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BLOG

Supreme Court Declines to Decide Whether FCC Orders Bind District Courts

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On June 20, 2016, the U.S. Supreme Court sidestepped an opportunity to give much-needed guidance to courts and litigants under the Telephone Consumer Protection Act (TCPA). In *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17–1705, the Court was faced with a pervasive question in TCPA lawsuits: are district courts required to follow orders from the Federal Communications Commission interpreting the TCPA's statutory text? Under the Hobbs Act, federal courts of appeals are vested with exclusive jurisdiction to "enjoin, set aside, suspend," or "determine the validity" of FCC orders. But lower courts have split on whether FCC orders control the TCPA's meaning in private lawsuits.

The Court declined to resolve that disagreement in *PDR Network*. At issue was the FCC's 2006 Order, which ruled that the TCPA's ban on "unsolicited advertisements" includes faxed advertisements that "promote goods or services even at no cost, such as free magazine subscriptions." The district court declined to follow the FCC's definition; it held that PDR Network's faxes, which advertised a free medical reference guide, were not "unsolicited advertisements." The Court of Appeals for the Fourth Circuit reversed, holding that the Hobbs Act required the district court to defer to the FCC's definition of "unsolicited advertisements."

The Supreme Court vacated and remanded for the Fourth Circuit to answer two preliminary questions that it had not addressed. First, was the FCC's 2006 Order a "legislative rule" that has the "force and effect of law," or rather an "interpretive rule," which may not be binding on district courts? Second, did PDR Network have a "prior" and "adequate" opportunity to seek judicial review of the 2006 Order? If so, the Administrative Procedure Act bars subsequent judicial review of the Order.

Although the Court left open the question whether district courts are bound by the FCC's orders, a four-justice concurrence authored by Judge Kavanaugh may have hinted at the Court's ultimate resolution of that issue. That concurrence, joined by Justice Thomas, Justice Alito, and Justice Gorsuch, endorsed the view that district courts are free to interpret the TCPA for themselves, despite contrary FCC orders. Time will tell whether a fifth justice adopts that view.

TIP: The Court's decision in *PDR Network* highlights two avenues for TCPA defendants to challenge unfavorable FCC orders. First, defendants can argue that the order is a non-binding "legislative rule." Second,

defendants can argue that they lacked an adequate opportunity to challenge the order when it was issued. Although both arguments are fact-dependent, TCPA defendants should carefully consider them in each case.

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