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“Club Texting” Seeks Ruling On “Text Broadcasters”

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Club Texting, Inc., has filed a Petition requesting a Declaratory Ruling from the FCC that “text broadcasters”, like “fax broadcasters”, are not “senders”. They define “text broadcasters” as persons or entities transmitting SMS text messages to mobile telephones on behalf of another person or entity for a fee. “Senders” are the originators of the message being sent to a large audience. Club Texting provides a platform that enables message senders to transmit mass text messages through its conduit service, such as weather emergency updates, school closing notifications, etc.

The Commission has previously ruled that “fax broadcasters” are not senders and therefore are not liable for the content of communications sent on their networks as long as there is no “high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmission.” (*In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 F.C.C.R. 8752, 8780 (1992), quoting *Use of Common Carriers*, 2 F.C.C.R. 2819, 2820 (1987)). Club Texting asks the Commission to apply the same standards to text broadcasters. Like fax broadcasters, text broadcasters would not be held liable for the content sent via their conduit unless the text broadcasters supply “the [text] numbers used,” “determine the content” or are engaged in “any other close involvement” (*In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C.R. 14014, 14131 (2003)).

This ruling is requested by Club Texting in light of the growing popularity of mass texting among businesses and consumers, to resolve the growing uncertainty about who is liable for unsolicited advertisements. Essentially, Club Texting appears to be looking for a “Get Out of FCC Jail FREE” card to be used against potential claims down the line.

What claims? The “fax broadcaster” analogy, to which Club Texting repeatedly (but only partially) alludes in its petition, is instructive. Recall back in the 1980s and 1990s – fax machines became ubiquitous as the then-high-tech way of document transmission.

But the spread of fax hardware opened the way for entrepreneurial types who saw fax machines as a cheap and easy way to reach potential consumers with targeted (or maybe not-so-targeted) advertising. And thus was born the “junk fax” industry. The result has been a near-constant barrage of unsolicited ads – for toner cartridges, travel services, investment advice, drugs, home-siding, etc., etc. – into home and office fax machines everywhere at all times of the day and night.

While fax advertising may provide some benefits, the public in relatively short order came to view it as a nuisance, and Congress responded by imposing very severe restrictions on the practice in the Telephone Consumer Protection Act (TCPA).

Club Texting’s petition suggests that unsolicited text messaging may be the Next Big Thing in creative advertising approaches, a direct descendant of fax broadcasting (or junk faxing). Pitched as a benign and desirable means of communicating important and useful information to the public, mass text message advertising sounds great, and it may indeed be great – until your shoe phone starts accumulating a gazillion messages offering INCREDIBLE SAVINGS!!! and MIRACLE CURES!!! and all manner of other tantalizing opportunities.

That’s when you can look for the public backlash – and in apparent anticipation of that day, Club Texting seems to be trying to protect itself preemptively.

Of course, Club Texting’s basic point should not be controversial: if Club Texting merely provides a technical conduit for text messaging, it should not be held responsible for entities which choose to abuse that conduit for their own purposes. No argument there.

But check out what happened in the fax broadcasting context. Entities were eager to promote the use of fax technology as an advertising mechanism, much like Club Texting is obviously bullish on text messaging. But a number of successful fax broadcasters found that their success was, at most, a mixed blessing. As the fax broadcasting industry swelled, so did adverse public reaction. So much so that at least one such fax broadcaster was fined more than \$5 million by the FCC for TCPA violations. (Club Texting’s petition is curiously silent about this and other similar seven-digit fines doled out to fax broadcasters who provided services, in the fax context, at least somewhat similar to those that Club Texting seems to be offering in the text messaging context.)

Certainly, Club Texting would prefer to avoid a similar fate. Asking for the FCC to provide something in the nature of a blessing at this stage of the game is a good start. But in light of the history of fax broadcasting, it is probably unlikely that the FCC will be enthusiastic about providing Club Texting with total prospective immunity.