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Eleventh Circuit reinvigorates Spokeo in single text message TCPA case

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Takeaway: Despite the relatively minor nuisance of receiving an unsolicited advertisement, TCPA defendants have had little success challenging TCPA claims on *Spokeo* (standing) grounds. In *Salcedo v. Hanna*, --- F.3d ---, No. 17-14077, 2019 WL 4050424 (11th Cir. Aug. 28, 2019), however, the Eleventh Circuit gave new life to standing arguments in TCPA cases, distinguishing contrary Eleventh Circuit authority and creating a direct conflict with the Ninth Circuit along the way. In *Salcedo*, the Eleventh Circuit concluded that receipt of a single, unsolicited text message does not constitute "concrete injury" sufficient to establish Article III standing. Although carefully limited to the facts of the allegations in that case (receipt of a single, unsolicited text message), *Salcedo* may encourage other TCPA defendants to mount standing-based challenges, at least in the Eleventh Circuit.

In August 2016, John Salcedo received a single text message from his former attorney, Alex Hanna, offering a discount on future legal services. Salcedo then filed suit alleging TCPA violations and seeking to represent a putative class of former Hanna clients who received similar text messages.

The defendants moved to dismiss on standing grounds. The district court denied their motion but certified that order for interlocutory appeal, in light of the Supreme Court's ruling in *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1549 (2016) (holding Article III standing requires a concrete injury), and the Eleventh Circuit's ruling in *Nicklaw*, 855 F.3d 1265, 1266 (11th Cir. 2017) (holding a technical violation of a mortgage satisfaction reporting requirement caused no concrete harm under *Spokeo*). *See Salcedo v. Hanna*, 16-CV-62480, 2017 WL 4226635, at *1 (S.D. Fla. June 14, 2017).

On August 28, 2019, the Eleventh Circuit reversed, ruling that Salcedo lacked standing. *Salcedo*, 2019 WL 4050424 at *2-6. Much of the court's opinion distinguished *Palm Beach Golf Center–Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015), where the Court of Appeals found standing based on receipt of an unsolicited fax because the fax occupied the fax machine for a full minute and consumed paper and ink. The *Palm Beach Golf* court further concluded that, by creating a private right of action for recipients of "junk faxes," Congress had voiced its concern about the invasion of privacy and other harm caused by receipt of unsolicited faxes.

The *Salcedo* court also declined to follow the Ninth Circuit's decision in *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017), where the Ninth Circuit ruled that the receipt of two unsolicited text

messages constitutes an injury in fact under Article III.There is now a clear split of authority between the Eleventh and Ninth Circuits on this standing issue.

The *Salcedo* panel concluded that the harm inflicted by an unsolicited text message is qualitatively different from the injury caused by receipt of a junk fax. Unlike a fax, a text message does not tie up a recipient's phone – the recipient can continue using the phone while it is receiving the unwanted text. A text message is also electronic – it does not require the recipient to incur paper or ink costs. And a text message does not invade the recipient's privacy in the same way as a telephone call. While the ringing of a residential phone could disturb the "domestic peace" of a family dinner, cell phones are designed to be used outside of the home and are often set on silent.

Moreover, unlike faxes and voice calls to cellular phones, Congress has been silent on the issue of unsolicited text messages. Although the FCC extended the voice call provisions of the TCPA to text messaging, Congress has never explicitly regulated unsolicited text messages. The Eleventh Circuit found that many of the privacy concerns Congress identified about faxes, residential voice calls, and cell phone voice calls do not apply to the more ephemeral text message. The court therefore concluded that Salcedo's "allegations of a brief, inconsequential annoyance" was insufficient to establish concrete injury and invoke federal jurisdiction. *Id*. at *7.

After finding no injury and thus no jurisdiction, the panel added a section that appears to limit the scope of its opinion.The court explained that "Article III standing is not a 'You must be this tall to ride' measuring stick.'" *Id*.The court said its assessment was "qualitative, not quantitative," and that it was "not attempting to measure how large or small Salcedo's alleged injury is." *Id*. at *7.Although some "intangible and ephemeral" harms may satisfy Article III, the Eleventh Circuit concluded that Salcedo's receipt of a single text message did not. *Id*.

Notably, Judge Jill Pryor concurred in judgment only, writing separately to "emphasize her understanding that the majority's holding is narrow . . . driven by the allegations . . . that Hanna sent him only one text message." *Id*. at *8. In her view, the majority opinion does not address whether a plaintiff who received multiple text messages may have standing (although more than one text was at issue in the *Van Patten* case criticized by the majority panel).

Salcedo should encourage TCPA defendants to mount standing challenges in any case involving text messages outside of the Ninth Circuit. Moreover, although *Salcedo* deals with a text message, the panel's reasoning could be extended to other TCPA violations, such as a single, unanswered cell phone call.