

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Akin Gump Strauss Hauer & Feld LLP Petition
for Expedited Clarification or Declaratory Ruling
Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991
Junk Fax Prevention Act of 2005
CG Docket No. 02-278
CG Docket No. 05-338

DECLARATORY RULING

Adopted: September 21, 2020

Released: September 21, 2020

By the Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. The Telephone Consumer Protection Act of 1991 (TCPA), as amended by the Junk Fax Prevention Act of 2005, prohibits any person from sending an unsolicited advertisement to a "telephone facsimile machine," with certain limited exceptions.

2. In 2019, law firm Akin Gump Strauss Hauer & Feld LLP (Akin Gump) filed a petition seeking clarification as to the definition of "sender."

3. By this declaratory ruling, we clarify that a fax broadcaster is solely liable for TCPA violations when it engages in deception or fraud against the advertiser (including when a fax broadcaster violates its contract with the advertiser in a manner that is deceptive or fraudulent).

1 Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, § 2(9) (1991), codified at 47 U.S.C. § 227(b)(1)(C); Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

2 47 CFR § 64.1200(f)(10).

3 Petition of Akin Gump Strauss Hauer & Feld LLP for Expedited Clarification or Declaratory Ruling, CG Docket Nos. 02-278 and 05-338 (filed Feb. 26, 2019) (Petition or Akin Gump Petition). Akin Gump describes itself as having a nationwide practice advising businesses on TCPA compliance and representing defendants in class action litigation concerning alleged violations of the TCPA.

4 See id. at 3.

II. BACKGROUND

4. In relevant part, the TCPA prohibits the use of “any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement,” with certain, limited exceptions.⁵ The Commission’s rules define the term “sender” of a fax advertisement 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.”⁶

5. The Commission has issued several orders clarifying which party or parties should be held liable for violations of the TCPA’s restrictions on fax advertisements.⁷ Specifically, in 2003, the Commission amended its rules to clearly indicate that a fax broadcaster’s exemption from liability is based on the type of activities it undertakes, and only exists “[i]n the absence of ‘a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions.’”⁸ And in its *2006 Junk Fax Order*, at the time it codified the definition of “sender,” the Commission elaborated that the liable “sender” is not always the advertiser: “[T]he sender is the person or entity on whose behalf the advertisement is sent. *In most instances*, this will be the entity whose product or service is advertised or promoted in the message.”⁹

6. On February 26, 2019, Akin Gump filed a Petition for Expedited Clarification or Declaratory Ruling requesting that the Commission clarify its position on fax sender liability and explain the scope of the exception to advertiser liability it articulated in the *2006 Junk Fax Order*.¹⁰ Akin Gump states that clarification is necessary to address inconsistencies between different courts’ interpretations of the Commission’s regulations with respect to “sender” liability in junk fax cases.¹¹ Akin Gump seeks clarification that a fax broadcaster should be the sole liable “sender” when it engages in deception or fraud against the advertiser (or blatantly violates its contract with the advertiser) such that the advertiser cannot control the fax campaign or prevent TCPA violations.¹²

7. Akin Gump contends that the requested clarification is grounded in sound judicial policy and Congressional intent; arises directly from the Commission’s *2006 Junk Fax Order* and is supported by the

⁵ 47 U.S.C. § 227(b)(1)(C).

⁶ 47 CFR § 64.1200(f)(10).

⁷ See *Rules and Regulations Implementing the Telephone Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8779-80, para. 54 (1992) (*1992 TCPA Order*), recon., Memorandum Opinion and Order, 10 FCC Rcd 1239, 1247, para. 35 (1995) (*1995 TCPA Order*); *Rules and Regulations Implementing the Telephone Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14131, para. 195 (2003) (*2003 TCPA Order*); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 and 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3808, para. 39 (2006) (*2006 Junk Fax Order*).

⁸ See *2003 TCPA Order*, 18 FCC Rcd at 14131, para. 195 (citing *1992 TCPA Order*, 7 FCC Rcd at 8780, para. 54).

⁹ *2006 Junk Fax Order*, 21 FCC Rcd at 3808, para. 39 (emphasis added).

¹⁰ Petition at 1.

