

Third Circuit Rules that a Single Voicemail on a Cell Phone is Sufficient to Confer Standing for a TCPA Claim

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In another court's journey into the murky waters of constitutional standing post-*Spokeo*, the Third Circuit Court of Appeals concluded that one single voicemail on a consumer's cell phone is sufficient to confer standing under the Telephone Consumer Protection Act (TCPA). In *Sussino v. Work Out World, Inc.*, the plaintiff alleged that she received an unsolicited call on her cell phone from Work Out World (WOW). When she did not answer, WOW left a prerecorded promotional offer lasting more than one minute on her voicemail. WOW moved to dismiss for lack of standing under Article III. The district court granted WOW's motion on the grounds that a single solicitation was not "the type of case that Congress was trying to protect people against," and in any event, the call and voicemail did not cause a concrete injury. Sussino appealed.

Focusing on statutory interpretation and Congressional intent, the Third Circuit created a two-step inquiry for satisfying the concreteness requirement of constitutional standing. In the first step, the court reviews whether the statute is intended to prevent the injury alleged. If so, the second step looks at whether the alleged injury has a close relationship to a traditional harm. The Third Circuit held that an affirmative response to both these questions renders an intangible injury sufficiently concrete for constitutional standing purposes.

WOW had argued that the TCPA does not prohibit calls for which the phone's owner is not charged. The Third Circuit disagreed, concluding that WOW's reading of the TCPA was "strained." The Third Circuit explained that although the TCPA's prohibitions regarding automated calls do not apply to calls that are not "charged" to the recipient, the Federal Communications Commission may nonetheless exempt such category of calls "by rule or order...in the interest of the privacy rights that [the TCPA] is intended to protect." Therefore, the mere fact that the cell phone owner is not charged for the call is unavailing when the privacy rights of the owner are implicated.

But is the right to privacy by itself sufficiently concrete to establish constitutional standing? In this case, the Third Circuit held that "intrusion upon seclusion" resulting from a single prerecorded call amounts to a sufficiently concrete injury. Citing to a recent Ninth Circuit decision, *Van Patten v. Vertical Fitness Grp., LLC*, the Third Circuit

found that claims for “invasion of privacy, intrusion upon seclusion, and nuisance” have long been recognized as traditional common law claims by American courts. In enacting the TCPA, Congress “elevated a harm that ‘while previously inadequate in law’ ... was of the same character of previously existing ‘legally cognizable injuries.’” Accordingly, Sussino’s claim for “nuisance and invasion of privacy” satisfied the concreteness requirement for constitutional standing.

We will have to wait and see whether the analytical inquiry adopted by the Third Circuit in evaluating concreteness of injury will gain ground among the federal courts.

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Privacy, Third Circuit Court Of Appeals, TCPA, Telephone Consumer Protection Act