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You Have One New Message—The Eleventh Circuit Correctly Applies the *Spokeo* Framework to TCPA Claims for Unsolicited Text Messaging

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YOU HAVE ONE NEW MESSAGE—THE ELEVENTH CIRCUIT CORRECTLY APPLIES THE SPOKEO FRAMEWORK TO TCPA CLAIMS FOR UNSOLICITED TEXT MESSAGING

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I. INTRODUCTION

The Eleventh Circuit recently created a circuit split regarding whether an unsolicited text message constitutes a concrete injury necessary to establish standing under the Telephone Consumer Protection Act (TCPA). The issue of standing under Article III was extensively addressed in the Supreme Court decision, *Spokeo, Inc. v. Robins*.¹ However, the circuit courts have differed in their application of the *Spokeo* framework to claims alleging a violation of the TCPA for receiving unsolicited text messages.² The disagreement among the circuit courts centers around whether there is a concrete injury. The impact of this disagreement is costly for businesses that may be exposing themselves to endless litigation by sending a simple text message. The Eleventh Circuit, contrary to the Second and Ninth Circuits, properly applied the *Spokeo* framework and held that there was no concrete injury.³ In reaching its decision, the Eleventh Circuit conducted an in-depth comparison of historical harms to the alleged harm and closely studied congressional intent underlying the TCPA's enactment.⁴ Furthermore, the Eleventh Circuit's *Spokeo* analysis is in line with other courts addressing the issue of intangible harms. Given the thorough analysis set forth in *Spokeo* and the Eleventh Circuit's reasoned application of the TCPA, the Supreme Court should

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1. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

2. Telephone Consumer Protection Act of 1991, Pub. L. 102-243 § 2, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227 (2018)); see *Salcedo v. Hanna*, 936 F.3d 1162, 1170 (11th Cir. 2019); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 93 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 677 (2019); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017).

3. See *Salcedo*, 936 F.3d at 1165.

4. *Id.* at 1168-72.

resolve the circuit split by adopting the Eleventh Circuit's approach.

II. BACKGROUND

In *Spokeo, Inc. v. Robins*, the Supreme Court provided a framework for courts to use when evaluating the issue of standing, particularly whether there is an injury in fact.⁵ The Supreme Court emphasized two main points regarding injuries in fact: (1) Congress cannot statutorily create standing where a plaintiff would not otherwise have standing; and (2) an injury in fact must be both concrete and particularized.⁶ A particularized injury must personally affect the plaintiff in an individual way.⁷ However, this is only one requirement for an injury in fact; the injury must also be concrete.⁸ The Court described a concrete injury as an injury that actually exists.⁹

In its opinion, the Supreme Court distinguished between tangible and intangible injuries, noting that although intangible injuries might be harder to identify, they can still be concrete.¹⁰ The Court instructed that history and the judgment of Congress are important to determining if an intangible harm is an injury in fact.¹¹ Regarding history, the Court stated, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."¹² With respect to the judgment of Congress, the Court emphasized that although Congress is well suited to identify intangible harms, "Article III standing requires a concrete injury even in the context of a statutory violation."¹³ Indeed, the Court noted that in some circumstances a statutory violation occurs but no harm results.¹⁴

III. ANALYSIS

The facts of the Eleventh Circuit's decision in *Salcedo v. Hanna* are brief. The plaintiff, John Salcedo, received a single, unsolicited text message from his former attorney, Alex Hanna, offering him a ten percent discount on services.¹⁵ Salcedo then filed suit in district court alleging that Hanna violated the TCPA.¹⁶ Hanna moved to dismiss the complaint, claiming Salcedo lacked standing.¹⁷ Although the district court expressed an opinion that Salcedo did have standing, the court

5. *Spokeo*, 136 S. Ct. at 1547-49.

6. *Id.* at 1547-48.

7. *Id.* at 1548.

8. *Id.*

9. *Id.*

10. *Id.* at 1549.

11. *Id.*

12. *Id.*

13. *Id.* at 1543.

14. *Id.* at 1550.

15. *Salcedo v. Hanna*, 936 F.3d 1162, 1165 (11th Cir. 2019).

