

High Court Punt Plunges TCPA Suits Into Greater Uncertainty

By Allison Grande

Law360 (June 21, 2019, 10:10 PM EDT) -- Businesses and consumers are bracing for a wave of conflicting court decisions over the contours of the Telephone Consumer Protection Act, after the U.S. Supreme Court on Thursday failed to deliver much-needed clarity on who has the final say on how the law is interpreted.

District courts tasked with overseeing the wealth of disputes that turn on how "autodialer" and other key statutory terms apply to modern telemarketing practices have long struggled with what weight to give to the Federal Communications Commission's numerous orders interpreting the TCPA.

No end to this confusion appears to be in sight, now that the Supreme Court has sidestepped the question of whether district courts are required under the Hobbs Act to defer to agency orders in a ruling that gives judges significant leeway to come down on either side of the debate.

"From a business perspective, the court's decision on how much deference to give to the FCC under the Hobbs Act, if any, was irrelevant. Instead, most just wanted a decision — and a clear one at that," Troutman Sanders LLP partner David Anthony said. "Justice Stephen Breyer's decision fails to provide such guidance and, in fact, could introduce more uncertainty into the TCPA landscape."

In their ruling Thursday, all the justices agreed that the TCPA dispute between health information services provider PDR Network LLC and chiropractic practice Carlton & Harris should be sent back to the Fourth Circuit without resolving the core deference question before the high court. According to the justices, that inquiry hinged on a pair of issues that were not properly vetted by the appellate court.

The justices faulted the lower court for failing to address whether the contested 2006 FCC order on what constitutes an unsolicited fax advertisement is the equivalent of a "legislative rule" that has the "force and effect of law," or is an "interpretive rule" that merely advises the public of the agency's stance on an issue. The question of whether PDR Network had a "prior" and "adequate" opportunity to seek judicial review of the FCC's order also wasn't adequately explored, the justices said.

While the Supreme Court dodged the main issue, the justices' narrow approach does provide a boost to both consumers and companies by providing them with "two powerful ways to challenge FCC orders: They can argue that the orders are nonbinding 'interpretive rules' or that the defendant did not have an 'adequate' opportunity to challenge the FCC's order," according to Covington & Burling LLP partner Kevin King.

Justice Brett Kavanaugh additionally opened a third door with his detailed concurrence advocating for the district court's ability to scrutinize and ultimately disregard FCC orders with which they disagree, King added.

But while the concurrence — which was joined by three other conservative justices — provides persuasive guidance and a potential framework for lower courts to follow in weighing these disputes, it's not binding. That leaves both the Fourth Circuit and other courts free to make their own calls on the force of relevant FCC orders.

"Regardless of what the Fourth Circuit does [on remand], other circuits may reach different conclusions on the two questions articulated by the Supreme Court," Venable LLP partner Dan Blynn said. "That could lead to even more discord among the courts and lack of consistent standards or applications of the law."

The chaos will almost certainly extend to the way statutory disputes under the TCPA are litigated, attorneys say.

"The Supreme Court's decision means that the current directionless mess of litigation under the TCPA is going to continue for a while, where it's a free-for-all and everyone's arguing when the FCC's interpretation benefits them that the agency's order controls, and when it doesn't benefit them, that the court's interpretation controls," said Snell & Wilmer LLP partner Becca Wahlquist.

Given the Supreme Court ruling's potential to inspire district court judges to feel more empowered to ignore FCC orders, the outcome of these arguments are likely to be inconsistent and could even go against the party who believes they have the upper hand, Troutman Sanders partners Alan Wingfield, Virginia Flynn and Chad Fuller said in a joint email.

"Thus, even if the FCC issues a favorable declaratory ruling, it may not provide TCPA defendants the certainty previously expected," the attorneys said.

The administrative and due process arguments that the Supreme Court dinged the Fourth Circuit for failing to address are also likely to be featured much more prominently and frequently in these disputes moving forward, attorneys say.

"The Supreme Court's punting decision will almost definitely deepen the quagmire of litigating TCPA cases and probably make most TCPA lawyers wish they had paid more attention in their Administrative Law class in law school," said Carlton Fields PA shareholder Aaron S. Weiss. "Instead of providing a pellucid standard, the Supreme Court has given the district courts — and lawyers — more homework."

