NOTE

ELEVENTH CIRCUIT SAYS ONE TEXT MESSAGE JUSTIFIES TELEPHONE CONSUMER PROTECTION ACT STANDING

Susan Drazen v. Juan Pinto, No. 21-10199 (11th Cir. 2023).
https://law.justia.com/cases/federal/appellate-courts/ca11/21-10199/21-10199-2023-07-24.html

INTRODUCTION

In 1991, Congress enacted the Telephone Consumer Protection Act ("TCPA") to respond to numerous consumer complaints about unwanted robocalls.[1] The Act's provisions contained a restriction on using automated telephone dialing systems ("ATDS"). Specifically, 47 U.S.C. § 227(b)(1)(A)(iii) reads:

> "It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system …to any telephone number assigned to …a cellular telephone …."[2]

Although this provision forbides making any call using ATDS, such a broad limitation does not clarify whether a single call or even a text message falls within the type of calls prohibited by this provision to sufficiently raise Article III's case or controversy issue.

In the instant case, the central question of the appeal was whether receiving a single unsolicited, illegal telemarketing text constitutes a concrete injury for Article III standing. The district court held that "receipt of a single text message" was not a concrete injury based on the Eleventh Circuit's previous holding in Salcedo v. Hanna.[3] On appeal, the Eleventh Circuit reevaluated the Salcedo holding by reviewing two previous holdings. The first case, Cordoba v. DIRECTV, LLC,[4] held that receiving more than one unwanted telemarketing call constituted a harm. While Hunstein v. Preferred Collection & Mgmt. Servs., Inc.,[5] showed a common-law tort claim of intrusion upon seclusion, and other circuit's approach on whether the harm shares a close relationship in kind rather than degree. As a result, the Eleventh Circuit concurred with the approach of other Circuit's and held that a single text message caused a concrete injury for Article III standing.

BACKGROUND

Salcedo v. Hanna, 936 F.3d 1162 (11th Cir. 2019)

Salcedo was a former client of Florida attorney Alex Hanna and received an unsolicited text message from Hanna offering a ten percent discount on his legal services. Salcedo subsequently filed suit in the United States District Court for the Southern District of Florida, alleging Hanna violated the TCPA. Hanna moved to dismiss for lack of standing. The district court disagreed, but the Eleventh Circuit reversed the district court's decision because Salcedo's allegations did not state a concrete harm that meets the injury in fact requirement of Article III.

The Eleventh Circuit concluded that receiving a single text message is not a concrete injury by distinguishing it from receiving an unwanted phone call. The Eleventh Circuit found that Salcedo's assertion was not anything comparable to "enjoying dinner at home with his family and having the domestic peace shattered by the ringing of the telephone" and "[n]or has he alleged that his cell phone was searched, dispossessed, or seized for any length of time."[6] The Eleventh Circuit further noted that Salcedo's allegation is "categorically distinct from those kinds of real but intangible harms," because "receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face." [7] Although the Eleventh Circuit acknowledged a text message may be annoying, it cannot justify invoking federal court jurisdiction. Yet, the Eleventh Circuit noted that its evaluation was qualitative, not quantitative. Even applying the criteria for an injury in fact from Spokeo, Inc. v. Robbins, 578 U.S. 330 (2016), the Eleventh Circuit could not find that the harm incurred from a single text message was concrete.

Cordoba v. DIRECTV, LLC, 942 F.3d 1259 (11th Cir. 2019)

DIRECTV hired Telecel Marketing Solutions, Inc., for telephone marketing purposes, and Telecel placed numerous marketing calls on behalf of DIRECTV. Cordoba personally began receiving unsolicited calls from DIRECTV at least eighteen times between April and November of 2015, despite having registered his number on the National Do Not Call Registry and repeatedly requesting that Telecel cease its calls. Cordoba even took the step of writing to DIRECTV, requesting it discontinue contacting him. Although DIRECTV responded, assuring him they would stop the calls, the unwanted calls continued.

