

FCC Reaffirms Potential TCPA Liability for Text Message Platforms

January 14, 2016

On January 11, 2016, the FCC's Consumer and Governmental Affairs Bureau released an [order](#) denying a petition by a text message platform provider for a declaratory ruling that the Commission should evaluate TCPA liability for these types of entities under the same standard established for fax broadcasters. In the Order, the Bureau explained that a separate liability standard for text message apps and platforms was laid out in the Commission's July 2015 Omnibus TCPA Order and that "text broadcasters can be liable for TCPA violations based on the factors discussed in that decision."

The petitioner, Club Texting, Inc., filed its request for a declaratory ruling in 2009. In the petition, Club Texting asked the Commission to apply the fax broadcaster TCPA liability standard to text message platforms, such that "liability will attached only if a text broadcaster 'demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such transmissions.'" In support of this request, Club Texting claimed that if the Commission made an affirmative finding that text broadcasters are not "senders" for TCPA purposes, it would "promote compliance" by the broadcasters' third party clients that "are in the best position to ensure that recipients have consented to receive the text messages."

FCC TCPA Declaratory Ruling

Nearly six years after the petition was filed, the FCC released its [July 2015 Omnibus TCPA Order](#), in which it responded to approximately two dozen petitions for clarification of a variety of TCPA-related issues, including the Commission's definition of a "caller" for purposes of determining TCPA liability. In the Order - which is currently being challenged in the U.S. Court of Appeals for the D.C. Circuit - the Commission determined that a calling or texting platform or application may face primary liability under the TCPA as the "caller" based on a case-by-case analysis of whether the entity takes the steps necessary to physically place the telephone call (or text), or is so involved in the placing of a call to have been deemed to initiate it (as opposed to merely having some role, however minor, in the causal chain that results in the making of the telephone call). The Commission further explained that other relevant factors when making its determination could include "the extent to which a person willfully enables fraudulent spoofing of telephone numbers or assists telemarketers in blocking Caller ID, by offering either functionality to clients," or whether the text broadcaster "has knowingly allowed its client(s) to use that platform for unlawful purposes."

The FCC's standard is similar to the "high degree of involvement" standard applicable to fax broadcasters, but the Commission made clear that it was not applying the fax broadcaster standard *per se*. This raises the possibility that outcomes involving calls or texts will differ than they would if faxes were involved. Until we see cases adjudicating liability, however, we will not know how much of a difference the standard makes in practice.

Club Texting Petition

Against this backdrop, the FCC's order in Club Texting is primarily procedural. In denying the Club Texting petition, the Bureau reaffirmed the position in the Order and noted that "the Commission has clarified the standard to be applied to text broadcasters and that standard is not the same standard as applies to fax broadcasters." It did not revise the standard, nor did it offer any meaningful clarifications of how the standard will be applied. Indeed, the order explicitly states that it is not adjudicating the liability of any particular text broadcasting service at this time.

We note that the FCC has proposed to fine a "robocall broadcaster" previously. The case involved [Dialing Services, Inc.](#), a developer of a software platform that allows customers to record their own messages and send them to a designated list of recipients. The Commission issued a Notice of Apparent Liability against the company in May 2014, and proposed a \$2.9 million penalty on the basis that Dialing Services had allowed its customers, through its platform, to make 184 unlawful prerecorded message calls to cell phones. According to the Commission, because of the company's involvement in the call process, Dialing Services made or initiated the calls. The Commission has yet to convert the NAL to a Forfeiture Order, however. Arguably, the Commission should apply the standard announced in the 2015 TCPA Declaratory Ruling to determine Dialing Services' liability in the case.

For now, service providers should expect the Commission to continue in its efforts to cast a wide consumer protection net, and companies involved in activities regulated by the TCPA should take whatever steps are necessary to avoid unwanted attention from regulators or the plaintiffs' bar.