FILED

FEB 28 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELISA R. ROMERO, Plaintiff-Appellant, v. DEPARTMENT STORES NATIONAL BANK; FDS BANK; DOES, 1 through 10, Defendants-Appellees.	No. 16-56265 DC No. CV 15-0193 CAB MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Argued and Submitted February 5, 2018
San Francisco, California

Before: D.W. NELSON, TASHIMA, and CHRISTEN, Circuit Judges.

Plaintiff Elisa Romero appeals the district court's dismissal of her claim against Defendants Department Stores National Bank and FDS Bank (the "Banks") under the Telephone Consumer Protection Act ("TCPA") for lack of Article III standing. Romero also appeals the district court's grant of summary judgment to

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

the Banks on her claim under California's Rosenthal Fair Debt Collection Practices Act ("the Rosenthal Act") and her common law claim for intrusion upon seclusion. Romero's claims arise out of nearly three hundred autodialed calls the Banks placed to Romero's cell phone regarding a debt that Romero concedes she owed. Romero does not dispute that she provided the Banks her cell phone number; she seeks compensation for calls made after July 2014, when she alleges that she first asked the Banks to stop calling.

We review questions of standing de novo. *Preminger v. Peake*, 552 F.3d 757, 762 n.3 (9th Cir. 2008). We also review a grant of summary judgment de novo. *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011). We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand.

1. The district court erred in concluding that Romero lacked standing under Article III to bring a TCPA claim. The district court did not have the benefit of *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017), in which we held that "a violation of the TCPA is a concrete, *de facto* injury." *Id.* at 1043. Romero has shown that this concrete harm is fairly traceable to the Banks' challenged conduct. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). We reject the Banks' attempt to inject a subject matter nexus requirement into the standing analysis. *See Bd. of Nat. Res. of State of Wash. v. Brown*, 992 F.2d 937,

945 (9th Cir. 1993) (citing *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 77–79 (1978)).

We also reject the Banks' attempt to distinguish *Van Patten*. The TCPA is not limited to telemarketing calls; Congress recognized unsolicited contact as a concrete harm regardless of caller or content, and this harm is similar in kind to harm that has traditionally been redressable by courts. *See Van Patten*, 847 F.3d at 1042–43 (citing Telephone Consumer Protection Act of 1991, Pub. L. 102–243, § 2, ¶¶ 10, 12, 105 Stat. 2394 (1991) and Restatement (Second) of Torts § 652B (Am. Law. Inst. 1977)). Thus, "[a] plaintiff alleging a violation under the TCPA 'need not allege any *additional* harm beyond the one Congress has identified.'" *Id.* at 1043 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)). Disputes regarding whether Romero gave prior express consent to receive calls from the Banks or revoked that consent go to the merits of her TCPA claim, not to her standing. *See Van Patten*, 847 F.3d at 1043–48.

2. The district court erred in granting summary judgment to the Banks on the basis of a defense under the Rosenthal Act. This provision states in full:

> A debt collector shall have no civil liability under this title if, within 15 days either after discovering a violation which is able to be cured, or after the receipt of a written notice of such violation, the debt collector notifies the debtor of the violation, and makes whatever

> adjustments or corrections are necessary to cure the violation with respect to the debtor.

Cal. Civ. Code § 1788.30(d).[1]

The Rosenthal Act is remedial, *see* Cal. Civ. Code § 1788.1, and so it is construed broadly to protect consumers, *see People ex rel. Lungren v. Superior Court*, 926 P.2d 1042, 1055 (Cal. 1996). With this in mind, the plain meaning of § 1788.30(d) comports with Romero's interpretation that the defense does not apply if the creditor cannot undo the harm to a debtor that its violation has already caused. Note that § 1788.30(d) applies only to "a violation which is able to be cured." The Banks' contrary interpretation would undermine the remedial goals of the Rosenthal Act.

That California would require a creditor to return a debtor to the position she was in before the Rosenthal Act violation in order to "cure" that violation finds support in other contexts, where future compliance is an insufficient "cure" if the ill effects of a violation have not been or cannot be remedied. *See Physicians Comm. for Responsible Med. v. Applebee's Int'l, Inc.*, 168 Cal. Rptr. 3d 334, 346–47 (Ct. App. 2014) (discussing Cal. Health & Safety Code § 25249.7(d)(1));

---

[1] Romero's argument that this defense is no longer available is foreclosed by *Afewerki v. Anaya Law Group*, 868 F.3d 771, 778–79 (9th Cir. 2017).

Page v. MiraCosta Cmty. Coll. Dist., 102 Cal. Rptr. 3d 902, 929–30 (Ct. App. 2009) (discussing Cal. Gov't Code § 54960.1(c)(2), (e)); *People v. Franco*, 228 Cal. Rptr. 527, 530 (Ct. App. 1986) (discussing Cal. Penal Code § 844). Because the Banks' violation here is the type that has allegedly caused harm like interruption of Romero's solitude, which cannot be cured merely by ceasing calls going forward, the district court erred in granting judgment for the Banks on this claim on the basis of the mere assertion of the defense.

3. The district court erred in granting summary judgment to the Banks on Romero's claim for intrusion upon seclusion. On this claim, Romero must prove: "(1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person." *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1998) (citation omitted).

California adopted this formulation of the intrusion upon seclusion tort from § 652B of the Restatement (Second) of Torts and courts draw heavily upon the Restatement's description of the tort. *See Taus v. Loftus*, 151 P.3d 1185, 1212, 1217 (Cal. 2007). The Restatement recognizes that telephone calls demanding payment of a debt may give rise to liability when they are "repeated with such persistence and frequency as to amount to a course of hounding the plaintiff." Restatement (Second) of Torts § 652B cmt. d (Am. Law. Inst. 1977). A creditor's

voluminous calls, even if unanswered, can also warrant civil penalties, suggesting that the California legislature and other reasonable people could consider such conduct highly offensive. *See* Cal. Civ. Code § 1788.11(d); *cf. Komarova v. Nat'l Credit Acceptance, Inc.*, 95 Cal. Rptr. 3d 880, 896 (Ct. App. 2009) (citing Cal. Civ. Code § 1788.11(e)).

When considering the evidence here in the light most favorable to Romero, a reasonable jury could conclude that the Banks' nearly three hundred calls, with multiple calls per day, from numbers Romero was not always able to recognize, which continued after she communicated that she was unable to pay and requested that the calls stop, would be highly offensive to a reasonable person. This is so even though the calls were made by a creditor to a number initially provided by the debtor wherein the content of the calls was not harassing.

The Banks have not shown that California would apply a creditor's qualified privilege to this type of claim, and we decline to do so here on this record. The district court assumed that Romero could meet the first element of her claim regarding intrusion into a private place. We decline the Banks' request to affirm on the alternative ground that Romero cannot meet this fact-intensive element of her claim, as there remain disputed issues that preclude affirming summary judgment on this basis.

REVERSED and REMANDED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk