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TCPA: Reversing panel decision, full Eleventh Circuit finds single text message sufficient to establish TCPA standing

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Takeaway: In *Drazen v. Pinto*, 74 F.4th 1336 (11th Cir. 2023) (en banc), the Eleventh Circuit held a single "unwanted, illegal" text message sufficient to establish concrete injury for standing purposes. This holding effectively overturns the Eleventh Circuit's prior outlier decision in *Salcedo v. Hanna*, 936 F.3rd 1162 (11th Cir. 2019), which held a single text message insufficient to establish standing.

Plaintiffs Suzan Drazen and Jason Bennett brought class action complaints alleging that GoDaddy used a "prohibited automatic dialing system" to make "promotion calls and text messages" in violation of the Telephone Consumer Protection Act ("TCPA"). *Drazen*, 74 F.4th at 1339-40. Numerous class members only received one illegal text message. The plaintiffs reached a settlement with GoDaddy at the district court level, but, on appeal, an Eleventh Circuit panel reversed the district court's ruling and dismissed the case for lack of jurisdiction. *Id.* at 1341. The panel noted that "[e]very class member must have Article III standing to recover individual damages" and found that numerous class members did not have standing because, under *Salcedo*, "a single unwanted text message is not sufficient to meet the concrete injury requirement for standing." *Id.* at 1342.

Drazen moved for rehearing en banc, asking the Eleventh Circuit to reevaluate *Salcedo* and "clarify the law regarding the elements necessary to pursue a TCPA claim." *Id.* The Eleventh Circuit granted that motion and reversed the panel's decision, finding that the *Drazen* class asserted a sufficiently concrete injury to establish standing. The court reasoned that the central question was whether an identified harm or injury "has a close relationship to a harm that has traditionally been regarded as providing a basis for lawsuit in English or American Courts." *Id.* at 1343. The court found that harm of receiving a single, unwanted text message closely resembled the "common-law tort of intrusion upon seclusion." *Id.* GoDaddy argued that plaintiffs' allegations did not satisfy the essential elements of a traditional intrusion upon seclusion tort claim. But the en banc court rejected GoDaddy's position that one text message could not establish standing: "[B]ecause the concreteness inquiry centers on whether the harms share a 'close relationship,' we do not require carbon copies; the new harm need only be 'similar to' the old harm." *Id.* Thus, because "receiving an unwanted text message shares a close relationship with the harm underlying the tort of intrusion upon seclusion," it did not matter, for standing purposes, that receiving this text message is insufficient to actually recover for intrusion upon seclusion. *Id.* at 1345.

The court did distinguish those harms that can "exist in degree" from those harms that either "exist[] or [do] not." In *Hunstein v. Preferred Collection & Management Services*, 48 F.4th 1236 (11th Cir. 2022) (en banc), for example, the full Court of Appeals found no standing for a plaintiff who alleged that a "creditor mailed personal information about his debt to a mail vendor." *Drazen*, 74 F.4th at 1344. The *Drazen* court

reasoned that this injury resembled the tort of public disclosure, and that "the element of publicity" required for that tort, "either exists or it does not; there is no in-between." 74 F.4th at 1345 . 1249. The *Drazen* court further reasoned that *Hunstein* was distinguishable because "the plaintiff's alleged harm was not just 'smaller in degree' than the common-law comparator – it was entirely missing." 74 F.4th at 1336.

Conclusion: The *Drazen* decision brings the Eleventh Circuit in line with seven other Circuits which have recognized that receiving a single unwanted text message is sufficient to establish standing. Going forward, defendants should recognize that the degree of harm is not dispositive for standing purposes. Rather, courts will consider whether the alleged harm is similar "in kind" to a traditionally recognized harm, such as a common law tort. Parties cannot defeat standing simply by arguing that an alleged harm is simply "smaller in degree" than that necessary to state a claim for a common law tort. Defendants may still be able to defeat standing if a harm is not the kind that can "exist in degree" but rather is a harm that "either exists or [] does not," such as the element of publicity discussed in *Hunstein*.