

**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 Petition

For Rulemaking of the ACA International

I want to thank the Commission for providing the opportunity to comment on the Commission’s Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991. Specifically, the Commission seeks comments on the ACA petition seeking to: 1. exempt all dialers in use today from the definition of automatic telephone dialing systems 2. rewrite the TCPA to change “capacity” to “present ability” 3. create an exemption that would expand prior express consent to include any phone number the consumer may subscribe to in the future and 4. create an exemption for wrong number automatically dialed calls to cell numbers.

I vigorously oppose the petition as it attempts to neuter the TCPA, rewrite the TCPA, expand prior express consent well beyond the intended scope of the TCPA and would create a virtually irrefutable defense to the TCPA.

The petition is essentially a rehash of prior petitions filed by the ACA. The Commission has already addressed ACA’s attempted redefining of automatic telephone dialing system in the context of automatically dialed calls being made to cell numbers in the Commissions 2003 and 2008 Orders. ACA has not provided any

sound basis or legal conclusions that would warrant walking back prior Commission orders.

The petition comes from a special interest group that seeks protection for its members that engage in behavior that can only be defined as telephonic harassment of consumers throughout the nation. The petitioner does not represent consumers and any claims that the petition will benefit consumers are an outright lie.

Contrary to petitioners claims class action litigation under the TCPA is not out of control. It is the Debt collection industry that has adopted the use of automatic dialers and treats cell numbers in the same manner as land lines to harass debtors and non-debtors that has caused the complained about consumer backlash. According to a PACER search one debt collector, Enhanced Recovery Company LLC has been sued over 450 times since 2011 under the FDCPA and TCPA. That is no surprise as debt collectors routinely call the cell numbers of neighbors, family members, friends, colleagues and consumers that do not owe the debt. And in most cases the debt collector will spoof a local number and refuse to properly identify themselves as required by the FDCPA 15 U.S.C. §1692d(6).

The debt collection industry garners the highest number of complaints of any industry with the FTC. It is no wonder that debt collectors are being sued in ever higher numbers.

“In 2011, the FTC reported a veritable deluge of complaints about debt collectors' systematic violations of the FDCPA. Complaints over the previous year, 2010, covered every major provision of the law, reporting that debt collectors:

- disclosed purported debts to a third party (13,568)
- harassed consumers at their place of work (17,008)
- falsely threatened arrest or seizure of property (20,256)
- repeatedly called consumers (54,147)
- used or threatened violence if consumers failed to pay (4,182)

Federal Trade Commission Annual Report 2011: Fair Debt Collection Practices Act (2011).

The solution to this problem is not, as the petitioner suggests, rewriting the TCPA. The solution is for the debt collection industry to comply with the FDCPA and TCPA. Compliance, contrary to their claims, will not impede the business of the debt collection industry. The petitioner readily admits that they are not willing to be part of the solution. It is petitioner's intention: "...to help the association respond to **legislative and regulatory threats**¹ (emphasis added). Legislative initiatives and regulations that protect consumer are not threats. They are responses to an out of control industry that blatantly engages in behavior that violates the FDCPA and the TCPA.

Petitioner claims that all TCPA law suits are harassing and frivolous in nature. Granted, maybe there are some examples of frivolous TCPA claims but the majority of TCPA claims are not frivolous. If all TCPA case were truly harassing and frivolous the courts would have dismissed the claims. The fact that few if any have been dismissed, based on claims that the law suits are harassing and frivolous, speaks loudly to the fact that petitioners such as the ACA making such claims are misrepresenting material facts to the Commission.

¹ <http://www.acainternational.org/governmentaffairs-taking-on-legislative-and-regulatory-challenges-31404.aspx>

Non-telemarketing calls to cell numbers are not treated differently under the requirement for prior express consent of the called party. It is the method that is regulated not the speech. The Commission cannot create an exemption for the petitioner based on the content of the call. The petition is not content neutral and subsequently, cannot be granted by the Commission.

Contrary to petitioners claim, the automatically dialed calls are not targeted to the debtor alone. Skip tracing is a very larger part of the debt collection industry. Skip tracing involves contacting family members, neighbors, friends, employers and colleagues. These people are the targets of the debt collection industry and they are the true targets of the ACA petition.

All Predictive Dialers Are Automatic Dialers

Once again ACA wants the Commission to revisit its determination that a predictive dialer is an automatic dialer. In their petition ACA suggests that a predictive dialer can be configured to not be an automatic dialer. Such a suggestion is absurd. What ACA is seeking is a definition of predictive dialer from the Commission that would circumvent the TCPA. The Commission should be strengthening their enforcement efforts instead of encouraging these petitions that seek to circumvent the TCPA.

