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What Companies Affected by the TCPA Should Know about this Year's Supreme Court Term

As the end of the Supreme Court's 2018-19 term is quickly approaching, many controversial hot-button topics have yet to be decided. Simmering below the front page headlines, however, are a pair of cases that have the potential to fundamentally reshape the interplay between federal agencies and the courts. Under existing administrative law, federal courts routinely defer to federal administrative agencies regarding the interpretation of federal laws as well regulations that those agencies have adopted to interpret the laws passed by Congress. This gives federal agencies incredible power to interpret, and reinterpret, federal laws and limits the role of the judiciary to scrutinizing and reversing only the most unreasonable and egregious decisions. For several years now, conservative lawyers and scholars have advocated for a shift in this balance of power, asserting that it gives agencies too much control over regulated companies. During this webinar, we will examine what the Supreme Court's decisions this term tell us about whether such a shift is occurring and break down what it means for companies that must comply with the Telephone Consumer Protection Act (TCPA).

The first case we will examine is *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, a TCPA junk fax class action. In this case, the Supreme Court is expected to address the question of whether the Administrative Orders Review Act, commonly known as the Hobbs Act, requires a district court to accept the FCC's legal interpretation of the TCPA or whether a party that has been sued for purported violations of the TCPA may assert new legal arguments against the FCC's interpretation of the TCPA when defending themselves in court. To non-lawyers this question may seem like a peculiar one, but the Hobbs Act, and the legal framework under which it operates, is important for all TCPA litigants. The overwhelming majority of companies regulated by the FCC's TCPA rules never participate in FCC rulemaking proceedings. Nevertheless, those companies may be barred by the Hobbs Act from arguing why the FCC's interpretation of the TCPA is unreasonable when they are later sued for violating the TCPA. This presents important due process considerations that are likely to play out in whatever decision the Supreme Court reaches in this case.

The second case, *Kisor v. Wilkie*, was added to the Court's calendar at the last minute, after the confirmation of Justice Brett Kavanaugh, who has written regularly about his desire to see a change in the deference given to regulatory agencies. At issue in this case is a dispute between Marine veteran James L. Kisor, who is seeking disability benefits for his service-related post-traumatic stress disorder, and the Department of Veterans Affairs that had declined to award him retroactive benefits. Underlying the case is a much bigger legal dispute over whether courts should defer to an agency's interpretation of its own regulations when there is ambiguity. The doctrine is known as "Auer deference." Here, the debate is about separation of powers and whether an agency should be able to adopt a vague regulation and then be entitled to deference when it later enforces the vague regulation in a manner that harms a regulated business. Some observers assert that elimination of this deference doctrine will compel agencies to provide clearer guidance to regulated companies, which is concern shared by many companies that struggle to comply with the TCPA.

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