Cordoba then commenced a class action lawsuit in the United States District Court for the Northern District of Geor-

gia, alleging DIRECTV and Telecel violated the TCPA. Cordoba represented all individuals 1) who received more than one telemarketing call from Telecel on behalf of DIRECTV and 2) whose telephone numbers were on the National Do Not Call Registry but received more than one DIRECTV marketing call from Telecel. The district court ordered certifying these classes and held that "the members of classes had standing because an unsolicited phone call is an injury in fact and that the proposed classes were ascertainable."8 DIRECTV appealed.

DIRECTV argued that absent class members lacked standing because they had not suffered an injury in fact under Spokeo, Inc. v. Robbins, 578 U.S. 330 (2016). However, the Eleventh Circuit held that "the receipt of more than one unwanted telemarketing call made in violation of the provisions enumerated in the TCPA is a concrete injury that meets the minimum requirements of Article III standing."[9] The Eleventh Circuit noted this holding aligned with the Third Circuit's reasoning that Congress recognized this injury under TCPA, closely resembling the type of harm that could give rise to the common law cause of action for "intrusion upon seclusion."[10]

The Eleventh Circuit distinguished this case from Salcedo v. Hanna. Unlike Salcedo, where the receipt of a single text message was "more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face,"[11] receiving an unwanted phone call "intrudes upon the seclusion of the home, fully occupies the recipient's device for some time, and demands the recipient's immediate attention."[12] The Eleventh Circuit noted that although the injury from receiving an unwanted phone call might not be of great magnitude in the broader context, it possessed the requisite concreteness and particularity to meet Article III standing. Therefore, the Eleventh Circuit concluded Cordoba established the injury in fact component of standing for both Cordoba and all the absent class members who received calls from Telecel and where registered in the National Do Not call Registry.

Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236 (11th Cir. 2022)

Hunstein failed to pay a medical bill related to his son's medical treatment to a hospital, which, in turn, handed over the incurred debt to a collection agency, Preferred Collection and Management Services.[13] Preferred Collection hired a commercial mail vendor to notify Hunstein of his debt by providing various details, including Hunstein's name, his son's name, the debt amount, and the fact that the debt was related to his son's medical treatment. The vendor then incorporated this information into a prewritten form letter and sent it to Hunstein. Shortly after receiving the letter, Hunstein filed suit in the United States District Court for the Middle District of Florida, alleging Preferred Collection had unlawfully divulged information about his debt to a third party, the mail vendor, thereby violating the FDCPA.[14] The district court granted Preferred Collection's motion for summary judgment, finding that the communication to the mail vendor did not fall under the FDCPA's criteria of being "in connection with the collection of any debt."[15] Hunstein appealed.

The Eleventh Circuit held that prohibiting a debt collector from communicating with a few individuals or entities in connection with the debt collection did not demonstrate a concrete injury. The Eleventh Circuit's reasoning rested on common-law tort's "publicity" element. Without publicity, there is no invasion of privacy and, consequently, no harm comparable to what one has to suffer after public disclosure. Publicity requires far more than just "any communication by the defendant to a third person."[16] That is, a matter must be "made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[17]

The Eleventh Circuit further noted that the threshold criteria between public and private communication was a qualitative inquiry rather than a quantitative one.[18] For example, when someone communicates a trade secret to thousands of new employees after a merger, it does not become public information. Conversely, a disclosure to a single person could qualify as publicity, depending on that person's identity. The effect of sharing another person's private information with an online personality or a reporter matters more than the number of people to whom it is made.

As a result, the Eleventh Circuit held that Hunstein's complaint lacked any allegations suggestive of publicity to be a concrete injury because it merely stated that Preferred Collection furnished his personal information to an unauthorized third party, who subsequently populated some or all of this information into a pre-written template, printed, and mailed the letter to Hunstein cannot meet the criteria of a concrete injury.

Justice Newsom dissented, holding a contrasting view regarding how close the resemblance satisfies the "close enough" standard for Article III purpose. Justice Newsom found it challenging to create a circumstance in which a plaintiff's harm is similar in both kind and degree to a common-law tort and yet remains distinct, the majority had not presented such a case. Although Preferred Collection's disclosure of Hunstein's private information to third-party mail vendor employees might have been less widespread or public than typical disclosures leading to actionable public disclosure of private facts claims, this distinction was a matter of degree of harm. The dissemination of personal information to a third party's employees and the resulting harm remained similar in kind.

