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Fifth Circuit disagrees with Eleventh Circuit and holds that a single text message is a concrete injury under the TCPA

Takeaway: TCPA defendants beware: it takes only a single, unsolicited text message for a plaintiff to establish Article III standing in the Fifth Circuit. In *Cranor v. 5 Star Nutrition, L.L.C.*, --- F.3d ---, No. 19-51173, 2021 WL 2133433 (5th Cir. May 26, 2021), the Fifth Circuit held that a single text message is precisely the type of nuisance and invasion of privacy Congress intended to ban under the TCPA, further solidifying the trend among the Circuits that a sole text message is enough to rise to a cognizable injury-in-fact. Joining a similar line of decisions from the Ninth, Seventh, Second, and Third Circuits, the Fifth Circuit expressly rejected the Eleventh Circuit's reasoning in *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), that a single text message does not rise to the level of an Article III injury-in-fact.

Putative class representative Lucas Cranor provided 5 Star Nutrition with his cell phone number when he made a purchase at its Austin, Texas store in June 2018. *Cranor*, 2021 WL 2133433, at *1. Thereafter, 5 Star sent Cranor a series of unsolicited text messages containing advertisements for its rewards program and a 50% off sale. *Id.* Cranor responded to the unsolicited text messages with a "STOP" request. *Id.* The parties later entered into a pre-suit settlement, with 5 Star paying Cranor \$1,000. *Id.* But 5 Star ended up sending Cranor one more promotional text message, to which Cranor again responded "STOP." *Id.* Finally, 5 Star got the message and stopped sending Cranor unsolicited texts. *Id.*

Cranor then filed a putative class action against 5 Star under the TCPA alleging the single text message inflicted "the very harm that Congress sought to prevent [in enacting the TCPA]—namely, a nuisance and invasion of privacy," as well as harm caused "by depleting the battery life on his cellular telephone, and by using minutes allocated to [him] by his cellular telephone service provider." *Id.* But the district court dismissed Cranor's complaint for lack of standing, concluding that a single text message does not constitute an injury-in-fact, because it is not an invasion of home privacy like a voice call to a residential line. *Id.* Cranor appealed.

Reviewing the dismissal *de novo*, the Fifth Circuit reversed and remanded. The panel concluded that a single text message did confer Article III standing because the nuisance that is an unsolicited text advertisement is the precise type of harm Congress sought to prevent by enacting the TCPA. While assessing Cranor's standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the court simultaneously rejected the Eleventh Circuit's conflicting interpretation of what constitutes a cognizable injury under the TCPA.

In *Salcedo*, the Eleventh Circuit departed from a Ninth Circuit holding that two unsolicited text messages give rise to an injury-in-fact. The *Salcedo* court held that a single text message did not give rise to standing under the TCPA. It reasoned that a text message was qualitatively different from a fax or a phone call—it does not invade

the privacy of the recipient's home, it does not incur paper or ink costs, and it does not tie up a recipient's phone line. *Salcedo*, 936 F.3d at 1168-69. Congress's silence on the issue of unsolicited text messages further influenced this holding. *Id.* at 1169.

But the Fifth Circuit did not agree with the Eleventh Circuit's focus on injuries to residential telephone subscribers. First, Congress expressly extended the TCPA to cellular phones, which are designed for use outside of the home. *Cranor*, 2021 WL 2133433, at *3. Second, the TCPA expansively addresses "nuisance and invasion of privacy" in non-residential contexts, including with respect to "emergency telephone line[s]" and "paging service[s]." *Id.* Finally, Congress delegated authority to the FCC to establish regulations consistent with the TCPA and did not limit that authority to only nuisances and privacy intrusions in the home. *Id.*

Turning to historical practice, the court found that Cranor's injury from the single text message had a close relationship to common law public nuisance. *Id.* Like public infrastructure such as a road or bridge, Cranor sought to use the American telecommunications infrastructure without harassment. *Id.* This reasoning departed from the *Salcedo* court's conclusion that a single text message did not have a common law analogue, because it was the "kind of fleeting infraction upon personal property that tort law has resisted addressing." *Id.* at *5 (citing *Salcedo*, 936 F.3d at 1172). In addition to noting that the Eleventh Circuit did not consider common law public nuisance, the Fifth Circuit flatly rejected the *Salcedo* court's focus on the "substantiality" of the harm, because the *Spokeo* inquiry focuses on the *types* of harm protected under the common law and not the precise point of when the harms become actionable. *Id.*