

**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)

**Comments of Joe Shields on the American Association of Healthcare Administrative
Management Petition for Expedited Declaratory Ruling and Exemption**

I hereby submit these comments in response to the Commission’s request for comments on the American Association of Healthcare Administrative Management (hereinafter “AAHAM”) Petition for Declaratory Ruling and Exemption. The petition, similar to many petitions before the Commission wants the Commission to convert a content neutral statute to a content based statute. Further, the petition asks the Commission to entirely eliminate the requirement for prior express consent of the called party if the called party is not charged for the call.

The petition asks the Commission to issue a declaratory ruling “...terminating a controversy or removing uncertainty...” See 47 C.F.R. §1.2. The AAHAM petition is not based on terminating any controversy or removing uncertainty on automatically dialed “healthcare” calls to cell numbers. The petitioner admits that the petition is based on eliminating “litigation risk¹” and not on terminating any controversy or uncertainty. Additionally petitioner admits that the petition seeks to: “...prevent a perpetual stream of devastating liability for non-telemarketing, healthcare calls...” Petitioner’s claim is

¹ AAHAM Petition Page 4, 1st paragraph.

unsupported by reference to any legal authority that such a perpetual stream of devastating liability for non-telemarketing, healthcare calls exists.

The petition seeks to expand prior express consent impermissibly and well beyond the common sense limitations of prior express consent to include calls that are much more than informational calls. For example, petitioner claims that calls that offer insurance coverage are “healthcare calls²”. Calls that offer a service or in this case insurance coverage are telemarketing calls under the TCPA’s definition of telemarketing calls. But then the TCPA’s prior express consent for automated calls to cell numbers doesn’t distinguish between telemarketing calls and these so called non-telemarketing calls.

Petitioner, ad nauseam, attempts to distinguish between telemarketing and non-telemarketing calls in regard to automated calls to cell phones. The Commission is to blame for that. The Commission started this non-telemarketing content based exemption with the CAA Order. Yet there is no content specific exemption for automated calls to cell numbers anywhere in the TCPA.

The claim that the exemption would be limited to non-telemarketing calls is entirely without merit. The original purpose of the TCPA was to regulate certain uses of technology that are abusive and potentially dangerous. The TCPA regulates these abuses by prohibiting certain technologies altogether, rather than focusing specifically on the content of the messages being delivered.

The TCPA is more than just telemarketing regulation; it is an important consumer protection statute. Opening cell phones to more calls through an expansion of prior express consent or similar exemption would drastically increase the amount of calls a

² AAHAM Petition Page 3, list item #10.

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).

Petitioner falsely claims that the courts and the Commission: “...have indicated that the provision of a telephone number within the context of a transaction constitutes “prior express consent.” Petitioner attempts to write in “implied” consent into the statute unsupported by reference to any legal authority⁴. The courts and the Commission clearly disagree with petitioner:

“The Court agrees with Plaintiff that the mere provision of his telephone number to the Hospital upon admission does not constitute express consent to receive calls from a distinct creditor, TCEP. See FCC Ruling, 23 F.C.C.R. at 565 n.38 (“[P]rior express consent provided to a particular creditor will not entitle that creditor (or third party collector) to call a consumer's wireless number on behalf of other creditors, including on behalf of affiliated entities.”); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954–55 (9th Cir. 2009) (plaintiff's express consent to receive calls from promoter was not consent to receive calls from company to whom promoter provided plaintiff's telephone number).

Hines v. CMRE Fin. Servs., Inc., 2014 U.S. Dist. LEXIS 3017 (S.D. Fla. Jan.10, 2014). The entity that filed the petition on behalf of AAHAM has made many similar

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.

⁴ AAHAM Petition, Page 4, Paragraph 3.

misrepresentations to the Commission including the claim that all TCPA claims are frivolous and that all consumer commentators actively support frivolous TCPA litigation. Consequently, there is a credibility issue with any petition filed by that entity.

