



‘Animal House’ Rules In Play In Robocall Row, Justices Told

Anne Cullen

January 3, 2019

Two nonprofits urged the U.S. Supreme Court to scrutinize the Federal Trade Commission's ability to pick decisions facing review in a dispute surrounding robocall regulations, likening the agency's stance on the matter to a quote from the comedy film "Animal House": "Nothing is over until we decide it is!"

The Cato Institute and The Southeastern Legal Foundation argued in a brief Wednesday that an agency letter stating certain telemarketing technology is subject to robocall regulations can be challenged in court, lobbying their support for a high court review of a split D.C. Circuit **decision finding otherwise**.

The organizations backed the challenge to the three-year-old letter brought by telemarketing trade group The Soundboard Association — which initially **lost its fight** against the agency at the district court level in mid-2017 — invoking the line spoken by the character John "Bluto" Blutarsky in the 1978 comedy film to support their argument that the FTC is inappropriately monopolizing the decision-making process.

"The lower court's opinion highlights the problem of reviewing agency actions exclusively from the agency's perspective," the groups said. "Under this reasoning, no agency action is final unless the agency says that it is — a John 'Bluto' Blutarsky view of finality, if you will." Ilya Shapiro, counsel for Cato in-house, added that this stance is unacceptable.

"As we wrote in our brief, the FTC here presents an 'Animal House' theory of judicial review: 'Nothing is over [and therefore subject to judicial oversight] until we decide it is,'" Shapiro told Law360 on Thursday. "I don't think that's good enough — and I think both the [Administrative Procedure Act] and the Constitution support me on that."

At the center of the litigation is technology that live telemarketers use to play prerecorded sound bites to consumers, which the 2016 letter — consisting of the FTC staff's opinion — stated was subject to robocall regulations. Soundboard, Cato and Southeastern argue that this letter

constitutes a final agency action, which subjects it to a notice-and-comment process as well as judicial review, while the FTC says it's just a nonbinding staff opinion, not a rule.

An attorney for Soundboard, Karen Donnelly of Copilevitz & Canter LLC, told Law360 that they're thrilled to have the backing of Cato and Southeastern, saying it's an "excellent brief" that "highlights the significance of the question presented in this case."

Donnelly added that the agency shouldn't be exempt from the rules, and emphasized the significance of the case.

"Federal regulators need to follow the law, just like everyone else," she said. "If not reversed, the D.C. Circuit's decision will have wide-reaching ramifications in administrative law."

Shapiro agreed that the case's outcome will have significant implications on a broad scale.

"Soundboard looks like a dry, technical case at first blush, but it really asks the fundamental question of when people are allowed to go to court to review the actions of powerful regulatory agencies that cause real harm," he said.

The FTC's response to Soundboard's petition is due early next week, but the agency asked the justices Thursday to push that deadline a month back to accommodate the attorneys' caseloads.

"The extension is requested to complete preparation of the government's response, which was delayed because of the heavy press of earlier assigned cases to the attorneys handling this matter," it said.

Counsel and representatives for Southeastern and the FTC did not immediately respond to requests for comment on Thursday.

The Southeastern Legal Foundation is represented by in-house by Kimberly S. Hermann. The Cato Institute is represented in-house by Ilya Shapiro and Evan Schrage. The Soundboard Association is represented by Karen Donnelly and Errol Copilevitz of Copilevitz & Canter LLC.

The Federal Trade Commission is represented by Solicitor General Noel Francisco of the U.S. Department of Justice.

The case is Soundboard Association v. Federal Trade Commission, case number 18-722, in the U.S. Supreme Court.