# Truth Health Chiropractic v. McKesson

**Sophia Wang**

896 F.3D 923 (9TH CIR. 2023)

In *Truth Health Chiropractic v. McKesson*, the Ninth Circuit affirmed the Northern District of California's grant of summary judgment to Plaintiffs and decertification order pursuant to an order of the Federal Communications Commission ("FCC"), which found that the Telephone Consumer Protection Act ("TCPA") does not apply to online fax services. The U.S. Supreme Court granted certiorari to hear the question regarding whether the Hobbs Act requires district courts to accept the FCC's interpretation that the TCPA does not apply to online fax services. The case was argued before the U.S. Supreme Court on January 21, 2025.

## I. BACKGROUND

Defendants McKesson Corporation and McKesson Technologies (collectively "Defendants") are companies that engage in services ranging from the sale of pharmaceuticals to health information technology.[1] Plaintiffs True Health Chiropractic and McLaughlin Chiropractic (collectively "Plaintiffs") are two small medical practices.[2] Between 2009 and 2010, Plaintiffs, as well as many other small medical practices, received various unsolicited advertisements through both stand-alone fax machines and online fax services from Defendants.[3] The advertisements were about certain software products that Defendants were selling.[4] In 2008, McKesson was warned by the FCC that it had "sent one or more unsolicited advertisements" via fax "in violation of the TCPA."[5]

On May 15, 2013, True Health Chiropractic sued McKesson, on behalf of a class of similarly situated small medical practices, on the grounds that Defendants sent unsolicited advertisements by fax in violation of TCPA.[6] Specifically, Plaintiffs contended that the small medical practices never

1. Petition for Writ of Certiorari at 7, McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp., No. 23-1226 (2024) [hereinafter Petition for a Writ of Certiorari].
2. *Id.*
3. *Id.* at 7-8.
4. *Id.* at 8.
5. Brief for Petitioner at 12, McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp., No. 23-1226, 2024 WL 4858625 (U.S. Nov. 18, 2024) [hereinafter Brief for Petitioner].
6. True Health Chiropractic Inc. v. McKesson Corp., No. 13-cv-02219, 2020 WL 7664484, at *1 (N.D. Cal. Dec. 24, 2020).

invited or permitted Defendants to send the faxes, and even assuming there was permission, there was no "opt-out notice," which Defendants were legally required to provide.[7]

Soon after filing the case, Plaintiffs moved to certify a class of all persons or entities "who received faxes from McKesson from September 2, 2009, to May 11, 2010" regarding Defendants' products and services."[8] The district court initially denied certification for failure to meet the requirement that issues common to all class members predominate over any issues affecting only individual members.[9] On appeal, the Ninth Circuit affirmed in part, but reversed as to the certification of a subclass, and remanded the case to the district court.[10] Following remand, the district court conducted limited supplemental discovery and granted Plaintiff's renewed motion for class certification of the aforementioned subclass.[11]

Six years into the parties' litigation, the FCC issued a declaratory ruling in 2019, finding that the TCPA excludes online fax services from the definition of "telephone facsimile machine."[12] Under the TCPA, a "telephone facsimile machine" is an equipment that "has the capacity . . . to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper."[13] In its Amerifactors declaratory ruling, the FCC interpreted the TCPA to exclude online fax services that "effectively receive[] faxes sent as email over the Internet" because an online fax service is "not itself equipment which has the capacity to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper."[14] The FCC further reasoned that because the online fax service does not by itself print a fax, such services do not implicate the "advertiser cost-shifting" problem Congress intended to address through the TCPA.[15] The FCC's Amerifactors ruling was challenged in 2020 by unrelated entities, but the FCC has not yet taken the application for review of the order.[16]

In 2020, Defendants moved to decertify the class on the basis of the FCC's Amerifactors ruling. In response to the motion, the district court ordered the parties to submit supplemental briefs to explain whether the FCC's Amerifactors order would bind the court in light of the Supreme Court's recent decision in *PDR Network v. Carlton & Harris Chiropractic*.[17] The *PDR Network* case involved a similar litigation related to the FCC's

