

Eleventh Circuit Finds No Harm in a Single Multimedia Text Message

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In *Salcedo v. Hanna*, No. 17-14077 (11th Cir. 2019), the Eleventh Circuit recently ruled that receipt of a single, unsolicited text message does not constitute the harm necessary to achieve Article III standing in a Telephone Consumer Protection Act (“TCPA”) lawsuit.

Background

In the suit, the plaintiff, John Salcedo, alleged that he received a single text message from his former attorney, Alex Hanna, offering a ten percent discount on Hanna’s services.

Salcedo filed a TCPA suit in the United States District Court for the Southern District of Florida as a representative for a putative class of former Hanna clients who alleged that they had also received unsolicited text messages from Hanna over the past four years. Salcedo alleged that the single text message caused him “to waste his time answering or otherwise addressing the message.” Salcedo also claimed that he was harmed because by answering the text message he and his cellular phone were “unavailable for otherwise legitimate pursuits” and that the message resulted in an invasion of his privacy and “right to enjoy the full utility of his cellular device.” He did not allege that the text cost him any money.

Hanna moved to dismiss Salcedo’s complaint on multiple grounds including lack of standing. The district court denied Hanna’s motion but the Eleventh Circuit reversed and remanded with instructions to dismiss the complaint. As a result, **the Eleventh Circuit created a split with the Ninth Circuit on the concreteness of harm required to establish Article III standing.**

Opinion

The Eleventh Circuit recognized that in prior decisions it held that plaintiffs had suffered harm and established standing even though they received only a single correspondence. *See e.g., Palm Beach Golf Center – Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015)(A plaintiff who received a single junk fax suffered the harm required to establish standing because during the minute or so that it took to receive and process the fax, the machine was unavailable for receiving legitimate business messages); *and see Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362, 1366 (11th Cir. 2017)(considering “the cost of printing the

unsolicited fax.”). However, **the Eleventh Circuit noted that the facts Salcedo alleged were distinguishable because he did not have tangible costs** like the consumption of paper, ink and toner. Likewise, Salcedo did not have the intangible costs that the plaintiff in *Palm Beach Golf* established because unlike a fax machine, which is entirely consumed while receiving a fax, the cell phone user can continue to use all of phone’s functions and receive other messages while the user receives a text message. The Court chalked Salcedo’s experience up to a “brief, inconsequential annoyance” unlike the “real but intangible harms” that Congress intended to prevent under the TCPA.

In addition to its finding, the Eleventh Circuit’s decision is significant because it contradicts *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017), which held that the receipt of two unsolicited text messages constituted an injury-in-fact. However, the Eleventh Circuit noted that in *Van Patten*, the court stopped short of examining whether an isolated text message received while out of the home fell within Congress’s intent to protect consumers from the nuisance of unwanted calls.

In justifying why it reached a different conclusion than its sister court, the Eleventh Circuit examined Congress’s legislative intent and its findings about telemarketing to determine whether they supported treating Salcedo’s allegations as concrete injury-in-fact. The Eleventh Circuit noted that despite its many amendments to the TCPA statute enacted in 1991, Congress has generally said nothing about harms from telemarketing via text message. In fact, **the Eleventh Circuit held that Congress’s legislative findings about telemarketing suggest that a single text does not disrupt the privacy and sanctity of the home in the way that led Congress to enact the TCPA in the first place.** For example, cell phones often have their ringers silenced and texts are often received when the user is outside of the home because cell phones are portable. Similarly, as discussed above, Congress has previously found faxes to be problematic because they occupy a recipient’s entire device while the instantaneous receipt of a text message does not carry the same implications.

Further, the Eleventh Circuit considered whether Salcedo’s alleged harm had a close relationship to a harm that has traditionally provided standing in the U.S. courts and found that it did not. For example, in comparison to Salcedo’s claim for invasion of privacy, the Court examined the similar tort of intrusion upon seclusion, which requires an invasion of privacy that would be highly offensive to a reasonable person. The Court found that Salcedo’s allegation that he received a single unwanted text message simply does not rise to that intense level of invasion. Similarly, the “seclusion” element requires intrusion into private affairs which are generally intrusions like eavesdropping and wiretapping, which are not closely related to the Salcedo’s alleged experienced. The Court conducted similar analyses with the torts of trespass and nuisance as well as conversion and trespass to chattel. However, none of Salcedo’s allegations were closely related to the elements of those torts either. Thus, the Eleventh Circuit found that the history and judgment of Congress do not support a finding of concrete injury in Salcedo’s allegations.

Despite this ruling, **the Eleventh Circuit declined to set a quantitative measurement for how many text messages would amount to the intangible harm necessary to show an injury-in-fact and establish standing.** The Court also made clear that it did not find that wasted time can never constitute a concrete harm for standing purposes, only that Salcedo’s allegation of wasted time was not concrete enough. Yet, while it declined to set a specific measurement the Eleventh Circuit noted that generally wasted time requires more than a few seconds.

Implications

This decision will have impacts on single plaintiff and class action cases. With respect to single plaintiff cases, because each text in violation of the TCPA technically constitutes its own cause of action, plaintiffs can no longer expect to establish standing to proceed on each text messages alleged in the complaint and may not recover damages for every single text message they receive. In other words, it will not be enough just to allege that a certain number of texts were received and that they texts were harmful as a whole. On the other hand, defense attorneys will likely have more leeway to push back and get creative with motions to dismiss and the text message-related questions they ask plaintiffs in discovery, at trial and in arbitration to discredit the plaintiff's allegation of harm.

From a class action standpoint, this decision will likely limit the number of text message cases because the class members will have to establish a concrete injury consisting of something more than just receipt of a text message. Moreover, identifying and establishing a common concrete harm among the class members could be an insurmountable challenge in certifying a class.

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