

U.S. Supreme Court Decision Leaves Uncertainty for Navigating TCPA Landmines

Amundsen Davis Class Action Alert
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The Telephone Consumer Protection Act (TCPA) prohibits unsolicited calls, text messages and faxes; it's a federal statute that provides for statutory damages between \$500-\$1,500 per violation. With the speed and ease (and lower cost) of mass communication technology, together with these draconian fines, TCPA lawsuits—and class actions—remain a favorite for consumer plaintiffs.

For a company looking to avoid the legal minefield caused by this federal statute, consideration of the statute's requisites has not been enough. Instead, the Federal Communication's Commission (the FCC), which has interpreted the TCPA and enacted regulations, yields power; and, this federal agency has issued numerous regulations for more than a decade. As companies ferret out these regulations in the code of federal regulations, it has been clear that the regulations seem to continuously expand the breadth of the TCPA. This assumes a company has notice of regulatory decisions and deciphers a bright line rule of what they mean.

For the unwary marketer and the learned advertiser alike, grappling with how to interpret and then implement certain FCC regulations has remained a challenge. And, companies may not get any exculpation from the courts. Instead, several federal circuit courts have held that FCC interpretations and regulations are *binding* on district courts—meaning defendants can't challenge the FCC's findings, no matter how incongruous.

This problem was front-and-center in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, where the Fourth Circuit Court of Appeals held that, consistent with an FCC interpretation, a facsimile offering a *free* medical reference manual was in fact an "unsolicited advertisement." To reach this conclusion, the Fourth Circuit concluded it was bound to follow the FCC's interpretation under the Administrative Procedures Act (commonly known as the Hobbs Act), which requires challenges to FCC orders to be brought within a short timeframe after and FCC order is enacted.

With a myriad of amicus submissions, the case landed in front of the Supreme Court, where both sides hoped for clarity on whether FCC rules are binding on district courts, or whether district courts are free to interpret the TCPA by its plain terms.

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The Court's long-awaited decision, however, failed to provide an answer, as the Court remanded the case without reaching the ultimate decision. The Court held that the appellate court should have, but didn't, consider two preliminary questions: First, whether the FCC's Order was an "interpretative rule" or a "legislative rule" issued by an agency pursuant to statutory authority, and second, whether the defendant PDR Network had an opportunity to challenge the 2006 FCC Order at the time of its enactment.

But not all hope is lost: Justice Kavanaugh's concurring opinion, joined by three justices, may provide a sneak preview of how the issue will ultimately be resolved. Therein, the concurrence concluded that the Fourth Circuit was wrong, and that district courts *should* be allowed to interpret the TCPA without being bound by FCC Orders. This opinion identifies what has long been a principle of administrative law, which is that "in an enforcement action, a defendant may argue that an agency's interpretation of a statute is wrong" unless a statute explicitly provides that agency order is not subject to judicial review in enforcement actions.

The Fourth Circuit will reconsider the issue on remand, and, ultimately, the Supreme Court may be asked to weigh in on the issue again. For the time being, however, TCPA defendants should brace themselves for a continued period of uncertainty. Until a definitive ruling comes down, companies that engage in telemarketing or other forms of telephone communications with customers or potential customers should do the following:

- Familiarize themselves with how courts in their jurisdiction interpret the Hobbs Act, and find out whether FCC interpretations are considered "binding" in their district;
- If facing a new TCPA lawsuit, consider at the outset whether the case can be transferred to a more favorable jurisdiction;
- Determine if a stay of TCPA litigation against it is appropriate as the appellate courts weigh this issue; and
- Stay abreast of FCC rulemaking concerning the TCPA, and, if appropriate, challenge FCC interpretations within the timeframe provided under the Hobbs Act.

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