16. *Id.*

17. *Id.*

certified an interlocutory appeal to the Eleventh Circuit.¹⁸ The Eleventh Circuit accepted the appeal and analyzed the issue of standing.¹⁹

A. THE ELEVENTH CIRCUIT'S REASONING

First, the Eleventh Circuit looked at the history of the TCPA.²⁰ The TCPA was enacted in 1991 to restrict the use of telephone dialing systems from sending unsolicited calls to residential homes and from sending unsolicited advertisements to facsimile machines.²¹ The TCPA authorizes the Federal Communications Commission (FCC) to implement regulations²² and creates a private right of action for consumers.²³ The Eleventh Circuit noted two important updates to the TCPA: (1) the TCPA was amended “to allow the FCC to exempt free-to-receive cellular calls”; and (2) the FCC extended the statute to apply to text messages.²⁴ The court opined that facially Salcedo’s complaint appeared to state a cause of action.²⁵

The court next considered the judicial power under Article III to hear “Cases” and “Controversies.”²⁶ The court noted that even when Congress appears to grant the federal courts jurisdiction, courts “are still obliged to examine whether jurisdiction exists under the Constitution.”²⁷ Article III standing requires the plaintiff “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”²⁸ The first element, an injury in fact, was at issue in this case.²⁹ In order to have standing, the injury must be concrete; or in other words, “it must actually exist.”³⁰ Under the *Spokeo* framework, if the concreteness of an injury is not readily ascertainable, courts look to Congress for guidance.³¹ Notably, the *Spokeo* decision stated, “Article III standing requires a concrete injury even in the context of a statutory violation.”³²

Next, the Eleventh Circuit analyzed its existing precedent regarding standing to sue for a single violation of the TCPA.³³ The court compared Salcedo’s allegations to the facts of *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, where it previously found an individual had standing to sue under the TCPA

18. *Id.*

19. *Id.* Because its “order ‘involve[d] a controlling question of law’ . . . the [district] court allowed Salcedo to pursue an interlocutory appeal,” which was granted under 28 U.S.C. § 1292(b). *Id.*

20. *Id.* at 1165–66.

21. *Id.* at 1166.

22. *Id.*; Telephone Consumer Protection Act of 1991, Pub. L. 102-243 § 3(b)(2), 105 Stat. 2394, 2396 (codified at 47 U.S.C. § 227(b)(2) (2018)).

23. Telephone Consumer Protection Act of 1991 § 3(b)(3) (codified at 47 U.S.C. § 227(b)(3)).

24. *Salcedo*, 936 F.3d at 1166.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

29. *Id.* at 1165.

30. *Id.* at 1167.

31. *Id.*

32. *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549).

33. *Id.*

for receiving a single junk fax.³⁴ The court first compared the tangible costs of receiving a junk fax with Salcedo's allegations.³⁵ Receiving a fax has monetary costs such as paper, ink, and toner.³⁶ By contrast, Salcedo's complaint failed to allege the text message cost him any money.³⁷ Next, the court looked to the intangible costs and found that the costs of receiving a fax message and a text message were substantially different.³⁸ "A fax message consumes the receiving device entirely," whereas "[a] cell phone user can continue to use all of the device's functions, including receiving other messages, while it is receiving a text message."³⁹ Thus, the Eleventh Circuit found *Palm Beach* to be factually distinct and not binding in the case at bar.⁴⁰

The court then turned to Congress for guidance.⁴¹ Notably, Congress was silent regarding text messaging generally.⁴² Although text messaging did not exist at the time the TCPA was passed in the form it exists today, Congress has amended the TCPA several times without adding unsolicited text messages to the provision at issue.⁴³ However, the FCC, through its rulemaking authority, has extended the voice call provisions of the TCPA to text messages. The court stated, "At most, we could take Congress's silence as tacit approval of that agency action."⁴⁴ Instead, the court found that Congress was particularly concerned with privacy in the home when it enacted the TCPA.⁴⁵ This purpose does not logically extend to text messaging because cell phones are routinely taken outside the home.⁴⁶ Moreover, the court noted that the amendment to the TCPA "allowing the FCC to exempt free-to-receive calls to cell phones" is evidence that Congress was less concerned with unsolicited calls to cell phones.⁴⁷

Finally, the court looked to historical practices to determine if this intangible harm was closely related to other traditionally recognized harms. First, the court examined the tort of intrusion upon seclusion.⁴⁸ Courts recognize torts of this kind when an intrusion of privacy is "objectively serious and universally condemnable."⁴⁹ The Eleventh Circuit found Salcedo's allegations fell short of

34. *Id.* at 1167-68; *see also* *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252-53 (11th Cir. 2015).