Susan Drazen v. Juan Pinto, 74 F.4th 1336 (11th Cir. 2023

Appellee Suzan Drazen filed a class action against Appellee GoDaddy in the United States District Court for the Southern District of Alabama, alleging GoDaddy violated the TCPA[19] by using prohibited ATDS to make promotional calls and text messages attempting to sell its services and products or to contact individuals who are no longer customers.

GoDaddy reached a settlement agreement[20] wherein they defined the class to include "all persons within the United States who received a call or text message to his or her cellular phone from" GoDaddy between November 2014 and December 2016. Drazen filed an unopposed motion for preliminary approval of that agreement. In response to this motion, the district court ordered the parties to brief on how this case is distinguishable from Salcedo v. Hanna, which held that the "receipt of a single text message" is not a concrete injury.[21] Upon considering the parties' briefing, the district court concluded only the named plaintiffs could have standing, disqualifying a plaintiff who received only one text from being a class representative.[22] Once counsel removed the disqualified plaintiff, the district court approved the fee award and an award of costs.

Appellant Juan Enrique Pinto filed an objection and moved to reconsider the fee award because GoDaddy vouchers

were subject to the 28 U.S.C. § 1712(e)[23] of the Class Action Fairness Act ("CAFA"). The district court overruled Pinto's objections and approved the class settlement. Pinto then appealed the CAFA issue and the approval of the class settlement.

Instead of addressing these issues, the panel of the Eleventh Circuit dismissed the case for lack of jurisdiction, because "the class definition does not meet Article III standing requirements." The panel noted the Supreme Court's guidance in TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021), which stressed that every class member must have Article III standing in order to recover individual damages. However, the panel held that, under Salcedo, "a single unwanted text message is not sufficient to meet the concrete injury requirement for standing." The court concluded that "the class definition cannot stand to the extent that it allows standing for individuals who received a single text message from GoDaddy." Drazen moved for rehearing en banc to reevaluate the Salcedo holding and to clarify the law in order to pursue a TCPA claim (i.e., concreteness requirement for Article III standing).

ANALYSIS

Drazen and Pinto asserted that the class members who received only one unwanted text message from GoDaddy suffered a privacy invasion that shared a close relationship with the harm associated with intrusion upon seclusion. GoDaddy refuted the argument stating that receiving one text message falls short of that degree of harm.

The Eleventh Circuit, relying on TransUnion,[24] found Drazen and Pinto satisfied the concreteness requirement for Article III standing. The court did not consider the common-law essential elements of harm. Instead, the Eleventh Circuit broadened the scope to include intangible harm, as guided by Hunstein, Spokeo and TransUnion.[25] Particularly, the Eleventh Circuit focused on whether the harms share "a close relationship"[26] in kind, not degree. This approach was initially adopted from the opinion of the Seventh Circuit[27] and became popular among the Fourth, Fifth, Sixth, Ninth, and Tenth Circuits.[28] Sister Circuits declined to consider the degree of offensiveness required to state a claim for intrusion upon seclusion at common law. Instead, they held that receiving at least one unwanted text or phone call resembled the kind of harm associated with intrusion upon seclusion.[29] Similarly, the Eleven Circuit itself held previously in Cordoba v. DIRECTV that receiving "more than one unwanted telemarketing call" causes a harm that bears "a close relationship to the kind of harm" that intrusion upon seclusion inflicts—also, adopting the harms in kind aligned with Hunstein v. Preferred Collection & Mgmt. Servs, where the Eleventh Circuit concluded that the alleged harm was "entirely absent" of public disclosure in kind by lacking the fundamental element of publicity. Further, Circuit Judge Newsom in Hunstein v. Preferred Collection & Mgmt. Servs dissented stating that the harm in kind and degree be situated in a binary manner, finding it "hard to imagine a circumstance in which a plaintiff's harm is similar in both kind and degree to a common-law tort and yet is not precisely the same."[30]

