

U.S. Supreme Court Balks on Judicial Deference to FCC in TCPA Case, While Concurrence Led by Justice Kavanaugh Looks to Swing

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TCPA litigators have been closely monitoring the U.S. Supreme Court's docket waiting for a ruling in the *PDR Network* case. At stake is what kind of judicial deference should be given to the FCC's interpretation of the Telephone Consumer Protection Act (TCPA). Specifically, the Court was set to decide whether the Hobbs Act required the District Court to accept the FCC's legal interpretation of the TCPA. Numerous decisions at both the District Court and Circuit levels have held that trial courts have no discretion to review an FCC order interpreting the TCPA, meaning that courts must provide these orders complete deference.

The Court in *PDR Network* was set to issue a ruling on this legal oddity where a court has no authority to interpret the TCPA when the Federal Communications Commission (FCC) has already ruled. The wait is now over, but instead of a touchdown, a majority of the Supreme Court decided to punt the case back to the 4th Circuit without providing a ruling on the certified issue. To complicate matters, Justice Kavanaugh issued a concurrence and was joined by three other justices, which means the issue remains in play. Kavanaugh's concurrence holds that courts are not required to give absolute deference to the FCC's orders; further, the justice expressly states his analysis should be used by courts in the future.

In 2013, PDR sent a fax to healthcare professionals to announce the launch of a digital version of its publication. PDR is a compilation of manufacturers' prescribing information on prescription drugs, which is available free of charge to health care professionals. Carlton & Harris Chiropractic received this fax and filed a class action against PDR, alleging that PDR violated the TCPA for sending it an unsolicited fax advertisement. The TCPA defines an "unsolicited advertisement" as "any material



advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."

The District Court dismissed the lawsuit because the PDR fax did not fit the statutory definition of an unsolicited advertisement because the service was "free"—it could not be bought or sold. However, the 4th Circuit reversed. The 4th Circuit held that the Hobbs Act required the District Court to follow the FCC's 2006 order, in which the agency determined that an offer of a free good or service could still qualify as "unsolicited advertisement" under the TCPA. As a result, the 4th Circuit found that the District Court erred because it did not provide absolute deference to the FCC's 2006 order as required by the Hobbs Act.

The U.S. Supreme Court granted PDR's *writ of certiorari* to determine whether the Hobbs Act required the District Court to accept FCC's legal interpretation of the TCPA. The majority never reached a decision on this issue. The majority found additional information is needed on the following issues: (1) whether the rule at issue is interpretive or legislative; and (2) whether the order in question afforded PDR a prior and adequate opportunity for judicial review. Justice Kavanaugh authored a 19-page concurring opinion and was joined by Justices Alito, Thomas, and Gorsuch. Kavanaugh concluded that the Hobbs Act should "[n]ot bar PDR from arguing that the FCC's legal interpretation of the TCPA is incorrect. Instead, 'the district court should interpret the statute as courts traditionally do under the usual principles of statutory interpretation, affording appropriate respect to the agency's interpretation.'" Kavanaugh tells courts that they should follow his opinion by stating that "[t]he analysis set forth in this separate opinion remains available to the court on remand ... and it remains available to other courts in the future." Justices Thomas and Gorsuch also joined in a separate concurring opinion authored by Justice Thomas, wherein they identified constitutional problems if courts were required to provide the FCC's legal interpretations of the TCPA absolute deference.

If Courts continue to give absolute deference to the FCC's orders, both concurring opinions raise constitutional concerns over the TCPA. How these concurring opinions will effect pending and future TCPA cases will be interesting to follow. Will courts adopt Justice Kavanaugh's analysis? Or will courts continue provide the FCC absolute deference and run into the constitutional issues raised by the four concurring Justices? Time will tell.

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