Even though the issues flagged by the justices have "been staring everyone in the face for years," very few practitioners have challenged the notion that FCC rulings may be mere interpretive rules or dug into the interaction between the Hobbs Act and the Administrative Procedures Act, according to Squire Patton Boggs partner Eric Troutman.

"The Supreme Court's PDR Network decision really gives TCPA practitioners a new way of looking at the FCC's TCPA rulings," Troutman said. "It was not just the Court of Appeals that failed to spot these issues potentially thwarting the FCC's exclusive jurisdiction over the TCPA."

Attorneys expect the ruling to leave open to attack the scores of orders the FCC has issued since the TCPA was enacted in 1991 addressing the meaning and applicability of key statutory terms such as autodialer, called party, reassigned number and vicarious liability, even if those readings aren't necessarily controversial.

"It could open up the floodgates to even more TCPA litigation and debate as to generally settled principles based on FCC rulings, such as text messages being treated the same as calls under the statute and subject to the TCPA's autodialer and other provisions," Blynn said.

The ruling could also impact the approach the FCC takes to issuing future rulings on the meaning of the TCPA.

These include the commission's highly anticipated decision on what constitutes an autodialer and how to avoid liability for calling reassigned numbers under the TCPA. The FCC was pushed to take another stab at interpreting these provisions in the wake of a successful Hobbs Act challenge mounted by ACA International and others that resulted in the D.C. Circuit striking down a 2015 FCC order that broadly defined autodialer and established a one-call safe harbor for reassigned numbers.

"In response to the Supreme Court's ruling, the FCC could be very clear moving forward about saying whether their statutory interpretations are interpretative rules or legislative rules, so at least at that point judges would know what they're dealing with," Stroock & Stroock & Lavan LLP partner Stephen Newman said.

The FCC might be more inclined to follow that path given where the pair of concurrences, authored by Justices Kavanaugh and Clarence Thomas, appeared to be steering the court.

"Four conservative justices — Kavanaugh, Thomas, Alito, Gorsuch — would have found that the Hobbs Act does not bar a defendant in an enforcement action from arguing that the agency's interpretation of the statute is incorrect," Hogan Lovells partner Mark Brennan noted. "They only need one more friend to join the party."

Justice Kavanaugh, in penning his concurrence, likely drew on his deep expertise on administrative law issues built during his time on the D.C. Circuit, where he authored a split 2017 opinion that struck down an FCC decision to require opt-out notices on solicited faxes.

"I am sure that what he learned in [that case] about how the FCC rolled out its solicited fax regulations and the expense, turmoil, and years of litigation those caused were very much on his mind as he explained why deference to agency interpretations poses serious problems, particularly when writing that the government's interpretation of the Hobbs Act 'blindsided[s] defendants who would not necessarily have anticipated that they should have filed a facial, pre-enforcement challenge,'" Drinker Biddle & Reath LLP partner Justin Kay said.

While Justice Kavanaugh was unsuccessful in courting a fifth justice to back his stance, attorneys say they wouldn't be surprised if that balance shifts if the issue comes before the high court again, which is likely to happen if the Fourth Circuit declines to follow the concurrence's advice.

"This decision reveals that Chief Justice John Roberts may not be prepared to act quite as decisively as his peers, but that does not mean that we have seen the last chapter on this important topic," said Womble Bond Dickinson LLP partner David Carter said. "Instead, the battle lines are being clearly

drawn and we are likely to see increasing litigation regarding the balance of power between the courts and regulatory agencies."

PDR Network is represented by Carter G. Phillips, Kwaku A. Akowuah, Daniel J. Feith and Kurt A. Johnson of Sidley Austin LLP, and Jeffrey N. Rosenthal and Ana Tagvoryan of Blank Rome LLP.

The chiropractic group is represented by Glenn L. Hara of Anderson & Wanca, and D. Christopher Hedges and David H. Carriger of Calwell Luce diTrapano PLLC.

The case is PDR Network LLC et al. v. Carlton & Harris Chiropractic Inc., case number 17-1705, in the U.S. Supreme Court.

--Editing by Kelly Duncan.