importantly, while the ALJ may issue an "initial" decision after an evidentiary hearing, the commission reviews that decision without any deference.[11]

Based on the foregoing, you would not be surprised to learn that the commission has a very successful record in deciding its own cases. Indeed, by some accounts the FTC has not lost a Part 3 case in the past 25 years; in *Axon Enterprise v. FTC*, the U.S. Court of Appeals for the Ninth Circuit, sympathizing with a challenger to the process, alluded to it as "a legal version of the Thunderdome in which the FTC has rigged the rules to emerge as the victor every time." [12]

For example, our firm represented Pom Wonderful as co-counsel in a five-month Part 3 trial involving 24 witnesses — including 14 experts — encompassing a broad range of advertising issues from claim interpretation to remedies. The hearing culminated in a 335-page initial decision from the ALJ with 1,431 findings of fact and a conclusion that 19 out of 43 advertisements challenged by the commission were deceptive.[13]

The commission, in a 54-page opinion, made its own findings (including as to witness credibility) and upped that number to 36 out of 43 advertisements, and, as to remedy, increased the severity of the injunction to require certain advertisements to be substantiated by at least two randomized and controlled human clinical trials.[14] The U.S. Court of Appeals for the D.C. Circuit ultimately rejected on

appeal the requirement for two randomized and controlled human clinical trials, but otherwise affirmed the agency's liability findings.[15]

After the administrative proceeding, respondents can appeal to any circuit court in which they reside or conduct business, but may find little quarter there: An appellate court's review is not de novo, but deferential if supported by substantial evidence.[16]

The last step in the administrative action journey, if the commission enters an order that is affirmed on appeal, is a separate, potential follow-on Section 19 action in district court for monetary relief. Here, the agency must show that a "reasonable [person]" would have known that the violative conduct was "dishonest or fraudulent." [17]

Before AMG, the FTC simply used Section 13(b) actions in district court to recover monetary relief to avoid the elevated standard. But future litigation regarding the uniquely phrased monetary relief requirement is now inevitable.

With the odds stacked against FTC targets in lightning speed administrative proceedings, settlement negotiations are to be expected. But even that process is thorny in Part 3.

If the litigants come to terms, the administrative action is paused, and FTC staff — who are otherwise screened from discussing the case with commissioners' offices — can discuss the proposed settlement with them. If the commission does not approve a settlement, the matter returns to Part 3 and the commissioners, who were exposed to the parties' settlement positions — likely twice, if prelitigation discussions also took place — and who have engaged in ex parte communications with the prosecuting staff, will resume their roles as adjudicators.

This exact scenario recently played out in *FTC v. Traffic Jams Events*, [18] which was contested in Part 3: After an unsuccessful four-month settlement "pause," [19] the matter returned to the ALJ, discovery resumed and concluded, and on a motion for summary decision the commission entered the full relief sought by FTC staff. [20]

This included an especially restrictive order barring the respondent from virtually all commercial activity pertaining to motor vehicles. [21] Now, the constitutionality of the entire administrative process, and the validity of that severe order provision, are under review in the U.S. Court of Appeals for the Fifth Circuit, which will consider whether FTC administrative adjudication affords respondents due process. [22]

Earlier this year, the Supreme Court in *Axon Enterprise v. FTC*, agreed to consider whether constitutional challenges to FTC's administrative adjudication procedure can be immediately brought in federal court, or whether the commission can first decide such issues on its own. [23]

Although the Supreme Court is only presently considering the procedural question regarding the sequencing of such challenges, as noted above the Fifth Circuit is poised to tackle the constitutional issue itself.

The same court in *Jarkesy v. U.S. Securities and Exchange Commission* just vacated an SEC administrative decision, finding it unconstitutional in a 2-1 decision because the petitioners were deprived of the right to a jury and because the delegation of adjudicatory power by Congress to the SEC was unintelligible. [24] The court also held that the SEC ALJ was unconstitutionally insulated from removal, but did not address whether that defect would warrant vacating the order. [25]

The Traffic Jam Events challenge does not raise the jury trial issue but is otherwise similar to Jarkesy, and the Fifth Circuit's general antipathy toward administrative proceedings in Jarkesy is a bad omen for the FTC.

In sum, the Supreme Court's actions in AMG and Axon have made the already complicated FTC administrative procedure even murkier, by simultaneously motivating more Part 3 actions but also raising the specter that they could be significantly reshaped. In the meantime, and perhaps for years to come, FTC administrative proceedings will carry on in their own inimitable and challenging way.

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Disclosure: Nikhil Singhvi was the assistant director supervising FTC staff prosecuting FTC v. Traffic Jams Events. John D. Graubert was co-counsel for defendant Pom Wonderful in the case discussed in this article.

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[1] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021).

[2] 16 C.F.R. § 3.11(b)(4).

[3] 16 C.F.R. § 3.21(a)–(c), § 3.31(b).

[4] 16 C.F.R. § 3.22(d),(e).

[5] 16 C.F.R. §§ 3.24(a)(2), 3.22.

[6] 16 C.F.R. § 3.24(a).

[7] 15 U.S.C. § 53.

[8] 16 C.F.R. § 3.11; 16 C.F.R. §§ 3.22, 3.26(d).

[9] 16 C.F.R. § 3.42.

[10] 16 C.F.R. § 3.43.

[11] 16 C.F.R. §§ 3.51, 3.54(a).

[12] Axon Enter., Inc. v. FTC, 986 F.3d 1173, 1187 (9th Cir. 2021).

[13] <https://www.ftc.gov/sites/default/files/documents/cases/2012/05/120521pomdecision.pdf>. The description of this matter is based on facts in the public record.

[14] https://www.ftc.gov/system/files/documents/public_statements/568951/130116pomopinion.pdf.

[15] *Pom Wonderful, LLC v. FTC*, 777 F.3d 478, 505 (D.C. Cir. 2015).

[16] *Id.* at 499-500; 15 U.S.C. § 21(c).

[17] 15 U.S.C. § 57b(a)(2).

[18] <https://www.ftc.gov/legal-library/browse/cases-proceedings/x200041-202-3127-traffic-jam-events-llc-matter>. The description of this matter is based on facts in the public record.

[19] https://www.ftc.gov/system/files/documents/cases/d09395_commission_order_returning_matter_to_adjudication_signedpublic.pdf.

[20] https://www.ftc.gov/system/files/documents/cases/d09395_commission_opinion.pdf.

[21] https://www.ftc.gov/system/files/documents/cases/d09395_commission_final_order.pdf.

[22] <https://dockets.justia.com/docket/circuit-courts/ca5/21-60947>.

[23] <https://www.supremecourt.gov/qp/21-00086qp.pdf>.

[24] *Jarkesy v. SEC*, No. 20-61007 (5th Cir. May 18, 2022).

[25] *Id.*