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Eleventh Circuit Delivers Crushing Blow to Single-Text TCPA Plaintiffs

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As thousands of actions under the Telephone Consumer Protection Act (TCPA), and particularly putative class actions involving the TCPA, continue to be filed throughout the country, the Eleventh Circuit has issued a potentially game-changing decision in *Salcedo v. Alex Hanna*, No. 17-14077, 2019 WL 4050424 (11th Cir. Aug. 28, 2019) – namely, that a single text message received by a consumer does not provide sufficient evidence of "injury in fact" to confer Article III standing to prosecute a claim for TCPA violations.

TCPA cases involving a single errant text were never intended to be particularly troublesome, as statutory damages are limited to $500 – $1,500 per violation, with no entitlement to attorneys' fees. However, the Plaintiff's bar has taken to filing these cases as class actions in the hope of drastically increasing their potential recovery. *Salcedo* involves one of these putative class actions, wherein the named plaintiff asserted that he received a single, unsolicited text offering him a discount on future legal services. He filed suit seeking statutory damages and to have himself named as a putative class representative, alleging that the text caused him harm by wasting his time and intruding upon his seclusion.

In reaching its decision that Salcedo does not have standing to bring this action, the Eleventh Circuit takes a stroll through history – namely the history of the TCPA, how Article III standing is defined, its own precedent, the intent of Congress, and the history of how these elements have been treated together.

The Court ultimately concludes that Salcedo's allegations of wasted time and intrusion on seclusion are insufficient to demonstrate a true, concrete "injury in fact." The Court found a text message distinct from a fax receipt of a junk fax based upon the fact that while a facsimile machine would be inoperable while the fax was being received, there was no such limitation on a text. *Salcedo*, 2019 WL 4050424, at *3-4. Although dicta, the Court also noted that a receipt of a single text did not amount to a telephone call that shatters domestic peace. *Id.* at *5, 7. Instead, the Court concluded, "Salcedo's allegations of a brief, inconsequential annoyance are categorically distinct….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 waved in one's face. Annoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts." *Salcedo*, 2019 WL 4050424, at *7. It goes on to say, "We have assessed how concrete and real the alleged harm is, and we have concluded that it is not the kind of harm that constitutes an injury in fact." *Id.*

It is noteworthy that the decision was on appeal of a motion to dismiss, and so it grounds itself in a finding that Salcedo's allegations of harm were insufficient to merit Article III standing. It therefore leaves open the potential for future plaintiffs to allege unusual situations to support a viable claim, such as utilizing a phone plan that charges for texts. However, such unusual situations may have difficulty satisfying the typicality requirement for class actions imposed by Federal Rule of Civil Procedure 23(a)(3).

Moreover, the concurring opinion in *Salcedo* also noted that it understood the majority's decision as narrowly "driven by the allegations…[of] only one text message. The majority opinion – appropriately, in my view – leaves unaddressed whether a plaintiff who alleged that he had received multiple unwanted and unsolicited

text messages may have standing to sue under the TCPA." *Id.* at 8. There additionally remains the possibility that the Eleventh Circuit will review the *Salcedo* decision en banc.

Additionally important, the Court consistently notes its disagreement with the decision of its sister court, the Ninth Circuit, in *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017). In *Van Patten*, the Ninth Circuit held that the receipt of *two* unsolicited text messages was sufficient to constitute injury in fact, offering the axiomatic conclusion "Congress identified unsolicited contact as a concrete harm," (*Id.* at 1043), which the *Salcedo* court found a "broad overgeneralization of the judgment of Congress." *Salcedo*, 2019 WL 4050424, at *5. This circuit split raises the potential that review by the U.S. Supreme Court will be sought. However, for now, single-text cases under the TCPA in Florida, Alabama, and Georgia face a steep hurdle to establish standing in federal court.

If you're facing claims for violations of the TCPA either by individual consumers, or via a putative class action based on sending of unsolicited text messages, based on this decision, you may have a new avenue of attack available to you, either via a motion to dismiss, a motion for judgment on the pleadings, or even a dispositive motion. Should you have any questions about this ruling, or any other TCPA-related inquiries, please contact the authors of this alert, or your regular Baker Donelson attorney.