

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

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

**Reply Comments of Joe Shields on the Comments of ACA on the Petition For
Expedited Declaratory Ruling of Rubio’s Restaurant Inc.**

ACA represents debt collectors the most vilified business in the country. ACA falsely claims that: “...courts grapple with how to define “called party.” As has been repeatedly pointed out to the Commission with voluminous case law, the courts are unified in their definition of called party. As many as four (4) dozen courts have issued orders asserting that called party is the user of the cell phone and not some “intended” called party.

The phrase “intended” is never mentioned in the statute. Subsection (b)(1)(A)(iii) contains the phrase "for which the called party is charged." Thus "called party" can only mean the current subscriber of the cell phone number because the current subscriber not the previous subscriber pays for calls to that cell number. The same phrase "called party" is used in subsection (b)(2)(C) regarding FCC authority in exempting calls when the calls "are not charged to the called party." It is ludicrous to suggest that an “intended called party” would be charged for a call to a consumer that actually receives the call. It is impossible for an intended called party to be charged for a call to the current subscriber. In subsection (d)(3) the phrase “called party” is used 3 times. It is just as ludicrous to suggest that identification of the caller be provided to the “intended called party” instead

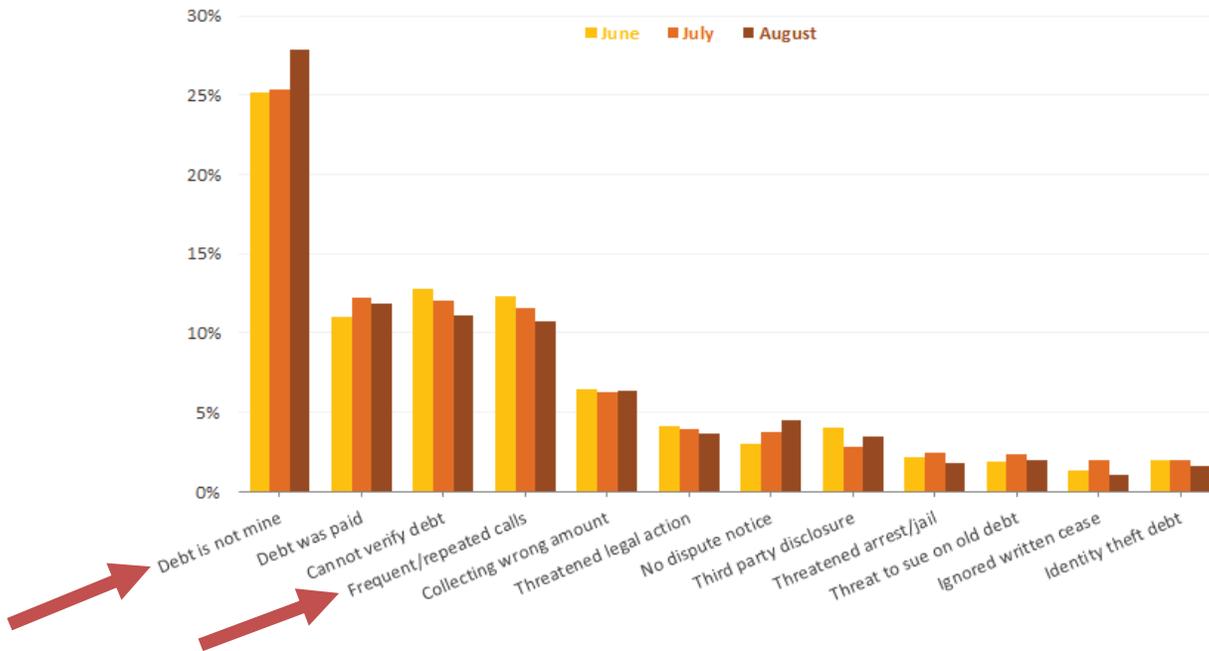
of the consumer that receives the call. It is impossible to provide identification of the caller to anyone other than the the individual that receives a call. Certainly not some intended called party. Interpretations that called party means intended called party makes much of the TCPA meaningless.

ACA cites to the Leyse case. ACA's and others reliance on the Leyse case has been repeatedly discredited in comments before the Commission. The Leyse case has absolutely nothing to do with calls to a reassigned cell number. In addressing the Leyse case in regard to calls specifically to reassigned numbers one court held that: "Leyse, 2010 WL 2382400, and *Kopff*, 568 F. Supp. 2d 39, are thus distinguishable because it was undisputed in those cases that the plaintiffs were not the subscribers to the telephone numbers called." *Olney v. Progressive Casualty Ins. Co.*, 2014 WL 294498 (S.D. Cal., Jan. 24, 2014).

ACA claims that: "there is *absolutely no return on investment to businesses for calling the wrong person* – it is a waste of time, money, and effort. If that is the case then why is the highest number of debt collection complaints before the CFPB calls to reassigned numbers and repeated calls?"

