The Eleventh Circuit Holds that A TCPA Claim Based on a Single Unsolicited Text Message Does Not Support Constitutional Standing

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Texting has displaced phone calls as the dominant means of communication for many cell phone users. Unsurprisingly, advertisers soon followed, using text-message-based solicitations, both for existing and potential customers. This practice has been hampered, however, by the application of the Telephone Consumer Protection Act (TCPA).

The TCPA prohibits the use of an automatic telephone dialing systems to call residential or cellular telephone lines without the consent of the called party. *See* 47 U.S.C. § 227(b)(1)(A)(iii), (B). Unsolicited calls to residential landlines or cell phone lines lead to significant sanctions of $500 to $1,500 per call. While the TCPA statute is silent regarding text messaging—not least because this technology did not exist in 1991—the FCC applied the statute to text messages beginning in 2003, treating them as calls for TCPA purposes.

Under FCC guidance, any unsolicited text message would qualify as a "call" for the TCPA's purposes, leading to the same, significant sanctions as qualifying calls. A recent decision of the Eleventh Circuit, however, has limited the reach of the TCPA when applied to text messages. *See generally Salcedo v. Hanna,* __ F.3d __, 2019 WL 4050424 (11th Cir. August 28, 2019).

Salcedo considered the question under the umbrella principle of constitutional standing. The well-established law of standing requires that there must be some real harm to the plaintiff in order to invoke the jurisdiction of the courts. This requirement derives from the "case or controversy" requirement under the U.S. Constitution. While the statutory damages of at least $500 seemingly recognize a harm that would support such standing, in *Salcedo's* words, "Even when those political branches appear to have granted us jurisdiction by statute and rule, we are still obliged to examine whether jurisdiction exists under the Constitution."

Salcedo held that there must be some allegations showing actual injury to the recipient. Since many phone plans are unlimited and do not impose the "per text" fees that were more common when the FCC promulgated rules applying the TCPA to text messages, the ability to show concrete injury has lessened over time. Unlike calls to land lines, "a single unwelcome text message will not always involve an intrusion into the privacy of the home in the same way that a voice call to a residential line necessarily does. Certainly, Salcedo has not alleged that he was in his home when he received Hanna's message. As we have also noted, the 1992 amendment allowing the FCC to exempt free-to-receive calls to cell phones, 47 U.S.C. § 227(b)(2)(C), suggests less congressional concern about calls to cell phones. And by nature of their portability and their ability to be silenced, cell phone calls may involve less of an intrusion than calls to a home phone."

The courts have shown an interest in limiting the reach of congressionally created harms through the constitutional requirement of standing before. *See, e.g., Genesis Healthcare Corp. v. Symczyk, 133* S. Ct. 1523, 1528 (2013) (holding that collective action claim mooted when the lead plaintiff accepted an offer of all the damages she could possibly win through a Rule 68 settlement offer). In *Salcedo,* the *de minimis* nature of the harm, changes to cell phone billing allowing free receipt

of text messages from third parties, congressional silence, and the vague "allegations of a brief, inconsequential annoyance are categorically distinct from those kinds of real but intangible harms. The chirp, buzz, or blink of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face. Annoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts."

Salcedo acknowledged a contrary ruling from the Ninth Circuit. S*ee Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (holding that the receipt of two unsolicited text messages constituted an injury in fact). *Van Patten* stated *inter alia* that "[w]e recognize that Congress has some permissible role in elevating concrete, de facto injuries previously inadequate in law 'to the status of legally cognizable injuries.' . . . We defer in part to Congress's judgment, 'because Congress is well positioned to identify intangible harms that meet minimum Article III requirements.'" *Salcedo*, however, emphasized that Congress has not addressed text messages specifically and would not employ the same deference to the FCC that it might otherwise afford to Congress in elevating inchoate harms into statutorily and constitutionally cognizable ones. In its words, "Any possible deference to the FCC's interpretation of the TCPA—the source of its application to text messaging—is not obviously relevant where the Supreme Court has specifically instructed us to consider the judgment of *Congress*."

Because of the current split in circuit authority, it would be wise not to resume an aggressive campaign of unsolicited text messages. *Salcedo* is only precedent for the Eleventh Circuit, and it did not consider whether constitutional standing may be acquired from the receipt of multiple unsolicited text messages. Nonetheless, the *Salcedo* precedent does afford a powerful tool for defendants in TCPA cases going forward and may also prove persuasive in circuits that have yet to address standing defenses to TCPA claims, including in analogous contexts like "unanswered calls," calls to unusued landlines, or calls where recipients don't exercise opt-out mechanisms offered by the sender.