Any piece of equipment that can automatically dial a telephone number falls under the definition of automatic dialer. That includes every predictive dialer in use today. Even when configured to dial a number after the number is clicked on, that predictive dialer is still an automatic dialer. The key is the dialing of a telephone number without human intervention. The intent of the TCPA was to restrict the use of all automatic dialing devices to two exemptions 1.prior express consent and 2. an emergency purpose.

That is entirely reasonable as automatic dialing of cell numbers is intrusive and a threat to public safety.

ACA's request that the Commission create an exempt category of predictive dialers runs counter all consumer privacy and public safety interests. It would not start and end with ACA's members. If one category of predictive dialer is exempted from the TCPA then telemarketers, pollsters and politicians would migrate immediately to using such dialers. That is the fallacy of the ACA's goals. Any exemption that ACA members get would be exploited by telemarketers, pollsters and politicians.

ACA cites to cases that are still pending and could easily be overturned on appeal². An appellate court decision, which outweighs ACA's cited cases, clearly and succinctly describes how a debt collector's predictive dialer works:

“The situation is this: Customer incurs a debt and does not pay. Creditor hires Bill Collector to dun Customer for the money. Bill Collector puts a machine on the job and repeatedly calls Cell Number, at which Customer had agreed to receive phone calls by giving his number to Creditor. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559 ¶¶ 9, 10 (Jan. 4, 2008) (2008 TCPA Order). The machine, called a predictive dialer, works autonomously until a human voice comes on the line. If that happens, an employee in Bill Collector's call center will join the call. But Customer no longer subscribes to Cell Number, which has been reassigned to Bystander. A human being who called Cell Number would realize that Customer was no longer the subscriber. But predictive dialers lack human intelligence and, like the buckets enchanted by the Sorcerer's Apprentice, continue until stopped by their true master. Meanwhile Bystander is out of pocket the cost of the airtime minutes and has had to listen to a lot of useless voicemail.” *Soppet v. Enhanced Recovery Company, LLC*, --- F.3d ---, 2012 WL 1650485 (7th Cir. May 11, 2012)

Similarly, the same court addresses the issue of called party and wrong number calls:

² *Hunt v. 21st Mortgage Corp.*, 2013 WL 5230061 (N.D. Ala. Sept. 17, 2013)

“Consider another analogy. Borrower agrees with Bank, as a condition of a loan, that Bank can enter Borrower’s garage and repossess his car if he does not keep current on payments. After signing this contract, Borrower sells his house, moves, does not tell Bank his new address, and defaults on the loan. Can Bank now enter the garage of the house where Borrower used to live and seize the car the repo men find there? Surely not.” Soppet v. Enhanced Recovery Company, LLC, --- F.3d ---, 2012 WL 1650485 (7th Cir. May 11, 2012)

“Both Enhanced Recovery and ACA International contend that this language is conclusive in their favor. The FCC said that providing a number gives “express consent by the cell phone subscriber to be contacted at that number regarding the debt.” (Emphasis added.) We don’t get the argument. Of course a subscriber’s consent to be called at a given number is consent “to be contacted at that number.” The FCC was addressing the meaning of the statutory words “express consent”. It was not addressing the meaning of the statutory words “called party” or stating a view about what happens if a number is reassigned after a subscriber gives consent. This litigation concerns the meaning of “called party.” The FCC did not define that term in the 2008 TCPA Order or, as far as we know, anywhere else. **We conclude that “called party” in §227(b)(1) means the person subscribing to the called number at the time the call is made.**” Soppet v. Enhanced Recovery Company, LLC, --- F.3d ---, 2012 WL 1650485 (7th Cir. May 11, 2012)

The same court squarely addresses ACA’s claim that the TCPA needs to be modernized:

“Section 227 was enacted in 1934. The provision covering automated calls to cell phones was added in 1991, and the statute has been amended several times since, most recently in December 2010. If Congress has failed to appreciate changes in the telecommunications business, Enhanced Recovery and the bill collectors’ trade association (ACA International, which filed an amicus brief) should alert their lobbyists.” Soppet v. Enhanced Recovery Company, LLC, --- F.3d ---, 2012 WL 1650485 (7th Cir. May 11, 2012)

As the appellate court determined ACA needs to alert their lobbyists and not seek to circumvent the legislative process by running to the Commission every two years seeking a new definition of automatic dialer.