¹¹ *Id.* at 3, 7-9 (citing, e.g., *Palm Beach Golf Center-Boca v. John G. Sarris, DDS*, 771 F.3d 1274 (11th Cir. 2014), opinion vacated and superseded on reconsideration, 781 F.3d 1245 (11th Cir. 2015) (*Palm Beach*); *Bridgeview Health Care Center v. Clark*, 816 F.3d 935 (7th Cir. 2016) (*Bridgeview*)). Although Akin Gump cites the 11th Circuit’s 2014 *Palm Beach* decision, rather than the court’s 2015 opinion on reconsideration, the relevant part of the opinion was the same in both.

¹² *Id.* at 3.

Commission's policies regarding TCPA liability; and would further the public interest by resolving judicial confusion and bringing uniformity and equity to the treatment of advertisers in junk fax cases.¹³

8. The Consumer and Governmental Affairs Bureau sought comment on the Petition.¹⁴ Most commenters support the Petition and argue that the requested clarification is necessary to hold liable the parties that are actually responsible for violations of the TCPA, give courts the guidance they need, and curtail damaging junk fax lawsuits against innocent advertisers.¹⁵ They agree that when a fax broadcaster engages in fraud or makes misrepresentations to an advertiser such that the advertiser loses control over the advertising campaign, the fax broadcaster—not the advertiser—should be liable for any TCPA violations that result. Three commenters oppose Akin Gump's request, arguing either that there is no "controversy" or "uncertainty" to be resolved or that the Commission should clarify that the party whose goods or services are advertised in an unsolicited fax is always the liable sender.¹⁶

III. DISCUSSION

9. In this Declaratory Ruling, we clarify, consistent with Commission rules and precedent, that a fax broadcaster may be exclusively liable for TCPA violations where it engages in deception or fraud against the advertiser, such as securing an advertiser's business by falsely representing that the broadcaster has consumer consent for certain faxes. Specifically, where the fax broadcaster engages in such conduct, it is the "sender" of the fax because it is acting contrary to the advertiser's interests, and thus not "on behalf of" the advertiser. Our clarification will encourage fax broadcasters to comply with the TCPA and avoid sending unwanted faxes to consumers, thus advancing the goals of the statute. We nonetheless emphasize that, to the extent the advertiser is on notice of TCPA violations by its fax broadcaster and fails to take action to stop such behavior, it cannot claim that it remains deceived by the fax broadcaster's action and may be liable for such violations.¹⁷

10. As an initial matter, we find sufficient controversy or uncertainty to support a declaratory ruling under section 1.2 of the Commission's rules.¹⁸ Specifically, there appears to be confusion related to the Commission's codified definition of "sender" and the Commission's statement in its *2006 Junk Fax Order* that "[i]n most instances, [the person on whose behalf the advertisement is sent] will be the entity

¹³ See Petition at 2-9. The TCPA creates a private right of action for violations of the fax advertising restrictions. Section 227(b)(3) states that "[a] person or entity" may bring "an action [for damages and injunctive relief] based on a violation" of the statutory prohibition or the Commission's implementing regulations. 47 U.S.C. § 227(b)(3).

¹⁴ See *Consumer and Governmental Affairs Bureau Seeks Comment on Akin Gump Strauss Hauer & Feld LLP Petition for Expedited Clarification or Declaratory Ruling*, CG Docket Nos. 02-278 and 05-338, Public Notice, 34 FCC Rcd 1115 (2019).

¹⁵ See Amerifactors Financial Group, LLC Comments; Buccaneers Holding, LLC Reply; Educational Testing Service Comments; Vincent A. Lavieri Comments; The National Association of Manufacturers Reply; RingCentral, Inc. Comments. Some commenters support Akin Gump's petition but also seek broader clarifications, which we do not address at this time.

¹⁶ See Cin-Q Automobiles, Inc. Comments at 5-8 (arguing that Akin Gump fails to demonstrate any ambiguity for the Commission to clarify and that, in the alternative, the Commission should impose a "but for" causation requirement under traditional tort law); Edelman Combs Lattner & Goodwin, LLC Comments at 2 (arguing that Akin Gump has failed to identify any ambiguity in the *2006 Junk Fax Order* that necessitates clarification and that the definition of "sender" implies that, under general tort principles, causation must exist such that the defendant's conduct (consent, actions, authority) is the reason that the unsolicited advertising facsimiles were sent); Craig Moskowitz et al. Comments at 1-2 (arguing that the definition of sender should be the person whose goods or services are advertised or promoted in the advertisement).

