Ninth Circuit Issues En Banc Ruling on the FTC's Power to Oversee Many Communications Companies

Stephanie S. Weiner, Adrienne E. Fowler, and E. Austin Bonner

The decision. In a highly anticipated en banc decision, *FTC v. AT&T Mobility,* the Ninth Circuit held earlier this week that common carriers are exempt from certain forms of Federal Trade Commission oversight only with regard to their common-carrier activities. As a result of this decision, the FTC can continue to bring enforcement actions against a company that engages in "unfair and deceptive acts or practices" with respect to its non-common-carrier lines of business, even if the company offers other services that qualify as common carriage.

This case arises from an FTC enforcement action related to AT&T Mobility's "throttling" of the mobile broadband data speeds of certain customers. Beginning in 2011, AT&T allegedly advertised "unlimited mobile data" while restricting speeds for customers who exceeded a preset data cap during any billing cycle. The FTC concluded that AT&T's throttling policy was unfair and deceptive and brought suit in federal district court.

AT&T moved to dismiss the FTC's lawsuit, arguing that it was exempt from FTC regulation because Section 5 of the FTC Act—which prohibits unfair and deceptive acts or practices in interstate commerce—does not apply to "common carriers subject to the Acts to regulate commerce." The FTC interpreted this common carrier exemption to be "activity based," i.e., that the FTC could go after AT&T with respect to its non-common-carrier offerings if AT&T argued that this exemption is status-based. During the relevant time, mobile internet access did not qualify as a common carrier service, so the FTC took the position that it could enforce Section 5 with respect to AT&T's mobile data offerings. In contrast, AT&T interpreted the exemption to be "status based," i.e. to exempt a company from FTC Section 5 jurisdiction altogether, if it offered any common carrier services. The district court sided with the FTC, concluding that the exemption is activity-based and applies only to AT&T's common-carrier activities, not the business as a whole. A panel of the Ninth Circuit later reversed, adopting AT&T's status-based interpretation.

After vacating the panel's decision, the en banc Ninth Circuit affirmed the district court's conclusion that the exemption is activity-based. Relying on the FTC Act's text, the usage of "common carrier" by courts at the time the Act was adopted, additional judicial interpretations, the expertise of the FCC and the FTC, and legislative history, the en banc court concluded that the common carrier exemption immunizes a business from FTC regulation *only to the extent the company is engaged in common carrier activities*.

Why does this matter? For today's communications companies, many of which offer a mix of common carrier and non-common-carrier services, it matters a great deal.

Had the Ninth Circuit panel's decision stood, the FTC could not have policed any unfair or deceptive conduct by a company that offered common carrier services (like telephone service), even if the company committed unfair or deceptive practices in connection with offering non-

common-carrier services (like the sale of telephones). Instead, only the Federal Communications Commission could have policed such conduct—but the FCC faces legal limits on how much it can regulate non-common-carrier services. So companies that offered a mixture of common-carrier and non-common-carrier services likely would have been subject to less oversight from federal regulators.

Instead, the en banc decision stands for the proposition that both the FTC and the FCC can police the conduct of these "mixed offering" companies: the FTC can police these companies' non-common-carrier activities, while the FCC can focus primarily (albeit not exclusively) on these companies' common-carrier activities.

In particular, the en banc decision affects government oversight of internet service providers. As a result of the FCC's back-and-forth on net neutrality, the offering of broadband internet access services is slated to become a non-common-carrier service (although the rules are not yet in effect). Under the Ninth Circuit en banc decision, the FTC will have the power to police companies' unfair and deceptive conduct in connection with their ISP offerings, even if the company also offers phone service or another common carrier offering. This will be particularly important for government oversight of ISPs' privacy and data security practices, as the FTC has historically been active in policing such data practices under its Section 5 authority.

What now? In terms of the litigation, AT&T may choose to seek Supreme Court review. If it does not do so, the FTC's lawsuit will proceed.

The en banc decision also means communications companies have all the more reason to monitor and engage with the FTC. And a complete turnover in FTC leadership is on the horizon. As we write this alert, only two of the five FTC commissioner slots are currently filled—and those two are on their way out the door. Congress is currently considering four FTC Commissioner nominees from President Trump: Republicans Joseph Simons, Noah Phillips, and Christine Wilson and Democrat Rohit Chopra. Communications companies should watch closely as these individuals articulate their enforcement priorities and work to develop relationships with new FTC leadership.

* * *

For more information regarding the decision, net neutrality, ISP privacy, or HWG's advocacy before the FCC and FTC, please contact Stephanie Weiner, Adrienne Fowler, Austin Bonner, or the HWG lawyer with whom you regularly work.