

Do I Have Standing Under the TCPA?

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McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation.

Ohio

Standing

***Dickson v. Direct Energy, LP*, 6th Cir. Case No. 22-3394.**

In this putative class action, the appellant appealed the district court's decision to dismiss his Telephone Consumer Protection Act (TCPA) claim for lack of Article III standing. On appeal, the Sixth Circuit reversed, finding that regardless of the number of ringless voicemails the plaintiff received, he had suffered a concrete injury cognizable under the TCPA.

The Bullet Point: The TCPA was enacted over public outrage over telephone marketing abuses. Specifically, companies had begun to use technology to automatically dial telephone numbers and deliver prerecorded voice messages. Congress decided this type of activity constituted an invasion of privacy and restricted such activity under the TCPA. In this case, the plaintiff received a single ringless voicemail. He never consented to such communications and filed suit on a class-wide basis for violating the TCPA. He claims that he was harmed by these communications because they tied up his phone line, cost him money, and were generally a nuisance. He also maintains that the calls disturbed his solitude and invaded his privacy. The defendant ultimately moved to dismiss the complaint for lack of standing, and the district court agreed.

On appeal, the Sixth Circuit found that a single ringless voicemail can satisfy Article III standing. The court noted that an injury need not necessarily be tangible (e.g., physical or monetary) to be concrete; intangible harms can create Article III standing. And Congress's decision to create a statutory cause of action may "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," so long as those injuries "'exist' in the real world." The court further noted that the injury asserted here had a close relationship to an intrusion upon seclusion claim, which sufficed to create standing.

Non-Compete Agreement

***TQL, LLC v. Leonard*, 12th Dist. Clermont, No. 2023-Ohio-2271.**

In this appeal, the Eleventh Appellate District reversed the trial court's decision refusing to enforce a non-compete clause.

The Bullet Point: Under Ohio law, "only reasonable noncompetition agreements are enforceable."

"A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public." An agreement not to compete "which imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect the employer's legitimate interests." On the legitimate purpose of a non-compete agreement is to prevent the disclosure of a former employer's trade secrets or the use of the former employer's proprietary customer information to solicit the former employer's customers. Another legitimate purpose of a non-compete agreement is the retention of employees in which an employer has invested time and other resources.

Illegality

***Buckeye Hoya, LLC v. Brown Gibbons Lang & Co., LLC*, 8th Dist. Cuyahoga No. 2023-Ohio-2177.**

In this appeal, the Eighth Appellate District affirmed the trial court's decision to grant summary judgment for the defendant, ultimately finding that while the parties failed to raise illegality as an affirmative defense, the claims still failed because the defendant fully performed.

The Bullet Point: To establish a breach of contract, a plaintiff must demonstrate (1) the existence of a contract; (2) that the non-breaching party performed on the contract; (3) that the breaching party failed to perform its contractual obligations without legal excuse; and (4) the breaching party suffered damages as a result of the breach. Illegality is an affirmative defense to a breach of contract action. Ohio courts may not enforce an illegal contract," and "a court will not lend its aid to any illegal contract, but on the contrary will leave the parties where it finds them and where they have placed themselves."

Florida

Assignment of Benefits

***SFR Services, LLC v. Tower Hill Signature Insurance Co.*, No. 6D23-36 (Fla. 6th DCA June 30, 2023)**

The Sixth District ruled that an assignment of benefits did not eliminate the duty to comply with the conditions of the insurance policy's Concealment or Fraud provision.

The Bullet Point: Under Florida law, while the assignment of a right to payment does not entail the transfer of contractual duties to the assignee, the assignment does not eliminate the duty of compliance with the conditions of the contract. At issue in this appeal is whether the assignee of a right to payment under an insurance contract was subject to the policy's Concealment or Fraud provision. The Sixth District ruled that it was, finding that the provision does not outline duties to be performed by the insured but instead provides a remedy for the insurer in the event of fraudulent conduct. The Sixth District reasoned that this provision would be of no value if its effect could be escaped by assigning the claim to a third party. Accordingly, the assignee was subject to the conditions set forth in the Concealment of Fraud provision contained in the insurance policy.

Punitive Damages

***Greenspire Global, Inc. v. Sarasota Green Group, LLC*, No. 2D22-2653 (Fla. 2d DCA June 23, 2023)**

The Second District examined whether a motion for leave to amend to claim punitive damages had proper evidentiary support.

The Bullet Point: Pursuant to Fla. Stat. § 768.72, a plaintiff must produce evidence that the defendant's conduct, knowledge, and intent reached the level of "intentional misconduct" or "gross negligence" before a punitive damages claim may proceed. In this case, the Second District concluded that the plaintiff's motion for leave to amend to assert punitive damages did not have proper evidentiary support. This is because the unverified complaint and its unauthenticated attachments were not evidence and, therefore, could not support the circuit court's determination that the plaintiff made an evidentiary showing sufficient to substantiate its punitive damages claims. Similarly, the plaintiff's affidavit from its managing member was inadequate to justify the punitive damages claims because it merely represented that the statements made in the unverified complaint are correct and failed to disclose how the affiant had personal knowledge of the defendant's intent. Accordingly, the order permitting the plaintiff to add punitive damages claims to its complaint was reversed.

Conditions Precedent for Civil Theft Claim

***Douglas Hannah v. Mark Holdings, LLC*, No. 6D23-83 (Fla. 6th DCA June 23, 2023)**

The Sixth District concluded that a plaintiff waived its right to argue that a defendant failed to comply with its demand letters sent in accordance with the civil theft statute.

The Bullet Point: Pursuant to Florida's civil theft statute, Fla. Stat. § 772.11(1), a prospective plaintiff must send a demand letter to its potential defendant as a condition precedent to initiating a civil theft action. The potential defendant then has thirty days to comply under the civil theft statute by returning the amount allegedly owed.

Upon receipt of the appellee's demand, the appellant sent a check drawn on his attorney's trust account within the statutory time frame. The appellee's lawyer accepted the check but did not tell the appellee about it or dispute the form of payment he received. The appellee then refused a wire transfer from the appellant and

demanded a second check. Because the appellee demanded payment in cash or a cash equivalent, the parties contest whether the appellant “complied” with the civil theft statute. On appeal, the Sixth District concluded that this issue need not be resolved because the appellee’s conduct waived any subsequent arguments it might have had about the appellant’s compliance with its demand letter upon receiving the full amount it demanded. Accordingly, the Sixth District concluded that the trial court should have entered a directed verdict on the appellee’s failure to satisfy a condition precedent and the appellant’s affirmative defense of payment.

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