35. *Salcedo*, 936 F.3d at 1168.

36. *Id.* at 1167-68.

37. *Id.* at 1168.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1168-69.

42. *Id.* In a footnote, the court recognized that recent amendments to the TCPA "expressly include text messaging" in provisions proscribing false transfers of caller ID information. *Id.* at 1169 n.7; *see generally* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141 § 503(a), 132 Stat. 348, 1091-92 (to be codified at 47 U.S.C. § 227(e)).

43. *Salcedo*, 936 F.3d at 1169.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1170.

48. *Id.* at 1171.

49. *Id.*

this requirement.⁵⁰ The court also noted, “Salcedo’s reasoning would equate opening your private mail—a serious intrusion indeed—with mailing you a postcard.”⁵¹ Second, the court analyzed the torts of trespass and nuisance and found both were inapplicable because the allegations did not demonstrate that the text message infringed on real property.⁵² Lastly, the court turned to the torts of conversion and trespass to chattel.⁵³ The court observed that Salcedo’s allegations slightly resembled those historical harms, but “differ[ed] so significantly in degree as to undermine his position.”⁵⁴

The Eleventh Circuit concluded that, under the *Spokeo* framework, Salcedo failed to allege a concrete injury and thus lacked standing to bring suit under the TCPA.⁵⁵ It is important to note the concurrence, which emphasized that the majority’s holding does not foreclose the possibility that a plaintiff who receives “multiple unwanted and unsolicited text messages may have standing to sue under the TCPA.”⁵⁶ This indicates that future plaintiffs might be allowed to pursue similar claims where the contact is more severe.

B. THE NINTH CIRCUIT’S REASONING

On the other side of the circuit split, the Second and Ninth Circuits have opined that a concrete injury can derive from a single, unsolicited text message.⁵⁷ In the *Van Patten* case, the plaintiff received text messages from a business the plaintiff had a former relationship with.⁵⁸ Although the court found the plaintiff had standing to sue under the TCPA, it nevertheless held in favor of the defendants because the plaintiff gave prior consent to receive such messages; thus, the text message was not “unsolicited.”⁵⁹

The Ninth Circuit first explored the history of courts recognizing invasion of privacy harms in one sentence: “Actions to remedy defendants’ invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts, and the right of privacy is recognized by most states.”⁶⁰ The court noted that Congress enacted the TCPA with privacy and nuisance concerns.⁶¹ The Ninth Circuit next turned to the harm Congress sought to address through the TCPA.⁶² The court stated, “Congress identified unsolicited contact as a concrete

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 1172.

55. *Id.*

56. *Id.* at 1173–74 (Pryor, J., concurring).

57. *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 95 (2d Cir. 2019); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017). For purposes of analyzing this side of the circuit split, this Case Note will focus on the reasoning of the Ninth Circuit. Although the plaintiff in *Van Patten* received two unsolicited text messages, the court’s reasoning extends to single message fact patterns. See *Van Patten*, 847 F.3d at 1043.

58. *Van Patten*, 847 F.3d at 1041.

59. *Id.* at 1046.

60. *Id.* at 1043.

61. *Id.*

62. *Id.*

harm.”⁶³ The court then attempted to equate the privacy concerns of receiving an unsolicited phone call in someone’s home with receiving a single text message, which may or may not be received in the home.⁶⁴ Altogether, the court combined the single sentence of tort history with congressional purpose to find a concrete injury existed.⁶⁵ The *Spokeo* decision guides courts to conduct a more thorough analysis when the alleged harm is difficult to recognize. Indeed, the Eleventh Circuit’s *Salcedo* analysis is more consistent with how other federal circuit courts apply the *Spokeo* framework to similar standing issues.⁶⁶ Comparing the *Van Patten* analysis with other cases reveals how deficient the analysis is.

