

How Courts Are Deciding Standing in Fla. Robocall Cases

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There is a continuing question regarding Article III standing for cases brought under the federal Telephone Consumer Protection Act in Florida.

To give the very quick recap: In 2019, the U.S. Court of Appeals for the Eleventh Circuit held that a plaintiff who receives a single text message does not have Article III standing.

While many other courts — including then-U.S. Circuit Judge Amy Coney Barrett when she was on the U.S. Court of Appeals for the Seventh Circuit — disagreed with that holding, the Eleventh Circuit reaffirmed that holding last year.

Additionally, effective July 1, 2021, Florida substantially revised its robocall related statute; those amendments produced what is commonly called the Florida mini-TCPA.

The question of whether a plaintiff can have Article III standing for receiving a text message in violation of the Florida mini-TCPA is really a situation of — as the incomparable Gorilla Monsoon said when Hulk Hogan took on Andre the Giant at WrestleMania III — "the irresistible force meeting the immovable object."

As hard as imagining what would happen when an irresistible force meets an immovable object seems, Hulk did beat Andre. And we do have some answers from federal courts in Florida on the relevant question.

Frater v. Lend Smart Mortgage

The earliest federal court decision on this came on Sept. 27, 2022, where U.S. District Judge Robert Scola of the U.S. District Court for the Southern District of Florida issued a ruling granting a motion to dismiss by a defendant contending that the federal court lacked subject matter jurisdiction, as the plaintiff did not have Article III standing based on the 2019 Eleventh Circuit decision in *Salcedo v. Hanna*.

Specifically, in *Frater v. Lend Smart Mortgage LLC*, the plaintiff brought a Florida Telephone Solicitation Act claim against a mortgage company and retail lender, and alleged that that defendant sent multiple text messages to her cellular phone.

The plaintiff filed her case in federal court. Specifically, her complaint provided examples of two such text messages while asserting that she suffered harms in the form of violations of their statutory rights and statutory damages, inconvenience, invasion of privacy, aggravation, annoyance and wasted time.

The defendant then moved to dismiss for lack of subject matter jurisdiction, arguing the plaintiff and putative class lacked Article III standing.

However, the court was not persuaded that the plaintiff demonstrated an injury in fact concrete enough from her assertions to grant the court subject matter jurisdiction. The court dismissed plaintiff's arguments, citing *Salcedo* as binding Eleventh Circuit precedent.

The court also cited *Drazen v. Pinto* for the proposition that in 2022 the Eleventh Circuit affirmatively relied on and upheld *Salcedo*'s holding on what constitutes standing.

Ultimately, the court granted defendant's motion to dismiss on a finding that plaintiff failed to allege a sufficient concrete injury in fact to demonstrate standing. Specifically, the court stated the appropriate test for determining whether an injury is concrete is one that is qualitative, not quantitative.

Iuliano v. UnitedHealth Group

Next up, a few hundred miles across Alligator Alley and Interstate 75, Tampa-based U.S. District Judge Steven Merryday of the U.S. District Court for the Middle District of Florida granted the plaintiff's motion to remand in *Iuliano v. UnitedHealth Group Inc.* in December 2022, for failing to invoke Article III standing because the complaint alleged no facts demonstrating a concrete injury.

Notably, the side advocating for removal was flipped from *Frater*. In *Iuliano*, the plaintiff filed a complaint in state court alleging that the defendant violated the FTSA. The plaintiff claimed she received four messages intermittently during three months from defendant.

The plaintiff, however, never texted "STOP" or otherwise replied to any of the four messages. The defendant removed the case to federal court. The plaintiff, using the rationale in *Salcedo*, then filed a motion to remand where she argued that the case should not be in federal court because there was no federal subject matter jurisdiction.

The court made quick work of the motion, citing standing precedent of Salcedo and Drazen in forming its opinion to remand the case. The court held that absent any directive to "STOP," and without any specific allegations of harm by the plaintiff, the plaintiff's action mirrored the facts in the 2020 Eleventh Circuit case *Eldridge v. Pet Supermarket Inc.*

Lastly, the court reasoned that under ruling of Drazen, the fact that the plaintiff class would include all persons in the state of Florida who received a single text message or voicemail transmission, the class would include members without a concrete injury.

Under the circumstances, the court found that this action could not proceed in federal court.[Thus, the plaintiff's motion to remand was granted.

