

Trade Secret Law Evolution Podcast
Greenberg Traurig, LLP
Episode 68

Speaker 1 ([00:00](#)):

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Jordan Grotzinger ([00:18](#)):

Welcome to the Trade Secret Law Evolution Podcast, where we give you comprehensive summaries and takeaways on the latest developments and trends in trade secret law. We want you to stay current and ahead of the curve when it comes to protecting your company's most valuable assets. I'm your host, Jordan Grotzinger.

[\(00:33\)](#):

Hi, everybody, and welcome to episode 68 of the podcast. Today with me is my recurring co-host, partner, and friend, Justin Victor. Justin, good to see you.

[\(00:50\)](#):

Today, we're going to go through news that just broke in the non-compete world, specifically the ruling in the Ryan v. FTC case, setting aside the FTC's non-compete ban nationally. We're going to explain why the decision was so important, go through some history of the FTC's non-compete ban and prior decisions, and then discuss what's next. So, let's jump right in. Justin, what just happened?

Justin Victor ([01:18](#)):

So, this is the decision that everybody following the FTC's non-compete ban has been waiting for, and we've been waiting a long time for it. So, without further ado, on August 20th, 2024 in the case Ryan v. FTC, the United States District Court for the Northern District of Texas issued a final judgment and order, setting aside the FTC's ban on employee non-competes. The key here is the ruling applies nationwide. The non-compete ban is not going to go into effect.

[\(01:56\)](#):

And this decision was particularly timely because if the nationwide order was not issued by this court or another court, the FTC's non-compete ban was set to go into place on September 4th, 2024. So, less than two weeks away. And if not set aside, the rule would have retroactively invalidated non-compete restrictions within employment contracts, with very limited exceptions, and would have made it so that employers couldn't have non-competes with employees on a go-forward basis,

Jordan Grotzinger ([02:32](#)):

That would've been quite the ripple across the country on September 4th. So, what does this mean, Justin?

Justin Victor ([02:40](#)):

So, it means that the FTC's rule that everybody's been talking about and everybody's been preparing for, that was set to go into place on September 4th, is not going to go into place. And as a result, as long as a non-compete is otherwise lawful, as long as there's no reason under state court law that it wouldn't be unlawful, as an employer, you can still have non-competes that are enforceable with your employees.

[\(03:12\)](#):

And unlike this specific court's prior order on July 3rd, 2024, which was a preliminary injunction order that restricted the non-compete, that only applied to the specific plaintiffs in the case. So, now, we have a nationwide ban in an order that strikes down the FTC's rule nationwide and restricts it from going into place. That's why this is so important.

Jordan Grotzinger [\(03:41\)](#):

What was the court's reasoning in striking down this rule nationally?

Justin Victor [\(03:46\)](#):

So, we got a preview of what the court's reasoning was going to be in the preliminary injunction ruling on July 3rd, and the court on August 20th parroted that reasoning.

[\(03:57\)](#):

First, it said that the FTC exceeded its statutory authority in enacting the rule, specifically holding that the FTC lacked the rulemaking authority for a nationwide ban on non-competes.

[\(04:10\)](#):

Second, the court held that the rule violated the Administrative Procedure Act due to a lack of justification for a universal ban that was, in the court's words, unreasonably overbroad.

Jordan Grotzinger [\(04:24\)](#):

Got it. So, what happens next?

Justin Victor [\(04:26\)](#):

Well, that's a great question, Jordan. Well, the FTC can and may appeal this ruling to the Fifth Circuit. We have to wait and see if that happens. And hopefully, by the time this podcast is published, it hasn't happened, but we have to wait and see what the FTC does. But even if there is an appeal, in the short term, it's highly, highly unlikely that any decision could or would be issued by any court before the effective date, September 4th, of the FTC's ban.

[\(04:57\)](#):

So, for now, and I think this is the thing that employers care about, for now, the FTC's rule will not go into effect on September 4th. Everything is status quo as it comes to the restrictions and notification requirements that were in the FTC's final rule.

Jordan Grotzinger [\(05:16\)](#):

So, this has been unfolding since April. There's been a few developments across a few courts. How did we get here, and why is this ruling such a big deal?

