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**Before the
Federal Communications Commission
Washington DC 20544**

In the matter of GroupMe, Inc.'s Petition for an Expedited Declaratory Ruling	CG Docket No. 02-278 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 DA 12-1180 July 24, 2012
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Gerald Roylance's Reply re GroupMe's Petition

I. Introduction

In DA 12-1180,¹ the FCC sought comment about GroupMe's March 1, 2012 petition.² The petition seeks (1) a redefinition of ATDS to exclude calls generated by a database of number and (2) a liability waiver that would allow callers to assume prior express consent on the slimmest of circumstances. What GroupMe wants can be simply expressed and rejected. The petition should be denied, but the FCC might clarify its description of automatic telephone dialing system ("ATDS") to remove continuing ambiguity about random or sequential number generators.

GroupMe wants any equipment that dials from a database of number to be outside the definition of automatic telephone dialing system. At one point, the FCC felt that debt collection "calls are not autodialer calls (i.e., dialed using a random or sequential number generator)."³ The FCC later reversed its autodialer position that required using number generators and concluded that predictive dialers which use a database of numbers were

¹ FCC, <http://apps.fcc.gov/ecfs/document/view?id=7021992529>, "Consumer And Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from GroupMe, Inc."

² GroupMe, Inc., "GroupMe, Inc.'s Petition for Expedited Declaratory Ruling and Clarification", March 1, 2012, <http://apps.fcc.gov/ecfs/document/view?id=7021871907>

³ 1992 Report and Order, FCC 92-443 ¶ 39.

automatic telephone dialing systems.⁴ That argument focused on a general definition of “capacity”. The number generator and capacity conflict keeps recurring in petitions to the FCC.

GroupMe apparently agrees that predictive dialers are ATDS and should be restricted.⁵ GroupMe points out the TCPA legislative history that remarked on efficiency gains that avoided human intervention. GroupMe’s database of numbers is no different than a predictive dialer’s database. GroupMe argues a size distinction rather than a substantial difference. Both systems operate from a database. GroupMe wants to exclude its database because GroupMe sends millions of texts in batches of 25 or less. Should predictive dialers be excused if they are programmed to call no more than 25 numbers at the same time? No. The TCPA imposes no exemption for quantity. Furthermore, the record has already established that GroupMe sends millions of identical “administrative” messages on its own behalf. If GroupMe’s system is not an ATDS, then predictive dialers are not ATDS. That, as the FCC has previously found, would be an unintended result.

GroupMe also wants a get-out-of-jail-free card for its inherently risky manner of gaining prior express consent. GroupMe wants to rely on a Terms of Service agreement that doesn’t spell out its clients’ risks to convey consent for GroupMe’s self-serving messages that advertise GroupMe’s service and application. GroupMe can easily provide proof of prior express consent. Assume GroupMe gets sued over a set of texts. GroupMe should then go to the group creator and demand proof of prior express consent. The group creator then produces written evidence of consent. If the group creator cannot do that, then GroupMe sues the group creator for indemnity. It should all be pretty easy to do. After all, GroupMe has assured us that the groups are less than 25 members. From a practical standpoint, as GroupMe suggests the story, a class action would have at most 25 members in the class. If the group really consists of the group creator’s friends, then the group creator could tell his friends he’ll be sued unless he supplies written consent. What friend would not supply such consent? If, on the other hand, the group creator indiscriminately added members, then both the group creator and GroupMe have a problem.

That brings us to the real conundrum here. If the group members consent to receiving these text messages, then the ATDS issue is irrelevant. If the group members have given prior express consent, then why are there so many class action lawsuits? Brian Glauser alleges he did not give consent. Presumably other class representatives make the same allegations. Something is rotten in Denmark. Defendants are having trouble providing clear and convincing evidence of prior express consent.

All GroupMe needs to do is make sure it has written prior express consent from all group members (not just group creators), and all GroupMe’s troubles go away. In

⁴ *2003 Report and Order*, FCC 03-153, ¶ 133

⁵ GroupMe Petition, pp. 13-14.

fact, GroupMe should be seeking that permission right now or it risks ratifying any prior bad acts.⁶

II. Comments

Generally, I second the opposing comments of Robert Biggerstaff.⁷ Mr. Biggerstaff is silent about random and sequential number generators, but he wants the Commission to elaborate its definition of ATDS. His view of prior express consent is appropriate.