Adding “present” Before “capacity” Requires Rewriting the TCPA

Previously, petitioners have used the term “current” in attempts to bypass the TCPA’s use of capacity. Here ACA uses the term “present ability”. The terms and the result are the same. The petitioners are suggesting that the Commission insert new

language into the TCPA. Changing “capacity” to “current capacity” or “present ability” is a rewriting of the TCPA. The Commission cannot rewrite the TCPA.

But more importantly such a change would exempt every dialer in use today. After the prior Commission ruling on predictive dialers, the dialers were configured with a preview mode of dialing telephone numbers. Clearly, this was an attempt to circumvent the TCPA. That is exactly what ACA is attempting with their request – get a definition of predictive dialer from the Commission that will allow them to circumvent the TCPA.

ACA’s reliance on *Hunt v. 21st Mortgage Corp.*, 2013 WL 5230061 (N.D. Ala. Sept. 17, 2013) is misplaced. The system used in that case was a Nortel manual dialing system that was incapable of automatically dialing telephone numbers. It is typical of petitioners and commentors to misquote cases in an attempt to mislead the Commission.

What ACA is asking the Commission for is a recommended configuration of a predictive dialer that is a TCPA complaint automatic dialer. The ACA petition on this point defies all logic. My cell phone automatically dials telephone numbers either by selecting the number from my contacts or speed dials the number if so assigned. Manually dialing a telephone number on my cell phone doesn’t change the capability of my cell phone. Adding “current” or “present” before capability doesn’t change what my cell phone is capable of doing. Simply, because I chose not to use the capability or I disable the capability doesn’t change the fact that my cell phone could be used to automatically dial cell numbers without the prior express consent of the called party.

Prior Express Consent Attaches to A Number Not a Person

The ACA petition asks that the Commission to expand prior express consent far beyond the intent of the TCPA. The request is fatally flawed. ACA states: “However,

consumers sometimes change wireless telephone numbers for the specific purpose of avoiding a debt collection call.” Avoiding debt collection calls is not prohibited under any law:

“But the consumer has no obligation to talk to a debt collector at all. They don't ever have to say a word, and they may not want to. And they shouldn't have to have their friends and neighbors contacted because they just don't want to talk.”³

ACA suggests the Commission accept an interpretation of the TCPA that: "...an individual consents to be contacted regarding the debt on any wireless number affiliated with that person or the underlying debt." The interpretation is so overbroad that it seeks Commission approval to sanction automatically dialed calls to cell numbers “affiliated” with the debtor. Such an expansive exemption would sweep automatically dialed calls to family members, neighbors, friends, employers and colleagues under this overbroad prior express consent exemption simply because a cell number may be affiliated with a debtor.

There is voluminous case law that ACA ignores that states that prior express consent can only come from the called party and not some affiliated party. "Defendant's position that only the intended recipient has standing to bring a claim under the TCPA **has been squarely rejected in no less than twenty cases**, (emphasis added) cases that are factually similar to the instant case." *Olney v. Progressive Casualty Ins. Co.*, 2014 WL 294498 (S.D. Cal., Jan. 24, 2014).

³ From FTC Debt Collection Hearings 2.0 Apr 28, 2011 Donald A. Yarbrough Comments. http://www.ftc.gov/sites/default/files/documents/public_events/debt-collection-2.0-%E2%80%93protecting-consumers-technologies-change/transcript.pdf

A Safe Harbor Is Not Justified

ACA claims that: "...debt collectors cannot be held to the standard of omniscience." The claim is another misrepresentation of the material facts. Verification that a caller has the right number for an individual is easily accomplished. Neustar provides a service which is updated every 15 minutes (emphasis added) from over 250 sources. Neustar's service can instantly identify whether a phone number is a wireless or wireline number and further verifies whether the name and phone number go together **or whether the phone number now belongs to a different person** (emphasis added).⁴

Given the fact that Neustar provides a service which identifies the current subscriber to a cell number there is no longer any need for a 15 day safe harbor for ported numbers. The petition seeks to reverse prior Commission and court rulings that there is no "calling someone else" or "inadvertent" call defense for automatically dialed calls to cell numbers.

