Class Actions Alert

11th Circuit Holds That Single Unwanted Text Message Does Not Confer Standing

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Key Points

• In Salcedo v. Hanna, the court found that a single text message sent in alleged violation of the TCPA does not result in concrete injury required by Article III.

• A single text message does not result in the type of harm that Congress intended to address by enacting the TCPA, or that would support standing under common law.

• The seminal opinion will likely limit the all-too-common scenario of putative class actions launched based on a single errant text message.

The 11th Circuit has ruled that the receipt of a single unwanted text message does not result in a concrete injury sufficient to confer Article III standing. In Salcedo v. Hanna, 2019 WL 4050424 (11th Cir. Aug. 28, 2019), the court addressed an all-too-familiar scenario of a putative class action complaint under the Telephone Consumer Protection Act (TCPA) seeking aggregate statutory damages based on a single, allegedly errant text message. The court carefully examines—and appropriately rejects—the proposition that the momentary annoyance of a single text constitutes a concrete injury under Article III. Its opinion may provide an important check against abusive litigation that goes far beyond Congress’s concern in enacting the TCPA.

The Underlying Lawsuit and District Court Decision

The lawsuit arose out of a text message that plaintiff Salcedo received from his former lawyer Hanna, offering a discount on future legal services. Alleging that the text invaded his privacy and “right to enjoy the full utility of his cellular device[,]” Salcedo filed a class action lawsuit on behalf of other recipients of unsolicited text messages sent by Hanna. As is typical in TCPA litigation, the complaint sought classwide statutory damages of $500 to $1,500 for each unsolicited text sent by Hanna over a four-year period. Hanna moved to dismiss, arguing that Salcedo failed to allege a concrete injury sufficient to confer standing under Article III.

The district court denied the motion, based on an 11th Circuit precedent that had held that the receipt of a one-page fax advertisement in violation of the TCPA resulted in a concrete injury and Article III standing. Noting that the scope of that precedent was thrown into question by the Supreme Court’s decision in Spokeo, Inc. v. Robins, 136
S. Ct. 1540 (2016), the district court certified the standing issue for interlocutory appellate review.

The 11th Circuit’s Opinion

The 11th Circuit followed the two-part analytical framework set forth in Spokeo, reviewing first the legislative history and judgment of Congress in enacting the TCPA and second the analogues at common law (if any) to the asserted statutory claim. The court found that neither supported Plaintiff’s alleged standing.

The court summarized in a word what Congress had found as to “harms from telemarketing via text message”: “nothing.” Id. at *4 (emphasis in original). This, the court explained, was unsurprising, since text messaging in its current form did not exist at the time of the TCPA’s enactment in 1991. Even in subsequently amending the TCPA, Congress had not “added text messaging to the categories of restricted telemarketing.” Id. at *5 (footnote omitted). Only subsequent Federal Communications Commission (FCC) rulings had expanded the scope of the statute to encompass texts.

As for the TCPA’s legislative history, Congress’s primary concern was not (as many plaintiffs argue) unwanted calls to cellular telephones, but was instead the “concern for privacy within the sanctity of the home[.]” Id. at *4. Because mobile devices are “often taken outside of the home and often have their ringers silenced,” text messages present significantly “less potential for nuisance and home intrusion.” Id. Indeed, Congress had instructed the FCC that the agency might exempt from the TCPA’s scope any nonchargeable calls placed to mobile numbers, undermining the notion that the TCPA provides a blanket prohibition of all calls to mobile numbers placed without consent. Congress also had instructed the FCC to establish telemarketing standards that include a “five-second rule” for releasing the called party’s line within five seconds of hang-up—showing that “Congress does not view tying up a phone line for five seconds as a serious intrusion.” Id. at *8.

Based on this analysis, the court concluded that the “judgment of Congress is ambivalent at best” as to whether an unwanted text constitutes concrete injury. Id. at *5. Noting that “congressional silence is a poor basis for extending federal jurisdiction to new types of harm” (id.), the court rejected Salcedo’s broad argument—so often made in TCPA litigation—that the mere statutory violation sufficed to confer standing, reasoning that texts messages that do not “involve an intrusion into the privacy of the home” are not the type of harm that Congress targeted in enacting the TCPA. Id.

The court also found that the common law did not provide standing in comparable circumstances. Common law theories, such as invasion of privacy, nuisance and trespass to chattel, present “significant differences in the kind and degree of harm they contemplate providing redress for.” Id. at *7. Such common law claims arise only in the event of serious invasions of real or personal property, or serial, highly offensive intrusions into one’s personal privacy, such as active intermeddling into one’s personal effects and affairs. The court noted that comments to Section 652B of the Restatement (Second) of Torts specify that liability for invasion of privacy does not arise “for one, two or three phone calls.” Id.

The court also declined to follow the 9th Circuit’s decision in Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037 (9th Cir. 2017), finding the decision to be based on a “one-sentence review of history[,]” rather than the analysis required by Spokeo. The court also distinguished cases (including its own precedent) involving junk faxes,
noting that unlike a fax machine that is unavailable due to the unwanted fax, “a text message consumes the receiving device not at all.” Id. Nor had Plaintiff alleged that he incurred any cost from the mere receipt of the text.

Takeaways

Salcedo is an important reminder that not every unwanted text message supports a putative nationwide class action under the TCPA. Instead, plaintiffs must show that the text message actually resulted in a concrete injury of the specific sort that Congress intended to address, or that presents highly offensive intrusions into personal privacy as recognized at common law. It remains to be seen whether these requirements can be met in individual or putative class actions challenging text messages under the TCPA.

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