

16-91 
No. _____

Supreme Court, U.S. FILED JUL 18 2016 OFFICE OF THE CLERK
--

IN THE
Supreme Court of the United States

BRIDGEVIEW HEALTH CENTER, LTD., individually and
as the representative of a class of similarly-situated
persons,

Petitioner,

v.

JERRY CLARK D/B/A AFFORDABLE DIGITAL HEARING,

Respondent.

On Petition for a Writ of Certiorari from the United
States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

David M. Oppenheim
Counsel of Record

Phillip A. Bock
BOCK, HATCH, LEWIS & OPPENHEIM LLC
134 N. La Salle Street, Ste. 1000
Chicago, IL 60602
Telephone: (312) 658-5500
Facsimile: (312) 658-5555
david@classlawyers.com
July 18, 2016

QUESTION PRESENTED

Does the Telephone Consumer Protection Act, 47 U.S.C. § 227, and its regulations as they existed prior to August 1, 2006, which hold that the party “on whose behalf” an unsolicited facsimile advertisement is sent is directly liable under the statute and the regulations *sub silentio* import common law agency requirements?

The Seventh Circuit below answered yes, but both the FCC and the Sixth and Eleventh Circuits answered no. *See Siding and Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886 (6th Cir. 2016); *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015); F.C.C. Letter by John Ley, *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015) (No. 13-14013), 2014 WL 3734105 (F.C.C. July 17, 2014) (emphasis added) (“FCC Letter”).

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Court's Rule 29.6, undersigned counsel states that Petitioner, Bridgeview Health Care Center Ltd., has no parent corporation and that no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING.....	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE.....	5
I. Introduction.....	5
II. Basis for Federal Jurisdiction in the District Court.....	7
III. Statement of Facts.....	7
IV. Course of Proceedings.	8
REASONS FOR GRANTING THE PETITION	9
CONCLUSION.....	15

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit.....	1A
---	----

APPENDIX B

Summary Judgment Order of the United States District Court for the Northern District of Illinois.....	15A
---	-----

APPENDIX C

Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Illinois	36A
---	-----

APPENDIX D

Order of the United States Court of Appeals for the Seventh Circuit Denying Rehearing En Banc.....	55A
--	-----

TABLE OF AUTHORITIES

Cases

CE Design Ltd. v. Prism Business Media, Inc., 606 F.3d 443 (7th Cir. 2010) 9

Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 131 S. Ct. 871 (2011) 6

Imhoff Investment, L.L.C. v. Alfocchino, Inc., 792 F.3d 627 (6th Cir. 2015) 6, 10, 13

Mims v. Arrow Fin. Servs., LLC, __ U.S. __, 132 S. Ct. 740 (2012) 7

Moriarty v. Glueckert Funeral Home, Ltd., 155 F.3d 859, 866 (7th Cir. 1998)

Palm Beach Golf Ctr.-Boca, Inc. v. Sarris, 981 F. Supp. 2d 1239 (S.D. Fla. 2013) 10

Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d 1245 (11th Cir. 2015) *passim*

Siding and Insulation Co. v. Alco Vending, Inc., 822 F.3d 886 (6th Cir. 2016) *passim*

Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 131 S. Ct. 2254 (2011) 6

Statutes

28 U.S.C. § 2342(1) 9

28 U.S.C. § 1331 7

47 U.S.C. § 227 7, 8, 9

Regulations

10 FCC Rcd. 12391 (1995) 9

Agency Interpretations and Orders

F.C.C. Letter by John Ley, Palm Beach Golf Ctr. -
Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d
1245 (11th Cir. 2015) (No. 13-14013), 2014 WL
3734105 (F.C.C. July 17, 2014) *passim*

In re DISH Network, LLC, 28 FCC Rcd. 6574 (2012)
6, 14

Treatises

Restatement (Second) of Agency 10

Other Authorities

Letter from Amy C. Nerenberg, Chief Deputy Clerk,
United States Court of Appeals for the Eleventh
Circuit, to Richard Welch, Office of General Counsel,
Federal Communications Commission (July 7, 2014)
(No. 13-14013, ECF Dkt. No. 53) 11-12

PETITION FOR A WRIT OF CERTIORARI

Bridgeview Health Care Center Ltd. (“Bridgeview”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit below (App., *infra*, 1a-14a) is reported at 816 F.3d 945. The findings of fact and conclusions of law of the district court (App., *infra*, 36a-54a) is unreported. The district court’s order on summary judgment (App., *infra*, 15a-35a) is also unreported

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2016. Fifteen days later, on April 5, 2016, Bridgeview timely filed its petition for rehearing en banc. 7th Cir. Rule 35. The court of appeals denied Bridgeview’s petition on April 19, 2015. App., *infra*, 55a-56a.

