

U.S. Supreme Court Sends Case Interpreting TCPA Back to Lower Court

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Congress enacted the Telephone Consumer Protection Act in 1992 to regulate how people communicate by phone and fax. The TCPA gave the Federal Communications Commission regulatory authority to issue rules expanding on the TCPA's statutory do's and don'ts. The FCC has exercised that authority often over the years, in rules codified in the Code of Federal Regulations and in FCC rulings that are not in the CFR.

Congress limited the public's ability to seek judicial review of the FCC's interpretations of the TCPA by subjecting the TCPA to the Administrative Orders Review Act, also known as the Hobbs Act. The Hobbs Act establishes a 60-day window for the public to seek review of the validity of a new FCC interpretation of the TCPA. Parties must proceed in federal appellate court within that narrow time frame if they wish to request an order enjoining, setting aside, suspending, or determining the validity of an FCC order.

On June 20, 2019, in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, the United States Supreme Court issued an opinion regarding the Hobbs Act's application to an FCC interpretation of the TCPA's "unsolicited advertisement" standard. Ultimately, the Court's decision did not break new ground: the Court remanded the case to the U.S. Court of Appeals for the 4th Circuit. However, the majority opinion and the two concurring opinions offer interesting thoughts on how the Hobbs Act may apply to the TCPA in the future.

PDR Network publishes a reference book setting out the uses and side effects of prescription drugs. The book is free for medical providers; PDR makes money by charging pharmaceutical companies to include information about their drugs in the book. Carlton & Harris Chiropractic, a medical provider, received an unsolicited fax from PDR promoting the free e-book version of the reference. Carlton & Harris sued PDR under the TCPA, claiming that the fax was an unlawful unsolicited advertisement.

A key point of dispute between the parties was whether the fax was, in fact, an unsolicited advertisement under the TCPA. In guidance issued in 2006, the FCC stated that fax messages that promote goods or services even at no cost are unsolicited advertisements because free publications are often part of an overall marketing campaign. No one in 2006 used the Hobbs Act's 60-day window to challenge the FCC's interpretation. In this litigation, the district court agreed with PDR that its faxes were not unsolicited advertisements. The trial court also found that the Hobbs Act did not apply to

its ruling because the court was not challenging the validity of the FCC's 2006 order.

The U.S. Court of Appeals for the 4th Circuit reversed. The appellate court reasoned that the Hobbs Act obligated the trial court to apply the FCC's 2006 guidance and conclude that an unsolicited fax offering something to the recipient for no charge was an advertisement. In other words, the appellate court determined that the district court's decision not to be bound by the FCC's 2006 order had the same effect as challenging the validity of the order.

The U.S. Supreme Court vacated the 4th Circuit's opinion. Five of the justices signed off on the majority opinion that the appellate court needed to address two preliminary issues regarding the application of the Hobbs Act before reaching a final decision. First, the Hobbs Act applies to "final orders" of the FCC. The Supreme Court directed the appellate court to determine whether the FCC's 2006 order was a "legislative rule" or an "interpretive rule." If it was a legislative rule, then it would likely be deemed a "final order" subject to the Hobbs Act. If it was an interpretive rule, then it might not be subject to the Hobbs Act. In that case, the trial court might be able to apply the TCPA's "unsolicited advertisement" standard without being bound to the FCC's 2006 guidance.

Second, the Supreme Court asked the appellate court to consider whether the Hobbs Act's narrow review process gave PDR a prior and adequate opportunity for judicial review of the FCC's 2006 order. If the appellate court found that PDR did not get this opportunity, then the majority opinion indicated that this could justify a decision not to apply the Hobbs Act. In short, the majority opinion held that it would be premature to consider the substance of the issues raised by the Hobbs Act and the TCPA in this case.

Justice Thomas wrote a short concurring opinion. He agreed with the remand result, but his opinion asserts that the Hobbs Act had no role to play in this private litigation. He agreed with the district court that the court could rule on the merits of Carlton & Harris's TCPA cause of action against PDR without determining the validity of the FCC's 2006 order. Justice Thomas was troubled by the notion that the Hobbs Act could take away from courts the right to apply the law.

In a much longer opinion, Justice Kavanaugh offered a similar argument. In his view, the Hobbs Act does not obligate federal district courts to apply FCC orders without contributing any independent analysis of their own to the merits of the case in front of them. Under this view, the Hobbs Act's 60-day window for challenge is not the only possible opportunity for private parties to seek judicial review of a TCPA interpretation. Justice Kavanaugh also expressed strong support for the notion that private parties should be able to argue in court that an FCC interpretation is wrong.

While this opinion concerns an arcane matter, it could lead to meaningful changes in TCPA litigation in the future, if the concurring opinions' approach carries the day. Many federal district courts hearing TCPA cases routinely defer to FCC interpretations, citing to the Hobbs Act. There are several areas of TCPA interpretation where the FCC has addressed an issue, perhaps wrongly, and courts have felt unable to revisit that guidance. For example, the FCC's interpretations of the TCPA's "autodialer" standard have prompted scrutiny and skepticism. If courts feel empowered to revisit TCPA

standards with an independent eye, defendants in private TCPA litigation could see favorable decisions in the future where, in the past, courts have refused to entertain interpretations at odds with FCC guidance.

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