GoDaddy TCPA Ruling Changes Class Certification Landscape

By **Cory Eichhorn, Sydney Alexander and Isaac Fuhrman** (August 12, 2022)

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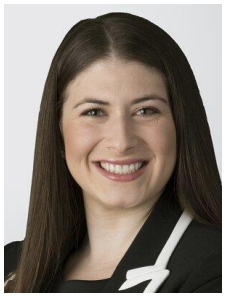

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On July 27, the U.S. Court of Appeals for the Eleventh Circuit **issued its decision** in Drazen v. Pinto, confirming for the first time that absent putative class members must have Article III standing.[1] In Drazen, the class plaintiffs alleged a Telephone Consumer Protection Act violation where GoDaddy.com sent prohibited marketing text messages and cell-phone calls.

The Eleventh Circuit's Ruling

As part of the settlement of the TCPA class action, the parties in Drazen submitted a class definition to the court that limited the putative class to those individuals receiving voice messages or text messages facilitated by multiple software applications, programs and platforms that GoDaddy.com used.

Notably, Drazen arose where the plaintiff sought certification of a damages class pursuant to Federal Rule of Civil Procedure 23(e). The district court determined that only the named plaintiffs must have standing.[2]

In Salcedo v. Hanna in 2019, the Eleventh Circuit found that a single unwanted text message is not sufficient to meet the concrete injury requirement for standing.[3] As such, the court found that the standing issue could be resolved by removing the one named plaintiff that received only a text message, and not a voice message.

The court also held, based on In re: Deepwater Horizon in the U.S. Court of Appeals for the Fifth Circuit in 2014, that the unnamed plaintiffs that only received a text message had standing because, while they would not have a viable claim in the Eleventh Circuit, they would have a viable claim in their respective circuits given a circuit split.[4]

The Eleventh Circuit reversed the district court's order granting the class settlement approval. On the issue of standing, the court held that the class definition did not meet Article III standing requirements based in part on Frank v. Gaos, where in 2019 the U.S. Supreme Court held that the courts must assure that standing existed at every stage of litigation, including at the settlement stage of a class action.[5]

The court also referenced TransUnion LLC v. Ramirez, where in 2021 the Supreme Court held that every class member must have Article III standing in order to recover individual damages.[6]

The Eleventh Circuit held that whether absent class members can establish standing may be exceedingly relevant to the class certification analysis required by the Federal Rule of Civil Procedure 23. The court reasoned that the standing analysis should be addressed at the certification stage, in Rule 23, rather than as a standalone requirement under Article III of the Constitution itself.

As a result, all plaintiffs within the class definition must have standing to recover individual damages. Such reasoning was affirmed by TransUnion according to the Eleventh Circuit. The

Eleventh Circuit also disagreed with the district court's interpretation of the Deepwater Horizon decision, writing that "nowhere does that case suggest that we check Article III standing at the door when dealing with class action."[7]

The court returned to TransUnion to reach the conclusion that any class definition that includes members who would not have standing under the precedent of the court is a class definition that cannot stand.

The Practical Implications of Drazen

This decision could have broad sweeping implications for not only TCPA class actions but in any class action where Article III standing is called into question and where circuit splits exist.

From a practical perspective, this more stringent application of standing in the class action context will likely result in less class actions being certified in the Eleventh Circuit and even where certification is appropriate, the application of Drazen could result in a much smaller class.

Moreover, Drazen is unique in that it occurred at the class settlement stage and requires district courts to consider standing even in the context of motions for preliminary approval of a class settlement. As such, defendants in class action matters now may have more leverage at the class certification stage to explore individual settlements or the settlement of the class on much smaller scale.

Drazen also creates yet another hurdle for class plaintiffs counsel to overcome not only at the class certification stage but also when negotiating a settlement. To that end, sophisticated class plaintiffs counsel should be much more selective in which class actions they bring and the manner in which they allege claims.

Regarding TCPA actions, defendants should also pay particular attention to the frequency of text messages and cellphone calls sent.

As Drazen suggests, those individuals who only received one text message would not have standing and therefore could not be part of a putative TCPA class settlement. In Drazen, however, the Eleventh Circuit refrained from deciding whether a single phone call to a cellphone constituted a concrete injury for Article III standing purposes.

As a result, counsel practicing in this area should pay particular attention to future Eleventh Circuit decisions that may affect the standing requirements as they relate to cases alleging TCPA violations implicating calls to cellphones or the use of prerecorded messages.

It remains to be seen how Drazen will affect the number of class actions filed in courts throughout the Eleventh Circuit and whether those cases are ultimately certified as a class either through a motion for class certification or a motion for preliminary approval of a settlement. It is clear that courts will apply additional scrutiny to class actions going forward with respect to the standing of the unnamed class members, which should inure to the benefit of defendants and their counsel in TCPA class actions.

Given the Drazen court's reliance on TransUnion, its holding could also be applied to other consumer class action cases outside the context of the TCPA where standing is an issue. This would include purported class actions brought under the Fair Debt Collection Practices Act, the Fair Credit Reporting Act and other federal acts governing consumer relationships.

In particular, there is a strong argument that Drazen should apply in any circumstance where class certification is at issue and the underlying violation is technical in nature given that a mere statutory violation does not generally equate to an injury-in-fact.

Based on the prevalence of class actions filed in the Eleventh Circuit alleging these types of technical violations, it is likely that Drazen will change the class certification landscape going forward.

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[1] See Drazen v. Pinto, No. 21-10199, 2022 WL 2963470 (11th Cir. July 27, 2022).

[2] Cordoba v. DIRECTV, LLC, 942 F.3d 1259, 1273 (11th Cir. 2019).

[3] Salcedo v. Hanna, 936 F.3d 1162, 1168 (11th Cir. 2019).

[4] In re Deepwater Horizon, 739 F.3d 790, 807 (5th Cir. 2014).

[5] See Frank v. Gaos, 139 S. Ct. 1041 (2019).

[6] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204–2205, 2208 (2021).

[7] Drazen, 2022 WL 2963470 at *6.