

Gerald Roylance
1168 Blackfield Way
Mountain View, CA 94040-2305
March 24, 2014

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

In the matter of Acurian's Petition for Declaratory Ruling	CG Docket No. 02-278 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 DA 14-229 20 February 2014
---	---

Gerald Roylance's Reply re Acurian's Petition

I. Introduction

In DA 14-229,¹ the FCC seeks comment about Acurian Inc.'s February 5, 2014 Petition.² Acurian wants a declaratory ruling that its prerecorded calls to residential lines are permitted under the TCPA and FCC regulations because they (1) are not commercial calls, (2) are not unsolicited advertisements, and (3) have First Amendment free speech protection. The FCC should deny the petition.

First, Acurian states it is the target of a class action lawsuit. Acurian also states that it has been subject to "various lawsuits". (Petition p. 5.) Consequently, the current petition represents forum shopping. The FCC should not entertain forum shopping petitions. Such petitions frequently omit key details of the case. The FCC has no discovery mechanism, and a petition is not the same sort of adversary proceeding.

¹ FCC, 20 February 2014, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling filed by Acurian, Inc.*, <http://apps.fcc.gov/ecfs/document/view?id=7521074086>

² Acurian, 5 February 2014, *Petition for Declaratory Ruling*, <http://apps.fcc.gov/ecfs/document/view?id=7521071225>

Unlike most forum-shopping petitioners, Acurian identifies the class action (*Blotzer v. Acurian*).³ However, Acurian does not attach the complaint or its answer. Acurian does not describe the complaint's allegations in detail, describe its answer, or even give suspected reasons for the denial of the motion to dismiss. It does not take much to deny a motion to dismiss. Even if there is no written opinion for the motion to dismiss, Acurian could supply the moving, opposition, and reply briefs, but it does not. Acurian does not even provide a transcript of any automated calls that it transmitted. Although Acurian claims that it had prior express consent, Acurian does not describe that consent or how it was obtained. Was it consent directly to Acurian or was it to a third party? There's not enough here to say that Acurian's prerecorded calls are OK.

Furthermore, Acurian states, "a 'primary motivation' behind Acurian's calls is to match individuals to clinical trials so that pharmaceutical companies may meet the FDA's pre-marketing testing requirements." (Petition page 12.) Such a statement leaves me uncomfortable because it is ambiguous about possible *other* primary motivations (compare "a primary motivation" to "the primary motivation") and secondary motivations. Is there a dual purpose to the calls?

Acurian could be hiding an elephant. The FCC should not rule in the dark.

Federal court judges are usually sharp. They do make mistakes, but such mistakes would be rare. I suspect there is much more to the issue than Acurian has described. Perhaps the wording of the drug trial ends up being an advertisement. We don't know. Acurian has given us a pig in a poke.

Instead of giving us clear details, Acurian paints class actions as evil and implies that Acurian is an innocent victim. That may be true of some class actions (and even *Blotzer*), but it is certainly not true for all class actions. And it is not a substantial legal argument. Evidence, not innuendo, is required.

Second, as to the Petition's points, let's assume that that automated message went to a residential land line and was as innocuous as Acurian wants us to believe.

Despite Acurian's claim, the call is commercial in nature. It may not be about selling something today, but a drug trial is something that is needed to develop a commercial product.

Acurian claims the call is not an unsolicited advertisement. A call that merely sought subjects for a drug trial would not be advertising property, goods, or services. Such an offer sounds more in employment, and offers of employment have been held to be outside of property, goods, or services. If the content was just about seeking test subjects and nothing more, then it would fit the FCC's exemption for prerecorded calls to residential telephones that do not include or introduce a solicitation. (Blotzer claims the calls go beyond employment.)

³ <http://dockets.justia.com/docket/california/cacdce/2:2013cv03438/562197>

Acurian claims that even if it fails the other prongs, the calls should have First Amendment protections. There is no First Amendment free speech protection for the drug trial. The automated call portion of the TCPA has survived many commercial free speech attacks. State laws that have banned automated political calls (a non-commercial free speech issue) have also been held constitutional. A person may have free speech rights, but a robot does not. Your free speech rights stop at the my-home-is-my-castle's front door.

