

**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 *ex parte* Notice of ACA.

Two things stand out in the recent *ex parte* notice of the ACA.¹

As a threshold matter, the example mentioned by the ACA of “plugging the manual dialing system into an ATDS” was precisely what I demonstrated when making a manual-dialed call on an iPhone which had an autodialing app presently installed. The proper way to address this issue is with an exemption under 227(b)(3)(C) for use of an ATDS when the criteria including direct human intervention is met, and not with a convoluted redefinition of ATDS that would require a content-based provision being engrafted onto that content-neutral definition.²

First the position taken by the ACA in the *Notice* “that prior express consent should attach to the consumer, rather than to the telephone number provided by the consumer at the time of consent”³ is quite different from the position taken by the ACA previously on this docket.

¹ *Notice of Ex Parte – ACA International (“ACA”), Petition for Rulemaking*, CG Docket Nos. CG 02-278, RM-11712, dated May 9, 2014. (“Ex Parte Notice”).

² *See Notice of Ex Parte Presentation of Robert Biggerstaff*, CG Docket No. 02-278, pp. 1-4, dated May 2, 1014.

³ *Ex Parte Notice*, p. 4.

In 2009, the ACA sang a very different tune. It expressly sought for express consent to attach to the phone number, and not to the person:

The proper construction of the TCPA regarding this situation is that the prior express consent of the consumer attaches to the provided telephone number and not to the type of service associated with that number. A contrary construction finds no basis in the TCPA nor the Commission's implementing rule and orders, as well as being simply unworkable.⁴

The mercurial position of the ACA on the proper interpretation of the TCPA is clearly not grounded by sound policy, but rather shifts on the whim of ACA's financial interests.

Second, the notion that "there is absolutely no return on investment for calling the wrong⁵ person – it is a waste of time, money, and effort"⁶ is patently false. Debt collectors might *prefer* to reach the debtor, but they do have ample incentive to call people other than the debtor, while *looking for* the debtor. Finding "fresh" contact information for a debtor is certainly a positive return on investment for those calls and a well-established procedure in the collection industry. There is no justification in the TCPA for calling the cell phone of an ex-spouse, neighbor, in-laws, or other person *looking for* the debtor...yet that is what ACA wants to be permitted to do. They may say they do not, but a careful reading of their proposed solutions indicate that the exceptions they seek belie any attempt at restraint on the industry's part.

⁴ *ACA International's Comment in Opposition to the Petition of Paul D.s. Edwards for Expedited Clarification and Declaratory Ruling Concerning the Telephone Consumer Protection Act*, p. 15, dated March 21, 2009 (emphasis added).

⁵ I note that the ACA uses the term "wrong person" rather than the more specific "non-debtor." This permits the ACA to claim that a debtor's roommate, ex-spouse, family member, neighbor, employer, or other person through whom the collector might be able to acquire contact with the debtor, is not the "wrong" person. Yet none of those people have consented to the calls to their cell phones.

⁶ *Ex parte Notice*, p. 5.

I have personally answered many wrong-number debt collection calls, and when I inform the caller they have a wrong number, they press forward with questions like “do you have a new number for Mr. Doe” or “can you give a message to Mr. Doe?” A simple review of training materials or interviews with former collectors will confirm that reaching a non-debtor is expected and agents are trained to use wrong number calls to acquire fresh information on the debtor. If they were not productive or had no ROI, they would simply apologize, hang up, and block the number from being called again. They do none of that.

Some have suggested to the Commission that reducing costs of making collection calls results in reduced costs to consumers. But they don’t mention the moral hazard of those reduced costs. As the cost to make the calls decreases, the financial incentive to call more numbers—and the more tenuously related numbers that are most likely to be wrong numbers—increases dramatically. The industry is actually shifting costs to innocent cell phone users who must pay to receive their wrong-number calls, and pay to receive their predictive dialer hangup (abandoned) calls. Cost-shifting to innocent consumers must *never* be permitted as a means of reducing costs to the industry.

The exemption for wrong number calls the ACA seeks sweeps two completely different classes of calls into one pot. One type is calls to a cell phone number given by the debtor to the creditor at the time the debt was initiated, when compliance product service provider (like Neustar) shows no reassignment, and the caller confirmed contact with the debtor at that number within a recent period of time. At the other end of the spectrum, however, are calls to skip-traced numbers, and calls to numbers chosen because they are *intentionally* calling a number for an ex-spouse, neighbor, relative, or other source not expecting to talk to the debtor, but rather on a quest to obtain fresh contact information for

the debtor. Whatever arguments are made to permit the former type of calls, must not be used to justify permitting the latter category of calls.

Finally, I cannot accept the claim that there is a “lack of any workable solutions to scrub for transferred numbers” as claimed by ACA.⁷ Those services, like Neustar currently exist. The industry can’t avoid its responsibility to comply with the law merely by claiming compliance products are imperfect. Indeed, demanding “perfection” of a compliance solution before using it is a common (an irresponsible) response from an industry that considers every consumer protection system like the TCPA as merely an impediment to its profits.

Respectfully submitted, this the 12th day of May, 2014.

/s/ Robert Biggerstaff

⁷ *Id.*