

FCC's Novel TCPA Enforcement Action Targets Arbitrage Schemes

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At its July Open Commission meeting, the Federal Communications Commission's (FCC or Commission) voted to approve a Notice of Apparent Liability for Forfeiture (NAL) against Thomas Dorsher, ChariTel Inc, OnTel Inc, and ScammerBlaster Inc (collectively the "Dorsher Entities") for allegedly engaging in a toll-free robocall traffic pumping scheme, in violation of the Telephone Consumer Protection Act (TCPA), that used revenue generated from the scheme to fund dangerous telephony denial of service (TDoS) attacks. The \$116 million proposed fine represents the FCC's first TCPA enforcement action targeting entities engaged in a toll-free traffic-pumping scheme, signaling the agency's willingness to take action against unlawful robocalls made to businesses.

Factual Background on the Alleged Traffic Pumping Scheme

The NAL alleges that between January 1, 2021 and March 2, 2021, Dorsher used ChariTel to make 9,763,599 prerecorded voice message calls (i.e., robocalls) to businesses' toll-free numbers without first obtaining the called party's consent and without any emergency purpose, in violation of the TCPA. As background, when a caller dials a toll-free number, the toll-free service provider pays the caller's local exchange carrier for originating the call and for performing the toll-free database query, as well as any intermediate services provided. The toll-free customer receiving the calls then compensates the toll-free service provider for completing the calls. This fee arrangement makes toll-free calling susceptible to a practice known as toll-free traffic pumping – where bad actors will transmit traffic to toll-free numbers in order to generate revenue that can be shared between a local exchange carrier and its caller customers that "pump" traffic to toll-free numbers.

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The Telephone Consumer Protection Act (TCPA)

According to the NAL, Dorsher allegedly was engaged in this type of toll-free pumping. Specifically, the robocalls that Dorsher made through ChariTel proclaimed to be a “public service announcement” warning toll-free customers about the dangers of illegal robocalls and directing them to report the calls to the FCC. ChariTel apparently generated income for each robocall that it placed to toll-free numbers as part of a revenue-sharing agreement with its voice service provider and used the revenue generated to fund the operations of OnTel, which launched TDoS attacks against other entities he believed were responsible for generating illegal robocalls. Dorsher marketed his toll-free robocalling and TDoS schemes as “ScammerBlaster,” which he advertised on his website. According to the site, ScammerBlaster’s purpose is to target “verified scammers” by overwhelming them with too many incoming calls for the system to process, thereby making it impossible for the phone system to make or receive calls.

Basis for the Proposed \$116 Million Forfeiture Under the TCPA

The TCPA makes it “unlawful for any person ... to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using ... an artificial or prerecorded voice ... to any telephone number ... for which the called party is charged for the call....” In the NAL, the FCC explained that “numbers for which the called party is charged for the call” includes toll-free numbers, forming the basis of the alleged TCPA violation given that Dorsher apparently made the robocalls without valid consent or an emergency purpose.

The FCC’s NAL alleges that the Dorsher Entities had knowledge that: (1) they were calling toll-free numbers; and (2) they “had no reasonable basis” to believe that they had the requisite consent to make such calls. Specifically, the NAL argues that placing such prerecorded calls to toll-free numbers was “financially lucrative” for the Dorsher Entities, as every call reviewed by the Enforcement Bureau was apparently made to a toll-free number. The NAL also notes that Dorsher admitted to an Industry Traceback Group consultant that the Dorsher Entities “knowingly engaged in toll-free traffic pumping by making robocalls to toll-free numbers.” Moreover, the NAL asserts that there is “no evidence that the Dorsher Entities had any prior contact with the toll-free subscribers,” and that it is “unlikely that toll-free subscribers would have consented to such calls, had they been asked, because they must pay for each such call.”

Based on its findings, the Commission proposed a forfeiture of approximately \$116 million for the nearly 10 million robocalls placed to toll-free numbers by the Dorsher Entities in early 2021. The FCC assessed a base forfeiture amount of \$4,500 per call but applied an upward adjustment of \$5,625 per call for violations that the NAL alleges are “egregious.” Specifically, the Commission based the upward adjustment on the following: (1) the Dorsher Entities apparently used revenue generated from the ChariTel robocalls to fund TDoS attacks, which at times targeted innocent parties; (2) each call cost the toll-free customer money; (3) each robocall imposed an “opportunity cost” on the toll-free subscriber – potential clients and customers could not reach toll-free subscribers while the line is tied up by illegal robocalls; and (4) the Commission has previously observed that toll-free traffic-pumping schemes impose undue costs on consumers and harm competition.

The NAL also proposes to hold Dorsher personally liable and to hold all of the Dorsher Entities – Thomas Dorsher, ChariTel, OnTel, and ScammerBlaster – jointly and severally liable. Applying common law principles, the Commission focused on Dorsher's "direct, personal participation" in actions on behalf of ChariTel and his other companies. The FCC also argues that all of Dorsher's companies should be held jointly and severally liable as "[r]elated companies operating in a common enterprise or as a single business entity."

Additionally, the Commission found evidence supporting piercing the corporate veil to find Dorsher personally liable. Turning to federal and North Dakota common law,^[1] the FCC found that Dorsher exercised sufficient control over ChariTel to treat it as "an alter ego." Specifically, the Commission found that Dorsher: is the incorporator of ChariTel and one of its three corporate directors; exercises control over ChariTel's robocalling operations; and used the compensation that ChariTel received from making toll-free traffic-pumping calls to "offset" the costs of TDoS attacks on suspected robocallers. The FCC argues that this indicates that Thomas Dorsher controlled how ChariTel's money was spent and demonstrated that he treated ChariTel's assets as assets for OnTel and ScammerBlaster. The FCC also found that "treating ChariTel and Dorsher as separate entities would sanction an apparent fraud, promote injustice, or lead to an evasion of legal obligations."

The Historic NAL Represents a New Chapter in the FCC's Illegal Robocall Fight

The FCC's NAL against the Dorsher entities breaks new ground in the fight against illegal robocalls. While the FCC has proposed hefty financial penalties against robocallers in recent years relying on various sections of the TCPA or Truth in Caller-ID Act, this NAL represents the first TCPA penalty proposed against an allegedly illegal robocaller engaged in a purported toll-free traffic-pumping scheme. It indicates that the Commission is expanding the fight against illegal robocalls to deter not only bad actors that target consumers, but also those that target businesses.

Wiley has a deep and experienced bench of lawyers who handle robocalling and robotexting issues for clients. Our experts handle federal and state policy issues; compliance with federal and state requirements; complex Telephone Consumer Protection Act (TCPA) issues, including political and charitable outreach; and TCPA enforcement actions and investigations.

[1] ChariTel, OnTel, and ScammerBlaster are all North Dakota entities.