While adopting this approach, the Eleventh Circuit distinguished this case from Hunstein v. Preferred Collection & Mgmt. Servs., because this case did not entirely miss all common-law tort elements for "intrusion upon seclusion." Intrusion upon seclusion consists of (i) intentional intrusion, (ii) into another's solitude or seclusion and (iii) which would be highly offensive to a reasonable person.[31] Unwanted phone calls are among the privacy intrusions that give rise to liability for "intrusion upon seclusion."[32] The Seventh Circuit stated that "[t]he undesired buzzing of a cell phone from a text message, like the unwanted ringing of a phone from a call, is an intrusion into peace and quiet in a realm that is private and personal."[33] While the Eleventh Circuit acknowledged that a single unwanted text message might not "be highly offensive to the ordinary reasonable man,"[34] an unwanted text message was nonetheless offensive to some degree to a reasonable person.[35] The Eleventh Circuit also considered the harm in degree, requiring it to draw a line, which was infeasible.[36]

The Eleventh Circuit also found that the harm in kind was supported by legislative authority. The Constitution empowers Congress to decide what degree of harm is enough so long as that harm is similar in kind to traditional harm. The court determined that was what Congress did in the TCPA when it provided a cause of action to redress the harm that unwanted telemarketing texts and phone calls cause.[37] The Third and Seventh Circuit found and supported the Congressional intent.[38] As a result, the Eleventh Circuit held that the receipt of an unwanted text message constituted a concrete injury and remanded this appeal to the panel to address the CAFA issues raised in Pinto's appeal.

CONCLUSION

Previously, the Eleventh Circuit had established that receiving a single unwanted text message did not meet the Article III standing for failing to be a concrete injury. In contrast, a single unwanted call did give standing in the instant case because it intruded upon one's seclusion as a tortious invasion of privacy. Here, the Eleventh Circuit reevaluated its standard toward a single text message. By looking at the alleged harm's close relationship in kind with the underlying tort of intrusion upon seclusion, the Eleventh Circuit held that a single unwanted text message could be a concrete injury, providing Article III standing. Although an unwanted text message may not be sufficiently offensive to satisfy the common law requirements, Congress, through its legislative authority, has established a lower injury threshold necessary to bring a claim under the TCPA.

Sangheon Han is a contributing editor He is currently a J.D. candidate at the University of Houston Law Center, TX, with an expected graduation in December 2023. He obtained his B.S. in Environmental Engineering from the University of Seoul, South Korea, in 2012, an M.S. in Chemical Engineering from Miami University, OH, in 2014, and a Ph.D. in Bioengineering at Rice University, TX, in 2020.

1 *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2344, 207 L. Ed. 2d 784 (2020).
2 *See* 47 U.S.C. § 227(b)(1)(A)(iii).
3 *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019)
4 *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259 (11th Cir. 2019)
5 *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236 (11th Cir. 2022)
6 *Id*. at 1172.
7 *Id*.
8 *Id*. at 1266.
9 *Id*. at 1270.

