

WEIL'S SCOTUS TERM IN REVIEW

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Supreme Court Holds that the FCC May Issue Forfeiture Orders Without a Jury Trial

By Josh Wesneski and Adam Mitchell

The Supreme Court held yesterday in *FCC v. AT&T, Inc.* that the Federal Communications Commission's administrative forfeiture proceedings do not violate the Seventh Amendment right to a jury trial. The decision allows the FCC to continue "assessing" penalties against common carriers without a jury—but makes clear that a carrier is entitled to a jury trial, with de novo review of the legality of those penalties, if the government ever seeks to enforce them.

The cases arose from FCC enforcement actions against AT&T and Verizon for allegedly violating laws that regulate the carriers' treatment of customer location data. The FCC, after an investigation, issued forfeiture orders assessing penalties of roughly \$57 million against AT&T and \$47 million against Verizon.

Under the statutory scheme, the carriers had two options. First, they could pay the penalties and then seek review in a court of appeals, which sits without a jury and reviews the administrative record under the standards set forth in the Administrative Procedure Act. Alternatively, the carriers could do nothing and decline to pay the penalty. The FCC may then refer the matter to the Department of Justice, which may bring a civil action in district court seeking enforcement of the forfeiture order pursuant to Section 504(a) of the Communications Act of 1934, as amended and codified at 47 U.S.C. § 504(a). A jury trial is afforded in such an enforcement action. Here, the carriers opted for the first route—they paid their penalties and filed petitions for review in their respective courts of appeals, arguing that the statutory scheme providing for forfeiture without the opportunity for a jury trial violates the Seventh Amendment.

The Second Circuit and the Fifth Circuit split on the carriers' petitions. The Second Circuit concluded that the statutory scheme does not offend the Seventh Amendment, because the FCC's forfeiture order does not by itself compel payment and a carrier can receive a jury trial in any enforcement action. The Fifth Circuit, by contrast, struck down the scheme, holding that the FCC impermissibly "found the facts, interpreted the law, adjudged guilt, and levied punishment" without a jury.

The Supreme Court reversed the Fifth Circuit and agreed with the Second Circuit. In an 8-1 decision, Chief Justice Roberts explained that the FCC's forfeiture orders do not definitively resolve the parties' legal obligations, and that the FCC's factual findings in its forfeiture proceedings are not conclusive. The Court reasoned that the Seventh Amendment requires only that, before legal rights and obligations are conclusively "ascertained and determined," a party has the chance to insist that a jury make the "ultimate determination of issues of fact." Because the statute provides that forfeitures are recoverable exclusively in a "trial de novo" under Section 504, in which the government must prove its case to a jury, the Court held that the FCC's forfeiture scheme does not violate the Seventh Amendment.

The Court further rejected the carriers' argument that the forfeiture scheme impermissibly coerces regulated parties into waiving their jury right by voluntarily paying the forfeiture in exchange for judicial review. The Court held that Section 504(c) prohibits the FCC from using unresolved forfeiture proceedings to a regulated party's prejudice, and that the uncertain prospect of reputational harm does not impermissibly burden the Seventh Amendment right.

Justice Thomas filed a lone dissent, arguing that the carriers may not have received a constitutionally adequate trial in certain jurisdictions and that the carriers had effectively been coerced into paying by orders that were presented as mandatory.

The decision is relatively narrow in that it addresses a scheme under which parties have a right to a jury trial on issues adjudicated by an agency before a penalty can be enforced. For most agency actions, judicial review is circumscribed by the Administrative Procedure Act. The FCC scheme is somewhat unusual in the provision it provides for de novo judicial review. It is not clear what implications the decision will have for agency actions not covered by this kind of scheme.

For common carriers and other regulated entities, the decision confirms that the FCC's forfeiture orders do not constitute mandatory orders to pay, and that no legal consequences can or will flow from a refusal to pay unless and until there is a jury trial. The decision also confirms, though, that the FCC can continue to assess forfeiture penalties without a jury trial, even if the practical effect of those assessments is to deter regulated entities from exercising their jury trial rights.

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