

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-12144

D.C. Docket No. 1:14-cv-00810-WSD

LABMD, INC.,

Plaintiff - Appellant,

versus

FEDERAL TRADE COMMISSION,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(January 20, 2015)

Before MARTIN and ANDERSON, Circuit Judges, and COTE,¹ District Judge.

MARTIN, Circuit Judge:

LabMD, Inc. is an Atlanta-based laboratory that performed cancer-detection testing services for doctors. After the Federal Trade Commission (FTC) discovered that LabMD patient information files were available on a peer-to-peer file-sharing network, it launched an investigation into LabMD's data-security practices. The investigation persisted for three years, leading LabMD's CEO, Michael Daugherty, to publicly criticize the FTC's actions. Shortly after Mr. Daugherty posted an online trailer for his book, "The Devil Inside the Beltway," which he says exposes corruption in the federal government, the FTC filed an administrative complaint against the company. The administrative proceeding is ongoing.

This appeal addresses the District Court's dismissal of LabMD's challenges to the FTC's ability to regulate and conduct enforcement proceedings in the area of healthcare data privacy. LabMD argues that the FTC's enforcement action violates the Administrative Procedure Act (APA), is ultra vires, and is unconstitutional.

Before we can reach the merits of LabMD's claims, we must first face the central question of whether the District Court has subject-matter jurisdiction to consider LabMD's challenges while the administrative proceeding is ongoing.

¹ Honorable Denise Cote, United States District Judge for the Southern District of New York, sitting by designation.

Because we hold that the FTC's Order denying LabMD's motion to dismiss was not a "final agency action," as is required of claims made under the APA, those claims were properly dismissed. And because we conclude that LabMD's other claims—that the FTC's actions were ultra vires and unconstitutional—are intertwined with its APA claim for relief and may only be heard at the end of the administrative proceeding, we affirm the District Court's order dismissing the case for lack of subject-matter jurisdiction.

I.

In 2008, internet-security company Tiversa, Inc. notified LabMD that it had obtained sensitive patient information from LabMD. Under circumstances that remain hotly disputed by the parties, the FTC learned about the possible breach of security involving patient information and began an investigation into LabMD's data-security practices in 2010. On July 19, 2013, Mr. Daugherty posted an online trailer to his book highlighting corruption in the federal government, including specific claims about the FTC. Three days after Mr. Daugherty posted the trailer online, the FTC gave notice of its intent to file a complaint against LabMD.

In August 2013, the FTC filed its administrative complaint, alleging that LabMD violated Section 5 of the FTC Act by engaging in an "unfair . . . act[] or practice[]" by failing to prevent unauthorized access to its patient information. LabMD moved to dismiss the FTC Complaint, which the FTC denied in a January

2014 Order. LabMD next filed suit in the District Court for the District of Columbia, seeking an injunction to stay the administrative action from going forward on the grounds that it was an improper expansion of FTC jurisdiction, was retaliatory, and violated the Due Process Clause. LabMD v. FTC, No. 1:13-cv-1787 (D.D.C. Nov. 14, 2013). LabMD filed a similar action in this Court, making the same allegations. LabMD Inc. v. FTC, No. 13-15267-F (11th Cir. Feb. 18, 2014). We denied LabMD's claim, citing our lack of jurisdiction over a non-final agency action, but we declined to address whether the District Court could hear any of the claims. Id. LabMD voluntarily dismissed its District of Columbia suit.

On March 20, 2014, LabMD filed this suit in the Northern District of Georgia, alleging that: (1) the FTC's administrative action against LabMD is arbitrary and capricious in violation of the APA because the FTC has no authority to regulate protected health information (PHI); (2) the action is ultra vires and exceeds its statutory authority; (3) the FTC's application of Section 5 to LabMD's security protocols violates the Due Process Clause of the U.S. Constitution because it did not provide fair notice or access to a fair tribunal and a hearing; and (4) the FTC violated LabMD's First Amendment right to free speech. The FTC filed a motion to dismiss, which the District Court granted.

II.

We review de novo a district court's grant of a motion to dismiss for lack of subject-

us review are not final. First, neither document is a consummation of the agency's decisionmaking process. LabMD suggests that these documents "effectively determined there would be legal consequences imposed on LabMD," because the filing of an FTC complaint almost certainly leads to a cease-and-desist order. But, high odds of a cease-and-desist order coming from the FTC do not advance our ability to review the FTC actions. It is the nature of the action we must consider, and the Complaint and Order do not finally decide these issues. By definition, the denial of a motion to dismiss ensures that the proceeding will continue to a

this may be, we are not

CSI Aviation Servs., Inc. v. U.S. Dep't of Transp., 637 F.3d 408, 412–13 (D.C. Cir. 2011) (holding that a Department of Transportation warning letter and exemption order were sufficiently “final” because they (1) included a definitive statement that the plaintiff’s business was violating the Federal Aviation Act; (2) presented a “purely legal” question with no factual disputes; and (3) imposed an immediate burden by effectively requiring the business to stop operating). Even if those exceptions applied in this Circuit, LabMD’s challenge here does not fit within their
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The Court in Thunder Basin emphasized that the claims “c[ould] be meaningfully addressed in the Court of Appeals” after final agency determination. Id. Our own Court’s decision in Doe v. FAA, 432 F.3d 1259 (11th Cir. 2005), also clarifies that all constitutional claims must be funneled through the direct-appeal process after a final agency action if that is the scheme created by Congress. Id. at 1262–63. The FTC Act provides for appellate review by the Courts of Appeals

LabMD's First Amendment claim must join its other claims to await appellate review after the Commission's proceedings are final, as Congress contemplated in the FTC Act.

The District Court correctly held that it did not have jurisdiction over LabMD's claims. And until the administrative proceeding is complete, we too