7. *Id.*
8. True Health Chiropractic, Inc. v. McKesson Corp., 896 F.3d 923, 928 (9th Cir. 2018).
9. *Id.*
10. *Id.*
11. *Id.*
12. Amerifactors Fin. Grp., LLC, Pet. for Expedited Declaratory Ruling, *Declaratory Ruling*, 344 FCC Rcd 11950, 11950-51 (2019).
13. Brief for Petitioner, *supra* note 5, at 4.
14. Petition for a Writ of Certiorari, *supra* note 1, at 9.
15. *Id.*
16. *Id.*
17. *See True Health Chiropractic*, 2020 WL 7664484, *2; *see also* PDR Network, LLC v. Carlton & Harris Chiropractic, 588 U.S. 1, 6-8 (2019).

interpretation of the TCPA provision prohibiting unsolicited advertisement by fax and the applicability of the Hobbs Act.[18] The Hobbs Act states that the courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain "final orders of the Federal Communication Commission."[19] In *PDR Network*, the Supreme Court did not decide whether an FCC order would bind the lower courts but provided a two-part guidance.[20] Specifically, in remanding the case back to the court of appeals, the Supreme Court instructed the court to consider (1) whether the FCC order was a "legislative rule which is issued by an agency pursuant to statutory authority and has the force and effect of law," or an "interpretive rule," which only "advises the public of the agency's construction of the statutes" and (2) whether the parties affected had "prior" and "adequate" opportunities to seek judicial review of the FCC order.[21]

In its Order issued on December 24, 2020, the district court found that in light of *PDR Network* and Ninth Circuit precedent, the court "must treat Amerifactors as authoritative."[22] In reaching its conclusion, the district court rejected Plaintiffs' argument that Amerifactors is not a final order under the Hobbs Act because (1) it is an "interpretive rule" and (2) an application for review of the Amerifactors order was pending before the FCC.[23] Specifically, the district court found that the Supreme Court held in *PDR Network* that an interpretive rule "*may* not be binding on a district court," and the use of "may" indicates that the *PDR Network* ruling does not definitively resolve the issue.[24] Thus, the ruling in *PDR Network* is not "clearly irreconcilable with" a binding Ninth Circuit precedent on the issue, *United States West Communications, Inc. v. Hamilton*. In *Hamilton*, the Ninth Circuit held that under the Hobbs Act, there is no distinction between a "legislative rule" and "interpretive rule" as far as the finality and enforceability of an FCC order is concerned.[25] And what matters, as the Ninth Circuit found, is whether the FCC order was merely "tentative," meaning whether it "determines rights and gives rise to legal consequences."[26] Additionally, the district court noted that per FCC regulations and case law, the reconsideration petition "does not affect the order's finality as it applies to [a defendant's] potential liability under the TCPA."[27] Thus, the court found that Amerifactors was a "final, binding order for purposes of the Hobbs Act," and under the Amerifactors ruling, there would be no liability under the TCPA for faxes received via an online fax service.[28] Consequently, the court modified the class definition to

18. *PDR Network*, 588 U.S. at 1.
19. 28 U.S.C. § 2342(1).
20. *PDR Network*, 588 U.S. at 5.
21. *Id.*
22. *True Health Chiropractic*, 2020 WL 7664484, at *6.
23. *Id.* at *6-7.
24. *Id.*
25. *Id.* at *6 (citing U.S. Commc'ns, Inc. v. Hamilton, 224 F.3d 1049, 1055 (9th Cir. 2000) ("The Hobbs Act itself contains no exception for 'interpretive' rules, and case law does not create one.")
26. *Id.*
27. *Id.* at *7.
28. *True Health Chiropractic*, 2020 WL 7664484, at *4.

