

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the)
Rules and Regulations)
Implementing the Telephone) CG Docket No. 02-278
Consumer Protection) CG Docket No. 18-152
)
Act of 1991)

Comments of Joe Shields on The Interpretation Of The
Telephone Consumer Protection Act In Light Of The D.C.

Circuit's ACA International Decision

In light of the 9th COA ruling in *Marks v. Crunch*¹ which properly interpreted the statutory language of the TCPA the Commission is once again asking for comments on what constitutes an ATDS. It has been made very clear by special interest groups which represent the debt collection, polling, political, charities and telemarketing industry that the only definition of ATDS that is acceptable to them is one that neuters the TCPA entirely so they can bombard Americans with billions of unwanted automatically dialed calls on their cell phones.

The Commission is asking if a cell phone can be used as an autodialer. The answer is a very loud **YES** because a cell phone is a powerful computer that can do many things.

¹*Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018)

Further, a SIM card for a cell phone can and is used in SIM card dialers used to make mass autodialed calls.

The ACA International court got it wrong when it decided an ATDS definition must exclude a cell phone. It is excusable for the court to rule in error because the ACA court was dealing with amicus briefs filed by the very same special interest groups that file comments with the Commission. In fact ACA has already filed an amicus brief with the Marks court.

Contrary to the special interest group's assertions, the 9th COA did not expand the definition of ATDS. The definition was squarely read from the plain language of the statute. Incorrectly limiting the definition of an ATDS to require a random or sequential number generator will neuter the TCPA and open the floodgates for automatically dialed calls to cell phones.

Definition of ATDS

The plain language of the statute states that an ATDS is "equipment which has the capacity to store... telephone numbers to be called... and to dial such numbers." **OR** "equipment which has the capacity to produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers."

That is exactly how the statute was written:

(a) Definitions

1. The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store **OR** produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

The plain language contained within the TCPA enumerates **two separate conditions** in the definition of ATDS. One is the storing of numbers to be called the other condition is producing telephone numbers to be called. Both conditions are not required for equipment to fall under the definition of ATDS². The ACA International ruling did not contravene every prior court decision on what an ATDS is nor did it change the statutory definition of ATDS.

By applying the last antecedent rule the "using a random or sequential number generator" applies only to the preceding term which is "production" of telephone numbers. It would be illogical to apply the "using a random or

² **"Many other courts, including this Court,** have followed the FCC's interpretation that automated dialing systems that automatically dial cell phone numbers from a preprogrammed list... are "automatic telephone dialing systems" under the TCPA." The same court stated further: "...it does not matter that the LiveVox software is not used to store or produce telephone numbers using a random or sequential number generator. It qualifies as an ATDS under the statute because it automatically dials telephone numbers from a preprogrammed list." *Lardner v. Diversified Consultants Inc.*, 17 F. Supp. 3d 1215 - Dist. Court, SD Florida 2014

sequential number generator" to the act of storing of telephone numbers.

The "or" between storing numbers and generating numbers is intentionally overlooked by the special interest groups. It makes good sense to them to treat the "or" as an "and" because **THAT WOULD EXEMPT EVERY ATDS IN USE TODAY**. Such a definition would make the prior express consent language requirement of the TCPA meaningless.

In 2008, the Commission rejected a petition that claimed: "a predictive dialer meets the definition of autodialer only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists." See: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 FCC Rcd 566-67 (Jan. 4, 2008).

The Commission must look to Congressional intent and **broadly** interpret the definition of ATDS.

"It should be noted that the bill's definition of an "automatic telephone dialing system" **is broad**, not only including equipment which is designed or intended to be used to deliver automatically-dialed prerecorded messages, but also including equipment which has the "capability" to be used in such manner. The Committee is aware of concerns that this broad definition could cover the mere ownership of office computers which are capable, perhaps when used in conjunction with other equipment, of delivering automated messages."

H.R. Rep. No. 633, 101st Cong., 2nd Sess. 1990, 1990
WL 259268 (Leg.Hist.)

Simply because more and more consumers are using cell phones is not a valid reason to open the flood gates for debt collectors, pollsters, politicians, charities and telemarketers to flood our cell phones with unwanted automatically dialed calls.

Conclusion

We have received six hundred and forty-eight (648) Rachel robocalls to our land line and cell phone numbers. We constantly receive text messages from political groups with no way to opt out from the calls. Politicians, pollster, charities and telemarketers have been calling nonstop since the ACA ruling.

So called legitimate calls that special interest groups falsely claim consumers want have added to the number of illegal calls we are getting every day. Not a day goes by without getting an autodialed call from a scammer or a spam text from a political PAC we cannot opt out from. Here is an example from early this morning:



This is another political text from a "human intervention" click monkey that the Commission created with its human intervention loop hole for mass texting. On the same day we received an unwanted automatically dialed call from Texas Water about selling us a water purification system despite the fact our telephone numbers are on the national and state do-not-call list. That call came after the 648th "Rachel" lower interest rate robocall from Indian scammers.

Cell phones are being disrespected by debt collectors, pollsters, political organizations, charities and telemarketers. Those providing services to these industries

and those representing these industries are seeking numerous exemptions which the Commission must deny. Our cell phone are for our families and friends only!

The Commission must do what congress directed it to do in the TCPA - PROTECT OUR PRIVACY AND OUR CELL PHONES.

Anything less is unacceptable.

Respectfully submitted.

/s/

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