Fontanez v. Wolverine Worldwide

Later in December 2022, in *Fontanez v. Wolverine Worldwide Inc.*, Tampa-based U.S. District Judge Kathryn Kimball Mizelle, also of the Middle District of Florida, granted the plaintiff's motion to remand back to state court, in opposition of the defendant removing the case to federal court, for failing to establish subject matter jurisdiction in that plaintiffs lack standing.

Similar to the plaintiffs in *Frater*, the plaintiff filed a putative class action suing on behalf of herself and others similarly situated for violation of the FTSA. Here, the plaintiff alleged she received at least one unsolicited text message from the defendant.

The defendant argued that the plaintiff had standing because the U.S. Supreme Court either implicitly overruled *Salcedo* or abrogated, finding its basis on the 2021 *TransUnion LLC v. Ramirez* case.

While the court acknowledged that an intervening decision of the Supreme Court can overrule the standing precedent of the Eleventh Circuit on the matter, the court noted such a Supreme Court decision must be clearly on point.

The court noted that the *TransUnion* decision raised different factual considerations and focused on the proper methodology for evaluating whether intangible harms satisfy the concreteness of Article III.

Critically, the case revolved around consumers with false alerts associated with their credit files, which led consumer information being shared with third-party businesses.

The court was not persuaded. Rather, the court found:

- TransUnion fortified the Eleventh Circuits analysis;
- The plaintiff did not allege any actual harm, not even in wasting her time or resources;
- The plaintiff did not allege she even read the messages, the messages consumed her battery or data, or suffered any annoyance; and
- The defendant offered no evidence to the contrary.

The court also found the rationale of Salcedo as binding precedent in that the irritation of one unsolicited text message is qualitatively insufficient. Thus, the motion to remand was granted.

Muccio v. Global Motivation

On the same date the Fontanez decision was filed, across the state — though this time via Interstate 4 and State Road 60 — Fort Pierce-based U.S. District Judge Aileen Cannon of the Southern District of Florida ruled on facts similar, but with inverse interests in that the defendants filed motions seeking dismissal for lack of Article III standing and failing to state a claim under Rule 12(b)(6).

Similar to Frater, the plaintiff in Muccio v. Global Motivation Inc. received unsolicited text messages. Specifically, the plaintiff alleged receiving five text messages from the defendant to solicit the sale of consumer goods and/or services.

The plaintiff alleged harm including liquidated actual damages, inconvenience and invasion of privacy, aggravation, annoyance and violation of their statutory privacy rights.

The court's analysis was analogous to that of Frater and Fontanez in finding that Salcedo remains binding precedent in the Eleventh Circuit.

Moreover, Judge Cannon also cited Drazen, as affirmatively upholding Salcedo's holding that a plaintiff does not suffer a concrete injury for Article III standing purposes when she has received a single unwanted text message.

Using the Salcedo framework, the court found that since no allegations were made consistent with the degree of harm associated with the highly offensive or objectively intense interference discussed in Salcedo, it was not enough to establish concrete harm under Article III and the Eleventh Circuit precedent.

By this point, the quantitative nature of the plaintiff's claim and lack of any allegations of concrete injury led the court to grant the defendants' motion to dismiss for lack of injury in fact for federal standing.

State Court Mini-TCPA Cases

As discussed above, Fontanez and Iuliano are cases that were originally filed in state court and then removed to federal court. After the remand, these cases are now back in state court. So the next question is whether the plaintiffs have standing in state court.

So far, only one reported state court decision has addressed this issue under the FTSA.

In *Alvarez v. Sunshine Life & Health Advisors*, Judge Lourdes Simon of the Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida, found in April 2022 that:

While an actual injury is required to invoke standing in federal court, a legal injury from the violation of a statute constitutes a "case or controversy" ... and is enough to invoke standing in Florida state court.

Thus, to bring an action under the FTSA in state court, a plaintiff need only allege that they received a text message from the defendant without prior express consent.

On the other hand, in *Toney v. Advantage Chrysler-Dodge-Jeep Inc.*, Judge Margaret Schreiber of the Ninth Judicial Circuit Court in and for Osceola County, Florida, held last year that there is no automatic standing in Florida state court for receiving prerecorded, telephonic, advertising messages to an individual — without first obtaining their written consent allegedly in violation of the TCPA.

If past is prologue, 2023 should be an interesting year for lawyers in Florida addressing standing issues under the FTSA. There have been several hundred FTSA class actions filed in Florida over the last two years, and the issue of standing is an important consideration in each case.

Given that several cases are now on appeal, it is likely that there will be more clarity this year.

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Telephone Consumer Protection Act

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