This petition is timely because it is being filed within 90 days of the Seventh Circuit’s denial of Bridgeview’s petition for rehearing en banc. 28 U.S.C. § 2101©; Sup. Ct. R. 13.5. This Court has jurisdiction to hear this petition under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

**The Telephone Consumer Protection Act ("TCPA")
28 U.S.C. § 227.**

Restrictions on use of telephone equipment

(C) Definitions

As used in this section—
.....

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person ...

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement ...
.....

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission . . .

(3) Private right of action

A person or entity may . . . bring . . .

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

**In the Matter of Rules & Regulations Implementing
the Tel. Consumer Prot. Act of 1991**

10 FCC Rcd. 12391, 12407-08 (1995)

35. Decision. We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with

this rule. This interpretation is consistent with the TCPA's legislative history, and with our finding in the Report and Order that carriers will not be held liable for the transmission of a prohibited message.

STATEMENT OF THE CASE

I. Introduction.

This case, as well as the conflicting decisions by the Sixth and Eleventh Circuits in *Alco* and *Sarris* turn on whether a Court is free to—and should—read common law agency requirements into the pre-2006 definition of “sender” in the FCC’s regulations of the TCPA.¹

The FCC itself was asked to weigh in on this precise question in *Sarris* and unequivocally confirmed that “The court determined ... a party whose goods or services were promoted in an unsolicited fax transmitted by a third-party could be held liable, if at all, only ‘under federal common law principles of agency for the actions of a third-party.’ That holding was in error.”

F.C.C. Letter by John Ley, Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d 1245 (11th Cir. 2015) (No. 13-14013), 2014 WL 3734105 (F.C.C. July 17, 2014) (emphasis added) (“FCC Letter”).

The Eleventh and Sixth Circuits have followed the FCC Letter and held that common law agency principles do not, as the Panel Decision here holds, govern “on behalf of” liability for faxes sent in

¹ The FCC amended its regulations effective August 1, 2006. 47 C.F.R. § 64.1200(f)(10).

violation of the TCPA. *Sarris*, 781 F.3d at 1254-1257 (“because DISH Network did not address the TCPA’s junk-fax-ban provision, the District Court’s reliance on it, to hold that a plaintiff must establish vicarious liability in order to recover under the statute when a third party sends unsolicited fax advertisements on behalf of the advertiser, was misplaced”), *citing In re DISH Network, LLC*, 28 FCC Rcd. 6574 (2012); *Alco*, 822 F.3d 886, 896-97 (“We note, however, that the Seventh Circuit’s decision to apply agency law is unsupported by any analysis. This is particularly perplexing because the FCC plainly knows how to impose the standards of agency law when it wishes to do so.”). *See also Imhoff Investment, L.L.C. v. Alfocchino, Inc.*, 792 F.3d 627, 634-637 (6th Cir. 2015).

The Sixth and Eleventh Circuit decisions, as opposed to the Seventh Circuit, correctly gave deference to the FCC’s interpretation of its own regulation. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 131 S. Ct. 2254, 2261-2262 (2011) (*citing Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 131 S. Ct. 871, 880 (2011) (“In the absence of any unambiguous statute or regulation, we turn to the FCC’s interpretation of its regulations in its amicus brief.”)).

The FCC’s view that common law agency principles do not govern is a reasonable and consistent interpretation of its “sender” regulation and should be followed.

It is respectfully suggested that the Court grant Bridgeview's petition in order to resolve the conflict between the Seventh Circuit and the Sixth and Eleventh Circuits (as well as the express position of the FCC interpreting its own regulation) and hold that the a "sender" under the 1995 FCC regulations is the entity "on whose behalf" a fax is sent, and that determination does not require proof of common law agency.

II. Basis for Federal Jurisdiction in the District Court.

Bridgeview sued Jerry Clark d/b/a Affordable Digital Hearing ("Defendant") for sending unsolicited faxes ads to Bridgeview and a class in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The district court had original subject matter jurisdiction over the complaint because it alleged a violation of the TCPA. *Mims v. Arrow Fin. Servs., LLC*, __ U.S. __, 132 S. Ct. 740 (2012); 28 U.S.C. § 1331.

