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FCC Power Grab Would Deal Blow To Private TCPA Challenges

By **Allison Grande**

Law360, New York (October 22, 2012, 10:46 PM ET) -- The Federal Communications Commission argued last week that the Sixth Circuit had no business entertaining a challenge to its telemarketing regulations — an aggressive bid to expand its authority that attorneys say would bar litigants from contesting the agency's rules in private actions without its approval.

Last month, the Sixth Circuit upheld the agency's exemption of a type of telemarketing known as a hybrid call from regulation under the Telephone Consumer Protection Act. In a hybrid call, a broadcast or radio station both announces a specific contest and promotes the station generally.

But the FCC contended the court should not have even conducted this analysis.

The Hobbs Administrative Orders Review Act, which deals with judicial review of agency regulations, deprives the court of jurisdiction over the substance of commission orders in private litigation, the agency argued.

"The panel's decision that courts may entertain collateral challenges to such orders and rules, outside the exclusive statutory scheme for review created by Congress, would create an unworkable process that places the validity of commission actions in issue in a host of proceedings in which the commission is unable to effectively defend itself," the FCC said in its Oct. 15 petition requesting that the Sixth Circuit reconsider.

In challenging a decision that essentially found in favor of its proclamations, the commission is seeking to expand its authority over the use of its regulations by contending courts shouldn't be allowed to interpret its intent without consulting it first, according to attorneys.

"The FCC probably likes the result, but it doesn't like what this decision is opening up," Hinshaw & Culbertson LLP partner James Vlahakis told Law360. "While the decision went in its favor this time, the next time a plaintiff makes the same argument, the court could find that it shouldn't defer to the FCC. So the agency is trying to stop this kind of adverse result in the future."

But the alternative process the commission advocates for resolving these types of disputes would most likely create a "procedural quagmire" for private litigants, according to Sedgwick LLP partner David Almeida.

"It would be very procedurally thorny if the FCC were to prevail under its Hobbs Act argument," he said. "Private individuals would still be able to file cases, but if the defendant's defense or the plaintiffs' response challenged a provision of the commission's regulations, then that would implicate the Hobbs Act, and the case would be jammed up

while the relevant appeals court decided the whole issue."

Plaintiff Mark Leyse brought a putative class action against Clear Channel Broadcasting Inc. after receiving a prerecorded call from 106.7 Lite FM on his home phone in June 2005. The recording described the channel's offerings and promoted a Motown song call-in contest.

Leyse argued that the call violated the TCPA, but the station countered that the FCC had explicitly exempted calls that invite consumers to listen to broadcasts from the statute's prohibitions against prerecorded calls.

The Southern District of Ohio in June 2010 dismissed the suit on the grounds that the FCC had exempted this type of call and the court was required to defer to its decision. The agency had created the exemption through a valid notice-and-comment rulemaking process under the standard set in the U.S. Supreme Court's 1984 decision in Chevron v. Natural Resources Defense Council, the court ruled.

In upholding this decision, the Sixth Circuit noted that the court had jurisdiction to hear the case because the suit did not seek to enforce or undercut an FCC order. It rejected Clear Channel's argument that the Hobbs Act deprived both the district court and the appeals court of jurisdiction to consider the suit.

The FCC opposed this finding, arguing that it flew in the face of Congress' intent in enacting the Hobbs Act, which was to consolidate multiple challenges in a single court of appeals. It also went against the precedent of "every other circuit to address the issue,"which have ruled the Hobbs Act divests district courts of the jurisdiction to consider the validity of FCC orders, the agency said.

Its petition cited eight cases from several circuits over the past three decades, beginning with the D.C. Circuit's 1984 decision in Telecommunications Research & Action Center v. FCC and ending with the 10th Circuit's 2007 decision in Qwest Corp. v. Public Utilities Commission of Colorado.

Vlahakis characterized the Sixth Circuit's decision as "sort of an outlier opinion," noting it even went against the circuit's own December 2010 opinion in Charvat v. EchoStar Satellite LLC. In that decision, the Sixth Circuit held that the district court should have invoked the doctrine of primary jurisdiction and let the FCC address the issue of whether the TCPA allowed a consumer to recover damages from a business or organization whose independent contractors made illegal marketing calls.

In its petition, the FCC made clear that its concern with the supposed rogue opinion stemmed from the precedent it could set not just for its TCPA regulations, but also for other agency rules that could draw challenges by private plaintiffs. The commission noted that it had "fortuitously learned of [the Sixth Circuit's decision] via a Westlaw search a week after the decision was issued."

"The FCC is basically saying that by letting private parties bring this up, that's problematic because the FCC can't keep track of all those private lawsuits, and each of these cases is going to result in very different interpretations by district court judges about what these regulations mean," Almeida said. "If the Hobbs Act had applied in this case, then the FCC would have been given notice of this suit, and it would have been able to intervene at the outset and not be blindsided."

Leyse has also filed a petition urging the Sixth Circuit to rehear the case. But his Oct. 18 filing based the request on the argument that the appeals panel had incorrectly called the FCC exemption a regulation. In actuality, he said, it was an interpretive rule, not entitled to deference under the Chevron standard for agency rulemaking.

Almeida hypothesized that the Sixth Circuit would entertain the FCC's petition for rehearing but ultimately uphold its "correct" analysis of the commission's regulations, while Vlahakis predicted the FCC would not back down from its stance on appeal.

"The case will most likely get resolved fairly quickly," Vlahakis said. "And if it doesn't, then the FCC will probably go to the U.S. Supreme Court to decide it."

Leyse is represented by Stephen R. Felson.

Clear Channel is represented by Judith A. Archer of Fulbright & Jaworski LLP.

The case is Mark Leyse v. Clear Channel Broadcasting Inc., case number 10-3739, in the U.S. Court of Appeals for the Sixth Circuit.

--Editing by Kat Laskowski and Andrew Park.