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Plaintiff Petitioners File Notice of Supplemental Authority in Consolidated Appeal of Anda Order

Thursday, October 20, 2016

On October 13, 2016, counsel for class action plaintiffs (“Plaintiff Petitioners”) in *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234, filed a notice of supplemental authority with the United States Court of Appeals for the D.C. Circuit, arguing that the court’s recent decision in *PHH Corp. v. CFPB*, No. 15-1177, 2016 WL 5898801 (D.C. Cir. Oct. 11, 2016), supports their arguments that the FCC’s October 2014 Anda Order (the “Anda Order”) “constitutes an impermissible retroactive legislative or adjudicatory rule” and violates separation of powers principles.

As we previously [reported](#), both Plaintiff Petitioners and class action defendants (“Defendant Petitioners”) have appealed the FCC’s Anda Order, while the FCC has continued to defend it in its entirety. Plaintiff Petitioners argue that the FCC lacked authority to grant retroactive waivers of its rule that opt-out notices required by Congress under the Junk Fax Prevention Act must appear on solicited faxes. Plaintiff Petitioners also argue that in granting such waivers, the FCC violated separation of powers by impermissibly extinguishing pending TCPA claims. Conversely, Defendant Petitioners agree with the FCC that it may grant retroactive waivers, but argue that the FCC did not have authority to require the inclusion of opt-out notices on solicited faxes in the first place. Defendant Petitioners also argue that the regulation of solicited faxes is a content-based restriction on speech and an impermissible intrusion on First Amendment rights. Oral argument in this consolidated appeal is scheduled for November 8, 2016.

Plaintiff Petitioners’ notice maintains that the court’s decision in *PHH* supports their arguments in opposition to the Anda Order in two ways. First, Plaintiff Petitioners argue that “by issuing the Waiver Ruling, the FCC retroactively waived an eight-year-old regulation, and thereby purported to retroactively nullify a vested, statutory cause of action under the TCPA.” This action, they contend, is similar to the CFPB’s attempt to retroactively apply a new interpretation to Section 8(c) of the Real Estate Settlement Procedures Act to penalize mortgage lenders such as PHH that relied on the old interpretation first espoused by the Department of Housing and Urban Development in 1997. Because the court found that the CFPB’s action violated due process, Plaintiff Petitioners suggest that the court should also find that the FCC has violated their due process rights by granting the waivers.

Second, Plaintiff Petitioners contend that their separation of powers argument is supported by the court’s finding that the CFPB’s single-director governance structure unconstitutionally intruded on the President’s executive powers because in so finding, the court relied on the lack of a historical foundation for such a structure. This reliance, they claim, is supportive because “Respondents ‘do not cite a single case’ in which an agency ‘had power to [retroactively] extinguish a statutory private cause of action’ without express statutory authority” (citing Reply Brief, p. 3).

But the Plaintiff Petitioners’ invocation of the reasoning in *PHH* is misguided. First, in finding that the CFPB could not retroactively apply a new statutory interpretation to punish an entity for action it took prior to the adoption of that interpretation, the court heavily focused on the fact that *liability* was being retroactively imposed and employed reasoning that mirrors that used to invalidate ex post facto laws. In fact though, even before it reached that discussion, the court held that the CFPB misinterpreted the statute, that “Section 8(c) specifically bars the aggressive interpretation . . . advanced by the CFPB in this case.” *PHH*, 2016 WL 5898801, at *31. Thus, first and foremost, the CFPB was not allowed to adopt a statutory interpretation that was inconsistent with Congress’

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legislation.

The court then went a step further and held that “[e]ven if the CFPB’s new interpretation were consistent with the statute (which it is not), the CFPB violated due process by *retroactively* applying that new interpretation to PHH’s conduct that occurred before the date of the CFPB’s new interpretation.” *Id.* at *33. In doing so, the court emphasized that “[t]he Due Process Clause limits the extent to which the Government may retroactively alter the legal consequences of an entity’s or a person’s past conduct.” *Id.* at *34. It highlighted “the bedrock due process principle that the people should have fair notice of what conduct is prohibited.” *Id.* And it cited *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012), for the proposition that “[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *Id.* In other words, the court repeatedly and heavily focused on the consequences retroactive application would have on the regulated entity (as opposed to the entity seeking to enforce the regulations) and the dangers of retroactive imposition of new liability on that entity (as opposed to an agency’s refusal to impose liability).

By contrast, in the consolidated appeal, the Plaintiff Petitioners are not the regulated entities; instead it is the Defendant Petitioners that did not have “fair notice of what conduct is prohibited.” *Id.* And the FCC has not suggested it will impose any new liability on Plaintiff Petitioners; instead it is declining to impose liability on Defendant Petitioners. Thus, rather than the Plaintiff Petitioners, the court’s reasoning and holding in *PHH* supports *Defendant* Petitioners’ position in the consolidated appeal, as the FCC’s decision to grant waivers is in line with long-standing due process precedent. *See id.* at *36 (citing *General Electric Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995), for the proposition that “[i]n the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability”).

Second, Plaintiff Petitioners’ argument concerning the *PHH* court’s holding with respect to separation of powers principles is also flawed. The *PHH* court held that the CFPB’s structure as a “single-Director independent agency” was unconstitutional because the director was checked by neither the President nor other, equal members of the CFPB. *Id.* at *4. In so holding, the court extensively examined whether other independent agencies have historically been structured this way and did so because “[i]n separation of powers cases not resolved by the constitutional text alone, historical practice matters.” *Id.* at *18. But the issue on appeal is not the structure of the FCC. Rather, it is the FCC’s ability to waive its own regulations, an ability that is explicitly authorized by statute rather than being the creature of “historical practice.” *See* 47 C.F.R. § 1.3; *cf. PHH*, 2016 WL 5898801, at *16 n.9 (“Of course, if the constitutional text is sufficiently clear, then the existence of any historical practice departing from that text is not persuasive.”). Therefore, Plaintiff Petitioners reliance on this portion of the *PHH* decision is also unpersuasive.

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