The Impact of PDR Network LLC v. Carlton & Harris Chiropractic

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Are district courts prohibited in every instance from considering challenges to the Federal Communication Commission ("FCC")'s interpretation of certain provisions in the Telephone Consumer Protection Act – or can district courts hear such challenges and give their own independent interpretations? In a closely-watched case, the U.S. Supreme Court did not answer that question directly. However, the Court strongly indicated that there is not an absolute jurisdictional bar to such challenges at the district court level.

In *PDR Network LLC* ('PDR") *v. Carlton & Harris Chiropractic* ("C&H"), the Supreme Court grappled with the extent to which district courts are bound by the FCC's "final orders." The Court unanimously agreed to vacate the Fourth Circuit's decision but disagreed on the next steps in the case. The majority opinion and both concurring opinions leave openings for private litigants to challenge FCC orders at the district court level.

A. Background on the Case

PDR allegedly sent a fax to C&H, a chiropractic practice. C&H claimed that the fax violated the TCPA's prohibition on faxing "unsolicited advertisements." PDR moved to dismiss the complaint, arguing that the fax was not an advertisement under the TCPA because the item referenced in the fax was offered at no cost. C&H opposed and relied on a 2006 FCC Order (the "2006 Order"). The 2006 Order interpreted the definition of unsolicited advertisement in the TCPA to include faxes that promote goods and services offered at no cost. On reply, PDR challenged the FCC's interpretation of unsolicited advertisement.

The district court allowed PDR's challenge and dismissed the case. In doing so, the district court both exercised jurisdiction and did not follow the FCC's definition of unsolicited advertisement. The Fourth Circuit reversed, holding that the district court's decision violated the Hobbs Act. The Fourth Circuit held that under the Hobbs Act only federal courts of appeal can determine the validity of agency orders. The Supreme Court granted certiorari on the question of whether the Hobbs Act divested the district court of jurisdiction to address the 2006 Order.

B. The Supreme Court's Decision

Instead of determining the core question of whether the Hobbs Act divested the district court of jurisdiction over a matter rubbing up against the 2006 Order, the Supreme Court remanded the case to the Fourth Circuit to address: (1) whether the 2006 Order is a "legislative rule" or a "interpretive rule," and (2) whether PDR had a "prior and adequate opportunity" to seek judicial review of the

2006 Order under a Hobbs Act petition.

Relating to the first question, the Court stated that an interpretive rule, unlike a legislative rule "may" not be subject to the Hobbs Act.[1] While a legislative rule has the force and effect of law, an interpretive rule serves to advise the public of the agency's construction of the statute and rules which it administers but lacks the force and effect of law. The Supreme Court emphasized its use of the word "may" to communicate that it was not answering the questions of which type of rule resulted from the 2006 Order or even if the Hobbs Act would apply to merely interpretive rules.

On the second question, related to whether defendant had an adequate opportunity to challenge the Order, under the Court's opinion, if PDR did not have a prior and adequate opportunity to challenge the 2006 Order, then it "may" have the opportunity to challenge the Order while defending the TCPA class action brought more than a decade after the 2006 Order. Again, the use of "may" meant that the Court was not answering the question of what would occur if PDR did not have an adequate opportunity to challenge the 2006 Order via the Hobbs Act.[2]

While the Court did not address what effect a finding that: (i) the 2006 Order was an interpretive rule; and/or (ii) PDR did not have an adequate opportunity to bring a Hobbs Act challenge would have on the Hobbs Act's application, it seems clear that the Court believed either finding likely would mean the Hobbs Act would not apply to PDR. Such a finding would spell victory for PDR on the appeal. However, the district court might still defer to the 2006 Order under the *Chevron* doctrine, even if the Hobbs Act did not preclude review. As a result, the ultimate effect of FCC interpretations remains open for litigation.

C. The Concurring Opinions

1. Justice Kavanaugh's Concurrence

Justice Kavanaugh authored a separate opinion concurring in the judgment, joined by Justices Thomas, Alito and Gorsuch. His concurrence opined that district courts have jurisdiction to hear challenges to the TCPA under customary principles of statutory interpretation, while giving the agency the appropriate level of deference.[3] 588 U.S. __ (2019) (Kavanaugh, J., concurring) (slip op. at 13). Justice Kavanaugh wrote that the Court should conclude that "the Hobbs Act does not bar [a defendant] from arguing that the FCC's interpretation of the TCPA is incorrect." *Id.* at 18. With respect to the "exclusive jurisdiction" provision of the Hobbs Act, Justice Kavanaugh concluded that it applied only to facial, pre-enforcement proceedings to challenge agency orders, *Id.* at 11, but not to an as-applied challenge to such an order made in the district court during an enforcement case such the one before the Court.

In sum, under Justice Kavanaugh's analysis, district courts would have jurisdiction to consider as applied challenges to FCC orders by private litigants defending against claims that touch upon such orders.

2. Justice Thomas's Concurrence

Justice Thomas, joined by Justice Gorsuch, concurred with the decision and agreed with Justice Kavanaugh's analysis regarding a private litigant's right to challenge the FCC's interpretation of the TCPA. However, Justice Thomas' went one step further: he identified the "more fundamental problem" that occurs when the Hobbs Act prevents courts from applying a governing statute to a case or controversy within its jurisdiction. Justice Thomas's concurring opinion makes the point that barring a district court from even reviewing an agency order while deciding a case, otherwise within the district court's Article III purview, places the order beyond judicial review, in violation of *Marbury*

v. Madison. This interpretation also forces the court to accept the agency's reasoning without looking to the statute and, thus, places the order on equal footing as a law passed by Congress. This violates Article I as it allows a body other than Congress to exercise legislative power.

Justice Thomas concluded that cases such as *PDR* emphasize the need to reconsider the assumption that Congress can constitutionally require federal courts to treat agency orders as controlling law without regard to the text of the governing statute. Justice Thomas noted that the constitutional concerns present with such an assumption are also present with respect to the *Chevron* doctrine, which mandates that courts give deference to agency interpretations of certain statutes.

D. Potential Impact

No justice on the Supreme Court was prepared to affirm the Fourth Circuit's ruling that a district court was bound to follow the FCC's 2006 Order interpreting the "advertisement" requirement under the TCPA. This provides litigants an opportunity to argue that such orders are not binding on the district courts in the context of an as applied challenge to such orders in a litigation seeking to enforce that order or its enabling statute.

If, on remand, the Fourth Circuit determines, as Justice Thomas's concurring opinion did, that the 2006 Order is merely an "interpretative rule," and that as applied challenges to interpretive rules are not subject to the Hobbs Act, then a significant number of FCC orders could be undermined in private party litigation before district courts.[4] Take the long-debated definition of ATDS: if certain FCC orders interpreting the TCPA (and defining ATDS) are found to be interpretive rules, then parties could challenge the rule at the district court. This could lead to a wave of new – and conflicting – district court decisions on the meaning of ATDS and other TCPA-related terms. Parties, and counsel, likely would engage in forum-shopping for jurisdictions where courts have interpreted the statute favorably to their side. In any event preserving a defendant's right to make an as applied challenge is a victory for common sense. Litigants should not precluded from challenging an agency's interpretation of a statute where, for example, the litigant was not even in existence when the agency provided that interpretation.

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[1] Justice Thomas's concurring opinion states the 2006 Order is an interpretive rule. 588 U.S. __ (2019) (Thomas, J., concurring) (slip op. 2).

[2] The Hobbs Act has a 60 day limit on the time to appeal the FCC's orders to the circuit court of appeals.

[3] To the extent a party had challenged the validity of an agency's order in a pre-enforcement proceeding, via the Hobbs Act, a party may be bound by that determination under ordinary preclusion principles. *Id.* at 7, n. 2.

[4] Also, it is possible that a finding that a litigant did not have a meaningful opportunity to mount a Hobbs Act challenge and/or participate in the rule making process, could allow as applied

challenge to the rule. It appears Justice Kavanagh would go even further. He would do away with the majority's requirement, that it be an interpretive rule or that there was no opportunity to challenge the rule at inception, in order to avoid the Hobbs Act's exclusive jurisdiction bar. He would simply allow any as applied challenge at the district court in an enforcement proceeding.