10 *See Susinno v. Work Out World Inc.*, 862 F.3d 346, 351 (3d Cir. 2017).
11 *Salcedo*, 936 F.3d at 1172.
12 *Cordoba*, 942 F.3d at 1270.
13 Though this case arose from the Fair Debt Collection Practices Act ("FDCPA"), the Eleventh Circuit addressed a concrete injury to establish Article III standing for consumers to bring a lawsuit.
14 15 U.S.C. § 1692c(b) ("[]without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, *in connection with the collection of any debt*, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.").
15 *Hunstein*, 48 F.4th at 1240.
16 Restatement (Second) of Torts § 652D cmt. a (emphasis added).
17 *Id*.
18 *Id*.
19 47 U.S.C. § 227, *supra*.
20 The settlement occurred after consolidating litigation with the same claim in the District of Arizona. *See Bennett v. GoDaddy.Com, LLC*, No. 2:16-cv-03908 (D. Ariz. 2016). Also, another similar case was filed in the District of Arizona and was incorporated into and resolved by the same settlement agreement with GoDaddy. *See Herrick v. GoDaddy.com, LLC*, No. 2:16-cv-00254 (D. Ariz. 2016).
21 *Salcedo*, 936 F.3d at 1172.
22 Further, the district court noted that those class members who also received only one text and therefore lacked a viable claim in this Circuit under *Salcedo* "do have a viable claim in their respective Circuit."
23 In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.
24 The Eleventh Circuit applied the comparable analysis in *TransUnion*. In *TransUnion*, the Supreme Court first looked at whether the class members had Article III standing for their claims and then turned to whether the class members demonstrated a "concrete harm" against defendant TransUnion. *See TransUnion LLC* at 2203.
25 The Eleventh Circuit stated that "[I]ntangible harms can satisfy Article III's concreteness requirement, too. Congress is 'well positioned to identify' those intangible harms. So when Congress identifies an intangible harm by enacting a law with a cause of action to redress that harm, we find its judgment 'instructive and important.' Yet at the same time, Congress "may not simply enact an injury into existence." Nor can Congress use 'its lawmaking power to transform something that is not remotely harmful into something that is.' So congressional judgment, though instructive, is not enough." *See Hunstein* at 1242-43; *Spokeo*, at 341; *TransUnion* at 2205.
26 The Eleventh Circuit further stated that the new harm need only be "similar to" the old harm rather than carbon copies of the old harm. (citing *Hunstein* at 1242); *see also TransUnion* at 2209 (2021) ("In looking to whether a plaintiff's asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for lawsuit in American courts, we do not require an exact duplicate.").
27 *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020)
28 *See Krakauer v. Dish Network, LLC*, 925 F.3d 643, 654 (4th Cir. 2019); *accord Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 822 (5th Cir. 2022); *Ward v. NPAS, Inc.*, 63 F.4th 576, 580-81 (6th Cir. 2023); *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1115 (9th Cir. 2017); *Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1192 (10th Cir. 2021). The Second and Third Circuits similarly focused on the "character" of the new and old harms when determining whether the relationship is sufficiently close; *see Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 93 (2d Cir. 2019); *Thorne v. Pep Boys Manny Moe & Jack, Inc.*, 980 F.3d 879, 890 (3d Cir. 2020).
29 *See Gadelhak*, 950 F.3d at 463 & n.2 (one unwanted text message); *Melito*, 923 F.3d at 93 (same); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042-43 (9th Cir. 2017) (two unwanted text messages); *Susinno v. Work Out World Inc.*, 862 F.3d 346, 351-52 (3d Cir. 2017) (one unwanted phone call); *Ward*, 63 F.4th at 581 (same); *Lupia*, 8 F.4th at 1192 (same); *Krakauer*, 925 F.3d at 652-653 (two unwanted phone calls in one year).
30 *Hunstein*, 48 F.4th at 1267.
31 Restatement (Second) of Torts § 652B; *see also, e.g., Jackman v. Cebrink-Swartz*, 334 So. 3d 653, 656 (Fla. Dist. Ct. App. 2021).
32 *See* Restatement (Second) of Torts, *supra*, § 652B cmt. d; W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 855 (5th ed. 1984).
33 *Gadelhak*, 950 F.3d at 462 n.1.
34 Restatement (Second) of Torts, *supra*, § 652B cmt. d.
35 Even GoDaddy conceded at oral argument that receiving one unwanted text message each day for thirty days would be enough to satisfy the offensiveness element; *see also* Restatement (Second) of Torts, *supra*, § 652B illus. 5.
36 The Eleventh Circuit stated that "[t]he argument that thirty unwanted text messages in thirty days are enough but one is not is an argument of *degree*, not *kind*. If thirty are enough, then are twenty-nine? Are twenty-eight? How about two? Drawing the line necessarily requires us to make a choice of degree."
37 *See* 47 U.S.C. § 227(b)(1)(A)(iii), *supra*.
38 *Susinno*, 862 F.3d at 352 ("Congress was not inventing a new theory of injury when it enacted the TCPA."); *Gadelhak*, 950 F.3d at 462 ("Congress identified a modern relative of a harm with long common law roots.").