

THE INJURY IN RECEIVING A TEXT MESSAGE

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I. INTRODUCTION

This year, the Ninth Circuit held that a single unsolicited call to a woman’s cellphone created sufficient harm for her to file suit under the Telephone Consumer Protection Act (“TCPA”).¹ The TCPA, codified in 1991, was initially enacted to prohibit companies from sending advertisements to potential consumers through their personal facsimile

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¹ *Susinno v. Work Out World Inc.*, 862 F.3d 346, 352 (3d Cir. 2017).

(“fax”) machines.² Since then, technology has advanced tremendously, and while the use of fax advertisements has declined, companies have looked to emerging technologies to reach customers directly.³ Text messages are an appealing medium for such schemes, with six billion text messages sent daily in 2011, and the average person sending or receiving thirty-five messages every day.⁴

In the 2016 case of *Spokeo v. Robins*,⁵ the Supreme Court analyzed the injury requirement for a claim filed under the Fair Credit Reporting Act of 1970 and held that an injury must be both “particularized” and “concrete” in order for a plaintiff to have standing to sue. Since the ruling was passed down, *Spokeo* has been used by federal Circuit Courts to analyze other consumer litigation claims.⁶

Recent TCPA litigation has addressed the issue of whether the harms being alleged under the Act are “concrete” and “particularized.”⁷ This has been a difficult question the Circuit Courts, who have attempted to address claims regarding technology that did not exist when the TCPA was enacted in 1991.⁸ This unresolved question presents problems for both businesses and consumers: businesses attempt to market to consumers through modern technology, while consumers attempt to preserve their right to privacy.⁹

In decisions examining the TCPA, both the Third and the Ninth Circuits found that unwanted messages from businesses constituted “particularized” and “concrete” harms under *Spokeo*.¹⁰ While this consumer-friendly approach has been the trend of the Circuit Courts, the Fourth Circuit took a contrary stance in formulation of the harm requirement under *Spokeo*.¹¹

Under the majority interpretation of the *Spokeo* framework, courts

² Spencer W. Waller, Daniel B. Heidtke & Jessica Stewart, *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343, 355 (quoting S. REP. NO. 102-178, at 3 (1991), reprinted in 1991 U.S.C.C.A.A.N. 1968, 1970).

³ *Id.* at 395.

⁴ Marissa A. Potts, “Hello, it’s me [Please don’t sue me!]: Examining the FCC’s Overbroad Calling Regulations under the TCPA”, 82 BROOK. L. REV. 281, 283 (2016).

⁵ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1542-45 (2016).

⁶ *See, e.g., Van Patten v. Vertical Fitness Grp., L.L.C.*, 847 F.3d 1037 (9th Cir. 2017).

⁷ *Id.*

⁸ *See, e.g., Van Patten*, 847 F.3d at 1040.

⁹ *See, e.g., id.*

¹⁰ *Van Patten*, 847 F.3d at 1041; *Susinno v. Work Out World Inc.*, 862 F.3d 346, 352 (3d Cir. 2017).

¹¹ *Dreher v. Experian Info. Solutions, Inc.*, 856 F.3d 337, 340 (4th Cir. 2017).

have deemed receiving an unsolicited text message to be an injury to a plaintiff.¹² While these rulings have aligned with the legislative intent of the TCPA, they ignore the realities of the shift in how technology affects consumers.¹³ This note will discuss *Spokeo*, the current split amongst the nation's appellate courts over its interpretation, and what should constitute a litigious injury for TCPA claims.

Section II will discuss the TCPA and explain its intended purpose. Section III will examine the *Spokeo* case and discuss the holding's impact on the analysis of subsequent TCPA claims. Section IV will discuss how plaintiffs bring TCPA claims, and specifically, what the injury requirements are for successful claims. Section V will analyze the circuit court decisions for consumer protection claims following the *Spokeo* ruling. Section VI will examine how the TCPA interpretation has changed as technology has advanced, and Section VII will apply the current legal framework to the question of whether a text message should constitute a concrete injury under the TCPA.

II. TELEPHONE CONSUMER PROTECTION ACT

Prior to the TCPA, Congress had not addressed the new telecommunications technologies that emerged at the end of the twentieth century. This lack of regulation left use of such devices unregulated and prone to abuse by unscrupulous advertisers.¹⁴ One prominent marketing medium among such advertisers was the fax machine.¹⁵ Businesses would gain access to consumers' numbers and then send promotions, often unsolicited, through consumers' fax machines.¹⁶ This practice was inexpensive for companies since their targets, whose ink and toner were used to print the advertisements, bore most of the financial burden.¹⁷ Consumers also faced blocked phone lines and general annoyance, as they had no control in receiving these advertisements.¹⁸

States attempted to regulate these burdensome practices, but interstate telecommunication structures made the legislation ineffective.¹⁹ In response to states' demand for federal regulation,

¹² Amanda Bronstad, *Latest TCPA Decision Eases Path for Consumers, Deepens Circuit Split*, 223 N.J. L. J. 1, 1 (2017).

¹³ *Id.*

¹⁴ Waller, Heidtke & Stewart, *supra* note 2, at 347.

¹⁵ Waller, Heidtke & Stewart, *supra* note 2, at 347.

¹⁶ Waller, Heidtke & Stewart, *supra* note 2, at 354.

¹⁷ Waller, Heidtke & Stewart, *supra* note 2, at 354.

¹⁸ Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 NEB. L. REV. 70, 78-79 (2011).

¹⁹ Waller, Heidtke & Stewart, *supra* note 2, at 347.

Congress enacted the Telephone Consumer Protection Act in 1991, with the purpose of “imposing restrictions on the use of telephones for unsolicited advertising by telephone and fax.”²⁰ The TCPA was a response to the issue presented by modern consumers’ increasing access to telecommunication technologies.²¹ Unlike previous advertising regulations, which focused on regulating an advertisement’s content, the TCPA focuses on regulating the medium of advertisement conveyance.²²

The TCPA protects consumers from unsolicited advertisements, which the law defines as “any material advertising the commercial availability of any property, goods, or services, which is transmitted to any person without that person’s prior express invitation or permission.”²³ This definition excludes “(A) . . . any person with that person’s prior express invitation or permission, (B) . . . any person with whom the caller has an established business relationship, or (C) . . . a tax exempt nonprofit organization[s].”²⁴

TCPA claims are most commonly enforced in private actions.²⁵ The Act allows plaintiffs to bring: (1) an action to recover for a monetary loss from a violation, (2) an action to recover \$500 in damages for each such violation, or both.²⁶ In addition, the court has the discretion to award punitive damages of up to three times the amount recoverable for compensatory damages if it finds that the defendant “willfully or knowingly” violated the TCPA.²⁷ Although it is the most common method of enforcement, private action is limited in “incentivizing lawsuits against, and deterring the actions of, intentional violators” of the Act.²⁸

State governments have the authority to bring civil action under the TCPA when a company shows a “pattern or practice of violations.”²⁹ State governments have not used this power often, instead relying on private actions to enforce the TCPA.³⁰ Because TCPA injuries are not destructive or dangerous, state governments do not prioritize enforcement.³¹

²⁰ Waller, Heidtke & Stewart, *supra* note 2, at 347.

²¹ Waller, Heidtke & Stewart, *supra* note 2, at 350.

²² Waller, Heidtke & Stewart, *supra* note 2, at 350.

²³ 47 U.S.C. § 227(a)(5) (2018).

²⁴ *Id.* § 227(a)(4).

²⁵ Waller, Heidtke & Stewart, *supra* note 2, at 348.

²⁶ 47 U.S.C. § 227(b)(3) (2018).

²⁷ 47 U.S.C. § 227(b)-(c) (2018).

²⁸ Waller, Heidtke & Stewart, *supra* note 2, at 348.

²⁹ 47 U.S.C. § 227(g)(1) (2011).

³⁰ Waller, Heidtke & Stewart, *supra* note 2, at 375.

³¹ Waller, Heidtke & Stewart, *supra* note 2, at 375.

The TCPA also permits administrative action against violators of the statute.³² The Federal Communications Commission (“FCC”) is the agency responsible for administrative enforcement.³³ The FCC has a form available on its website for consumers to report TCPA violations.³⁴ Under the Act, “[a]ny person that is determined by the Commission . . . to have violated [the TCPA] shall be liable to the United States [for a forfeiture penalty].”³⁵ The FCC is also responsible for prescribing regulations to implement the statute.³⁶ While the FCC has broad authority to enforce and interpret the statute, it is limited by the same slow processing that burdens state enforcement, again leaving a majority of TCPA enforcement in the hands of private litigants.³⁷

The TCPA has been amended by Congress to cover modern technologies that emerged after its enactment in 1991.³⁸ The Ninth Circuit has deemed the FCC’s interpretation of the phrase “to call” as “communicat[ing] with a person by telephone” to be reasonable.³⁹ Under this interpretation, the Act applies to both voice calls and text messages.⁴⁰ This is consistent with the intended purpose of protecting consumer privacy, as “a voice or text message [is] not distinguishable in terms of being an invasion of privacy.”⁴¹

III. SPOKEO V. ROBINS

In 2016, a claim filed under the Fair Credit Reporting Act made its way to the Supreme Court.⁴² Defendant operated a company that provided a database for information about individuals.⁴³ The controversy arose when the company gave incorrect information about the plaintiff to a third party.⁴⁴ The Supreme Court granted certiorari to determine the sufficiency of the injury claimed by the plaintiff.⁴⁵ In the context of Article III standing, the Court held that “a plaintiff’s injury must be both

³² Linetsky, *supra* note 18, at 79.

