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SCOTUS Punts on TCPA Guidance

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In its long-awaited ruling addressing whether the Administrative Orders Review Act (Hobbs Act) requires district courts to accept the FCC's legal interpretations of the Telephone Consumer Protection Act (the TCPA), the Supreme Court of the United States unexpectedly failed to answer the question for which it had granted certiorari review. Rather than provide the hoped for clarification that many had been seeking on this contested issue, the Court remanded the case to the U.S. Court of Appeals for the Fourth Circuit to answer two preliminary sets of questions which had not been presented to the lower court. Though a unanimous ruling as to the judgment, the decision in *PDR Network v. Carlton & Harris Chiropractic* shows profound differences in opinion between the justices as to fundamental principles of administrative law, leaving open questions of district court and FCC authority to interpret the TCPA until a later date.

PDR Network involved a putative class action wherein the main legal question was whether a fax informing recipients that they could reserve a free e-book constituted an unsolicited advertisement. The FCC had entered an order in 2006 (the 2006 FCC Order) which concluded that faxes which "promote goods or services even at no cost" including "free magazine subscriptions" and "catalogs" were unsolicited advertisements in violation of the TCPA. However, the district court dismissed the case, deciding in large part that it was not bound by the 2006 FCC Order. On appeal, the Fourth Circuit concluded that under the Hobbs Act, it had "exclusive jurisdiction" to "enjoin, set aside, suspend," or "determine the validity" of FCC "final orders." Therefore, it ordered the district court to adopt the 2006 FCC Order's interpretations.

SCOTUS granted certiorari review to answer the question "[w]hether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act." Writing for the Court, and joined by four other justices, Justice Stephen Breyer admitted that the Court found it "difficult to answer this question," explaining that the answer may depend upon the resolution of two preliminary issues which were not argued before the Fourth Circuit, specifically: (1) Is the 2006 FCC Order the equivalent of a legislative rule which is issued by an agency pursuant to statutory authority and has the force and effect of law, or is it an interpretative rule which simply advises the public of the agency's construction of the statutes and rules which it administers and therefore lacks the force and effect of law, noting that the latter may not be binding and may not require the district court to adhere to it; and (2) did the Hobbs Act afford the defendant a prior and adequate opportunity to seek judicial review of the 2006 FCC Order, noting the Hobbs Act's exclusive-review provision requires challenges be brought in a court of appeals within 60 days after the entry of the order in question, and that if the prior opportunity was not adequate, it may be the case that the defendant would still be able to challenge the validity of the 2006 FCC Order even if it were found to be a legislative rule. The Court took pains to note that it was using the word "may" intentionally, as it was not definitively deciding on these issues at this time and was merely vacating and remanding for the Fourth Circuit to reach its own conclusions.

In a spirited concurring opinion, Justice Kavanaugh, joined by three other justices, agreed with the majority opinion that the Fourth Circuit erred and that its judgment should be reversed. However, he castigated the majority for not entering a final ruling on this issue, and provided his own analysis for how the final ruling should be reached, noting, "The analysis set forth in this separate opinion remains available to [the Fourth

Circuit] on remand (if it needs to reach the question after answering the preliminary issues identified by this Court), and it remains available to other courts in the future."

In his analysis, Justice Kavanaugh strongly disagreed with the notion that the Hobbs Act implicitly barred district courts from reviewing agency interpretations in subsequent enforcement actions.[1] He based his conclusion on a "general rule of administrative law" that, in an enforcement action, a defendant may argue that an agency's interpretation of a statute is wrong, unless Congress has explicitly precluded the defendant from doing so, thereby making it the "default rule" that a district court may review whether the agency's interpretation is correct, subject to the usual principles of statutory interpretation and affording appropriate respect to the agency's interpretation. Moreover, he noted that, in an enforcement action, a district court does not determine the validity of an agency order; it merely finds whether the defendant is liable under the correct interpretation of the statute, rendering the circuit court's exclusive jurisdiction to determine validity irrelevant.

