

COMMUNICATIONS LAW UPDATE

February 3, 2005

City of Rancho Palos Verdes v. Abrams

The Supreme Court recently heard oral argument in *City of Rancho Palos Verdes v. Abrams*, which will decide whether suits brought under section 332(c)(7) of the Telecommunications Act of 1996 may include claims for damages and attorney's fees under 42 U.S.C. § 1983 and 42 U.S.C. § 1988. Wilmer Cutler Pickering Hale and Dorr LLP represented the respondent, Mark Abrams, in support of allowing section 1983 and 1988 claims to be included with section 332(c)(7) claims. Seth Waxman argued the case, and was assisted by Bill Lake, Jon Frankel, Paul Wolfson and others.

Section 332(c)(7) requires state and local zoning authorities to follow certain procedural and substantive standards in considering applications to site wireless towers. It prohibits such authorities from discriminating among wireless carriers or taking any action that has the effect of prohibiting a wireless service. It also requires those authorities to rule without unreasonable delay and to issue written decisions that are supported by substantial evidence.

As Mr. Abrams's team argued, the section 1983 damages remedy is necessary to allow section 332(c)(7) to have its intended effect. Section 332(c)(7) was included in the 1996 Act after wireless carriers frequently found their network expansion plans thwarted by local zoning boards

and planning commissions responsive to the "NIMBY" ("not in my back yard") concerns of local residents. As the wireless industry developed in the early 1990s, wireless carriers were required to add new antennas in order to serve the exploding demand for wireless services. Local zoning boards and planning commissions, however, obstructed and delayed antenna sitings in a variety of ways. Many instituted either *de facto* or *de jure* moratoria on any new antenna sitings for as long as two years. Others denied applications based on subjective and often unsupported opposition to the proposed siting, despite significant evidence indicating that the proposed antenna was necessary for uninterrupted wireless service and would have little negative effect. Still others simply stalled proposals by deeming the applications incomplete, requiring additional lengthy investigations and hearings, and changing application requirements during the approval process.

Whether claims under this provision may also include a claim under section 1983, which permits the recovery of damages for deprivations of federal rights, and section 1988, which permits attorney's fees, has been uncertain since section 332(c)(7) became law. The question eventually reached the courts of appeals, where a split developed between the Seventh and Third Circuits (finding that section

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1983 claims are not allowed in conjunction with claims under section 332(c)(7)) and the Ninth and Eleventh Circuits (finding the opposite). After this split solidified following the Ninth Circuit's opinion in *Abrams v. City of Rancho Palos Verdes*, the Supreme Court granted certiorari.

The central question that the Court faces in deciding the case is whether section 332(c)(7) provides the sort of "comprehensive remedial scheme" that is sufficiently incompatible with section 1983 to reflect Congress's intent to disallow section 1983 claims. In only two instances has the Court found a statute to be so comprehensive as to oust section 1983: the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act, in one case, and the Education of the Handicapped Act in another. In these statutes, Congress had either explicitly limited relief to injunctive relief and excluded damages, or had established elaborate administrative procedures that evidenced a desire for any claims to be resolved out of court.

Section 332(c)(7), as Mr. Abrams's team argued, is quite different from these statutes. Section 332(c)(7) provides an explicit right of action, requires claims to be made within 30 days of the local authority's final action, and requires expeditious judicial resolution, but neither provides nor excludes any explicit remedy. Rather than indicating any preference that claims arising under the provision be settled out of court through elaborate administrative procedures, section 332(c)(7) specifically provides for such claims to be adjudicated in court. The City of Rancho Palos Verdes (represented by Jeffrey Lamken and others from Baker Botts LLP), however, with the United States joining as *amicus*, urged the

Court to broaden the universe of claims for which a section 1983 claim is barred to include any statute that specifically provides for judicial remedy of violations of the rights the statute confers.

The case was argued on January 19, 2005, and both sides faced vigorous questioning. Among the many questions, Justice Scalia expressed concern over the prospect of municipalities having to pay damages and attorney's fees awards for mistaken zoning decisions without an opportunity to correct their mistakes. In response, Mr. Waxman noted that courts would retain their traditional discretion in making damages awards and that they could simply remand the matter to the local authority without ordering damages, as appropriate. In addition, Justice Breyer noted that section 332(c)(7) provides review similar to review of administrative agency decisions, and that it would be unusual to award damages in such a context. Mr. Waxman pointed out that section 332(c)(7) has substantive provisions as well, such as the requirements that decisions may not discriminate between carriers or have the effect of prohibiting wireless service. During the City's argument, Justice Ginsburg pointed out that because Congress amended the Cable Act in 1992 to specifically exclude damages against municipalities, and section 332(c)(7) is silent on damages, it appears that Congress knew damages against municipalities were possible and chose not to prohibit them in the wireless context. Mr. Lamken argued in response that while Congress did not explicitly prohibit damages, it implicitly did so through the various procedural mechanisms in section 332(c)(7).

A decision is expected this spring.

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