R A I L

The Journal of Robotics, Artificial Intelligence & Law

Cite this publication as:

The Journal of Robotics, Artificial Intelligence & Law (Fastcase)

Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@ meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, scientists, engineers, and anyone interested in the law governing artificial intelligence and robotics. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

Morgan Morrissette Wright, Publisher, Full Court Press at mwright@fastcase.com or at 202.999.4878

For questions or Sales and Customer Service:

Customer Service
Available 8 a.m.–8 p.m. Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)
ISSN 2575-5633 (print)
ISSN 2575-5617 (online)

Federal Court Says Voice Service Providers "Mey" Face TCPA Liability for Facilitating Spoofed Robocalls

John C. Nelson Jr., Ken Payson, David M. Gossett, and John D. Seiver*

The authors of this article discuss a federal court decision that provides a critical lesson—and warning—for voice service providers and emphasizes the need to step up illegal-robocall mitigation efforts.

When a dialing platform or voice service provider is sued under the Telephone Consumer Protection Act ("TCPA"),[1] it often can successfully move to dismiss because it did not "make" the calls at issue or is immune from liability as a "common carrier."

These and other defenses were recently raised by several voice service providers in a putative TCPA class action pending in the U.S. District Court for the District of West Virginia, but were rejected when the court denied the carriers' motion to dismiss. The court's decision provides a critical lesson—and warning—for voice service providers and emphasizes the need to step up illegal-robocall mitigation efforts.

Mey v. All Access Telecom, Inc. et al.

In *Mey v. All Access Telecom, Inc. et al.*,[2] the West Virginia-based plaintiff filed a class action lawsuit against several communications service providers, alleging they each violated the TCPA by transmitting calls over their networks (and specifically to the plaintiff) that contained spoofed Caller ID information. In a joint motion, the service providers requested that the TCPA claims against them be dismissed because the court did not have personal jurisdiction over them, the providers did not "make" the allegedly offending calls but only transmitted them, and the providers were immune

from TCPA liability as "common carriers." The court rejected all of these arguments and denied the motion to dismiss.

In rejecting defendants' personal jurisdiction argument, the court concluded that the defendants could not justifiably argue that they were "mere middlemen" with respect to the calls at issue, and accepted plaintiff's allegation that they had purposefully and knowingly directed their actions toward West Virginia. As the court explained, "[e]ach Defendant was paid to send these calls into West Virginia, each knew the calls were headed to West Virginia, and the calls were in fact received in West Virginia." Thus, "[b]ecause each Defendant profited from its exposure to [the West Virginia] market," they were answerable in West Virginia courts for their conduct.

The court was similarly unconvinced by defendants' assertion that they did not "make" the calls at issue, noting that "the scope of liability under the TCPA is broader than defendants suggest," and that they could indeed be deemed call "makers" if they were "so involved in the placing of [the calls] as to be deemed to have initiated [them]." Referencing a 2015 Federal Communications Commission ("FCC") order outlining the factors to be considered in the call "maker" analysis,[3] the court explained that one must look to the "totality of the facts and circumstances" surrounding the alleged Caller ID spoofing, including the extent to which the defendants "willfully enable[d] fraudulent spoofing of telephone numbers," "assist[ed] telemarketers in blocking Caller ID," and "knowingly allowed its client(s) to use [its services] for unlawful purposes."

According to the court, the plaintiff had alleged sufficient facts supporting the call "maker" factors to survive a motion to dismiss. The court based this conclusion on the plaintiff's assertions that each provider knew when spoofed robocalls were being placed through their networks, knew that the callers were spoofing invalid numbers, and could easily have identified and blocked the robocalls based on the large volumes of calls originating from specific callers.

The court also used these same allegations to reject the defendants' common carrier defense, concluding that common carriers can be liable under the TCPA if they had "a high degree of involvement or actual notice of an illegal use" and "fail[ed] to take steps to prevent such transmissions." According to the court, the plaintiff's allegations signaled the type of involvement that could meet this standard.

We note that this may not be the final word on whether the complaint in *Mey* will survive dismissal. The plaintiff has announced that she will amend her complaint again because she "acknowledges that her allegations regarding [the TCPA count against the carriers] do not satisfy the *Facebook [v. Duguid]* standard." In the *Facebook* decision,[4] the U.S. Supreme Court substantially narrowed the autodialer definition, so plaintiff's anticipated amendment will generate an opportunity for the carriers to file another motion to dismiss.[5]

Lessons Learned: The Need to Implement Illegal-Robocall Mitigation Policies

The district court's decision on the motion to dismiss is limited: All it really means is that the plaintiff has pled sufficient facts to survive a motion to dismiss. The defendants will still have a chance to establish their defenses through discovery and summary judgment, and will be able to argue that *Facebook* precludes the claims. But the decision nevertheless provides a valuable lesson—and warning—for voice service providers.

In particular, given the FCC's focus on illegal robocalls, including its orders requiring providers to implement caller authentication technology, improve call blocking efforts, and deploy other robocall mitigation strategies, it is more important than ever for providers to ensure they are doing everything they can to safeguard their networks from transmitting illegal and fraudulent robocalls—failing to implement these strategies presents a host of FCC enforcement risks. As this decision highlights, such failures may also lead to TCPA liability (or, at the very least, being named in a costly TCPA class action lawsuit that may not be subject to early dismissal).

Accordingly, it is in the best interest of all providers to ensure that they acknowledge the FCC's most recent illegal-robocall guidance and implement caller authentication and robocall mitigation strategies consistent with the FCC's policies and requirements.

Notes

* John C. Nelson Jr. (johnnelson@dwt.com) is an associate at Davis Wright Tremaine LLP, handling a wide range of telecommunications law, policy, and litigation matters. Ken Payson (kenpayson@dwt.com) is a partner

at the firm and co-chair of the firm's class-action defense group, guiding clients through the complex statutory and regulatory framework of privacy, false advertising, employment, and product liability class-action jurisprudence. David M. Gossett (davidgossett@dwt.com) is a partner at the firm and a member of the firm's technology, privacy, and security group, helping clients navigate cutting-edge issues affecting internet, FinTech, communications, and other companies. John D. Seiver (johnseiver@dwt.com) is of counsel at the firm, handling major state and national communications litigation, with particular focus on privacy and pole attachments.

1. 47 U.S.C. § 227.
2. No. 5:19-cv-00237-JPB (N.D. W. Va. April 23, 2021).
3. 30 FCC Rcd. 7961 (July 10, 2015).
4. 141 S. Ct. 1163 (2021).
5. In September the court denied defendants' motion to dismiss plaintiff's third amended complaint, finding that the allegations were "sufficient to establish that it is plausible that an ATDS system was utilized in placing the calls in question.