
Hughes Hubbard & Reed

Protecting Mobile Content Providers Against Improper Billing Practices of Third Parties

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While not directly involving mobile digital content providers, a class action lawsuit pending in Federal court in Massachusetts has brought into focus a practice that such providers must be aware of and protect themselves against. At issue in *Knox and Esparza v. m-Qube, Inc.* is “cramming” pursuant to which a cellular subscriber is automatically billed for mobile content services that were not purchased. The plaintiffs in *Knox* allege that m-Qube, a third-party provider of billing services for wireless carriers, unlawfully billed for services that the plaintiffs did not order. Specifically, the plaintiffs allege that m-Qube continued to bill for services that had been purchased by prior subscribers using their mobile phone numbers, which were “recycled” or “refurbished” after the prior subscriber terminated his or her cellular contract. The parties have briefed a motion to dismiss, on which oral argument is scheduled to be heard at the end of the month. Curiously, while the complaint alleges wrongdoing on the part of the content mobile digital providers themselves (in particular, negligently failing to determine when authorization was provided for billing for the mobile content), no content providers were named as defendants. Notwithstanding that fact, the allegations of the case do provide critical guidance to mobile digital content providers when entering into agreements with wireless carriers. Typically, wireless carriers and/or their third-party billing vendor(s) assume primary responsibility for obtaining authorization from subscribers to bill such subscribers for the content purchased, whether on a subscription, per-view or per-download basis, as well as for managing the billing and collections. The content provider is paid a portion of the revenue remitted by the subscriber and collected by the carrier and/or third-party vendor for the content purchased. But what happens when, as in *Knox*, the subscriber claims he or she did not request the content and/or authorize being billed for it? Could the content provider be held liable under those circumstances, where it has received the economic benefit of such unauthorized transaction? The law currently is unclear on this subject. However, mobile digital content providers may mitigate their risk under these circumstances by ensuring that their content license agreements with wireless carrier and mobile content aggregator partners clearly provide that the carrier or aggregator, as applicable, will indemnify the content provider for any claims that may arise as a result of such billing practices and that such partners’ independently procure and maintain sufficient insurance coverage for losses incurred in connection with any such claims. While an argument could be made that the indemnification provisions of many

content license agreements can be broadly construed to cover such a situation (e.g. where the carrier must indemnify the content provider for claims arising as a result of the carrier's wireless service generally), a better practice would be to expressly cover claims related to billing and other potential disputes that may arise between the subscriber and the carrier and/or its agents.

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