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News

Carlos Ortiz Analyzes in ARM Compliance Digest: Returned Phone Call Enough to Confer Standing in TCPA Case

September 29, 2020

In the September 28, 2020 edition of the *ARM Compliance Digest*, Hinshaw partner Carlos Ortiz discussed a Texas federal court ruling which dismissed an FDCPA claim over defendant placing one unanswered call to the plaintiff's cell phone, but denied a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim for alleged violations of the Telephone Consumer Protection Act because the plaintiff returned the call:

> In *Cunningham*, a federal judge from the Eastern District of Texas held that a *single* missed debt collection call made to the plaintiff's cellular phone was sufficient to establish an injury-in-fact for purposes of Article III standing under the TCPA. Although the defendant presented the court with authority from the Eleventh Circuit that held a single, unanswered text message was not sufficient to establish Article III standing under the TCPA, this court was not persuaded. The Cunningham court distinguished a text message in the other case from a cellular call in this litigation as follows:
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> *At issue in this case is a missed call, not a single, unsolicited text message. It only takes one glance at a text message to recognize it is for an extended warranty for a car you have never owned or a cruise you have won from a raffle you never entered. A missed call with a familiar area code, on the other hand, is more difficult to immediately dismiss as an automated message.*
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> While the *Cunningham* court had no Fifth Circuit precedent to guide it on how to define an injury-in-fact for a claim arising from the TCPA, the reasoning it applied was difficult to understand. That is, there are examples of decisions from other courts that have held that more alleged "harm" than what was at issue here was not enough to establish Article III standing under the TCPA. For example, in *Perez v. Golden Tr. Ins., Inc*., No. 19-24157-Civ, 2020 U.S. Dist. LEXIS 120819 (S.D. Fla. July 6, 2020), a district court held that *two* text messages received over the span of four days was not enough to establish Article III standing under the TCPA, even though the plaintiff alleged that "he was injured by wasting 60 seconds of his time reviewing the messages, causing aggravation and intrusion, wasting "7 minutes researching Defendant and the source of the messages on the internet," and wasting "5 minutes locating and retaining counsel for this case in order to stop Defendant's unwanted calls."" Thus,

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the *Cunningham* court's distinction on how an individual would react to a text message that he/she did not immediately recognize appears to be overly simplistic and inconsistent with everyday life.

Yet, the *Cunningham* court's decision remains concerning. If a single unanswered call is enough to confer Article III standing under the TCPA, then it would appear that just about any alleged "harm" would be. Hopefully, there will be more decisions out of the Fifth Circuit and from other jurisdictions that will hold differently.

Read the September 28, 2020 edition of AccountsRecovery.net Compliance Digest.