Justin Victor [\(05:28\)](#):

It's been a long process. In January 5th, 2023, the FTC put forward proposed rules banning non-competes, and that actually followed an executive order from July 9th, 2021, instructing the FTC to take action related to non-competes. So, we had this proposed rule on January 5th, 2023 by the FTC, and there was a comment period where business associations and companies that use non-competes and individual organizations were allowed to submit their comments to the proposed rule. And those were all sent to the FTC.

[\(06:09\)](#):

And then, on April 23rd, 2024, there was a vote by the FTC, approving the FTC's ban on non-competes. And when this approval came on April 23rd 2024, an effective date was set, and that effective date was September 4th, 2024. And so, the rule was rolled out in April and everybody was prepared, or was supposed to prepare, for the actual rule itself to go into effect on September 4th, 2024. At that time, a lot of people were speculating there's going to be a court decision that's going to ban this rule. But here we were in August 2024, pretty close to the effect the date of the rule, and that hadn't happened yet.

[\(07:01\)](#):

And this is so critical. Because if the rule was not enjoined, two things would've been required. The first thing is that most employees with non-competes would have to inform their employees that the non-competes that they had in place were no longer enforceable. So, there was a notice requirement. Every single person you have that has a non-compete, unless there's a limited exception that applies, has to be informed that that employer is not going to enforce the non-compete.

[\(07:33\)](#):

And then, second, non-competes were not going to be enforceable as a matter of law pursuant to the FTC's rule. And this applied on a retroactive basis with very limited exceptions. So, it wasn't just that people you hire after September 4th and have employment agreements with, or confidentiality and restrictive covenant agreements with, you weren't going to be able to have non-competes with those individuals. It's that all the restrictive covenant agreements you had with your prior employees had to be analyzed. And unless a specific exception applied, those were going to be retroactively non-enforceable.

Jordan Grotzinger [\(08:14\)](#):

And that, of course, would've been a big deal. Because unlike my state, California, there are still several states that enforce non-competes, at least partially. And so, that would've had a pretty massive effect. And quickly, there were some prior rulings on the FTC ban in the Ryan case and some of the other litigation. What happened in those cases?

Justin Victor [\(08:40\)](#):

Part of the reason why everybody's been holding their breath is we were hoping for certainty sooner, and we didn't get it. The first decision that came down was also in the Ryan case on July 3rd, 2024. There was a preliminary injunction ruling that I alluded to. And specifically, on July 3rd, 2024, the court said, "Look, I'm, on a preliminary basis, going to prevent enforcement of the FTC's rule against you plaintiffs, against you specific plaintiffs in the case, and some other parties that intervened in the Ryan case. But at this point, I'm not issuing a nationwide ban."

[\(09:21\)](#):

So, on July 3rd, we had the court's reasoning, which we got later on, again, on August 20th, 2024, but we didn't have the nationwide ban. All that was told within the order was that the court said they would issue a dispositive motion before August 30th, 2024, literally right before the deadline of the effective

date of September 4th, 2024. So, starting in July, everybody was waiting. When is this ruling going to come down by Ryan? And is this ruling going to be extended nationwide, or is it going to just stay and be confined to the actual plaintiffs and plaintiff interveners in the Ryan case?

Jordan Grotzinger ([10:05](#)):

So, the court promised a ruling by August 30th, and it is what? So, it delivered?

Justin Victor ([10:11](#)):

It delivered.

Jordan Grotzinger ([10:12](#)):

Okay. I think you were about to talk about the litigation in Pennsylvania. What happened there?

Justin Victor ([10:18](#)):

So, not every court has taken the same view as to whether the FTC has authority to issue a rule that bans non-competes. And an example is, in Pennsylvania, ATS Tree Services v. the FTC. And on July 23rd, 2024, the United States District Court for the Eastern District of Pennsylvania issued a decision and reasoning that is in stark contrast to the Ryan court.

([10:46](#)):

In fact, the court denied the plaintiff's request for an injunction of the rule, not just nationwide, but to that specific plaintiff. And the court said, "Look, we think the FTC does have authority to issue a non-compete ban, and we think the ban as written and the rule as written is within the FTC's authority." So, that was the decision that was in, obviously, stark contrast to the decision in Texas.

Jordan Grotzinger ([11:17](#)):

And before you talk about the next case, as you're saying that, it does make me think, is this going to reach the Supreme Court? Of course, that depends on further appeals. But when there already have been conflicting federal rulings, not enough to trigger SCOTUS review yet, but it opens up the possibility. And it's just, boy, it's hard to imagine this Supreme Court tolerating that FTC ban. But that remains to be seen, and we'll keep our eye out. What other litigation has there been that's worth talking about?

