

Florida State Court Holds Pizzerias Liable Under TCPA for Third-Party Fax Blasts

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Based on the Eleventh Circuit's 2015 decision in *Sarris v. Palm Beach Golf Ctr. Boca, Inc.*, a Florida state appellate court has held that using a third-party company to send unauthorized fax ads will not protect the company whose business is promoted in the ads from liability under the federal Telephone Consumer Protection Act of 1991 (TCPA). §227(b)(1)(C) of the TCPA prohibits sending faxed advertisements absent an established business relationship (EBR) with the recipient and a prominent opt out notice on the faxes. In addition, faxed advertisements may only be sent to numbers voluntarily provided by the recipient in connection with the EBR, or made publicly available by the recipient. In *Dewar v. Dough Boy Pizza, Inc.*, three Florida pizzerias used a third-party marketing company to fax blast advertisements for their restaurants to local businesses. Based on the marketing company's assurances that its services were legal, the restaurants' owner provided the marketing company with the zip codes where the pizzerias were located, the restaurants' logo, slogan, and coupon specials. The marketing company created the ads and faxed them to numbers it had purchased from a third-party company, making no effort to obtain the recipients' consent to receive the faxed advertisements. Certain recipients filed a class action lawsuit in Florida state court against the restaurants, alleging the faxes violated the TCPA and unlawfully converted the recipients' fax toner

and paper under a state law conversion theory. The trial court granted the defendants' motion for summary judgment and denied class certification. Based on *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, (*Sarris I*), then on appeal to the Eleventh Circuit, the court found the pizzerias could not be held liable under the TCPA for third-party fax ads absent proof the restaurants were vicariously liable for the faxes under common law principles of agency or ratification. However, the Eleventh Circuit thereafter reversed *Sarris I*, ruling that a person whose services are advertised in an unsolicited fax transmission, and on whose behalf the fax is transmitted, may be held liable directly under the TCPA's ban on the sending of junk faxes. Prior to issuing its decision, the Eleventh Circuit sought input from the FCC on the applicability of the FCC's 2012 *Dish Network* ruling. In *Dish Network*, the agency stated that sellers were *not* responsible for calls made by third-party telemarketers in violation of the TCPA absent grounds for imposition of vicarious liability. However, in responding to the Eleventh Circuit, the FCC advised that "the DISH Network ruling applie[d] only to liability for telemarketing calls and neither addresse[d] nor alter[ed] the Commission's pre-existing regulatory treatment of unsolicited facsimile advertisements," citing to its 1995 Memorandum Opinion and Order. That order stated that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements." The Eleventh Circuit relied on the FCC's interpretation of the TCPA in reversing *Sarris I*, noting that according to the FCC, the *Dish Network* ruling relied on by the district court applied to the marketing call provisions of the TCPA, but not the junk fax provisions. Therefore, *Dish Network* did not insulate the dental practice on whose behalf the advertising faxes were sent from liability in *Sarris*. The *Dough Boy* plaintiffs then successfully appealed to the Second District Court of Appeal of Florida based on the Eleventh Circuit's decision in *Sarris*, winning a reversal of the trial court's judgment and order denying class certification. *Sarris*, and now *Dough Boy*, underscore the nuances in the TCPA with respect to the difference in the statutory language, for example the prohibition on "initiating" certain calls vs. "sending" faxed advertisements, the wide range of businesses that can be held liable for TCPA violations, and the significance of the FCC's interpretations of the statute. These cases also drive home the danger of using third-party "marketing" companies, which may either initiate or hire other providers to send faxed advertisements in violation of the TCPA. Notably, the fax ads at issue in *Dough Boy* and *Sarris* were sent by the same fax telemarketing company which sent the fax ads which resulted in a [\\$22 million TCPA judgment](#) against a commercial roofing company in New Jersey.

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