The supporting comments of Portfolio Recovery Associates are flawed.⁸ PRA misquotes the TCPA:

As a consequence, the TCPA imposes restrictions on the use of “automatic telephone dialing systems” (“ATDS”), which it defines as equipment with the “capacity” to generate numbers randomly or sequentially and to dial those numbers.

PRA has ignored the “to store” prong of the TCPA definition. PRA has a self-serving motive. If it is like most debt collectors, then PRA is using a predictive dialer to reach not just the debtor, but also friends, relatives, and even people with similar names to the debtor. If PRA oversteps by autodialing a cellular telephone without prior express consent, then it can and should be sued.

PRA also thinks that 1991 was the dark ages of telephony. In my comments,⁹ I pointed out that WarGames was a 1984 movie that used a tiny computer to dial sequential telephone numbers. DECTalk appeared in 1984. DECTalk could answer telephone calls, dial out, and speak. We had one connected to a DEC-20 mainframe computer (1MB of main memory and 1.2GB of disk) in the late 1980s; others had them connected to Vaxes. Predictive dialers were being developed in the late 1980s.^{10 11} AT&T, Rolm and Northern Telecom provided private branch exchanges that also interfaced to a personal computer.¹² Congress could see where telephony was headed, and Congress wanted to impose broad restrictions on automated telephony systems. Otherwise, it would have just

⁶ GroupMe should require an affirmative opt-in by each group member.

⁷ Comment of Robert Biggerstaff,
<http://apps.fcc.gov/ecfs/document/view?id=7022008274>

⁸ Comments of Portfolio Recovery Associates,
<http://apps.fcc.gov/ecfs/document/view?id=7022008720>

⁹ <http://apps.fcc.gov/ecfs/document/view?id=7022008666>

¹⁰ D. A. Samuelson, Predictive Dialing for Outbound Telephone Call Centers,
<http://www.jstor.org/stable/25062520>

¹¹ Technology Marketing Corporation, The History of the Predictive Dialer, 2006,
http://www.promero.com/call_center_intelligence/predictive-dialer-history.asp

¹² Chris Sells, Windows Telephony Programming: A Developer’s Guide to TAPI, Addison Wesley, 1998, pp. xvi-xvii. Sells was doing telephony programming for Spanlink Communications in 1989, p. x.

written narrow prohibitions against automated prerecorded calls such as already existed in California's Public Utilities Code § 2811 and Civil Code § 1770(a)(22).

PRA complains that a broad reading of capacity punishes efficiency. So what? Congress intended to limit efficient automated telephony. PRA misreads the intention of the TCPA to solely preserve public safety and prohibit cost shifting. PRA ignores that the TCPA also intended to protect privacy. Congress would recognize that people would carry their cellular telephones with them, and that calls could happen at in opportune times. I would imagine that several Congressmen had cellular telephones, and they had received calls at inopportune times. People have cellular telephones for their convenience – not the convenience of telemarketers or debt collectors. How many court rooms and theater productions ask the audience to turn off their cellular telephones? Collection agencies must love cellular telephones – it gives them a chance of calling consumers during business hours when those consumers are at work. Employers don't like that. Even I don't like that. I've heard too many debt collection calls in the next cubicle over.

The Cargo Airline Association comments¹³ are more focused on consent than autodialing. The CAA points out that prior express consent may transfer in the case of, for example, debt collection, but the CAA fails to acknowledge that if there was no consent in the first place, then the transfer issue is irrelevant, and the caller is on the hook for the prohibited call. The CAA makes only a passing mention about random and sequential number generators, and that refers to endangering public safety by tying up lines. The CAA argues that its calls should not be considered to invade privacy, but the CAA ignores the cost shifting argument. The CAA should realize that some will not welcome the calls even though they are informative. I detest Express Scripts automated calls informing me of prescription status.

The CAA wants to make package deliveries more efficient by notifying “package recipients of the shipment, arrival, or scheduled delivery date of a package; failed attempts to deliver specific packages; or that a package is available for pickup at a specific carrier location.” A focus seems to be on home delivery because people are often not at home during business hours. Deliveries to businesses are less problematic.

FedEx charges extra for home delivery. That probably reflects the cost of failed deliveries. Calling ahead might be reasonable, but it should be done with actual prior express consent when the recipient is a cellular telephone. The caller runs the risk of dinging the recipient for cellular telephone charges. Why not use email? The comments about failed attempts to deliver a package seem silly. All the carrier need do is leave a paper notice – and that notice could include a tracking number for the package, a website, a pickup location, and even ways to express consent for cellular telephone calls or text messages.

