



Business Litigation Update

August 2023

One Text Message Is Enough: Eleventh Circuit Essentially Overturns Prior TCPA Ruling

Key Notes:

- A July 24 *en banc* decision from the Eleventh Circuit held that the receipt of a single unwanted text message is sufficient to establish standing to pursue a claim under the TCPA.
- This decision essentially overturns the Eleventh Circuit's 2019 decision in *Salcedo v. Hanna*, which held that the receipt of a single text message was not a concrete injury sufficient to establish standing.
- Entities that communicate via text message should develop policies and safeguards to ensure text messages are not sent to individuals who did not consent to receiving them.

To bring a lawsuit in federal court, a party must have “standing,” i.e., a concrete injury the court can redress. Courts have often grappled with what is sufficient to make an injury “concrete,” especially when the alleged injury is not a physical injury or financial loss.

In *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), the Eleventh Circuit held that “the receipt of a single text message” is not a concrete injury and, therefore, not sufficient to create standing under the Telephone Consumer Protection Act (TCPA). However, the Eleventh Circuit recently changed course in *Drazen v. Pinto*, 2023 U.S. App. LEXIS 18832 (11th Cir. July 24, 2023), finding that individuals who receive a single unwanted text message have standing under the TCPA.

In *Drazen*, the defendant was alleged to have sent unwanted text messages in violation of the TCPA. A class action was filed in August 2019 and was consolidated with several other district court cases across the country. The

parties eventually reached a class-wide settlement, which defined the class members as “all persons within the United States who received a call or text message to his or her cellular phone from” the defendant between November 2014 and December 2016. The district court ultimately approved the settlement but acknowledged the issue of standing under *Salcedo* because about 7% of the proposed class members had only received one text message.

On appeal, a panel for the Eleventh Circuit relied on *Salcedo* to dismiss the case due to a lack of jurisdiction, observing that a “class definition cannot stand to the extent that it allows standing for individuals who received a single text message[.]” The plaintiffs then moved for a rehearing *en banc*, urging the Eleventh Circuit to revisit the holding in *Salcedo*. That motion was granted.

The *en banc* panel disagreed with the prior decision, holding that individuals who received only one unwanted text message did have standing to sue. In reaching this decision, the court provided a detailed discussion on intangible harms and the creation of standing, noting that once Congress identifies an intangible harm, it is for the courts to decide if that intangible harm has “a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” If so, there is a concrete injury and the plaintiff will have standing.

The court observed that in enacting the TCPA, Congress identified the receipt of unwanted marketing calls and text messages as an intangible harm, and that this intangible harm shares a close relationship with the common law tort

of intrusion upon seclusion. As a result, the court held that even those individuals who received only one unwanted text message had standing.

The defendant argued that the receipt of only one text message “falls short” of the degree of harm needed to establish intrusion upon seclusion. The court rejected this position, noting that a court should ask “whether the harms are similar in kind but not degree.”

The Eleventh Circuit’s prior decision in *Salcedo* was the minority rule. By essentially overturning that decision, the Eleventh Circuit has joined the majority of federal circuits that have addressed the issue, which have taken the “kind but not degree” approach in evaluating standing under the TCPA.

As has always been the case, entities that send text messages or make calls that may be subject to the TCPA are encouraged to be cautious and ensure their compliance with the TCPA.

FOR MORE INFORMATION

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