Share of Debt Collection Complaints by Sub-Issue

(12 most common sub-issues)



From <http://www.insidearm.com/daily/debt-buying-topics/debt-buying/more-consumers-claiming-debt-collectors-calling-about-invalidpaid-debt/>.

If it were true that debt collectors don't want to call the wrong person then why is it that nearly two thirds of all TCPA cases filed in court are against debt collectors for exactly that reason – calling the wrong person? I can personally attest to the fact that I routinely get robocalls to my cell number for debts I do not owe. See for example *Shields v Barclays Bank PLC*, Case No.: 4:14-cv-02576, (USDC SDTX) a case involving a robocall to the wrong person. This comes after Barclays was sued for the exact same conduct and lost their Motion for Summary Judgment on the exact same issue of “Called Party”.¹

And just as the ACA is doing, Barclays cited to the Leyse case. In the Gutierrez case the court stated: “This Court, however, declines to follow either Leyse or Dawson. Instead, the Court is persuaded by Plaintiffs’ argument that the TCPA is intended to

¹ *Gutierrez v Barclays Group*, 2011 WL 579238, at *4-5 (S.D. Cal. Feb. 9, 2011)

protect the telephone subscriber, and thus it is the subscriber who has standing to sue for violations of the TCPA.”²

ACA attempts to distinguish between informational calls and telemarketing calls. As has been repeatedly pointed out to the Commission the TCPA is more than just telemarketing regulation; it is an important consumer protection statute. Opening cell phones to more calls through a safe harbor or similar exemption would drastically increase the amount of calls a consumer could receive. The heightened cost-shifting, privacy, and safety concerns for cell phones justify a continued strict consent scheme with respect to such communications.³ “The TCPA is not only directed at telephone solicitations, it is also directed at autodialer calls to cellular phones, as reflected by the different subsections of § 227, which create separate causes of action for telephone solicitations and automated calls to cellular phones.” *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 752 (W.D. Tex. 2011)

ACA regurgitates its claim that: “there is currently no comprehensive, reliable reassigned numbers database, and there is no adequate marketplace solution to address those changes.” It’s a lame excuse at best. According to Becky Burr (Neustar Deputy General Counsel and Chief Privacy Officer and former FTC Attorney-Advisor), Neustar’s TCPA compliance services “use continuously updated and **highly accurate phone data** (emphasis added) that gets updated multiple times per minute to tell you

² *Id*

³ *Heidtke, Daniel B. and Stewart, Jessica and Waller, Spencer Weber, The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology* (September 17, 2013). Loyola University Chicago School of Law Research Paper No. 2013-016.

instantly . . . whether the subscriber name that you have matches.”⁴ Neustar is not the only one offering such a service. Infutor, Nextmark List or Contact Center Compliance offers the same or similar service.

ACA also regurgitates its claims of: “...an onslaught of opportunistic TCPA litigation...” The rise in TCPA law suits is the direct result of increased use of automatic dialing technology and the abuses that come with it. The intentional abuses of the TCPA by legitimate companies are the cause for the increase in TCPA claims.

The prospect of a large class action suit provides a significant deterrent, especially given the FCC’s limited enforcement efforts. Class actions also bring attention to the TCPA and the illegal conduct of legitimate companies. Increased attention to the statute increases compliance by industry members and increases awareness by consumers, which is important where enforcement is lacking. The prospect of a large class action suit provides a significant deterrent, especially given the FCC’s limited enforcement efforts. The Commission issued five Notices of Apparent Liability, resulting in only two forfeiture orders addressing Do-Not-Call violations between 2003 and 2009⁵. FCC enforcement of the TCPA is entirely ineffective and without consumer enforcement the TCPA would be meaningless.

The Commission must bear in mind that the effectiveness of the TCPA will ultimately be defined by its ability to protect consumers’ cell phones. The Commission must also bear in mind that consumers are increasingly experiencing more illegal conduct on their cell phones from legitimate companies than by any other media. The blame is put

⁴http://www.neustar.biz/information/docs/pdfs/solutionsheets/credit_and_collections_tcpa.pdf

⁵ Since 2009 (the last five years) not one NAL or Forfeiture Order has been issued by the Commission for Do-Not-Call violations.

on the widening use of cell phones. Such blame is misplaced. It is the use of automatic dialing technology that is to blame.

One never hears from those that use the technology responsibly. The only ones that the Commission hears from are those that are being sued. And in most if not all cases they are being sued for good reason. Twitter is a good example – Twitter failed to remove cell numbers when the cell numbers were disconnected which caused an undeliverable notification to be sent to Twitter. To add insult to injury Twitter made it nearly impossible to stop the unwanted text messages by using an unknown opt out procedure instead of the universal “Stop”.

Being sued for violating the TCPA is not a valid reason to create a virtually irrefutable defense. Being sued for violating the TCPA is not a valid reason to force consumers to be subjected to unwanted, unauthorized and dangerous calls to their cell numbers which are intended for a previous subscriber. The Commission needs to protect consumer’s cell phones and denying the Rubio’s petition would be one way to protect consumer’s cell phones.

Respectfully submitted,

_____/s/

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