Justin Victor ([11:57](#)):

So, there was also a case in Florida, and this was Properties of the Villages v. the FTC. And on August 15th, 2024, in that matter, a federal court case in Florida, the court found that the FTC exceeded its authority in passing the non-compete ban. Very similar opinion and very similar reasoning to what we saw in Texas. But similar to the preliminary injunction opinion in Texas, the court only enjoined enforcement of the non-compete ban to the plaintiffs in that case, and it wasn't extended nationwide.

([12:34](#)):

So, we got this decision that was similar to the decision in the prior decision in Texas, the July decision in Texas in August 15th, 2024 in Florida. But again, it didn't apply to everybody, it just applied to those specific plaintiffs.

Jordan Grotzinger ([12:51](#)):

Okay. So, we've had two rulings from two different courts issuing injunctive relief, only one of those nationally, and one rejecting it. So, now what?

Justin Victor ([13:05](#)):

The first thing is, employers can take a very deep breath. They can stop working with counsel, which we've been doing on what a notice is going to have to look like, auditing their restrictive covenants as to who would have to get the notice and what form those notices would have to be sent out in. And they can also stop working on ensuring that the restrictive covenants that they were going to have to roll out on a go-forward basis for employees they hire after the effective date comply with the FTC's rule. The FTC's rule is, it has been essentially struck down by this Texas decision, and it will not go into effect. Things are the status quo.

Jordan Grotzinger ([13:50](#)):

Thanks for that, Justin. And thanks for staying on top of this. You've really become a go-to person on this important national development. It's also worth noting that we are seeing a trend at the federal and state levels, and judges are following suit. There is a real pushback against non-competes. It's possible, as we discussed that, Ryan, the ruling in Ryan gets appealed, or that a more limited ban is proposed.

([14:22](#)):

More and more states continue to issue restrictions on the use of non-competes. I suggested before, there are many states that still enforce it, although I mentioned partially. The exceptions are getting narrower. And best practices now are to review your agreements and make sure if you're a company, make sure that the restrictive covenants are narrowly tailored to the jurisdiction or states where employees work.

([14:54](#)):

And finally, and importantly to me and this podcast, this trend emphasizes the importance of trade secret protection, which isn't going anywhere. I already live, as I said, in a jurisdiction, California, where non-competes are illegal, subject to a few exceptions. And so, companies should renew focus on the required, reasonable measures to protect trade secrets. And the three, arguably four now, buckets of protection that I've talked about for years.

([15:26](#)):

One is, contracts and policies. That is a bucket of protection. Make sure your employment contracts have appropriate confidentiality clauses. Make sure your corporate policies protect trade secrets by limiting access only as needed, and other measures. The second bucket, and equally, if not more important in 2024, is technology. You want robust technological protection of trade secrets from the basics, like password protection to more sophisticated measures like VPNs and things that I can't even talk about intelligently. I defer to my tech people on that.

([16:08](#)):

The third bucket, of course, is physical. Arguably less important in a lot of contexts these days. Although, recently, we had an in-house counsel from a rocket company that works at a giant facility with literally tons of physical, technological equipment, to which not anybody should be given access. So, physical remains important, actual locks on doors. And this same guest, who if she's listening, you know who you are, suggested a fourth bucket, which I had not considered before, but now I'm adding to my list of three. And that is education and outreach. Things like training for employees on emphasizing the importance of trade secret protection and taking those confidentiality obligations seriously.

[\(17:06\)](#):

So, we hope that was helpful. We, and by we, I mean Justin, will continue to stay abreast of these developments, and we'll keep doing episodes to bring everybody up to speed. Justin, thanks a lot, my friend. I'm losing count of how many times you've been on. Always love the input and the energy. You're a great co-host, and look forward to seeing you back.

Justin Victor ([17:29](#)):

Thank you so much for having me. I look forward to being back.

Jordan Grotzinger ([17:31](#)):

Thanks. All right. Bye, everybody.

[\(17:35\)](#):

Okay, that's a wrap. Thanks for joining us on this episode of the Trade Secret Law Evolution Podcast. As the law evolves, so will this podcast, so we value your feedback. Let us know how we can be more helpful to you. Send us your questions and comments.

[\(17:48\)](#):

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