

Circuits Are Split Over Whether Agency Law Applies to TCPA Fax Cases

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On May 9, 2016, the Sixth Circuit reversed a decision of the Northern District of Ohio granting summary judgment to Defendant in a TCPA fax case. [*Siding & Insulation Co. v. Alco Vending, Inc.*](#), No. 15-3551. The district court had accepted Defendant's argument that it could not be liable under the TCPA for sending the allegedly offending faxes because while it did retain an ad agency (B2B/Caroline Abraham, a combination known well to practitioners in this space) to transmit faxes advertising its services to *consenting* businesses, it had never authorized transmission of faxes to *non-consenting* businesses, including the Plaintiff. Finding that under federal common-law agency principles Defendant could not be held vicariously liable for sending the faxes because it neither authorized the transmission of the offending faxes, nor ratified the ad agency's conduct, the district court entered summary judgment in favor of Defendant.

The Sixth Circuit reversed, holding that the proper standard for evaluating the defendant's conduct was based on the FCC's regulations that impose liability on the entity "on whose behalf" a fax is sent (the "on-whose-behalf" standard). In choosing that standard, the Court analyzed and declined to apply two other standards that were presented by the parties: (i) a strict liability standard, and (ii) a vicarious liability standard.

As to the strict liability standard, the court invoked its prior reasoning and holding in *Imhoff Inv., LLC v. Alfocchino, Inc.*, 792 F.3d 627 (6th Cir. 2015) and explained that the FCC's current definition of "sender" includes "the person or entity...whose goods or services are advertised or promoted in [an] unsolicited advertisement," and that if that definition applied "Alco would be strictly liable for the transmission of the unauthorized faxes." The Court found, however, that this definition of "sender" did **not** apply because (i) the faxes at issue were sent before the current definition of "sender" took effect (the faxes were broadcast in November 2005 and July 2006, whereas the new enactment became effective August 2006), and retroactive application of the new definition of "sender" would expose the defendant to increased liability. (The Sixth Circuit also took a swipe at the Seventh Circuit's decision in *Bridgeview Health Care Ctr., Ltd. v. Clark*, Nos. 14-3728 & 15-1793, rejecting the application of a strict liability standard, stating that *Bridgeview* was "perplexing" and "unsupported by

any analysis.”)

As for the vicarious liability standard (which was employed by the District Court below) the Court declined to apply it, too, reasoning that the District Court incorrectly relied on the FCC’s *Dish Network Order* 28 FCC Rcd. 6574 (2013) which, as the FCC had explained in a letter submission relied upon by the Eleventh Circuit *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015), did not extend to fax cases. Instead, the court, following the approach articulated in *Sarris* and by district courts in *Cin-Q Autos., Inc. v. Buccaneers Ltd. P’ship*, No. 08cv1592, 2014 U.S. Dist. LEXIS 174134 (M.D. Fla. Dec. 17, 2014) and *City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc.*, No. 13cv4595, 2015 U.S. Dist. LEXIS 132034 (D.N.J. Sept. 29, 2015), adopted a “on-whose-behalf” standard which it reasoned does not rely on traditional agency rules of ratification or authorization, but rather factors such as, “the degree of control that the latter entity exercised over the preparation of the faxes, whether the latter entity approved the final content of the faxes as broadcast, and the nature and terms of the contractual relationship between the fax broadcaster and the latter entity.” In its estimation, this approach existed as a “middle ground between strict liability and vicarious liability.”

Applying this standard to the case before it, the Sixth Circuit found that some factors tended to show that B2B did not act on behalf of Alco, while others tended to show the opposite, and remanded to the District Court to “apply the correct legal standard” and determine whether a genuine dispute of material fact exists or whether additional discovery may be required.

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National Law Review, Volume VI, Number 139

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