Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

Comments of Robert Biggerstaff on the Petition of Acurian

As the Acurian Petition ("Petition") notes, the federal district court[1] denied Acurian's motion to dismiss. In other TCPA cases, some courts have granted a defendant's motion to dismiss claims based on robocalls, and some have not. But this does not indicate there is any irregularity or ambiguity in the Commission's rules. There are certainly some fact patterns that no reasonable person could conclude the robocalls in question were part of a solicitation. Those are ripe for dismissal or summary judgement in favor of the defendant.[2] There are also certainly some fact patterns that no reasonable person could conclude the robocalls in question were *not* part of a solicitation. Those are ripe for summary judgement in favor of the plaintiff. But there are a handful of cases where a trier of fact will need to answer the question of whether the calls are, or are not, part of a solicitation.

The First Amended Complaint ("FAC") in *Blotzer* make clear that the gravamen of the case is that the robocalls of Acurian were in fact "a smokescreen, masking their true purpose of acquiring new customers" for Acurian's client. FAC ¶18. The court heard

[1] *Blotzer v. Acurian Inc.*, No. 2:13-cv-0343(CD Cal.)

[2] I note that if Acurian's calls are permissible, Acurian could extinguish all claims by simply agreeing to the certification of a class, and then prevailing on summary judgment and thereby obtaining *res judicata* over the entire class. This seems to me to be a quite efficient way of resolving all such claims expeditiously, and eliminating duplicative actions.

arguments on a motion to dismiss, and found that the case should continue. This illustrates that the Commission should leave such fact-intensive determinations to the tiers of fact. Indeed, this is the path the Commission has always taken. For example, in 2012, the Commission noted that:

> home loan modification and refinance calls placed pursuant to the Recovery Act *generally* are not solicitation calls and do not include or introduce an unsolicited advertisement.[3]

But in the next sentence, the Commission adopted an explicit case-by-case analysis, rather than a blanket exemption:

> We note, however, that should such calls be challenged as TCPA violations because the primary motivation appears to be sending a telephone solicitation or unsolicited advertisement rather than complying with the Recovery Act, we will consider the facts on a case-by-case basis. Further, if a "Recovery Act" robocall is made to a wireless number, prior express consent, which may be either oral or written, is specifically required pursuant to the Act.[4]

In another example, the Commission found that newsletters that were generally not advertisements under the fax advertising rules,[5] but in the same paragraph, the Commission cautioned:

> We emphasize that a newsletter format used to advertise products or services will not protect a sender from liability for delivery of an unsolicited advertisement under the TCPA and the Commission's rules. We will review such newsletters on a case-by-case basis should they be brought to our attention.[6]

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[3] *2012 Robocall Report and Order*, 27 FCC Rcd 1830, ¶ 31 (FCC Feb. 15, 2012) (emphasis added). Ironically, the Petition also cites the same paragraph of the 2012 Order.

[4] *Id.*

[5] *2006 TCPA Order*, ¶ 53.

[6] *Id.*

In fact, the Commission has explicitly adopted the same policy of "case-by-case" analysis involving numerous issues in TCPA orders since 1995. The same result is proper here.

Clinical Trials Are Often a Marketing Subterfuge

Perhaps it is just me, but I often hear, see, and read advertisements for various potions for regrowing hair, burning fat, enlarging or shrinking some specific body part, etc., where those advertisements announce some type of "clinical trial" for a limited number of people who call to promptly to participate. The potion itself is often free, if a "participant" merely pays shipping and handling. This is just one illustration that any type of exemption for calls related to a "clinical trial" is ripe for abuse. This issue must be left to a fact finder to determine—given all the evidence—if a call was part of a scheme to *evade* the TCPA rather than to comply with it. As over 400 years of caselaw has repeatedly confirmed, the purpose of the law is "to suppress subtle inventions and evasions for continuance of the mischief."[7] Such subtle inventions regularly require a trier of fact and an adversarial proceeding to be discovered.

Telemarketing Is Not the Sole Target of the TCPA.

Acurian cites a self-serving "U.S. Chamber of Commerce Study" for the proposition that "it is rare these days to see TCPA litigation brought against its original intended target—abusive telemarketers."[8] Nothing is further than the truth, and indeed that is not the record of the *Blotzer* case against Acurian. As the FAC in *Blotzer* notes, Acurian is

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[7] *Heydon's Case*, 3 Co. Rep. 7a, 7b; 76 Eng. Rep. 637, 638 (1584).

[8] The Chamber of Commerce document is wrong on the law, and the statistics. In enacting the TCPA, members of Congress found that "the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call." *Telephone Consumer Protection Act*, PL 102-243, 105 STAT. 2394, Congressional Findings, No. 13 (1991). My own review of caselaw found that a large majority of TCPA cases were indeed filed against obvious telemarketers (including people sending illegal fax ads) and abusive debt collector robocalls.

alleged to be engaged in a "smokescreen"— trying to couch it's calls as non-solicitations, where they are in fact part of scheme to sell commercial products or services.[9] This is for a fact-finder to determine.

CONCLUSION

Like the numerous other times similar fact-intensive issues have been rased, the Commission should reiterate that the existing rules are adequate and that a case-by-case determination of whether any particular robocall is, or is not, within the existing rules is properly left to the fact finder in any particular case.

In introducing the TCPA, its author, Fritz Hollings, said:

> Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.
>
> The telephone is a basic necessity of life. You cannot get along in this country if you do not have a telephone in your home. However, owning a telephone does not give the world the right and privilege to assault the consumer with machine-generated telephone calls. These calls are a nuisance and an invasion of our privacy.[10]

I urge the Commission that in any adjudicative decision, the intent of Congress and the broad remedial purposes of consumer protection are given precedence over private pecuniary interests that are counter to the purposes of the TCPA.

Respectfully submitted, this the 24th day of March, 2014.

/s/ Robert Biggerstaff

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[9] To illustrate one similar example, I personally received uninvited robocalls from a local chiropractor offering a "free" evaluation. His defense to a TCPA claim was that "your health is an emergency" so that his robocalls were covered under the "emergency purpose" exception in the TCPA.

[10] 137 Cong. Rec. S9840 (daily ed. July 11, 1991) (statement of Sen. Hollings); See also, 137 Cong. Rec. S16204 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) ("It is telephone terrorism, and it has got to stop.")