The petitioner falsely claims that: “Restricting healthcare calls... ..would unreasonably limit the ability of AAHAM members and other healthcare providers to deliver effective and efficient healthcare services to patients.” Petitioners claim is a non-starter. AAHAM members can and do deliver effective and efficient healthcare services to patients cell phone numbers as long as there is prior express consent of the called party. Eliminating prior express consent of the called party is not justified nor is it in the best interest of the public given the privacy and safety concerns of cell phone subscribers.

Petitioner admits that AAHAM members can and do deliver effective and efficient healthcare services to “...wireless telephone numbers provided by consumers...⁵”

Consequently, there is no controversy or uncertainty that the Commission needs to address.

Not Charged For the Call Is Limited to Wireless Carriers

As a threshold matter the Commission has started down a slippery slope with the Cargo Airline Association (hereinafter “CAA”) Order which granted a blanket exemption for package delivery notifications “...that will not be charged to the called party.” The language in the TCPA that the Commission relied on to create such an exemption was never meant to extend beyond calls from wireless carrier to their subscribers. For example, in a recently introduced Senate bill that would criminalize the use of robocalls, S 1959, the bill states:

⁵ AAHAM Petition, Page 11, Paragraph 1.

(b) PROHIBITION -

(2) EXEMPTIONS - Paragraph (1) shall not apply to a telephone call -

(C)(i) that is **made by a provider of commercial mobile radio service**, as that term is defined in section 20.3 of title 47, Code of Federal Regulations, or any successor thereto, **to subscribers of the service; and (ii) for which the subscribers described in clause (i) are not charged;**

Clearly, the above “not charged” applies only to calls made by carriers to their subscribers.

In fact, the Commission has acknowledged that “not charged for the calls” is limited to calls from wireless carriers to their subscribers: “Consistent with our determination in 1992, **calls made by cellular carriers to their subscribers, for which subscribers are not charged in any way for the call** (either on a per minute, per call, or as a reduction in their “bucket” of minutes) are not prohibited under the TCPA. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, -- FCC Rcd. --, 2003 WL 21517853, No. FCC 03-153 (F.C.C. Jul 03, 2003) Footnote 610

See also: “Moreover, neither TCPA nor the legislative history indicates that Congress intended to impede **communications between radio common carriers and their customers** regarding the delivery of customer services by barring **calls to cellular subscribers for which the subscriber is not called.** *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8774 Para. 45.

The Commission miss-guided exemption is so broad that the requirement for prior express consent of the called party becomes useless language since the prior express

consent of the called party can easily be bypassed by anyone as long as the called party is not charged for the call.

Wireless carriers will certainly exploit this exemption and make tons of money off of delivering all manner of calls including telemarketing, polling, political, debt collection, informational and health related calls to their subscribers as long as their subscribers are not being charged for the calls.

Congress never intended for such a broad exemption from the requirement of prior express consent of the called party. Such a broad exemption entirely eviscerates the “prior express consent” language of the TCPA!

Since the Commission has created such an exemption the Commission must now apply the same miss-guided interpretation to every call regardless of content. The Commission cannot grant the exemption on the one hand to CAA and then deny it for anyone else. The Commission has opened the floodgates and consumers will be paying for it in a loss of privacy on their cell phones.

In creating the CAA exemption the Commission based the exemption solely on the assumption that package delivery notifications may be desired communications. The Commission created a content based exemption for calls to cell numbers something the Commission does not have the authority to do.

The Commission could have approached the CAA petition the same as the GroupMe petition and granted a similar limited exemption to 3rd party consent of the package sender. The Commission chose to bypass consent entirely and now consumers are faced with increasingly more automated nuisance calls to their cell numbers from anyone that can show the Commission that the calls will not be charged to the called

party. Prior express consent becomes surplusage as long as the called party is not charged for the call.

Prior Express Consent Works - Why Change It Now?

