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Pro-Biz Group Backs Axon 9th Circ. Merger Review Challenge

By **Christopher Cole**

Law360 (March 18, 2021, 6:24 PM EDT) -- A free enterprise group is backing police body cam maker Axon's Ninth Circuit challenge to the Federal Trade Commission's merger review process, saying a split circuit panel decision favoring the FTC "cries out" for a second opinion.

The Atlantic Legal Foundation, a Washington, D.C., group that promotes limited government, filed an amicus brief Wednesday saying the full court should revisit the panel's ruling that Axon could not dispute the FTC's administrative process in federal court until the proceeding was over.

The panel's **January ruling** notched a victory for the FTC's position that Congress did not intend to let the courts short-circuit the commission's ongoing in-house antitrust reviews of proposed deals. But the Atlantic Legal Foundation said the ruling blocked Axon's right to a legal remedy.

"Axon's constitutional claims need to be heard sooner rather than later. They go to the heart of civil justice, which should be as important to independent regulatory agencies as it is to federal courts," Lawrence S. Ebner, the foundation's attorney, told Law360 in an email Thursday.

Axon sued the FTC in an Arizona district court in January 2020 on the same day the agency filed an administrative complaint targeting the company's 2018 purchase of body camera supplier Viewu. The FTC said the deal eliminated competition on price and innovation.

But the case rose to the Ninth Circuit after the district court said it lacked jurisdiction over a challenge to the FTC's administrative merger reviews, which are a statutorily granted power and a responsibility the agency shares with the U.S. Department of Justice. **Axon petitioned** for en banc rehearing after the circuit panel rejected its view, with a dissenting judge saying it should be able to pursue some constitutional claims.

Axon has lodged constitutional complaints against the FTC's process, which the company argues is slanted in the commission's favor and always leads to an outcome it wants. The agency says the statute does not allow for judicial review of an ongoing FTC case.

But that shuts the courthouse doors to companies like Axon that believe the FTC's proceedings are flawed, making this a pivotal case, the Atlantic Legal Foundation said Wednesday.

"Its ultimate resolution either will enable or foreclose meaningful judicial review of claims that challenge the structural constitutionality of administrative enforcement proceedings prosecuted and adjudicated in-house by extraordinarily powerful independent regulatory agencies such as the Federal Trade Commission," the foundation said.

The brief says when it comes to the FTC and another powerful agency that uses a similar enforcement scheme, the Securities and Exchange Commission, whether federal district courts can review structural constitutional claims after an administrative proceeding has started "is a question of whether justice delayed is justice denied."

The foundation suggested the process, if left unchallenged, leads to a backwards result.

"Fundamental fairness — and common sense — compel the conclusion that the respondent in an FTC administrative enforcement action should not be required to suffer the crippling cost, business disruption, reputational harm and adverse outcome of a fully adjudicated administrative proceeding before seeking judicial review of substantial, wholly collateral, threshold objections to the entire proceeding's constitutional legitimacy," it said.

The legal group also said the panel was well-suited for en banc review because the opinion was clearly "fragile" and "ambivalent" on the key jurisdictional questions.

Axon's counsel declined to comment Thursday.

An FTC spokeswoman declined to comment beyond the commission's court filings.

The Atlantic Legal Foundation is represented by its own Lawrence S. Ebner.

Axon is represented by its own Pamela B. Petersen.

The government is represented by Daniel Aguilar and Joshua Marc Salzman of the U.S. Department of Justice's Civil Division.

The case is Axon Enterprise Inc. v. FTC et al., case number 20-15662, in the U.S. Appeals Court for the Ninth Circuit.

--Additional reporting by Matthew Perlman. Editing by Philip Shea.

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