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11th Circ. TCPA Ruling Could Imperil Class Claims: Experts

By **Allison Grande**

Law360 (August 28, 2019, 3:01 PM EDT) -- The Eleventh Circuit ruled Wednesday that receiving a single unsolicited text message doesn't generate the harm necessary to sustain Telephone Consumer Protection Act claims, complicating plaintiffs' path to asserting such allegations across large classes.

The three-judge panel's published opinion, which reversed a decision to allow plaintiff John Salcedo to proceed with claims over an unsolicited text he received from his former lawyer Alex A. Hanna, also creates a circuit split on Article III standing that may push the U.S. Supreme Court to revisit the concreteness requirement the high court established in its landmark Spokeo decision, defense attorneys say.

In its 22-page decision, the Eleventh Circuit panel found that its own precedent, the legislative history of the TCPA and the Supreme Court's decision in Spokeo v. Robins — which concluded that plaintiffs must allege concrete injuries and not rely on mere statutory violations to establish standing — provided little support for treating Salcedo's allegations as the type of intangible harm that could confer standing.

The panel distinguished Salcedo's allegations "of a brief, inconsequential annoyance" from receiving one text message from the "real but intangible harms" that Congress intended for the TCPA to remedy, which include having family dinners interrupted by a ringing telephone and having cellphone lines tied up for long periods of time.

"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," Circuit Judge Elizabeth L. Branch wrote for the panel. "Annoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts."

The ruling goes against the Ninth Circuit's **January 2017 decision** in Van Patten v. Vertical Fitness, which found that the receipt of two unsolicited text messages constituted a concrete injury sufficient to meet the Spokeo bar.

The Eleventh Circuit panel on Wednesday found its sister circuit's decision to be unpersuasive. It noted that the Ninth Circuit "stopped short" of examining whether isolated text messages not received at home spur the harm envisioned by Congress and instead embraced the "broad overgeneralization" that lawmakers had identified "unsolicited contact" as a concrete harm.

"As we have more thoroughly explained, an examination of those torts reveals significant differences in the kind and degree of harm they contemplate providing redress for," the Eleventh Circuit panel ruled.

Carlton Fields partner Richard J. Ovelmen, who **argued the case** on behalf of Hanna and his law firm, called the dispute "extremely significant."

"At least four trillion text messages are sent in the United States in a year," Ovelmen said in an email to Law360 Wednesday. "Congress never considered texting when it enacted the TCPA, and the court wisely concluded that, at least in the instance of a single text from a lawyer to his former client

announcing a discount for future services, this is not within the scope of what the act intended to address. The opinion reinforces the importance of a concrete injury to have standing in a case."

TCPA defense attorneys not involved in the Eleventh Circuit case said Wednesday that the ruling was likely to help ease the growing swell of text message class actions by throwing up a major roadblock to class certification.

"The Eleventh Circuit's decision is a game changer in TCPA text message cases," said Eric Troutman, a partner at Squire Patton Boggs LLP and contributor to the firm's TCPAWorld blog.

In order to meet the standard set by the Eleventh Circuit, plaintiffs will have to allege a concrete harm caused by the receipt of an unwanted text message, such as the interruption of a dinner or family outing, according to Troutman. Proving that every class member suffered the same injury is likely to doom class certification efforts, he said.

"The decision suggests that TCPA text message class actions may no longer be possible, since providing discrete harm across an entire class is impossible absent individualized inquires," Troutman added.

By declining to set a quantitative measurement for how many text messages would be enough to cause the type of intangible harm necessary for standing, the Eleventh Circuit instead established a qualitative injury test that depends on individualized inquires rather than classwide generalizations, noted TCPA defense attorney Mark Eisen of Benesch Friedlander Coplan & Aronoff.

"Plaintiffs' lawyers can certainly get creative with trying to allege harm in their complaints, as we've already seen them do post-Spokeo, but what the Eleventh Circuit is saying is that because the standing analysis isn't necessarily quantitative, performing it with respect to a class is going to be incredibly tricky," Eisen said.

The ruling could also help to limit the massive statutory damages awards of between $500 and $1,500 per count that is helping to fuel much of this litigation, according to Troutman.

"As each TCPA count is technically a separate claim — requiring separate Article III standing — TCPA plaintiffs can no longer expect to recover for every text message received, even if one or two caused an actual disruption," he said.

The decision is likely to resonate not just in text message disputes in the Eleventh Circuit, but also in fights across the country involving both texts and phone calls, defense attorneys predicted.

"I expect a large number of district courts outside of the Eleventh Circuit to follow this reasoning from now on," Troutman said.

The exception will be the Ninth Circuit, where the Van Patten ruling and similar decisions have created a comparably relaxed standing environment, attorneys say.

"Salcedo is almost certain to drive even more TCPA litigation to the Ninth Circuit," Troutman predicted.

This divide could inspire the U.S. Supreme Court to revisit the issue of standing post-Spokeo, according to attorneys. With the decision, the Eleventh Circuit cemented not only a split with the Ninth Circuit on what harm is required to prop up TCPA cases, but also deepened an internal divide with other Eleventh Circuit rulings that have found standing for similar privacy harms under statutes such as the Video Privacy Protection Act.

"Decisions like this are making it more and more likely that the Supreme Court in some respect is going to have to clarify Spokeo, because we're getting not only Circuit splits on the TCPA specifically, but also a lot of questions about the application of Spokeo more generally," Eisen said.

Counsel for the Salcedo, the former client who brought the dispute decided by the Eleventh Circuit Wednesday, did not immediately respond to a request for comment.

U.S. Circuit Judges Jill Pryor and Elizabeth L. Branch and U.S. District Judge Danny C. Reeves sat on the panel for the Eleventh Circuit.

Salcedo is represented by Scott D. Owens and Sean M. Holas of Scott D. Owens PA, Rebecca Smullin and Scott L. Nelson of Public Citizen Litigation Group and Seth M. Lehrman of Edwards Pottinger LLC.

Hanna is represented by Richard J. Ovelmen, Steven Blickensderfer and Dorothy C. Kafka of Carlton Fields and Daniel Frederick Blonsky and Susan Elizabeth Raffanello of Coffey Burlington PL.

The case is Salcedo v. Hanna et al., case number 17-14077, in the U.S. Court of Appeals for the Eleventh Circuit.

--Additional reporting by Nathan Hale. Editing by John Campbell.

Update: This article has been updated with additional details about the ruling and its significance.
