

Consumer Litigation Group

Dimitrios Kolovos □■○
Brian T. Shaw □■
Joseph A. Mullaney, III □■●
William J. Veitch □

Law Office of Dimitrios Kolovos, LLC
211 West State Street, Suite 204
Media, PA 19063

Phone: 610-616-5303
Fax: 610-672-1944

New Jersey Office
423 White Horse Pike
Haddon Heights, NJ 08035
Phone: 856-861-4241
Fax: 610-672-1944

□ Bar of NJ
■ Bar of PA
○ Bar of NY
● Bar of MD

www.ConsumerLitigators.com
info@ConsumerLitigators.com

August 31, 2012

VIA ECFS
Chairman Julius Genachowski
Federal Communication Commission
445 12th Street SW
Washington, DC 20554

RE: *GroupMe, Inc., Petition for Expedited Declaratory Ruling and Clarification*
CG Docket No. 02-278

Dear Chairman Genachowski:

Please accept my comments in the above-referenced matter filed out-of-time.

Petitioner wants the Federal Communication Commission (FCC) to “clarify” the meaning of the terms “automatic telephone dialing system” (ATDS) and “capacity,” as used in 47 U.S.C. § 227(a)(1). (Petition p. 14.) As a Consumer Rights Attorney, I write in opposition to Petitioner’s request.

Petitioner’s pecuniary motives for seeking a ruling is amply demonstrated by the Comments of Robert Biggerstaff dated August 28, 2012. It is also attempting to procure a rule that could detour Petitioner out of several courts and into the arms of *Chevron*’s embrace.¹ I further underscore the negative consequences should the FCC grant Petitioner’s request.

In its zeal to transmit 100 million text messages – monthly – Petitioner advocates a rule that if adopted would fundamentally alter the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, *et seq.*, and the FCC’s treatment of ATDS technology. I reiterate that technology should continue to be characterized as ATDS if it *could* be used as a random or sequential number generator.

In large part, Petitioner justifies its request by stressing that its mass texting platform is “not a marketing tool, does not generate commercial advertisements, and has implemented policies and procedures to prevent individuals from using the service for commercial purposes.”

¹ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) where the Supreme Court set forth the legal test to grant deference to a government agency’s interpretation of a statute which it administers; see also Petition at 2, fn 4.

(Petition p. 8.) Such a rationale could perfectly apply to pervasive debt collection practices, too.

Wrong Cell Number Calls by Debt Collectors

A debt collector who inadvertently, but manually calls a wrong cell number for debt collection purposes arguably does not violate the TCPA. To violate the TCPA, a debt collector calling a wrong cell number would have to use ATDS or an artificial or prerecorded voice.² *See* 47 USC § 227(b)(1)(A)(iii).

The “clarification” Petitioner seeks could permit debt collection calls to wrong cell numbers if a debt collector used similar devices envisioned by the Petitioner. Debt collectors do not use random or sequential number generators for debt collection. Instead, they use ATDS that has predictive and/or autodialing properties. Nonetheless, the FCC implemented the TCPA by holding that if a device has the “capacity” to randomly or sequentially generate telephone numbers, it would still be an ATDS even if only used for predictive or autodialing. *See* 47 C.F.R. § 64.1200(a)(1) (An “automatic telephone dialing system” is “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.” (emphasis added) (citing 47 U.S.C. § 227(a)(1)).

To be sure, ATDS used by debt collectors is not a “marketing tool” or “commercial advertisements,” the bases upon which the Petitioner justifies its request. But if adopted, debt collection ATDS to wrong cell numbers – slightly tempered by TCPA lawsuits – would be even *more* out of control than it is now.

Debt collectors have no incentive to correct and remove wrong cell numbers from their ATDS. First, the cost associated with wrong cell number calls is next to nothing considering wide-spread adoption of VoIP technology in debt collection call centers. Second, front-line debt collectors are generally not empowered to correct and remove wrong cell numbers because a computer has already and automatically connected them to their next call.

Third, the nation’s largest debt collectors are powered by high capacity, sophisticated ATDS capable of making hundreds of calls per second. When those systems are programmed to call the wrong cell number, my consumer clients are extremely annoyed when confronted by robotic voices or when their cell phones are clogged with debt collection voicemails.

There is little a consumer can do once its cell number is wrongly programmed in a ATDS. When they call the debt collector, my consumer clients encounter resistance from debt collectors when dealing with a wrong-number complaint. They are accused of lying about the wrong number status of a call or advised that they cannot correct the ATDS. The usual promise that a wrong cell number will be purged from a ATDS “in the next 24 hours” often rings hollow.

Lastly, Petitioner’s request is a great threat to consumers who do not owe debt because they cannot argue or otherwise advise a debt collector’s ATDS that it has a wrong cell number. There usually is no human at the other end of a ATDS call to point out the error. The only

² The TCPA excludes ATDS or artificial or prerecorded voice calls by debt collectors if they are made for emergency purposes or made with the prior express consent of the called party.

recourse is to allow the wrong cell number call to clog voicemail, but only after waiting for the voicemail to engage. My consumer clients are greatly annoyed by wrong cell number calls by debt collectors and more so by their refusal to remove cell phones from ATDS.

Adopting Petitioner's request would permit debt collectors to engage in a similar framework and evade Congress' intent to severely restrict non-human calls to "cellular telephone service[s]." *See* 47 U.S.C. § 227(b)(1)(A)(iii); 2003 TCPA Order, 18 FCC Rcd at 14115, ¶ 165.

Petitioner's business model appears to be of legitimate interest to the public. It also appears to provide a service that today's tech-savvy consumers desire. However, its request as written and its underlying rationale threatens consumers with cell numbers called by out-of-control debt collectors.

Your time and attention to this matter is greatly appreciated; please direct any questions, comments, or concerns to the above contact information.

Very truly yours,
CONSUMER LITIGATION GROUP
s/Joseph A. Mullaney, III
Joseph A. Mullaney, III, Esq.

JAM
Encl(s): None
CC: None