¹⁷ See *2006 Junk Fax Order*, 21 FCC Rcd at 3808, para. 40. We note that Akin Gump agrees with this analysis. See Petition at 3 n.9.

¹⁸ See 47 CFR § 1.2.

whose product or service is advertised or promoted in the message.”¹⁹ We agree with commenters that the wide variety of standards different courts apply to determine “sender liability” in fax broadcaster cases shows uncertainty justifying clarification.²⁰ We thus disagree with Cin-Q Automobiles, which argues that there is no ambiguity in the Commission’s rulings that necessitates clarification.²¹

11. Turning to the merits, we clarify that the fax broadcaster, not the advertiser, is the sole “sender” of a fax for the purposes of the TCPA when it engages in conduct such as fraud or deception against an advertiser if such conduct leaves the advertiser unable to control the fax campaign or prevent TCPA violations (including cases in which such fraud or deception violates a fax broadcaster’s contractual commitments). The Commission has made clear that the “sender” of a fax advertisement in most cases is the advertiser, but not in all cases.²² In the *Fax.com Order*, for example, the Commission took enforcement action against a fax broadcaster that went to “great lengths to deceive” the advertiser into “facilitating [its] unlawful activities” by assuring the advertiser that it provided a “fully legal service” and that it had “prior permission” to send fax ads on the advertiser’s behalf to numbers in the fax broadcaster’s database.²³

12. We thus reiterate that where the fax broadcaster’s deception or fraud leaves the advertiser unaware of and unable to prevent the unlawful faxes, sole liability for violations should rest with the fax broadcaster because the unauthorized faxes cannot reasonably be considered to be “on behalf of” the advertiser. Where the fax broadcaster’s misconduct effectively defeats any measures the advertiser took or could have taken to comply with the law, the faxes cannot be considered sent “on [the advertiser’s] behalf” as contemplated by our rules.²⁴ And that decision is consistent with the federal common law of agency to the extent that it applies here.²⁵ Under such agency principles, a seller of goods or services may

¹⁹ 47 CFR § 64.1200(f)(10); *2006 Junk Fax Order*, 21 FCC Rcd at 3808, para. 39 (emphasis added).

²⁰ See Akin Gump Petition at 9; see also, e.g., *Buccaneers Holding, LLC Reply* at 10-13; *RingCentral Comments* at 3-7; *Educational Testing Service Comments* at 4-7. Compare *Bridgeview*, 816 F.3d at 937 (holding that “agency principles are properly applied” to determine if a party is the directly liable sender of a fax advertisement), with *Imhoff Investment, L.L.C. v. Alfocino, Inc.*, 792 F.3d 627, 634 (6th Cir. 2015) (concluding that direct liability for violations of the TCPA attaches to the entity whose goods are advertised, without any need to ascertain the entity “on whose behalf” a fax advertisement was sent) (*Imhoff*), and *Palm Beach*, 781 F.3d at 1257-58 (adopting a multifactor test for determining “on whose behalf” a fax advertisement was sent aimed at placing liability at the source of the offending behavior).

²¹ Although Cin-Q asserts there is no controversy to be resolved, Cin-Q acknowledges that courts have adopted divergent standards for fax sender liability and that several courts have ruled that it would be improper to impose TCPA liability on a person or entity solely because its “goods or services” are advertised in a fax, reasoning that doing so could hypothetically allow a third party to “sabotage” a defendant. See *Cin-Q Automobiles Comments* at 7-8; see also *Buccaneers Holding, LLC Reply* at 10 (stating that Cin-Q’s position confirms there exists a controversy to be resolved).

²² See *2006 Junk Fax Order*, 21 FCC Rcd at 3808, para. 39.

