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Be Careful What You Wish For: Lack of Article III Standing Comes Back to Bite TCPA Defendants

Client Bulletins

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Defense arguments about a plaintiff's lack of standing in federal court can come back to bite them, as shown by the Southern District of Florida's recent decision in *Guerra v. Newport Beach Auto. Grp. LLC*, No. 21-20568, 2021 U.S. Dist. LEXIS 47354 (S.D. Fla. March 12, 2021). In *Guerra*, the plaintiff sued Newport Beach Auto Group in Florida state court, alleging violations of the TCPA. Being a federal statute, Newport Beach removed the case to federal court on the basis of federal question jurisdiction. Yet, the district court granted the plaintiff's motion to remand the case back to state court.

The Supreme Court definitively decided nearly a decade ago, in *Mims v. Arrow Financial Services*, that defendants could absolutely remove TCPA claims to federal court on the basis of federal question jurisdiction. (Which really shouldn't have required a Supreme Court decision to resolve that issue, but that's a separate and now long-moot discussion.) So, what gives? Let's discuss.

In 2016, the Supreme Court held in *Spokeo v. Robins* that absent a "concrete and particularized" injury, a plaintiff lacks standing to pursue claims in federal court under Article III of the Constitution. While *Spokeo* involved the FCRA, defendants in TCPA cases jumped on this holding. Plaintiffs in TCPA cases routinely make generalized claims of "annoyance" and "nuisance" regarding allegedly unwanted phone calls. But those are pretty uniformly just boilerplate language in pleadings. In reality, many plaintiffs aren't annoyed at all, but instead hope for such calls for the purposes of attempting a cash-grab settlement or bringing a class action lawsuit. Anyone in the TCPA realm knows there is a whole cottage industry of people who own multiple phones and/or purchase recently reassigned telephone numbers to increase the chance of receiving calls to bring suit.

In the wake of *Spokeo*, many defendants argued that these plaintiffs don't really have a "concrete and particularized" injury, and that general claims of annoyance (even if true) for nuisance calls isn't the type of injury befit for the limited jurisdiction of federal courts. Some Circuits rejected these arguments, holding that even receipt of a single phone call in violation of the TCPA is sufficient "injury" for purposes of Article III standing.

Yet, this argument has gained some traction in other courts and Circuits. Specifically, in *Salcedo v. Hanna*, the Eleventh Circuit (the Circuit over which *Guerra* was pending) held that the receipt of a single unwanted text message was not really a "concrete" injury sufficient to confer Article III standing: "The chirp, buzz, or blink of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face. Annoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts." The Eleventh Circuit held open the possibility that specific allegations of harm might give rise to an injury ("like enjoying dinner at home with his family and having the domestic peace shattered by the ringing of the telephone") or that multiple calls might be sufficient to confer standing. But one call? Nope, not enough in the Eleventh Circuit. Since then, some district courts have taken *Salcedo* further to hold that up to three calls also isn't sufficient to confer Article III standing.

But even when courts like *Salcedo* find that the plaintiff hasn't sufficiently alleged harm to confer Article III standing, this does not amount to a win *on the merits* for the defendant; i.e., plaintiff loses and everyone goes home. Instead, it simply means that the claim can't be heard in *federal* court, and the plaintiff must bring his or her claim in state court (and depending on state law, everyone can then fight over whether plaintiff can bring a claim there).

Which brings us to *Guerra*. After Newport Beach removed the case to federal court, the plaintiff moved to remand to state court. Now, the plaintiff latched onto *Salcedo* to argue that he *hadn't* alleged any *real* harm sufficient for Article III standing, and that instead only a Florida state court could decide his claims. And despite the plaintiff alleging he received multiple unwanted calls and jamming his complaint full of alleged harms like annoyance, intrusion upon seclusion, and trespass, the district court followed *Salcedo* (kind of, it never addresses the fact that the plaintiff alleged multiple calls in this case, which the Court in *Salcedo* indicated might be enough), held it did not have jurisdiction, and remanded the case back to state court.

Now, somewhat ironically after defendants had to fight to get TCPA cases heard in federal court for years (see *Mims* from earlier), plaintiffs are trying to turn "no injury" arguments like in *Salcedo* into a way to get *back* to state court. So, be careful what you wish for. To be clear, decisions like *Salcedo* are reaching the right conclusion: generally, many (most?) TCPA plaintiffs haven't incurred any real harm in any meaningful way. What implications that means for re-filed or remanded state court cases is a discussion for a different day.

But given the challenges imposed by many federal courts in putative class actions and hard lines many Circuits have drawn in TCPA jurisprudence, in my opinion federal courts are a better place to be.

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