The calls, if they are as claimed by Acurian, would not violate the FCC's exemption to the TCPA that allows commercial prerecorded calls to residential telephones.

That said, Congress did not want residential telephone subscribers subjected to automated calls no matter what the content of those calls. The FCC's exemption was overbroad, but that is not before us here.

I'm also surprised that Acurian would use automated telemarketing to find test subjects for clinical trials. Clinical trials are usually small affairs (say 100 subjects) rather than massive undertakings. It suggests that Acurian is doing some sort of shotgun screening to find test candidates. Instead of an advertisement in a paper or magazine or on television (the usual approach), Acurian may just be calling a lot of telephone subscribers looking for those with some disease and a willingness to be a guinea pig. For some diseases, such as asthma, candidates may be easy to find. For rare constellations, it may be much harder to find candidates (say asthma where common drugs are ineffective). If Acurian is calling hundreds of thousands of numbers in search of a 20 test subjects, then I'd be queasy about the effort.

Finally, nothing in the record suggests that Acurian's prerecorded calls did not include something other than "a primary motivation".

II. Details

Some details of the case are available at <http://ia601008.us.archive.org/29/items/gov.uscourts.cacd.562197/gov.uscourts.cacd.562197.docket.html>. There is free access to the First Amended Complaint (#10), the motion to dismiss opposition (#19), and the bare order denying the motion to dismiss (#22).

The First Amended Complaint (FAC) is poorly pled, but it suggests that Acurian may be making calls not only to fill current drug trials but also to offer its services to match the call recipient with future drug trials. The allegations can take the automated calls (which plaintiff said were without consent at FAC) out of the employment defense and into the offer of employment services. Its one thing to place a call and offer someone a job, and it is a different thing to call that same person and offer them a job matching service. Offering a job is not an unsolicited advertisement, but offering a service runs afoul of the TCPA.

The FAC at ¶ 11 alleges, “Defendant contacted Plaintiff on her residential telephone number ending in 7299, in an effort to sell or solicit its services.” The FAC at ¶ 22 alleges, “Defendant’s prerecorded voice messages, serve as a pretext to advertise, not only the medical study referred to in the call, but also any other studies and services the Defendant and/or the undisclosed entity offers.”

My impression is that the allegations in the complaint are thin and that the plaintiff has used some artful pleading to fend off a motion to dismiss. The FCC has suggested that prerecorded market surveys are permissible, and seeking test subjects for a medical trial does not seem far removed from that goal. Market surveys involve products, so the mere suggestion that an unnamed company may have some back pain relief medicine at a future date does not seem to be an unsolicited advertisement. Nothing suggests that a company running a market survey is not entitled to compensation. A fair statement is that the call recipient must be the consumer of the property, goods, or services. A voiceblaster of political prerecorded calls sells his services to the political committee rather than the call recipient. All of these points suggest that *Blotzer* overreaches.

The plaintiff does bring up some significant points. We don’t know the relationship of the defendant to the pharmaceutical firm. If Acurian only acts as the agent for the pharmaceutical firm, then I think it gets off. If Acurian is also acting on its own behalf as a matching service for its test-subject clients, then it could be in trouble. Consider the case where Acme Casting robocalls residential telephones offering to put recipients on a casting list for extras.

IIRC, there is a pending iHire petition on this docket that raises the question of whether iHire acted just for the prospective employee or whether it was also advertising its employment services to the employer.

I would let the *Blotzer* case run. The Plaintiff seeks discovery for relevant issues, and that could make all the difference. If Acurian has a strong case (which it should have if its characterization in the Petition is accurate), then a motion for summary judgment should succeed.

III. Conclusion

The FCC should deny the petition for declaratory ruling if only for the forum shopping issue. The FCC has been very clear about its TCPA exemptions in the past, so it is unlikely that the district courts will misinterpret those exemptions or the case law that has developed around it. The FCC has no substantial evidence before it (not even a transcript of the call), so the petitioner seeks a ruling in the dark. The FCC should trust the District Court’s judgment and deny the petition.

The FCC should not offer a statement that recruiting subjects for medical testing would not run afoul of its current regulations due to the risk of being overbroad. Acurian would be served by the FCC ruling on the iHire matter.