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Article III Standing A Double-Edged Sword for TCPA Plaintiff Seeking Remand to State Court

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In the post-*Spokeo* world, standing challenges are no longer commonplace for most TCPA defendants, with courts having largely held that the receipt of one call or text is sufficient to confer Article III standing. But in an unusual twist, the Southern District of New York recently faced *a TCPA plaintiff* challenging his own standing under Article III. *See Fischer v. Verizon N.Y., Inc.*, No. 18-CV-11628(RA), 2019 U.S. Dist. LEXIS 89015 (S.D.N.Y. May 28, 2019).

In *Fischer*, the *pro se* plaintiff filed suit in state court, asserting claims under the TCPA and New York state law. The plaintiff alleged that he received numerous "disruptive" robocalls from defendants between 2011 and 2017. He claimed that the calls persisted though his phone number was on the national do-not-call list and though he had sent the defendants multiple cease and desist letters.

The defendants removed the case to U.S. district court based on the federal court's original jurisdiction over private claims asserted under federal law. The plaintiff then moved to remand back to state court.

The plaintiff did not contest federal jurisdiction over TCPA claims generally, but instead argued that the court lacked subject matter jurisdiction because there was no concrete, particularized injury, or "injury in fact," to establish Article III standing. Let that sink in: a plaintiff claiming not to have a concrete injury, but seeking TCPA damages based on his alleged receipt of the defendants' robocalls.

The plaintiff's own allegations—that he received numerous prerecorded calls over the years and that the calls were so "disruptive" they had to be answered—worked against him in this context. The court denied the motion to remand, relying on prior Second Circuit authority holding that "the receipt of unauthorized, prerecorded phone calls is sufficient to confer standing to bring suit under the TCPA." The plaintiff alleged that he had *received* robocalls made without his consent, and that was enough.

We would assume that all TCPA plaintiffs want to establish an injury in fact and Article III standing, but that put the *Fischer* plaintiff at a disadvantage in his forum selection strategy. While out of the norm and ultimately unsuccessful, *Fischer* is a reminder to be creative and to look at both sides of TCPA authority. Some cases can be a double-edged sword, with authority typically deemed helpful sometimes boxing a party in to certain positions.

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