

Set Back For “Set Up” Claims: Court Holds Serial-Plaintiff Lacks Standing to Pursue TCPA Claim

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Serial-litigant Mark Leyse was handed a well-deserved defeat after a decade long crusade against Bank of America (“BOA”) for alleged violations of the Telephone Consumer Protection Act (“TCPA”). *Leyse v. Bank of Am., N.A.*, No. 11-7128, 2020 U.S. Dist. LEXIS 44234 (D.N.J. March 13, 2020).

The case has a long and tortured history, including multiple trips up to the Third Circuit, but to briefly summarize. In 2005—yes, *over 15 years ago*—Leyse answered a phone call from DialAmerica, which called on behalf of BoA. Leyse was a BoA customer, but the call (to a residential landline) was intended for his roommate. The call played a prerecorded message. Leyse sued BoA for alleged violations of the TCPA, which in relevant part prohibits pre-recorded message calls to residential landlines without the prior express consent of the called party.

Now, most people would simply let ignore a call like this. But not Leyse. You see, Leyse was an “investigator” for a plaintiff’s attorney, where his job included using fake names to call companies and record the calls for purposes of gathering evidence for TCPA lawsuit. True to form, after Leyse received the call at issue, he called DialAmerica over 20 times, using fake names and recording calls, to try and gather more evidence for a case.

On March 13, 2020, the district court entered summary judgment against Leyse and in favor of BoA on multiple grounds. First, the court found that Leyse lacked Article III standing because he did not suffer any injury in fact. The court noted that Leyse did not even bother to allege any type of harm (e.g., annoyance, nuisance, etc.) and simply sought statutory damages for an alleged technical violation. The court concluded that Leyse could not reasonably show any alleged harm from the calls when the “evidence clearly shows that he welcomed such calls in his role as a paid investigator aiding his counsel in the preparation of TCPA lawsuits.”

But the district court didn’t stop there. The court also held that Leyse lacked statutory standing; that is, that Leyse was outside of the “zone of interests” of honest consumers that the TCPA was intended to protect. These two grounds for judgment are significant. Besides *Stoops*, many courts to date have been hesitant to stop “set up” TCPA claims, despite how common such manufactured claims are becoming. (The court’s statutory standing determination is also important as a “death knell” of a manufactured TCPA claim entirely, as opposed to a lack of Article III standing, which may simply keep the matter out of federal court.)

The court then held that because Leyse was a BoA customer, the then-existing “established business relationship” (“EBR”) defense also applied and made the call exempt from the TCPA. IMPORTANT: THE EBR DEFENSE NO LONGER APPLIES UNDER THIS SECTION OF THE TCPA

AND WAS ELIMINATED YEARS AGO. But given that the EBR defense was still valid in 2005 when Leyse received the call, it provided another discreet basis for the court's judgment in favor of BoA.

Given the history of the case so far, an appeal back to the Third Circuit seems probable, but good law has been made, and hopefully more courts will follow suit to try and curb the rampant TCPA-abuse with respect to manufactured and set up cases.

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