If a consumer **has not** provided their cell number to their health care provider then obviously the consumer does not want their health care provider to call them on their cell number. If a consumer **has** provided their cell number to their health care provider for a limited purpose then obviously the consumer does not want automated calls from 3rd parties that are merely associated with the healthcare provider. Expanding consent to include affiliates will only increase automated nuisance calls to cell numbers. If it is so important to contact someone about their health why not make a manual call?

Using automated technology to maximize profits at the expense of consumers is contrary to Congressional intent and the TCPA. Increased efficiency and reduced cost at the expense of consumers is cost shifting something Congress intended to prohibit with the TCPA regardless of content of the message. Such an exemption amounts to the taking of property without consent of the owner of the property.

The Spamming Comments

Lastly, I would like to address the coordinated “spamming” comments that begin with: “Re: Communication Innovators Petition for Declaratory Ruling” This spamming of the proceeding before the Commission does not reflect comments from informed and truly interested parties. Clearly, this spamming is meant to interfere with the process and create a false impression that “most” commentators support the petition.

This spamming is the act of one single entity that intends to influence and prejudice the Commission in the matter. I suggest that the Commission take this

spamming as one comment since the submission is clearly a form comment originated by one person and not a true comment. See for example comments of Colleen Wentz, Timothy Moore, Christine L Stottlemeyer and Richard Lovich, filed 01/16/15, that left the XXX form place holders intact and failed to provide their name and contact information⁶. See also the improperly filed Ex Parte comments from Americollect Inc. employees. Americollect Inc. is clearly a 3rd party debt collector. The debt collection industry is the driving force behind the numerous repetitive petitions that seek to neuter the TCPA!

More importantly, there is a lack of credibility with such form comments that at best amount to a criminal interference in a proceeding before the Commission. Such repetitive form comments have severely impacted and continue to impact ECFS in proceeding 14-28 where hundreds of thousands of such form comments have been and continue to be processed. Such clearly illegal behavior should not be tolerated by the Commission.

Conclusion

As pointed out repeatedly in earlier comments the Commission never hears from those businesses that comply with the TCPA. The Commission only hears from those being sued for violating the TCPA. Further, lack of enforcement has led many to stop filing complaints with the Commission. For example, I filed 509 Rachel robocall to cell number complaints with the Commission – the Commission has done nothing about those complaints. This lack of enforcement not only encourages illegal behavior it encourages these petitions that seek to weaken the TCPA even further. Without the private attorney’s general private right of action there would be no enforcement of the TCPA.

⁶ For example: “Xxx was founded in xxxx.” and “I can be reached at XXX-XXX-XXXX.”

That is really what this petition is all about – to thwart legitimate litigation that enforces what the Commission has failed to enforce. As an example, the Commission recently issued a Forfeiture Order for robocalls to American West Advertising a company that went out of business years ago. The enforcement action took 5½ years from citation to forfeiture order. That kind of enforcement is a joke and encourages illegal robocalls from legitimate companies!

The schema of prior express consent has worked since the enactment of the TCPA. Now that automatically dialed text or prerecorded message calls have become so cheap businesses want to do away with the TCPA. It is a war on cell phone privacy in the name of efficiency. Yet with consent there is no impediment against efficiency. Therefore AAHAM already has what it wants – it can use efficiency all it wants as long as it respects the privacy of cell phone users and obtains prior express consent of the called party.

Cell phones are not like landlines. Consumers carry cell phones wherever they go. Unlimited calls that AAHAM advocates will create safety issues and distractions for the called party. There is no constitutional right for any business to barrage us on our cell phones with unwanted automatically dialed text message or prerecorded message calls that invade consumer privacy and create safety issues and distractions. The risk to the called party far outweighs any efficiency benefits to AAHAM members. Those that use technology responsibly and obtain prior express consent of the called party can and do enjoy the efficiency that comes with technology.

The Commission should exercise its authority to protect the privacy and safety of cell phone users. One way the Commission can that is to deny the AAHAM petition in its entirety.

Respectfully submitted,

_____/s/_____

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