As the Commission has previously ruled: "...we reject proposals to create a good faith exception for inadvertent autodialed or prerecorded calls to wireless numbers..." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, ¶ 123, 18 FCC Rcd. 14014, 2003 WL 21517853, 2003 FCC Lexis 3673 (2003). "Indeed, the distinction proffered by AT&T potentially would eviscerate the policy goals of the statute in protecting telephone subscribers from unwanted telemarketing calls by creating a **virtually irrefutable defense** (emphasis added) that the telemarketer was trying to reach 'someone else' at that number. *In the Matter of Consumer.net v. AT&T*, 15 FCC Rcd. 281, 1999 WL 1256282 (1999). ACA has

⁴ <http://www.neustar.biz/resources/whitepapers/understand-tcpa-law-and-mitigate-risk> See also: <http://www.neustar.biz/resources/product-literature/on-demand-verification-for-credit-and-collections>

not provided any sound logic or legal basis for walking back these prior Commission determinations.

Voluminous case law debunks ACA's claims for a new "calling someone else" or "inadvertent call" exemption: "Standing to bring a private right of action is recognized for the person who answers a call to their cell phone, even if the caller intended to reach a different person." *Soppet v. Enhanced Recoery Co., L.L.C.*, 679 F3d 637 (7th Cir. 2007) ("called party" means the person subscribing to the called number at the time the call was made; *Kane V. National Action Fin. Servs., Inc.*, 2011 WL 6018403 (E.D. Mich. Nov. 7, 2011) at *7. "Like Kane, Plaintiff has received calls on his own cellular phone from a party using an automated dialing system and intending to reach someone else." *Harris v. World Financial Network National Bank et al*, 867 F.Supp.2d 888 (2012) WL 1110003. "The TCPA is essentially a strict liability statute which imposes liability for erroneous unsolicited [calls]." *Alea London Ltd. v. American Home Services, Inc.*, 638 F.3d 768, 776 (11 Cir. 2011). "...provides for a cause of action for any person who receives an unsolicited fax and does not limit the cause of action to the intended recipient of an unsolicited fax." *Dawson v. Am. Dream Home Loans*, No 06CV000513, 2006 WL 2987104 (Ohio Com. Pl. Oct. 4, 2006). "Accordingly, the Court finds that the "called party" for the purposes of § 227(b)(1)(A)(iii) was not Former Customer, but the Plaintiffs". *Breslow v. Wells Fargo Bank, NA*, 857 F. Supp. 2d 1316 - Dist. Court, SD Florida 2012.

See also: "Defendant's position that only the intended recipient has standing to bring a claim under the TCPA **has been squarely rejected in no less than twenty cases**, (emphasis added) cases that are factually similar to the instant case." "Adopting

Defendant's position would shift responsibility from a business making automatic and prerecorded calls to individuals receiving them." *Olney v. Progressive Casualty Ins. Co.*, 2014 WL 294498 (S.D. Cal., Jan. 24, 2014). "Instead, the Court is persuaded by Plaintiffs' argument that the TCPA is intended to protect the telephone subscriber, and thus it is the subscriber who has standing to sue for violations of the TCPA." *Gutierrez v Barclays* Case No. 10cv1012 DMS (BGS) WL 579238 (S.D. Cal. Feb. 9, 2011). "The use of 'called party' to unambiguously refer to the actual recipient in another section of the TCPA is compelling evidence that the term carries the same meaning in other provisions." *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1321 (S.D. Fla. 2012).

ACA suggests that the Commission adopt a new exemption in their rules that is not found in the TCPA. The Commission cannot create an exemption that does not exist in the TCPA. Even if the Commission were to do so the courts will look to the statute and not the Commissions crafting of an exemption not found in the TCPA. And as shown above there are dozens of cases that debunk the ACA request to create a wrong number exemption or safe harbor.

Conclusion

ACA's Petition for Rulemaking is a rehash of similar attempts to neuter the TCPA with a definition of automatic dialer which will exempt all dialers in use today. ACA's request to rewrite the statute to include "present ability" is also a rehash of the "current" capability petitions that attempt to rewrite the statute to exempt all dialers in use today. ACA's request to broaden prior express consent to all affiliated cell phone numbers conflicts with the plain language of the TCPA and voluminous court decisions

regarding prior express consent of the called party. ACA's request for a safe harbor also conflicts with the TCPA and flies in the face of available services that prevent wrong number autodialed calls.

I vigorously oppose the petition as it attempts to neuter the TCPA, rewrite the TCPA, expand prior express consent well beyond the intended scope of the TCPA and would create a virtually irrefutable defense to the TCPA. The petition is an attempt to thwart the privacy protections provided by the TCPA. The petition must be denied.

Respectfully submitted,

_____/s/_____

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