³³ Linetsky, *supra* note 18, at 79.

³⁴ *Id.* at 80.

³⁵ 47 U.S.C. § 227 (e)(5)(A)(i) (2018).

³⁶ *Id.*

³⁷ Waller, Heidtke & Stewart, *supra*, note 2 at 348.

³⁸ Waller, Heidtke & Stewart, *supra*, note 2 at 367.

³⁹ Waller, Heidtke & Stewart, *supra*, note 2 at 367.

⁴⁰ Van Patten v. Vertical Fitness Grp., L.L.C., 847 F.3d 1037, 1041 (9th Cir. 2017) (citing *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C. Rcd. 14014, 14115 (F.C.C. June 26, 2003)).

⁴¹ Satterfield v. Simon & Schuster, 569 F.3d 946, 954 (9th Cir. 2009).

⁴² Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1544 (2016).

⁴³ *Id.* at 1544.

⁴⁴ *Id.*

⁴⁵ *Id.*

‘particularized’ and ‘concrete,’ and courts considering the issue must distinguish between those characteristics in their standing analysis.”⁴⁶ The Court based its holding on the Constitution, finding “a plaintiff ‘cannot allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.’”⁴⁷

IV. JURISDICTION FOR TCPA CLAIMS

A. Article III Standing

For a court to have jurisdiction, the plaintiff must present a claim with standing.⁴⁸ Standing is the “right to make a legal claim or seek judicial enforcement of a duty or right.”⁴⁹ Article III of the United States Constitution addresses federal court standing, requiring a “case or controversy” to be established in order for a federal court to have jurisdiction.⁵⁰ Article III has three requirements for establishing a “case” or “controversy”: (1) an injury-in-fact, (2) that was caused by the defendant, and (3) that is redressable.⁵¹ An “injury-in-fact” is defined as “[a]n actual or imminent invasion of a legally protected interest, in contrast to an invasion that is conjectural or hypothetical.”⁵² If the defendant caused an injury-in-fact, and the injury is redressable, a federal court has Article III standing to hear and decide the case.⁵³

In addition to Article III standing, federal courts also require prudential standing.⁵⁴ This doctrine specifies that “prudential rules should govern the determination [of] whether a party should be granted standing to sue . . . [t]he most important rule [being] that a plaintiff who asserts an injury must come within the ‘zone of interest’ arguably protected by the Constitution or a statute.”⁵⁵ Under the prudential-standing doctrine, a case with Article III standing may lack federal jurisdiction if there is no prudential standing.⁵⁶ This requirement was

⁴⁶ *Id.* at 1545.

⁴⁷ U.S. CONST. art. III, § 2; *see also* Spokeo, 136 S. Ct. at 1544, 1549.

⁴⁸ U.S. CONST. art. III, § 2.

⁴⁹ Priya Khangura, *Hurdles to the Court: The Doctrine of Standing Under Statutory Violations*, 11 DUKE J. CONST. LAW & PUB. POL’Y SIDEBAR 41, 41 (2016) (citing BLACK’S LAW DICTIONARY (10th ed. 2014)).

⁵⁰ *Id.*

⁵¹ Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

⁵² BLACK’S LAW DICTIONARY 405 (Bryan A. Garner ed., Thomson Reuters 5th Pocket ed. 2016).

⁵³ U.S. CONST. art. III, § 2.

⁵⁴ Khangura, *supra* note 49, at 41.

⁵⁵ *Injury-in-Fact*, BLACK’S LAW DICTIONARY 638 (Bryan A. Garner ed., Thomson Reuters 5th Pocket ed. 2016).

⁵⁶ *Id.*

enacted to limit the role of courts in areas of public dispute.⁵⁷

The prudential standing doctrine has two exceptions: (1) the existence of “countervailing circumstances,” or (2) if Congress grants “an express right of action to persons who otherwise would be barred.”⁵⁸ However, these exceptions do not apply to the Article III standing requirements.⁵⁹ Federal courts require an injury-in-fact to establish jurisdiction, regardless of whether Congress granted a right of action by statute.⁶⁰