¹³ Comments of the Cargo Airline Association,
<http://apps.fcc.gov/ecfs/document/view?id=7022008789>

Nothing precludes the delivery person from manually dialing the telephone number on the packing slip and talking to the intended recipient, but that would conflict with time and motion goals. UPS is serious about time and motion, so it is clear that the CAA is looking for inexpensive automated interactions with package recipients and not human interactions. If CAA wants such interactions with a cellular telephone, then it needs prior express consent.

The CAA can get what it wants another way. Have another class of package recipient. Those package recipients who have registered with the carrier and expressed consent for these calls can get a shipping discount.¹⁴ If the delivery is more efficient, then the carrier should share the benefits of that efficiency with the participants. Instead, the CAA wants all the benefits and none of the liabilities.

Communications Innovators¹⁵ quotes the statute and claims that “using a random or sequential number generator” modifies “to store or produce telephone numbers to be called”, but CI does not explain what “to store” using a number generator means. It reads the definition as being telephone numbers “that have been randomly or sequentially generated”, but that is not the statutory language. Telephone numbers can be “produced” using a random or sequential number generator; historically, the generator would supply a small portion of the telephone number. CI’s plain reading simply ignores “to store”; it is redundant with to “produce”.

GroupMe’s comments¹⁶ are off the wall. It comments on the CAA petition. It complains about the number of lawsuits, but it apparently suggests that the plaintiffs want GroupMe’s messages. If so, then why did they sue? GroupMe inexplicably compares its service with that of school closings sent to contact numbers that parents provided to the school. Arguably, parents have consented to such messages when they filled out the forms; the telephone number was not provided by an unrelated third-party. Furthermore, a school closing is arguably a public safety issue. We don’t want second graders being unsupervised because mom and dad didn’t know the school was closed. GroupMe is being sued because plaintiffs allege they never gave the group creator permission to transmit such texts. What act did the plaintiff do to signal consent? What public safety issue is implicated in Glauser’s complaint?

GroupMe also appears to be ignorant of its own for-profit existence. If GroupMe has no commercial interests, then how is it going to make money? Steal from its stockholders? GroupMe should not claim innocent motives in its petition and comments while telling its investors a different story.

Its Terms of Service argument is a joke. GroupMe targets unsophisticated consumers. GroupMe does not tell those consumers about the TCPA prohibitions and penalties. GroupMe then expects those consumers to convey prior express consent that

¹⁴ CAA Comments on page 3, where registration is described.

¹⁵ Comments of Communications Innovators, <http://apps.fcc.gov/ecfs/document/view?id=7022008822>

¹⁶ GroupMe, Inc.’s Comments, <http://apps.fcc.gov/ecfs/document/view?id=7022008825>

GroupMe may use for its own purposes? That smells. GroupMe's argument dies in a simple agency argument. GroupMe is a principal. GroupMe creates an agency when it appoints the group creator to obtain prior express consent for GroupMe's own messages to the group's members. If that consent is not obtained, then both principal and agent are liable.

GroupMe also believes that prior express consent can be satisfied with an opt-out mechanism. The statement is absurd. Prior express consent is not subsequent express consent. GroupMe has a distorted view of the world.

GroupMe's First Amendment argument is also absurd and too late for consideration. GroupMe's rights end where my rights begin. GroupMe has no right to force me to incur automated text messaging costs without my consent. Do we allow campaign flyers to be mailed with postage due? GroupMe may certainly file its petition and make comments on this docket. That is free speech. But it has no right to use a machine to advertise its app and force me to pay for that communication. Free speech arguments have been leveled at the TCPA, and those arguments have failed.

In GroupMe's fantasy world, any non-commercial text would be permitted. Political organizations and non-profits could quickly consume a consumer's bucket of minutes or stick the consumer with an enormous bill. GroupMe wants a world that does not make sense. No wonder GroupMe is getting sued.

I endorse the opposing comments of Joe Shields.¹⁷ Shields addresses some court cases, and he points out that Pimental alleges receiving over 150 text messages in a single day – all without Pimental's consent.

I endorse the opposing comments of the Consumer Litigation Group.¹⁸ Joseph Mullaney clearly foresees the damage that non-telemarketing debt collection calls can have when they reach non-debtors. Excluding systems that can place hundreds of calls per minute from the definition of ATDS seems patently wrong. Excluding database telephone numbers does not make sense. It would gut the protections of the TCPA.

