

# CARLTON FIELDS

ATTORNEYS AT LAW

## FEBRUARY 2004 TELECOM AND TECHNOLOGY LITIGATION UPDATE

### **FCC IMPOSES \$5 MILLION FINE ON UNSOLICITED FAX SENDER**

***In the Matter of Fax.com, Inc., FCC 04-2, File No. EB-02-TC-120 (F.C.C. Jan. 5, 2004)***

The Federal Communications Commission ("FCC") has imposed a \$5.38 million fine on Fax.com, Inc., for the company's repeated practice of sending unsolicited faxes to consumers in "willful" violation of the Telephone Consumer Protection Act ("TCPA"). This is the largest single penalty the FCC has ever imposed for a violation of the TCPA.

The TCPA prohibits the delivery of unsolicited advertisements, or "junk faxes", to either business or residential facsimile machines. Fax.com specialized in sending its clients' advertisements to facsimile machines whose numbers were contained in Fax.com's database.

After receiving numerous complaints from consumers alleging they received unsolicited fax transmissions from Fax.com's clients, the FCC issued citations to Fax.com and six of its clients. The citation warned Fax.com that it would face fines up to \$11,000, the statutory maximum, for each subsequent violation of the TCPA if it was "highly involved" in sending any unsolicited facsimile advertisement or it continued to transmit advertisements without taking steps to ensure its clients obtained permission from recipients to fax the advertisements. The FCC did not pursue enforcement action against Fax.com's clients.

After learning that Fax.com was continuing to send unsolicited fax advertisements, the FCC fined Fax.com \$11,000 for each of 489 subsequent TCPA violations. The FCC rejected Fax.com's argument that the TCPA's ban was an unconstitutional violation of free speech, noting that several courts have upheld the law. The FCC also pointed out that Fax.com failed to inform its clients of the broad prohibitions on faxing unsolicited advertisements and falsely informed clients that it had prior permission to send fax ads to the contacts in its database.

Comments: Companies that seek to send facsimile advertising should familiarize themselves with the TCPA's requirements and the FCC rules. Prior to sending a fax advertisement, permission must be obtained from the recipient. Not only is the FCC apparently stepping up enforcement of this act, but private individual and class action lawsuits are on the rise. See August 2003 Carlton Fields Telecommunications and Technology Litigation Update.