²³ *Fax.com, Inc.*, Order of Forfeiture, 19 FCC Rcd 748, 758, para. 24 (2004); *Fax.com, Inc.*, Notice of Apparent Liability, 17 FCC Rcd 15927, 15941, para. 24 (2002) (maximum forfeiture warranted where fax broadcaster deceived its advertiser clients that faxes were lawful and misrepresented to consumers that advertisers had initiated them, thus improperly “leav[ing] its clients . . . vulnerable to . . . enforcement actions that may involve substantial monetary penalties” for which those advertisers should not have been held liable).

²⁴ See 47 CFR § 64.1200(f)(10).

²⁵ See, e.g., *DISH Network Petition for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, Declaratory Ruling, 28 FCC Rcd 6574, 6584-87, paras. 29-30, 33-36 (2013) (majority ruling) (*DISH Network Declaratory Ruling*) (applying agency principles to determine extent of vicarious liability under the TCPA), *pet. for review dismissed*, *DISH Network, LLC v. FCC*, 552 Fed. Appx. 1 (Mem) (D.C. Cir. 2014) (holding that the court lacked jurisdiction to review an order that was not final).

not be vicariously liable for the misconduct of its alleged agent (i.e., a fax broadcaster) where the fax broadcaster's fraudulent or deceptive conduct makes clear that the seller did not expressly or implicitly authorize it to commit the acts that violated the TCPA.²⁶

13. Our decision is supported by Congressional intent and Commission precedent. In enacting the TCPA, Congress directed the Commission to consider the "most cost effective methods of preventing facsimile advertising abuses."²⁷ By imposing liability for unsolicited fax advertisements on a fax broadcaster that is "highly involved" in the unlawful conduct, the Commission attempted to place liability at the source of the offending behavior that Congress intended to curtail.²⁸ Where the fax broadcaster deliberately acts without the advertiser's authorization and contrary to the advertiser's directives and interests, the fax broadcaster is the source of the offending behavior, and there is no basis for interpreting the statute as imposing liability on the advertiser.

14. Our finding is also consistent with the Seventh Circuit's decisions in *Bridgeview* and *Paldo Sign & Display Co. v. Wagener Equities, Inc.*²⁹ In *Bridgeview*, the court reviewed a lawsuit brought against an advertiser that contracted a fax broadcaster to advertise his business in Terre Haute, Indiana.³⁰ The advertiser approved the design and content of facsimiles to go to 100 businesses within 20 miles of Terre Haute. In violation of those instructions, the fax broadcaster sent nearly 5,000 faxes to entities across three Midwestern states, the vast majority of which were far outside the Terre Haute area. In determining which entity was the liable "sender," the court interpreted the phrase "on whose behalf" in the Commission's definition and concluded that the faxes were not sent on behalf of the advertiser, as the fax broadcaster acted without the advertiser's knowledge and contrary to its authorizations.³¹

15. Similarly, in *Paldo*, the Seventh Circuit determined that, "to be liable as a sender [of unauthorized fax advertisements], a person must have done something to advertise goods or services," but where the person neither "authorized" nor "approved the sending of the fax broadcast transmission," the person cannot be held liable because the ads were not sent "on [its] behalf."³² In that case, a commercial real estate agent and his company negotiated with a fax broadcaster about transmitting fax advertisements, and the broadcaster assured the company that it would provide a copy of the proposed ad and a list of the contacts to whom it would be faxed for review and approval before sending out any ads. Contrary to that representation, the broadcaster sent over 10,000 faxes without obtaining the company's approval for the ad copy or the list of recipients. The court found that, because the company "played no part in sending the faxes," the faxes were not sent "on its behalf," and thus it could not be held liable as the "sender" of the ads under section 64.1200(f)(10) of the Commission's rules.³³

²⁶ See *Bridgeview*, 816 F.3d at 939; Restatement (Third) of Agency § 1.01; cf. *DISH Network Declaratory Ruling*, 28 FCC Rcd at 6487, para. 34 (a seller may be liable for the acts of another if it ratifies those acts by knowingly accepting their benefits, i.e., "through conduct justifiable only on the assumption that the person consents to be bound by the act's legal consequences.") (quoting Restatement (Third) of Agency § 4.01, cmt. d).

²⁷ H.R. Rep. No. 102-317 at 25 (1991).