Twilio's comments in support of the petition¹⁹ are self serving. Twilio wants companies such as GroupMe to use its application programming interface, so it needs to support them. Twilio characterizes GroupMe as a fax broadcaster, but Twilio has ignored that GroupMe also sends messages advertising its own interests. Furthermore, GroupMe, rather than behaving as a simple common carrier, lays claim to the content of all the text messages it carries. UPS and Fedex do not claim to own all of the packages that they transport. Twilio is not being critical in its assessment.

¹⁷ Comments of Joe Shields, <http://apps.fcc.gov/ecfs/document/view?id=7022008730>

¹⁸ Comments of the Consumer Litigation Group, <http://apps.fcc.gov/ecfs/document/view?id=7022008833>

¹⁹ Comments of Twilio Inc., <http://apps.fcc.gov/ecfs/document/view?id=7022008778>

Twilio complains that there is litigation, but it does not analyze that litigation. Instead, Twilio condemns the litigation because companies “must spend energy and dollars fighting these lawsuits”. Defense costs are not the issue. The question is whether the plaintiffs were injured. Twilio claims that “most consumers want the SMS alerts, coupons, and other information provided by through SMS marketing by the companies.” That is not a good argument. “[D]espite the fact that the vast majority of the users of their SMS services never complain” does not mean that most users want the service. Most people probably don’t know how to complain, or if they do, they have better things to do. *ESI v. United Artists Theatre Group* suggests that only one in 90,000 recipients of an illegal fax bother to sue. Even if most recipients do want the service, that does not mean the privacy and cost-shifting protections should be ignored for those who do not want the service.

Twilio wants ATDS to be interpreted narrowly, but why shouldn’t ATDS be interpreted broadly? The TCPA wants to protect consumers, and a broad interpretation achieves that goal. Instead, Twilio wants to cross off the word “capacity” (the FCC cannot rewrite the TCPA) and drop some commas. Twilio does not address what the TCPA means when it says “to store”.

Twilio suggest Congress intended the ATDS definition to prohibit line seizures and “limit the delivery of thousands of identical prerecorded messages.” (Parroting the GroupMe petition.) That is not the case. Congress separated these different ideas. It is illegal to deliver even a single prerecorded message. Autodialing cellular telephones is prohibited whether or not a prerecorded message is delivered. Congress intended a broad interpretation.

Twilio’s definition of prior express consent would implicate only the nebulous first person making or initiating the call. Intermediaries are free to rely on someone else obtaining the required prior express consent – but those intermediaries should remain liable if that consent cannot be produced. Strict liability is an important aspect of the TCPA. I get plenty of prerecorded calls where the caller claims that I opted-in on some website, filled out some contest entry forum, or otherwise consented. About a year ago, I got a call from an insurance agent who had paid for some opt-in leads. I believed his story – somebody took advantage of him and sold him some fake leads. That however should not relieve him of liability; it only means he can pursue his supplier for indemnity. After all, he chose his supplier – I didn’t. There is too much opportunity for abuse. Plenty of defendants point the finger at somebody else and say go after them – and often the somebody else is untraceable, broke, or offshore.

The US Chamber of Commerce²⁰ claims that these text messages are valuable non-marketing information and that the class action lawsuits are frivolous. The TCPA does not permit automated calls to cellular telephone no matter what the content. Such a position immediately destroys the commenter’s credibility. If a lawsuit is frivolous, then a motion to dismiss should easily dispense with the lawsuit and gain sanctions for the

²⁰ Comments of the US Chamber of Commerce,
<http://apps.fcc.gov/ecfs/document/view?id=7022008729>

defendant. Class action lawyers do not make a habit of filing frivolous lawsuits. Although there may be some frivolous lawsuits, there are many defendant companies filing FCC petitions in an attempt to escape class action lawsuits. That suggests the opposite – that the lawsuits are not frivolous, that they have merit, and that defense attorneys try any avenue, no matter how thin, to escape. That a law firm sought exorbitant fees for a boiler plate complaint does not suggest the underlying lawsuit is frivolous or without merit – in fact, it suggests the opposite: plaintiff’s attorney fees imply a settlement or judgment in plaintiff’s favor.

In general, the Chamber is the only supporting commenter that undertakes a serious analysis of the statutory definition. The Chamber suggests dialing sequential numbers could tie up all lines of a business. Although true, the TCPA is more general than that. 47 U.S.C. § 227(b)(1)(D) prohibits any ATDS from engaging more than one line simultaneously. The prohibition is aimed at the end result – tying up multiple lines – and not the technology used to get there (sequential, random, or stored numbers).

