

## High Court Sends TCPA Junk Fax Dispute Back To 6th Circ.

By Allison Grande

Law360 (October 7, 2019, 2:15 PM EDT) -- The U.S. Supreme Court on Monday ordered the Sixth Circuit to revisit its split decision that faxes seeking contact information verification qualify as advertisements under junk fax rules, in light of an earlier high court ruling on the validity of federal agencies' interpretation of federal law.

The high court in a short summary disposition vacated a Sixth Circuit panel decision from November that revived a putative TCPA class action against health care information technology provider Enclarity Inc. and its parent company LexisNexis Risk Solutions.

The Supreme Court then remanded the dispute to the appellate court for further consideration in light of its June decision in *PDR Network v. Carlton & Harris Chiropractic*. The Supreme Court offered no further explanation of its decision.

In the *PDR Network* case, the Supreme Court sidestepped the question of whether district courts are required under the Hobbs Act to defer to agency orders such as the Federal Communications Commission's numerous interpretations of the TCPA. Instead, the justices sent the dispute back to the Fourth Circuit to consider a pair of key questions that hadn't been properly addressed: whether the challenged FCC order was a legislative or interpretive rule and whether *PDR Network* had been afforded an adequate opportunity to challenge the order.

Enclarity and LexisNexis argued in appealing the Sixth Circuit ruling to the Supreme Court in March that the fate of its dispute hinged on the outcome of the *PDR Network* case, given that both disputes centered on the interpretation of the same 2006 FCC order on what constitutes an unsolicited fax advertisement. In that order, the FCC interpreted the statute to prohibit unsolicited faxes even if they offer goods at no cost.

Matthew N. Fulton DDS PC, the Michigan-based dental practice pressing the case against Enclarity, agreed in a June brief filed before the Supreme Court issued its *PDR Network* decision that the two matters were closely related and that, if the high court were to hold that FCC pronouncements are not binding on federal courts, then the dispute should be remanded to the Sixth Circuit for further proceedings. However, the dental practice asserted that if the high court were to find that FCC orders are binding on lower courts, then Enclarity's challenge should be denied.

After the Supreme Court handed down its *PDR Network* decision June 20, Enclarity and LexisNexis submitted a reply brief arguing that, while the justices did not ultimately decide the core question of

whether district courts are required to defer to agency decisions, the same unresolved preliminary issues that warranted remand in the PDR Network dispute were at play in their case.

"Like PDR Network, this private-party TCPA suit turns on the meaning of 'advertisement,' and it involves the same portion of the same 2006 FCC order addressing informational faxes," the companies argued in their July 3 reply brief. "And like PDR Network, the court of appeals here has not addressed whether the 2006 FCC order is a legislative or interpretive rule; whether Enclarity had a prior, adequate opportunity to challenge that order; or whether the answers to those questions impact the order's force. A remand would give the court of appeals the opportunity to address those questions in the first instance."

The parties' dispute stems from the transmission of a September 2016 fax message to the Fulton dental practice requesting verification of its contact information and secure fax number to help "minimize the potential privacy risks that could arise from information sent to an unsecured location." The dental practice alleged that the communication, which did not include an opt-out notice, ran afoul of the TCPA, which prohibits dissemination of unsolicited fax advertisements without a satisfactory opt-out notice.

A Michigan federal judge dismissed the suit, agreeing with the defendants' contention that the fax did not qualify as an advertisement under the TCPA. But in a 2-1 ruling handed down last year, a Sixth Circuit panel reversed that decision, concluding that the dental practice at this stage in the litigation had "plausibly alleged" that the fax was an unsolicited advertisement "because it served as a commercial pretext for future advertising opportunities."

Counsel for the parties did not immediately respond to a request for comment Monday.

Enclarity and LexisNexis are represented by Joseph R. Palmore, Bryan J. Leitch and Tiffany Cheung of Morrison & Foerster LLP.

The dental practice is represented by Phillip A. Bock of Bock Hatch Lewis & Oppenheim LLC.

The case is Enclarity Inc. et al. v. Matthew N. Fulton, case number 18-1258, in the Supreme Court of the United States.

--Editing by Orlando Lorenzo.

*Law360 is owned by LexisNexis Legal & Professional, a RELX Group company.*