"include a Stand-Alone Fax Machine Class and an Online Fax Services Class." Based on the new class definition, Defendants argued that class decertification is warranted because the FCC Amerifactors ruling would "necessitate individualized inquiries to determine whether class members received the advertisements through online fax services or traditional analog fax machines."[29]

On September 29, 2021, the district court ordered Plaintiffs to show cause as to why the class should not be decertified given the new class definition.[30] In its subsequent October 15, 2021 Order, the district court held that Plaintiffs failed to provide sufficient and satisfactory class-wide proof in support of the predominance requirement for certification of a Stand-Alone Fax Machine class.[31] Specifically, Plaintiffs produced two types of proof: (1) declarations from over 100 telephone carriers and (2) expert testimony supporting that in the absence of data "it can be assumed that the class member used a stand-alone fax machine."[32] The proof, in the court's opinion, was not representative, given there were more than 6,000 individual class members, and was not reliable, as it was based on untested assumptions proffered by an expert and Plaintiffs' counsel.[33]

A circuit split exists as to the question of whether FCC orders are binding on district courts. The Second, Third, Fourth, and Eighth Circuits have held that the FCC's interpretive rules of the TCPA are not binding on district courts.[34] The Seventh Circuit has held that district courts are not bound by FCC rules, whereas the Ninth Circuit has taken the opposite view that district courts are bound by all FCC rules, no matter whether they are interpretive or legislative.[35]

## II. ANALYSIS

On appeal, the Ninth Circuit affirmed the district court's grant of summary judgment to Plaintiffs on McKesson's consent defenses, decision of decertifying the class, and decision not to award treble damages for abuse of discretion.[36]

---

29. *Id.*

30. Order Decertifying Class, Truth Health Chiropractic v. McKesson Corp., No. 13-cv-02219, 2021 WL 4818945, at *1 (N.D. Cal. Oct. 15, 2021).

31. *Id.*

32. *Id.* at *1 n.2.

33. *Id.*

34. *See, e.g.*, Gorss Motels v. FCC, 20 F.4th 87 (2d Cir. 2021); Robert W. Mauthe MD PC v. Millennium Health LLC, 58 F.4th 93 (3d Cir. 2023); Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC, 883 F.3d 459 (4th Cir. 2018) (remanded by Supreme Court for consideration as to whether the rule was interpretative or legislative); Nack v. Walburg, 715 F.3d 680 (8th Cir. 2013).

35. *See* CE Design, Ltd. v. Prism Bus. Media, Inc., 606 F.3d 443 (7th Cir. 2010); *see also Hamilton*, 224 F.3d 1049 (9th Cir. 2000).

36. True Health Chiropractic, Inc. v. McKesson Corp., No. 22-15710, 2023 WL 7015279, at *1 (9th Cir. Oct. 25, 2023).

### *A. Summary Judgment to Plaintiffs on McKesson's Consent Defenses*

The Ninth Circuit found that Defendants' consent defenses were untenable.[37] Defendants argued that Plaintiffs consented to the advertisement by either voluntarily providing fax numbers on product registration or agreeing to the relevant clause in the end-user license agreements ("EULAs").[38] The Ninth Circuit confirmed the district court's decision that neither the content of the form nor the terms of EULA clearly showed that the features and services they consented to would include promotional advertisements.[39]

### *B. Decertification Order*

The Ninth Circuit held that the district court "correctly found that it was bound by the Federal Communication Commission's Amerifactors declaratory ruling." The court found that the Hobbs Act's "exclusive jurisdiction," which encompasses "any proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] . . . except in limited circumstances," forecloses the district court's ability to review the agency's interpretation.

In response to Plaintiffs' argument on the finality of the case, the Ninth Circuit agreed with the district court that the FCC's Amerifactors decision was both an order of the FCC and a final decision of the FCC.[40] First, the court disagreed with Plaintiffs' proposed distinction between an order issued by the FCC's Consumer and Governmental Affairs Bureau ("Bureau") and an order issued by the full FCC for the purpose of evaluating the FCC order's authority.[41] The Bureau, as the court found, received delegated authority from the FCC to issue rulings in "matters pertaining to consumers and governmental affairs," and such rulings "have the same force and effect" as orders of the full FCC.[42] Second, the Ninth Circuit found that the Amerifactors ruling was final. The Amerifactors ruling, as the court noted, went through the general rulemaking process, and "impose[s] an obligation, den[ies] a right, or fix[es] some legal relationship as a consummation of the administrative process."[43] And in a footnote, the court stated a pending application for review of Amerifactors would not change the finality of the Amerifactors ruling because the ruling is "effective upon release," and in the absence of a stay pending review issued by the full commission, Amerifactors remains in effect.[44]