The Chamber states, “Congress set about ‘[b]anning such automated or prerecorded telephone calls to the home,’ as well as to other types of numbers, including cellular telephones.” Why shouldn’t those comments extend to the automated calling that GroupMe wants to do to cellular telephones? Just because some specific problems can be identified with sequential or random telephone number dialing does not mean similar abuses occur with database directed dialing. Even a telephone in a database might reach a hospital room.

The Chamber raises irrelevant definitions of capacity. English words can have many meanings, and stadium capacity is not what Congress was interested in.

Although the Chamber tries to finely dissect the word “capacity”, it is much more casual with the rest of the definition of ATDS. The Chamber quickly summarizes an ATDS as “the capacity to store or produce random/sequential numbers.” That is not the statutory definition and it is not the clarification that the FCC provided in 2003.

Later the Chamber states, “But the TCPA’s plain language requires more – a capacity to dial the randomly or sequentially generated or stored numbers.” The intent of this rephrasing is wrong, but it can be read appropriately. It can be “a capacity to dial randomly generated numbers”, “a capacity to dial sequentially generated numbers”, and “a capacity to dial stored numbers”. The last reading is one that destroys GroupMe’s capacity argument. GroupMe’s equipment has the capacity (current or otherwise) to dial stored numbers. That is all the FCC required in 2003.

The Chamber comments on the third-party consent aspect, but its conclusion is not clear. Certainly, consent may be obtained through a third party (an agent), but the Chamber does not address the crux. Should that consent be a grant of immunity to the calling party? Anybody can rely on third-party consent, but they better be prepared to pay if the third party didn’t actually obtain that consent.

Brian Glauser's opposing comments²¹ echo some earlier comments, but they also appear to be devastating to the petition. GroupMe offers an odd service – it is essentially a text message distribution list. Why don't the wireless carriers offer such a service? It would seem to be easy for them to implement – at least to the point of maintaining a subscriber's lists and letting him send a mini text-blast. Glauser explains the difference between long codes and short codes. In particular, there is a lot of oversight for short code messages – oversight that is ignored for long codes. The implication is the wireless carriers do not want to provide an ATDS text messaging service because they know the TCPA forbids it.

III. Conclusion

The GroupMe petition should be denied.

The proposed definition of ATDS would be a disaster. Anyone with a database of cellular telephone numbers (whether opt-in or not), could use that database to send text messages containing unsolicited advertisements without fear of violating TCPA subsection (b). Calling from a database would not be an ATDS and therefore not subject to the TCPA automated equipment restrictions. Cost shifting be damned. It would be OK to text messages to hospitals because the telephone numbers are not random or sequential. That is not what Congress intended.

The FCC should reaffirm that a system that dials a set of numbers from a database is an ATDS. That is the naïve notion of an ATDS, and it is the statutory notion.

The FCC should find that GroupMe's system is an ATDS. If defendants are going to forum shop, then there should be consequences.

For the courts, the FCC might put the random or sequential number generator issue to bed rather than leave it hanging from the 1992 Report and Order.

The statutory definition is:²²

- (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 FCC should interpret the comma-spliced phrase "using a random or sequential number generator" as modifying "produce". If the equipment stores telephone numbers and then dials those numbers, then it is an autodialer even though it does not use a random or sequential number generator. That is the reasonable interpretation of the disjunction.

²¹ Comments of Brian Glauser, <http://apps.fcc.gov/ecfs/document/view?id=7022009632>

²² 47 U.S.C. § 227(a)(1)

In addition, the FCC might consider that a database query that retrieves telephone numbers from a database constitutes a sequential number generator. The query generates a sequence of records, and then the equipment dials those numbers.

The FCC might comment that although a conventional speed dialer application is not an ATDS, the “capacity” argument is still there. An iPhone application can easily be an ATDS if it dials a list of numbers. Hiring a bunch of people to merely press buttons (i.e., add some trivial human intervention by emulating a speed dialer) should not defeat the broad definition of ATDS. Common sense should apply.

The FCC should make clear that the ATDS should be interpreted liberally to effect Congressional intent.

The third-party consent issue is nonsense. GroupMe and others may use third parties to obtain consent, but if they are sued, then they must demonstrate the appropriate (i.e., possibly written) prior express consent with clear and convincing evidence. If they cannot, then they are liable. They cannot force the plaintiff to sue their (possibly judgment proof) agent.