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The Murky Status of TCPA Standing in the 11th Circ.

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On July 27, the U.S. Court of Appeals for the Eleventh Circuit issued a precedential decision in *Drazen v. Pinto*, which centered on an "argument over the meaning of coupon settlements."

But while coupon settlements were the focus of the briefing and oral argument, the court's decision focused on standing, finding "an Article III standing problem with the class [and thus] vacat[ing] the District Court's approval of class certification and settlement."

The most significant part of *Drazen* is the court's definitive statement that a class settlement may not be approved unless the district court is satisfied that all class members have Article III standing. That holding will have a significant impact on class settlements in the federal district courts in Florida, Alabama and Georgia.

The vehicle that the court took to get there was the Telephone Consumer Protection Act. As the court noted, in recent years, the Eleventh Circuit has "been less than a model of clarity in [TCPA decisions] *Cordoba* and *Glasser* for purposes of Article III standing analysis."

While the *Drazen* opinion did not specifically identify the cause of this confusion, we submit that the fundamental problem stems from the fact that there are many subparts of the TCPA giving rise to distinct causes of action, and the different language in those subparts explains the distinctions in standing.

Understanding the court's comment that it has "been less than a model of clarity" on TCPA standing requires an analysis of the prior published TCPA cases issued by the Eleventh Circuit since the U.S. Supreme Court's 2016 decision in *Spokeo Inc. v. Robins*.

Florence Endocrine

In *Florence Endocrine Clinic PLLC v. Arriva Medical LLC*, a case arising under the fax subpart of the TCPA, the Eleventh Circuit held in 2017 that a plaintiff suffers an Article III injury when he or she receives an unwanted fax that occupies the fax machine during the time the fax is being sent and shoulders the cost of printing the fax.

The *Florence Endocrine* decision did not break new ground, as it was essentially a reaffirmance of the court's published pre-*Spokeo* decision on the same issue in *Palm Beach Golf Center-Boca Inc. v. John G. Sarris DDS PA* in 2015.

The rule of *Florence Endocrine* can be summarized as follows: A plaintiff who receives an unwanted fax has Article III standing.

Salcedo

Florence Endocrine was relatively minor in comparison to the court's next TCPA decision — *Salcedo v. Hanna*, in August 2019.

In *Salcedo*, the court conducted an exhaustive analysis into TCPA standing requirements and held that the receipt of a single unwanted text message does not establish a concrete injury in fact.

Contrary to other circuits that had addressed this issue before and after, in *Salcedo*, the Eleventh Circuit fundamentally rejected the argument that any TCPA violation automatically satisfies Article III standing. Once the court rejected the categorical rule, it then further rejected Salcedo's argument that his alleged waste of time and temporary loss of use of his phone resulting from the receipt of the single text message rose to the level of concrete injury.

Critically, the court also held that a text message, unlike a fax or a phone call, does not immobilize a phone and is substantially less harmful than a phone call because an individual receiving a text message can "continue to use all of the device's functions, including receiving other messages, while [the phone] is receiving a text message."

It is noteworthy that U.S. Circuit Judge Jill Pryor issued a concurrence in *Salcedo* stating that the majority opinion "leaves unaddressed whether a plaintiff who alleged that he had received multiple unwanted and unsolicited text messages may have standing to sue under the TCPA."

Because the plaintiff in *Salcedo* only alleged receipt of one text message, the question of multiple text messages was not part of the briefing and was not part of the court's majority opinion.

While the plaintiff in *Salcedo* only received one text message, the court made clear that its analysis considered the qualitative nature of the injury as opposed to the quantitative nature, and subsequent

district courts applied *Salcedo* to find no Article III standing in cases involving multiple text messages. The rule of *Salcedo* can be summarized as follows: A plaintiff who receives a single text message does not automatically have Article III standing.

Cordoba

The next published decision from the Eleventh Circuit was *Cordoba v. DirecTV LLC* in November 2019.

Unlike *Salcedo*, which involved autodialed calls to cellphones, *Cordoba* involved calls to a residential line, allegedly in violation of the do-not-call portions of the TCPA. This is perhaps the most important and understudied part of the Eleventh Circuit TCPA jurisprudence.