---

37. *Id.*
38. True Health Chiropractic Inc. v. McKesson Corp., 332 F.R.D. 589, 589, 596, 601 (N.D. Cal. 2019).
39. *True Health Chiropractic*, 2023 WL 7015279, at *1.
40. *Id.* at *2.
41. *Id.*
42. *Id.* (citing 47 U.S.C. § 155(c)(1), (3)).
43. *Id.* (citing Hamilton, 224 F.3d at 1054).
44. *Id.* at *2 n.1.

As the Amerifactors order involves "apply[ing] preexisting rules to new factual circumstances," the Ninth Circuit found that the ruling applies retroactively.[45] Accordingly, the Ninth Circuit affirmed the district court's grant of summary judgment to Defendants on claims related to the use of online fax service because Plaintiffs could not show how to distinguish the stand-alone fax machine subclass and online fax service class.[46]

### *C. Order Denying Treble Damages*

The Ninth Circuit found the district court did not abuse its discretion by denying treble damages to Plaintiffs on individual claims. A court may award treble damages only if "it finds that a defendant 'willfully or knowingly' violated the TCPA."[47]And because Defendants were never made aware of how and why it violated the TCPA in 2008, the Ninth Circuit found that Defendants could not and did not "willfully or knowingly" violate the TCPA.[48]

## III. CONCLUSION

For the reasons above, the Ninth Circuit affirmed the district court's judgment that the district court is bound by the FCC's Amerifactors ruling. McLaughlin Chiropractic Associates petitioned the Supreme Court of the United States for a writ of certiorari, which was granted on October 4, 2024.[49]

The Supreme Court heard the oral argument of the case on January 21, 2025.[50] In Oral Argument, Petitioner, McLaughlin Chiropractic, argued that although the courts of appeals would have the exclusive jurisdiction to determine the validity of agency's orders, district courts can consider and review the validity of an agency's interpretation under the Hobbs Act.[51] In support, Petitioner cited Justice Kavanaugh's concurring opinion in *PDR Network*. Specifically, the concurrence states that the Hobbs Act does not bar a party from arguing that the agency's interpretation of the statute is wrong before the district court when the Hobbs Act is silent on whether a party may argue against the agency's legal interpretation in subsequent enforcement proceedings.[52] Thus, under the Hobbs Act, district courts can examine the agency's interpretation of the TCPA "under the usual principles of statutory interpretation, affording appropriate respect to the agency's interpretation" and decide whether to apply the order in the context of the litigation.[53]

45. *True Health Chiropractic*, 2023 WL 7015279, at *2 (quoting Reyes v. Garland, 11 F.4th 985, 991 (9th Cir. 2021)).

46. *Id.*

47. *Id.* at *3 (quoting 47 U.S.C.§ 227(b)(3)).

48. *Id.*

49. Brief for Petitioner, *supra* note 5, at 5.

50. Transcript of Oral Argument at 1, McLaughlin Chiropractic Assoc. v. McKesson Corp., No. 23-1226 (2024), https://www.supremecourt.gov/oral_arguments/audio/2024/23-1226 [https://perma.cc/EUE2-22WU].

51. *See id.* at 4-6, 12.

52. *See PDR Network*, 588 U.S. at 18.

53. *Id.*; *see also* Transcript of Oral Argument, *supra* note 50, at 16-17.

Respondent, McKesson, argued that the Hobbs Act's exclusive jurisdiction should be interpreted to mean district courts cannot review the merits of an agency's final order, and only courts of appeals can hear challenges regarding whether an agency order is unlawful.[54]

54. Transcript of Oral Argument, *supra* note 50, at 34-36.