III. Statement of Facts.

Defendant owns and operates a company in Indiana. 816 F.3d at 937. In June 2006, Defendant hired a fax broadcaster, who sent unsolicited fax ads promoting his business to Bridgeview and the other class members. *Id.* The broadcaster faxed 4,989 advertisements to businesses throughout Indiana. *Id.* The TCPA provides a remedy of \$500 in statutory damages for the sending of an unsolicited fax

advertisement. 47 U.S.C. § 227(b)(3).

Following trial, the district court found that Clark instructed the fax broadcaster to only send faxes to businesses within a 20-mile radius of Terre Haute. 816 F.3d at 937. The trial court held, applying agency principles, that Clark was not liable for the faxes advertising his business—that he paid the fax broadcaster to send—that were sent to businesses outside the 20-mile radius of Terre Haute. *Id.*

IV. Course of Proceedings.

Bridgeview filed the present action on May 6, 2009. Following class certification, the parties filed cross-motions for summary judgment. The district court granted plaintiff's motion in part, granting summary judgment for the portion of the class that was within a 20-mile radius of Terre Haute, but denied the cross-motions as to the remaining class members because the Court determined, applying common law agency principles, that there was a question of fact regarding Clark's specific instructions to the fax broadcaster—and that Clark would not be liable for facsimiles sent on his behalf if they were sent to persons other than those he intended to send to. *Ibid.*, *_a_*. [pp. 9-14]

Following a bench trial, the district court ruled for Clark, finding that he had no vicarious liability for the faxes promoting his business that the broadcaster sent to people outside the geographic

radius.

Bridgeview appealed. The March 21, 2016 panel decision affirmed the district's court's orders. *Ibid.*, 1a-10a. Bridgeview timely filed a petition for rehearing *en banc*, which was denied without opinion on April 19, 2016. *Ibid.*, _a-_a.

REASONS FOR GRANTING THE PETITION

This petition raises a discrete but important question of deference to agency interpretation of its own regulations and presents a clear Circuit split over the standard to adjudicate claims under a federal statute, the TCPA.

The Telephone Consumer Protection Act, ("TCPA"), 47 U.S.C. § 227(b)(1)(C), makes it unlawful to "send" "unsolicited advertisements" by fax. In the 1995 regulations, the FCC defined the "sender" of a fax to mean, "[T]he entity or entities on whose behalf facsimiles are transmitted." 10 FCC Rcd. 12391, 12407-08 (1995).

The Hobbs Act, 28 U.S.C. § 2342(1), renders district courts without jurisdiction to invalidate an FCC regulation, and this continues on appeal from a district court decision. *CE Design Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443, 446 (7th Cir. 2010). Thus, the FCC's "sender" regulation governs who is liable for a fax sent in violation of the TCPA.

The Decision in this case holds “agency rules are properly applied to determine whether an action is done ‘on behalf’ of a principal.” The Decision then goes on to define “agency rules” by reference to the common law as expressed in the Restatement (Second) of Agency and *Moriarty v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 866 (7th Cir. 1998). 816 F.3d at 938. This exact approach to determining when an advertiser is liable as the “sender” of a fax ad sent by a fax broadcaster has been firmly rejected by the FCC, the Sixth and the Eleventh Circuits. *Imhoff*, 792 F.3d at 634-637; *Sarris*, 781 F.3d at 1254-1257; *Alco*, 822 F.3d at 896-97; F.C.C. Letter, 2014 WL 3734105 at *4.

It also contradicts the express interpretation by the FCC of its own regulation. In *Sarris*, the district court in Florida adopted a common law agency test, indistinguishable from that adopted by the Decision here, to determine whether a dental practice was liable for fax ads promoting its practice when they were actually transmitted by a fax broadcaster. *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 981 F. Supp. 2d 1239 (S.D. Fla. 2013) (“*Sarris P*”), *rev’d and remanded sub nom. by* 781 F.3d 1245. The Eleventh Circuit invited the FCC’s view and, based on that view, reversed the district court holding its application of a common law agency test was in error because the “sender” regulation created a lesser standard. *Sarris*, 781 F.3d at 1258.

In *Sarris I*, it was undisputed the defendant dental practice hired an independent contractor to market its business, and the independent contractor had in turned hired a fax broadcaster. The independent contractor claimed he had never finally approved the content of the ad that the fax broadcaster actually broadcast. 781 F.3d at 1252. But there was evidence that it was the practice of the fax broadcaster to only send ads that had been finally approved. *Id.* The district court applied common law agency principles to the district court granted summary judgment for the dental practice. *Id.* at 1249, 1252.

On appeal, the Eleventh Circuit posed the following question to the FCC:

[T]he TCPA prohibits the sending of unsolicited advertisements to facsimile machines, and defines "sender" to be "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."