Unlike the fax portion of the statute at issue in Florence, or the autodialed texts to a cellphone portion of the statute at issue in *Salcedo*, the portion of the statute at issue in *Cordoba* requires the plaintiff to have received "more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection."

Accordingly, in *Cordoba*, while the court held that the plaintiff had Article III standing, it did not answer the question that was left open in Salcedo. Rather, *Cordoba*'s "suggest[ion] that the receipt of more than one unwanted phone call is enough to establish injury in fact" presumably was a reference to the statutory requirement that a plaintiff must have received more than one unwanted call to pursue a claim under the do-not-call list.

Notably, in *Cordoba*, the court preserved the text versus phone call distinction and noted that "a text message does not occupy the device for any period of time, unlike a fax or a phone call, and it does not create the same intrusion into the privacy of the home like an unwanted residential phone call."

The rule of *Cordoba* can be summarized as follows: Under the portion of the TCPA that requires a plaintiff to have received more than one phone call to demonstrate a violation, a plaintiff has Article III standing if he or she received more than one phone call, at least to the extent the phone call occupied his or her phone for a period of time.

Glasser

Next, in January 2020, the Eleventh Circuit issued its opinion in *Glasser v. Hilton Grand Vacations Co*.

Glasser concerned autodialed phone calls to a cellphone — in alleged violation of Title 47 of the U.S. Code, Section 227(b)(1)(A) — and raised the question of how the Eleventh Circuit would interpret the definition of an autodialer, which at that point had not been addressed by the U.S. Supreme Court.

While Article III standing was addressed at an early stage by the district court, by the time the case reached appeal, neither party pressed that issue.

However, the Eleventh Circuit requested supplemental briefing from the parties on standing.

By this point, *Salcedo* and *Cordoba* had issued. And in *Glasser*, the court observed that in *Cordoba*, issued just two months earlier, the court ruled:

The receipt of more than one unwanted telemarketing call … is a concrete injury that meets the minimum requirements of Article III standing. We appreciate that the point is close, as another decision of the court suggests. But *Cordoba* resolves it, establishing an Article III injury and giving plaintiffs standing to bring these claims.

The rule of *Glasser* can be summarized as follows: Under the portion of the TCPA that requires a plaintiff to have received more than one unwanted telemarketing call to demonstrate a violation of the statute, a plaintiff has Article III standing if he or she received more than one unwanted telemarketing call.

Drazen

As we noted at the outset, in the *Drazen* opinion the court conceded that it had been less than a model of clarity in *Cordoba* and *Glasser*. We think that the clearest source of this schism comes from the fact that although the cases involved different subsections of the TCPA, the court in *Glasser* relied on *Cordoba* in holding that the "receipt of more than one unwanted telemarketing call … is a concrete injury that meets the minimum requirements of Article III standing."

The critical distinction not addressed in *Glasser* was that while *Cordoba* involved a claim for receiving calls in violation of the residential line in violation of the do-not-call portion of the TCPA, *Glasser* involved a claim for receiving autodialed calls to a cellphone in violation of a different section of the TCPA.

As noted, the do-not-call provisions of the TCPA require the receipt of more than one call to show a violation of the statute, as opposed to demonstrating Article III standing, whereas the prohibition against autodialed calls to cellphones does not. Accordingly, the court's statement in *Glasser* relating to more than one phone call borrowed the language used in *Cordoba*, even though the provision at issue in *Cordoba* was not the same.

Drazen itself adds even more confusion to the analysis. Unlike *Glasser*, in which the court ordered supplemental briefing on Article III standing, standing was not addressed in the *Drazen* briefs.

Drazen is also complicated because it involved both phone calls and text messages made in violation of the TCPA. The court's holding that a plaintiff who received more than one phone call has standing appears to follow from *Glasser*.

As discussed above, however, *Glasser* extends *Cordoba* without accounting for the fact that it concerned a different part of the statute. Finally, the *Drazen* opinion does not definitively say whether a plaintiff who received multiple text messages (as opposed to phone calls) automatically has Article III standing.

The opinion is presently the subject of a motion for rehearing. It would be helpful that either in such an amended opinion or in future cases, the court clarifies the Article III standing issues for "single versus multiple" calls or texts — and while doing so considers the different language in the different sections of the TCPA.

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