Justice Kavanaugh further found that acts which preluded judicial review of agency statutory interpretations in subsequent enforcement actions did so expressly. He thereby concluded that as Congress had not expressly done so in the Hobbs Act, its silence should not be read to preclude judicial review, as "Congress can, must, and does speak clearly." He noted that it would be "grossly inefficient and unfair" to not support this default rule, as it would be "wholly impractical – and a huge waste of resources – to expect and require every potentially affected party to bring pre-enforcement Hobbs Act challenges against every agency order that might possibly affect them in the future." He concluded, "In short, the text of the Hobbs Act is best read to mean that [the sender] can argue that the agency's interpretation of the TCPA is wrong. And the district court can decide what the statute means under the usual principles of statutory interpretation, affording appropriate respect to the agency's interpretation. By doing so, the district court will not 'determine the validity' of the agency order..."

In a bit of prognostication, Justice Kavanaugh noted in closing:

Under the Court's holding today, if the [Fourth Circuit] on remand concludes that the FCC's order was not subject to the Hobbs Act in the first place, [the sender] will be able to argue that the FCC's interpretation of the TCPA is incorrect. Or if the court concludes that pre-enforcement review was not adequate for [the sender], then [the sender] likewise will be able to argue that the FCC's interpretation of the TCPA is incorrect. If the court on remand reaches neither of those conclusions, however, then the court on remand will confront the question that we granted certiorari to decide and that is analyzed in this separate opinion. For the reasons I have explained, I would conclude that [the sender] may argue that the FCC's interpretation of the TCPA is incorrect, and that the District Court is not required to accept the FCC's interpretation of the TCPA.

The stark divisions in what is purportedly a unanimous decision leave numerous questions on how the Court will ultimately resolve this issue. The majority has focused on questions which no one asked and provided no answers of its own in response, with each of its "mays" leaving open the binding effect of FCC orders and whether defendants can challenge FCC orders years after they become final, all while the four other justices appear ready to find that district courts have authority to interpret and apply the TCPA in each action, so long as the appropriate standards for statutory interpretation and agency deference are met. Ultimately, it is apparent that rather than provide the clarity which has been needed in the wake of the D.C. Circuit's decision in *ACA International v. Federal Communications Commission, et al*. [ACA Int'l v. FCC, 885 F.3d 687 (D.C. Cir. 2018)] and the increasingly conflicting Circuit Court decisions which have resulted thereafter, [See, e.g., *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119 (3d Cir. 2018); *King v. Time Warner Cable Inc.*, 894 F.3d 473 (2d Cir. 2018)] SCOTUS's ponderings in the course of its illusory unanimity have left these issues and their ultimate resolution open until the next time this dispute returns to the Court.

TCPA litigation remains extensive, with thousands of new cases filed each year affecting parties over a vast array of industries, particularly those in financial services. Inter-circuit conflict over the scope of key statutory terms and the very defenses which may be raised to enforcement actions has left defendants in the dark, and this uncertainty will only continue to invite more litigation. While the Court's opinion in *PDR Network* invites an interesting debate on how it will rule when next it takes up a TCPA related question, with the Court in possible disagreement over the authority of district courts to consider defendants' challenges to the FCC's TCPA interpretations, and until a firm decision is reached, ambiguity will continue to reign to the detriment of defendants and the burden of the lower courts.

Moving forward, businesses that may be subject to TCPA liability need to be even more vigilant about compliance and consult with legal counsel about potential gaps in their compliance programs. Should you have questions about this ruling or any other TCPA-related inquiries, please contact the author of this alert or your regular Baker Donelson attorney.

[1] It is noteworthy that the federal government filed an amicus brief arguing that the Hobbs Act should be interpreted to bar district court review, and that Justice Kavanaugh spent the majority of his concurring opinion directly rebutting each of its contentions.