C. THE ELEVENTH CIRCUIT PROPERLY APPLIED THE SPOKEO FRAMEWORK

In the *Spokeo* decision, the Supreme Court was concerned with the Ninth Circuit’s failure to distinguish between the injury in fact requirements of concreteness and particularization.⁶⁷ The Court explained that an injury may be particularized, but nevertheless fail for not being concrete.⁶⁸ The Ninth Circuit’s analytical shortfall in the *Spokeo* decision is the same problem with its *Van Patten* decision.⁶⁹ Both the *Salcedo* and *Van Patten* opinions failed to discuss particularization in detail, presumably because it was quite clear that the alleged harm personally and individually affected the plaintiffs.⁷⁰ However, the Ninth Circuit’s analysis of intangible harms is deficient in the sense that it only identified a particularized harm to the plaintiff and failed to adequately explain a concrete injury as instructed by the Supreme Court.

One point is clear from the Supreme Court’s reasoning: courts must find a concrete injury in fact even when Congress identifies an intangible harm.⁷¹ However, the Supreme Court’s decision in *Spokeo* does support the assertion that when Congress identifies an intangible harm, courts should show deference.⁷² The *Van Patten* decision conveniently skirted around the fact that Congress has not explicitly extended the protections of the TCPA to text messaging. As the Eleventh Circuit noted, it was the FCC that extended the voice call provision of

63. *Id.*

64. *Id.*

65. *Id.*

66. See *DiNaples v. MRS BPO, LLC*, 934 F.3d 275, 280 (3d Cir. 2019) (finding a concrete injury where a debt collector exposed the plaintiff’s QR code in violation of the Fair Debt Collection Practices Act); *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1275 (9th Cir. 2019) (finding that the plaintiffs suffered a concrete injury under the Illinois Biometric Information Privacy Act from improper use of facial recognition technology); *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1066 (D.C. Cir. 2019) (finding that the plaintiff suffered an injury in fact under the Fair and Accurate Credit Transactions Act when she received a receipt displaying her full credit card information); *Susinno v. Work Out World Inc.*, 862 F.3d 346, 348 (3d Cir. 2017) (finding that the plaintiff suffered a concrete injury under the TCPA for receiving an unsolicited phone call and one-minute voicemail).

67. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016).

68. *Id.* at 1548–49.

69. See *Van Patten*, 847 F.3d at 1043; *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413–14 (9th Cir. 2014).

70. See *Van Patten*, 847 F.3d at 1043; *Robins*, 742 F.3d at 412.

71. *Spokeo*, 136 S. Ct. at 1549.

72. *Id.*

the TCPA to text messaging.⁷³ Thus, the Ninth Circuit's deference to Congress is severely undermined by the fact that Congress has not identified text messaging as an intangible harm. Furthermore, a closer look at the FCC guidance undercuts the finding of a concrete injury for unsolicited text messaging.⁷⁴ In extending the voice call provisions to text messages, the FCC stated:

This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service. Congress found that automated or prerecorded telephone calls were a greater nuisance and invasion of privacy than live solicitation calls. Moreover, such calls can be costly and inconvenient.⁷⁵

This guidance mentions the cost and inconvenience of "text calls," which, as the Eleventh Circuit explained, often do not cost the receiver anything and at most cause a couple of seconds of inconvenience.⁷⁶ Therefore, under this guidance, finding a concrete injury is more difficult where the plaintiff incurred no extra cost and the inconvenience is minimal. Where other courts have faced a difficult standing question, the judgment of Congress is easily ascertained because the statute at issue explicitly prohibits the act or omission alleged.⁷⁷

Next, the Ninth Circuit failed to properly define the harm at issue. The harm the Ninth Circuit identified was unsolicited contact.⁷⁸ The Eleventh Circuit defined the harm more narrowly, as unsolicited text messages.⁷⁹ The Ninth Circuit's overgeneralization of the harm is not only an incorrect application of law but also contrary to the history of the TCPA. In an attempt to reconcile its definition of harm with the legislative history and purpose of the TCPA, the Ninth Circuit performed a scant, incomplete analysis of the history.⁸⁰ The Ninth Circuit simply stated that invasions of privacy and nuisance are torts traditionally recognized by courts.⁸¹ Specifically, the court stated that "in enacting the TCPA, Congress made specific findings that 'unrestricted telemarketing can be an intrusive invasion of privacy' and are 'nuisance.'"⁸² However accurate this may be, the Ninth Circuit failed to compare those traditional torts to the alleged harm at issue: unsolicited text messaging. Upon a more thorough inspection, as performed by the Eleventh Circuit, it is clear that unsolicited text messaging is sufficiently

73. *Salcedo v. Hanna*, 936 F.3d 1162, 1169 (11th Cir. 2019).

74. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14014, 14115 (2003).

75. *Id.*

76. *Id.*; *Salcedo*, 936 F.3d at 1168.

77. See *DiNaples v. MRS BPO, LLC*, 934 F.3d 275, 280 (3d Cir. 2019); *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1275 (9th Cir. 2019); *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1066 (D.C. Cir. 2019); *Susinno v. Work Out World Inc.*, 862 F.3d 346, 348 (3d Cir. 2017).

78. *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017).

79. *Salcedo*, 936 F.3d at 1170.

80. See *Van Patten*, 847 F.3d at 1042-43.

81. *Id.* at 1043.

82. *Id.* (quoting Telephone Consumer Protection Act of 1991, Pub. L. 102-243 § 2, 105 Stat. 2394).

distinct from the traditional torts of invasion of privacy, nuisance, and others.⁸³

A look at other courts' decisions reveals that *Van Patten* is an anomaly. Other courts—even those within the Ninth Circuit—define the harm at issue more narrowly and properly analyze that specific harm by comparing it to other traditionally recognized harms.⁸⁴ In *Patel v. Facebook*, the Ninth Circuit closely analyzed the common law history of privacy rights in connection with technological invasions of privacy.⁸⁵ Specifically, the court analyzed whether the alleged harm was similar to an invasion of privacy to determine whether a close relationship existed.⁸⁶ This is very different from its *Van Patten* analysis which simply stated that an invasion of privacy can constitute a cause of action and that the purpose of the TCPA is to protect privacy interests, and then concluded the unsolicited text message had a close tie to a traditional harm.⁸⁷ Similarly, the D.C. Circuit identified the harm narrowly as “avoiding an increased risk of identity theft.”⁸⁸ The court then compared the alleged harm with common law breach of confidence.⁸⁹ The court noted that the statutory violation at issue and breach of confidence involve very similar relationships with respect to trust.⁹⁰

IV. CONCLUSION

The Ninth Circuit's decision in *Van Patten* purported to apply the *Spokeo* framework for determining whether a concrete injury exists.⁹¹ However, the analysis is truncated and simply restates the analysis urged by the Supreme Court without a thorough application. The type of harm the Ninth Circuit recognized is particularly troublesome in a society so increasingly dependent on cell phone usage. Congress sought to protect the sanctity of the home from unwanted telemarketing calls.⁹² Text messaging occurs nearly everywhere a person goes and is hardly confined to the privacy of one's home.

Hopefully, the Supreme Court will provide guidance regarding the application of *Spokeo* to TCPA claims for unsolicited text messages. However, as it stands, the circuit courts disagree as to whether an unsolicited text message is a concrete injury under the TCPA. The *Salcedo* opinion provides a thorough analysis and very carefully applies the *Spokeo* framework.⁹³ Until Congress or the Supreme

83. *Salcedo*, 936 F.3d at 1170-72.

84. See *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270 (9th Cir. 2019); *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1064 (D.C. Cir. 2019).

85. *Patel*, 932 F.3d at 1271-73.

86. *Id.* at 1273.

87. See *Van Patten*, 847 F.3d at 1043.

88. *Jeffries*, 928 F.3d at 1064.

89. *Id.*

90. *Id.* at 1064-65.

91. *Van Patten*, 847 F.3d at 1042-43.

92. See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243 § 2, 105 Stat. 2394, 2394-95 (repeatedly emphasizing in the findings a concern for privacy within the home).

93. See *Salcedo v. Hanna*, 936 F.3d 1162, 1166-73 (11th Cir. 2019). The Eleventh Circuit recently acknowledged how it can be a very close call to find standing. *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1306 (11th Cir. 2020) (citing *Salcedo*, 936 F.3d at 1168). In so doing, the court referenced the *Salcedo* case to demonstrate the difficulty in determining whether a concrete injury exists. *Id.*

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Court addresses this issue, businesses should beware of sending potentially unsolicited contact.