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# FCC Letter Brief Suggests That Faxes and Phone Calls are Different for Purposes of Direct Liability Under the TCPA

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At the invitation of the Eleventh Circuit Court of Appeals, the FCC recently filed a letter brief in *Palm Beach Golf Center-Boca, Inc. v. Sarris*, No. 13-14013 (11th Cir.). The letter brief took the position that defendants can be held ***directly*** liable any time their products or services are advertised via a fax that violates the TCPA—even if they did not send the fax or even know that it was going to be sent.

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The defendant in *Sarris* was the owner of a dental practice ("Owner") who gave "free rein" to an independent contractor ("Marketer") to market its services. *Sarris*, 981 F. Supp. 2d 1239, 1251 (S.D. Fla. 2013). The Marketer then engaged another independent contractor called Business to Business Solutions to send a series of fax advertisements, one of which was received by the plaintiff in 2005. The Owner moved for summary judgment because he had not been aware of the faxes until his attorney received a letter about them from another recipient. The trial court entered summary judgment in favor of the Owner, finding as a factual matter that there was no case for vicarious liability and holding as a legal matter that the Owner could not be held directly liable for a fax he had not sent or known about. The trial court relied on *In re Joint Petition by Dish Network LLC*, 28 FCC Rcd. 6574 (2013) ("*Dish Network*"), in which the FCC addressed vicarious liability in the context of telemarketing calls and pronounced—broadly, we thought—that federal common law principles should guide the imposition of vicarious liability under the TCPA.

The issue referred to the FCC in *Dish Network* concerned the scope of liability of a "seller" of goods or services that engages a "telemarketer" to "initiate" telemarketing calls on its behalf. The TCPA's plain language only prohibits the "initiat[ion]" of certain calls.*See* 47 U.S.C. § 227(b)(1)(B). The TCPA's implementing regulations define "telemarketer" as the party who "initiates" a call and "seller" as the party "on whose behalf a telephone call" is initiated. 47 C.F.R. § 64.1200(f)(9) & (11). The FCC determined that the TCPA ***only*** imposes direct liability on the "telemarketer" who "initiates" calls and not on the "seller" on whose behalf they are initiated. A "seller" can at most have vicarious liability, which according to the FCC should be established under federal common law agency principles.

Because *Dish Network* addressed calls but not faxes, the question on appeal in *Sarris* is whether the trial court was right to extend the *Dish Network* reasoning to the blast fax context. The Eleventh Circuit solicited the opinion of the FCC, which responded with regulatory hair-splitting. Under its logic, its regulations—not the statute itself—distinguish between "sending" faxes and "initiating" calls, such that the actual "sender" of a fax is exonerated but the business whose product or service is advertised is liable for potentially ruinous aggregate statutory damages whether federal common law agency is proven or not.

The FCC's letter brief begins by emphasizing that the TCPA prohibits the "send[ing]," as opposed to the "initiat[ing]," of unsolicited faxes. 47 U.S.C. § 227(b)(1)(C). The FCC's regulations define "sender" as "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement." 47 C.F.R. §64.1200(f)(10). Based on that regulatory

language, the FCC opined that the TCPA "allow[s] a plaintiff to recover damages [under a theory of direct liability] from a defendant who [transmitted] no facsimile to the plaintiff, but whose independent contractor did, ... as long as the transmitted fax constitutes an unsolicited facsimile advertisement promoting the defendant's goods or services." *See* FCC's Letter Br. at 7. The FCC offered no explanation as to why it believes a "seller" in the voice call context should receive more protection than the person "whose goods and services are promoted" in the blast fax context, nor why the actual "sender" in the blast fax context should be exonerated, when the only difference between these two types of defendants is the medium through which they advertise. *See id.*

The FCC also offered no explanation as to why the regulatory definition of "sender," which did not become effective until August 1, 2006, was relevant to a case about a fax that was sent on December 13, 2005. 47 C.F.R. 64.1200(f)(8) (effective August 1, 2006). The Owner was quick to note that in its reply to the FCC's letter brief. *See* Def.'s Supp. Letter Br. at 1-4. The Owner also argued that the FCC's letter brief is owed no deference because it (1) improperly seeks to apply the regulatory definition retroactively and (2) rather than merely interpreting an existing regulation, the FCC seeks a *de facto* expansion of direct liability to sellers. *Id.* at 5 (citing *Auer v. Robbins,* 519 U.S. 452, 117 S. Ct. 905 (1997)). For its part, the plaintiff argued that the FCC's letter brief is entitled to significant deference because it is consistent with the Commission's view that the "entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements." *See* Pl.'s Supp. Letter Br. at 2-3 (citing *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, 12407, ¶ 35 (Aug. 7, 1995)). But that 1995 statement speaks loosely in terms of "ultimate" liability, which could just as easily be (and indeed more likely is) a reference to vicarious liability.

The scope of direct liability under the TCPA is important because, as the facts of the *Sarris* case demonstrate, the relationship between businesses that the vendors that actually initiate calls or send faxes is often attenuated. If the Eleventh Circuit were to adopt the position taken in the FCC's letter brief, the result could be not just strict but absolute liability for TCPA defendants that neither know nor have reason to know that their products or services are being advertised via fax. The letter brief's arguments in favor of such a result have little if any persuasive force, as the imposition of absolute liability and the distinction between faxes and calls find no support in the statute's language or legislative history, or indeed common sense.