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The Injury that Never Heals: The Eleventh Circuit Court of Appeal Hears Oral Argument on Issue of Whether a Single Text Message is Sufficient to Allege a TCPA Claim

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As we have frequently discussed, Article III standing is a recurring issue here at TCPALand.

This week another TCPA matter was heard in the Eleventh Circuit Court of Appeal where the court is attempting to decide whether the receipt of a single text message is sufficient to meet the definition of a concrete injury under Article III. The case is *Salcedo v. Hanna et al.*, case number 17-14077.

Here's the background: Plaintiff John Salcedo brought a class action lawsuit against Alex Hanna and the Law Offices of Alex Hanna, alleging that defendants violated the TCPA by sending unconsented-to text messages promoting Hanna and the law firm to Plaintiff and other former clients of theirs. While Plaintiff had used the law firm's services before, he alleged that he did not consent to receive the text. The defendants moved to dismiss for a lack of concrete injury, among other things. As we know, under *Spokeo*, a Plaintiff must suffer a "concrete injury" to have standing to file suit in federal court.

The district court denied Defendants' motion but granted Defendants the right to file an interlocutory appeal. Surprisingly, the Eleventh Circuit that previously found that a one-page fax advertisement was a cognizable, particularized personal injury sufficient to confer Article III standing in *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015), granted Defendants' request for an interlocutory appeal. The court acknowledged that while *Palm Beach* is binding on the Eleventh Circuit, *Palm Beach* predated *Spokeo*. The court also questioned whether the receipt of one text is sufficient to constitute a concrete injury-in-fact such that Plaintiff has Article III standing. In its order approving Defendants' interlocutory appeal, the court noted that "this case involves an unsettled and controlling question of law. Resolving this issue will materially advance the termination of this litigation and potentially eliminate the need for protracted and expensive litigation over one text message."

The oral arguments were heard on Tuesday.

Defendants' counsel begun his argument by quoting the FCC chairman, Ajit Pai, stating that "the TCPA has become the poster child of lawsuit abuse and the number of TCPA cases each year skyrocketed..." Plaintiff's counsel in response argued that the issue here was whether there was concrete harm, not the amount of TCPA lawsuits.

During oral argument, Defendants' counsel argued that unlike *Palm Beach*, the single text did not make Plaintiff's phone inoperable and did not prevent Plaintiff from receiving other text messages or phone calls while the text was being. The texts also did not cost Plaintiff anything. Counsel further argued that the texts did not rise to the level of an invasion of privacy because a reasonable person would not find the text to be highly offensive conduct



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- such as calling a person at their home, opening another's mail or entering a person's private home.

In turn, Plaintiff's counsel argued that Plaintiff suffered an injury by an invasion of his privacy and loss of time in responding to the unwanted text. She further contended that a text is simply a modern-day form of a phone call and the receipt of the text was the harm to privacy.

The Eleventh Circuit panel consisted of U.S. Circuit Judges Jill Pryor and Elizabeth L. Branch and U.S. District Judge Danny C. Reeves.

The questions posed to Defense counsel focused on the difference between the de minimis harm in receiving one text as opposed to receiving multiple texts. The court noted to Plaintiff's counsel that the Congress has not commented on regulating text messages and questioned whether counsel was necessarily asking the court to apply a new *Chevron* like deference. The judges further questioned whether the previous customer relationship between Plaintiff and Defendant makes a difference in the analysis, whether the manner of how Plaintiff responded to the text matters, and if the amount of time Plaintiff allegedly loss affects the parties' analysis.

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