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SCOTUS to Decide If Courts Must Defer to the FCC's Interpretation of "Unsolicited Advertisements" under the TCPA

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On November 13, 2018, the Supreme Court agreed to consider the amount of deference a federal court is required to give the Federal Communications Commission in determining what constitutes an unsolicited advertisement within the meaning of the Telephone Consumer Protection Act (TCPA). *PDR Network v. Carlton & Harris*, No. 17-1705. The case is scheduled for oral argument on March 25, 2019.

The case arose out of a single unsolicited fax PDR Network sent to a chiropractor's office offering a free electronic copy of the Physicians' Desk Reference, a compilation of manufacturer prescribing information for prescription drugs. The chiropractor's office sued PDR Network, claiming the unsolicited fax constituted an unsolicited advertisement in violation of the TCPA.

A judge in the Southern District of West Virginia dismissed the action on the ground that the fax did not violate the TCPA because it offered the e-book for free. In so ruling, the court rejected plaintiff's argument that a 2006 FCC rule interpreting the term "unsolicited advertisement" compelled the finding that this phrase included all "facsimile messages that promote goods or services even at no cost." The court reasoned that, under step one of the well-known *Chevron* analysis, the TCPA's own definition of "unsolicited advertisement" was "clear and easy to apply," so it was not compelled to defer to the FCC's 2006 rule. The court further held that the FCC rule supported its holding in any case, because it showed that the FCC was concerned only with communications of a commercial nature. Because the fax lacked a "commercial aim" – that is, it was not motivated by "hope to make a profit" – it was not an advertisement under the FCC's interpretation.

On appeal, the Fourth Circuit, in a 2-1 decision, vacated the district court's dismissal on the grounds that, under the Hobbs Act, a party aggrieved by FCC rulemaking may challenge the validity of that rulemaking only by filing a petition in a federal *appellate* court. In other words, *district* courts are not vested with authority to ignore or invalidate the FCC's 2006 rule interpreting the term "unsolicited advertisement." Thus, the district court was wrong to even engage in the first step of the *Chevron* analysis, as it had no choice but to defer to the FCC's rulemaking. Furthermore, the Fourth Circuit held that, contrary to the district court's findings, the FCC's 2006 rule had interpreted

the term “unsolicited advertisement” not to require any commercial aim.

The dissent concluded that the district court did not actually make a finding that the FCC’s 2006 rule conflicted with unambiguous statutory language under step one of *Chevron*, as evidenced by the fact that the district court applied the statutory language *and* the 2006 rule together in reaching its conclusions. The dissent would have affirmed the district court’s ruling on the ground that the TCPA’s phrase “unsolicited advertisement” was ambiguous, and that reading the FCC rule as requiring such an “advertisement” to have a commercial aim was a permissible and reasonable construction of the TCPA. This view aligns with holdings of the Second, Sixth, Ninth, and Eleventh Circuit, all of which require that a communication have a commercial nexus to a firm’s business in order to constitute an “advertisement.”

In March, the Supreme Court will consider whether the Hobbs Act required the district court in this case to automatically defer to the FCC’s legal interpretation of “unsolicited advertisement” in the TCPA. Petitioner PDR Network filed its opening brief on January 8, 2019, and the case has caught the attention of amici curiae due to due process concerns regarding the ability of defendants to challenge rules under which they are sued, and disagreement as to whether the Hobbs Act forbids any interpretation of the FCC rule by district courts. Watch this space for further developments.

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