We would like to know, therefore, the position of the FCC on whether the TCPA and its accompanying regulations allow a plaintiff to recover damages from a defendant who sent no facsimile to the plaintiff, but whose independent contractor did.

Letter from Amy C. Nerenberg, Chief Deputy Clerk, United States Court of Appeals for the Eleventh Circuit, to Richard Welch, Office of General Counsel, Federal Communications Commission (July 7, 2014) (No. 13-14013, ECF Dkt. No. 53).

The FCC answered, “[Y]es.” FCC Letter, 2014 WL 3734105 at *1. The FCC went on to explain that under its “sender” definition “liability does not depend upon the application of federal common law vicarious liability principles.” *Id.* And the district court’s reliance on “federal common law agency principles” was “in error.” *Id.* at 4.

The FCC further explained that “direct liability for sending an unsolicited facsimile advertisement attaches to the entity (defined as the ‘sender’) whose goods or services are being promoted, and not generally to the entity that physically transmits the facsimile.” *Id.* at *2. “Under the FCC’s rules, a party that transmits the unsolicited facsimile advertisement, but does not also meet the definition of ‘sender,’ may nevertheless be jointly and severally liable (along with the sender) ‘if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.’” *Id.* at *2 n.2 (emphasis added). The FCC concluded:

[T]he unsolicited fax prohibition in section 227(b)(1)(C) clearly “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,” July 7 Letter at 1, so long as the transmitted fax constitutes an unsolicited facsimile advertisement promoting the defendant’s goods or services.

Id. at *5.

Based on the FCC Letter and the “sender” regulation, the *Sarris* Court determined that because “a plaintiff may prevail under a theory of direct liability against the entity ‘on whose behalf’ an unsolicited fax advertisement is sent, we need not address the District Court’s vicarious liability analysis of the TCPA claim.” *Sarris*, 781 F.3d at 1250 n.4.

The Sixth Circuit has also followed the FCC and *Sarris*. In *Imhoff*, the Court found the fact pattern “effectively identical to *Palm Beach*,” and held that the “sender” regulation governed so the advertiser was directly liable and common law agency principles were irrelevant. 792 F.3d at 636-67. The court held:

The pertinent FCC regulations are explicit that the party whose goods or services are advertised—and not the fax broadcaster—is the sender. We therefore find that Alfoccino is a party subject to direct liability for the unsolicited Alfoccino advertisements B2B transmitted to Avio in violation of the TCPA.

Id. at 637.

Likewise, in *Alco*, the Sixth Circuit was invited to follow the Seventh Circuit decision in this case. It pointedly declined, holding that *Sarris* and *Imhoff* were correct and the Seventh Circuit was not:

Imhoff and *Palm Beach Golf Center* together thus explain why the district court in this case should not have relied on the vicarious-liability standard to evaluate *Alco*'s liability.

On the other hand, the Seventh Circuit very recently addressed the vicarious-liability issue in *Bridgeview Health Care Center, Ltd. v. Clark*, 816 F.3d 935 (7th Cir.2016). ...

We note, however, that the Seventh Circuit's decision to apply agency law is unsupported by any analysis. *See id.* This is particularly perplexing because the FCC plainly knows how to impose the standards of agency law when it wishes to do so. *See Dish Network*, 28 FCC Rcd. 6574, 6584 (2013) ("[W]e find that the seller may be held vicariously liable under federal common law principles of agency for TCPA violations committed by third-party telemarketers."). But the FCC in the 1995 Order imposed no such standards; indeed, it said nothing whatsoever about agency law or vicarious liability in relationship to fax broadcasters. *See* 10 FCC Rcd. at 12407–08. We therefore respectfully decline to adopt the

Seventh Circuit's decision to focus solely on agency principles when the FCC itself has declined to do so.

CONCLUSION

The Court should grant Plaintiff's petition so the Court can resolve the conflict between the Seventh Circuit's holding applying vicarious liability standards to TCPA claims and the contrary holdings of the Sixth and Eleventh Circuits, who relied on the FCC's interpretation of its own regulation to hold that the party on whose behalf a fax is sent is directly liable.

Respectfully submitted,

David M. Oppenheim

Counsel of Record

Phillip A. Bock

BOCK, HATCH, LEWIS & OPPENHEIM LLC

134 N. LaSalle Street, Ste. 1000

Chicago, IL 60602

Telephone: (312) 658-5500

Facsimile: (312) 658-5555

david@classlawyers.com

APPENDIX