²⁸ See *1995 TCPA Order*, 10 FCC Rcd at 12407, paras. 34-35; see also, e.g., *Palm Beach*, 781 F.3d at 1257 (finding that the Commission's construction of the TCPA was consistent with Congressional intent).

²⁹ See *Bridgeview*, 816 F.3d at 939; *Paldo Sign & Display Co. v. Wagener Equities, Inc.*, 825 F.3d 793 (7th Cir. 2016) (finding a fax broadcaster acted without authority when sending thousands of faxes without first clearing the list of recipients or the text of the message with the advertiser) (*Paldo*).

³⁰ *Bridgeview*, 816 F.3d at 936-39.

³¹ *Id.*

³² *Paldo*, 825 F.3d at 797-98

³³ *Id.* at 799.

16. We therefore disagree with commenters that urge us to clarify that the party whose products or services are advertised in a fax advertisement is always the liable sender.³⁴ Such an interpretation was clearly not the Commission's intent in defining "sender" for the purposes of its rules, as the Commission specifically stated at the time that "in most instances," not "in all instances," the advertiser would be the "sender."³⁵ Further, a "but for" causation test that Cin-Q Automobiles supports is essentially the equivalent of a "strict liability" test and would almost certainly always hold the advertiser liable, which is neither consistent with our precedent nor equitable.³⁶ As we state above, requiring advertisers to shoulder liability for fax broadcasters' violations that advertisers do not authorize and cannot prevent would undermine the goals of the statute by reducing fax broadcasters' incentives to avoid sending unwanted faxes. Further, imposing liability on advertisers in such cases would lead to absurd and unreasonable results, and potentially incent fraudsters to "frame" advertisers.³⁷ For example, an advertiser would be liable simply because its goods or services appeared in another unrelated company's faxes, even if the defendant neither used a fax machine to send the advertisement itself nor caused a fax machine to be used to send the fax by hiring a fax broadcaster to do so.³⁸

17. Finally, consistent with past Commission guidance, we note that an advertiser nevertheless may be liable under the TCPA for the unauthorized conduct of its fax broadcaster if the advertiser directs or "is aware of ongoing conduct encompassing numerous acts by [the fax broadcaster]," consents to the conduct, or fails to take action to prevent further misconduct by the fax broadcaster.³⁹ In such cases, the faxes cannot be said to be sent because of fraud or deception against the advertiser—both of which require the advertiser to be unaware of the deceit. Similarly, an advertiser will unquestionably be liable if it directs a fax broadcaster to take unlawful actions or otherwise agrees that the broadcaster should take unlawful actions.

IV. ORDERING CLAUSES

18. IT IS ORDERED that, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, sections 1.2 and 64.1200 of the Commission's rules, 47 CFR §§ 1.2, 64.1200, and the authority delegated in sections 0.141 and 0.361 of the Commission's rules, 47 CFR §§ 0.141, 0.361, the Petition for Expedited Clarification or Declaratory Ruling filed by Akin Gump Strauss Hauer & Feld LLP in CG Docket Nos. 02-278 and 05-338 on February 26, 2019, IS GRANTED TO THE EXTENT DISCUSSED HEREIN.

³⁴ See Cin-Q Automobiles Comments at 6; Craig Moskowitz et al. Comments at 1-2.

³⁵ *2006 Junk Fax Order*, 21 FCC Rcd at 3808, para. 39.

³⁶ See Cin-Q Automobiles Comments at 7-8 (stating that "but for" causation means that the harm would not have occurred in the absence of the defendant's conduct and arguing that the Commission should require the party whose goods or services are advertised in a fax be the "but for" cause of the faxing).

³⁷ See, e.g., *Bridgeview*, 816 F.3d at 938 (finding that the trial court correctly rejected strict liability by recognizing that it would lead to absurd results).

³⁸ See Educational Testing Service Comments at 4.

³⁹ *DISH Network Declaratory Ruling*, 28 FCC Rcd at 6587 n.104 (citation omitted).

19. IT IS FURTHER ORDERED that this Declaratory Ruling shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Patrick Webre
Chief
Consumer and Governmental Affairs Bureau