

# INSIGHT: One Text Message Not Enough for TCPA Lawsuit

**Akin Gump**  
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*Not every unsolicited text message provides an offended party the ability to sue under the TCPA, the Eleventh Circuit ruled. Akin Gump attorneys examine the ruling and explain that the ruling confirms important limits as to the type of harms that the TCPA was enacted to address.*

A single text message sent in alleged violation of the Telephone Consumer Protection Act (TCPA) isn't sufficient to confer federal court standing, the U.S. Court of Appeals for the Eleventh Circuit recently ruled.

In *Salcedo v. Hanna*, the court rejected the proposition that the momentary annoyance of a single text constitutes a concrete injury under Article III. The opinion may provide an important check against abusive litigation that goes far beyond Congress's original intent in enacting the TCPA.

## The Underlying Lawsuit and District Court Decision

The lawsuit presented a typical scenario in TCPA litigation. Based on the receipt of a single unwanted text message, the plaintiff, John Salcedo, filed a putative TCPA action seeking aggregate statutory damages of \$500 to \$1,500 for each unsolicited text sent by defendant Alex Hanna over a four-year period. Salcedo alleged the unwanted text invaded his privacy and "right to enjoy the full utility of his cellular device."

Hanna moved to dismiss on the ground that these allegations were insufficient to support standing under Article III. The district court denied the motion, based on an 11th Circuit precedent that found standing based on plaintiff's receipt of a one-page fax advertisement.

Even so, the district court certified the standing issue for interlocutory appellate review, in light of the U.S. Supreme Court decision in *Spokeo Inc. v. Robins* (2016), which requires lower courts to examine a statute's legislative history and common law analogues in determining their jurisdiction to hear plaintiff's claims under Article III.

## No Intrusion Into Privacy of Home

The circuit court followed the two-part analytical framework set forth in *Spokeo* and held that the receipt of a single unwanted text message did not amount to a concrete injury sufficient to confer standing. The court reviewed the legislative history of the TCPA and common law analogues, and concluded that neither supported plaintiff's alleged standing.

The court summarized in a word what Congress had found as to "harms from telemarketing via text message": "nothing." This was unsurprising, since text messaging in

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its current form did not exist at the time of the TCPA's enactment in 1991. Even in subsequently amending the TCPA, Congress had not "added text messaging to the categories of restricted telemarketing."

As for the TCPA's legislative history, Congress's primary concern was not unwanted calls to cellular telephones, but was instead the "concern for privacy within the sanctity of the home." Because mobile devices are "often taken outside of the home and often have their ringers silenced," text messages present significantly "less potential for nuisance and home intrusion."

Indeed, Congress had instructed the Federal Communications Commission to consider exempting nonchargeable calls to mobile numbers from the TCPA's scope, undermining the notion that Congress intended the TCPA to restrict all calls to mobile numbers.

Congress likewise also had instructed the FCC to establish telemarketing standards permitting the release of the called party as long as five seconds after hang-up, indicating that "Congress does not view tying up a phone line for five seconds as a serious intrusion."

The court concluded that the "judgment of Congress is ambivalent at best" as to whether an unwanted text constitutes concrete injury. Noting that "congressional silence is a poor basis for extending federal jurisdiction to new types of harm", the court rejected Salcedo's broad argument—so often made in TCPA litigation—that the mere statutory violation sufficed to confer standing. As text messages that do not "involve an intrusion into the privacy of the home," they do not present the type of harm that Congress targeted in enacting the TCPA.

The court also found that the common law did not provide standing in analogous circumstances; to the contrary, a single text message is "precisely the kind of fleeting infraction upon personal property that tort law has resisted addressing."

Common law theories, such as invasion of privacy, nuisance, and trespass to chattel, are limited to serious invasions of property—such as complete and permanent dominion over real or personal property—or serial, highly offensive intrusions into one's personal privacy—such as active intermeddling into one's personal effects and affairs. The comments to Section 652B of the Restatement (Second) of Torts even specify that liability for invasion of privacy does not arise "for one, two or three phone calls."

The court also declined to follow the Ninth Circuit's 2017 decision in *Van Patten v. Vertical Fitness Grp. LLC*, finding the decision to be based on a "one-sentence review of history" rather than the two-step analysis required by Spokeo.

In addition, the court distinguished cases (including its own precedent) involving junk faxes, noting that unlike a fax machine that is unavailable due to the unwanted fax, "a text message consumes the receiving device not at all." Nor had the plaintiff alleged that he incurred any cost from the mere receipt of the text.

## Takeaways

Salcedo is an important reminder that not every unwanted text message supports a putative nationwide class action under the TCPA. Instead, plaintiffs must show that the unwanted text messages actually resulted in a concrete injury of the specific sort that Congress intended to address in enacting the TCPA, or a highly offensive intrusion into their personal privacy, as required under common law.

It remains to be seen whether these requirements can be met in individual or putative class actions challenging text messages under the TCPA.

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