B. Harm Requirement

In recent TCPA cases, circuit courts have used the “concrete” and “particularized” analysis from *Spokeo* when conducting the standing analysis.⁶¹ *Spokeo* holds that, for consumer plaintiffs to satisfy the injury-in-fact requirement under Article III, the plaintiff must show an injury is “concrete and particularized.”⁶² An injury is “concrete” when it actually exists, rather than being a mere abstraction.⁶³ However, the injury does not have to cause a tangible harm.⁶⁴ For consumer litigation claims, the harm alleged can be intangible.⁶⁵ While this does not bar an establishment of concreteness, a court must determine if an actual harm has been particularized.⁶⁶ An injury is “particularized” when it “affects the plaintiff in a personal and individual way.”⁶⁷ To determine the sufficiency of an alleged injury, courts follow the two-step inquiry established in *Spokeo*.⁶⁸

The first step to determine sufficiency of an injury is to define the protected legal interest.⁶⁹ This can be done by looking to the language and legislative history of the statute.⁷⁰ Though statutory intent indicates a likelihood of recognizable harm, the *Spokeo* decision affirmed a statute granting a right to file a claim that does not “automatically satisf[y] the

⁵⁷ Khangura, *supra* note 49, at 41 (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

⁵⁸ Khangura, *supra* note 49, at 41 (citing *Warth*, 422 U.S. at 501).

⁵⁹ Khangura, *supra* note 49, at 51.

⁶⁰ Khangura, *supra* note 49, at 51.

⁶¹ *See, e.g.* *Susinno v. Work Out World Inc.*, 862 F.3d 346, 350 (3d Cir. 2017).

⁶² *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (emphasis added).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1549.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Michael G. McLellan, *Finding a Leg to Stand on: Spokeo, Inc. v. Robins and Statutory Standing in Consumer Litigation*, 31 ANTITRUST ABA 49, 50 (2017).

⁶⁹ *Id.*

⁷⁰ *Id.*

injury-in-fact requirement.”⁷¹

Once the court establishes a protected legal interest, the analysis then proceeds to step two: a determination of whether the harm violates a legally protected interest.⁷² Justice Alito explained in *Spokeo* that, because the analysis is based on historical practices, “it [can be] 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.”⁷³ A legally protected interest can also be inferred by looking to the legislature’s intent in enacting the statute.⁷⁴

V. CIRCUIT COURT CASES FOLLOWING *SPOKEO V. ROBINS*

A. Ninth Circuit

i. Van Patten v. Vertical Fitness

In 2017, *Van Patten v. Vertical Fitness* applied the *Spokeo* analysis to a TCPA claim.⁷⁵ The plaintiff filed suit after receiving a series of promotional texts from Vertical Fitness.⁷⁶ Vertical Fitness had acquired a gym of which the plaintiff had previously been a member.⁷⁷ Though the plaintiff had only been a member of that gym for three days, the plaintiff provided his personal information, including his phone number, when submitting an application.⁷⁸ Three years after leaving the gym, Vertical Fitness, which had obtained his number during their acquisition of the gym, sent the plaintiff promotional text messages.⁷⁹

In response to the text messages sent by Vertical Fitness, the plaintiff filed a putative class action under the TCPA.⁸⁰ His claim alleged Vertical Fitness had “caus[ed] consumers actual harm” with “the aggravation that necessarily accompanies wireless spam” along with having to “pay their cell phone service providers for the receipt of such wireless spam.”⁸¹

When the Ninth Circuit analyzed the plaintiff’s standing, it used the

⁷¹ *Spokeo*, 136 S. Ct. at 1549.

⁷² McLellan, *supra* note 68, at 49.

⁷³ *Spokeo*, 136 S. Ct. at 1549.

⁷⁴ McLellan, *supra* note 68, at 49.

⁷⁵ *Van Patten v. Vertical Fitness Grp., L.L.C.*, 847 F.3d 1037, 1041 (9th Cir. 2017).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Van Patten*, 847 F.3d at 1041.

standard established in *Spokeo*.⁸² In determining if there had been a concrete harm, the court looked to historically recognized cognizable harms in English and American courts.⁸³ When Congress enacted the TCPA, it found that “‘unrestricted telemarketing can be an intrusive invasion of privacy’ and is a ‘nuisance.’”⁸⁴ In traditional English and American law, invasion of privacy and nuisance have been considered substantial harms, warranting judicial relief.⁸⁵ The Ninth Circuit found that unsolicited calls and texts, “‘by their nature, invade the privacy and disturb the solitude of recipients.’”⁸⁶ Because the harm addressed by the TCPA had historically been recognized by the courts, the Ninth Circuit held the text messages were a concrete and particularized harm that entitled the plaintiff to both Article III and prudential standing.⁸⁷

B. Third Circuit

i. Susinno v. Work Out World, Inc.

In *Sussinno*, the Third Circuit considered the harm requirement for a TCPA claim.⁸⁸ The plaintiff’s claim in the case centered around a single unsolicited call to her cellphone from defendant Work Out World, Inc. (“WOW”).⁸⁹ The plaintiff alleged harm derived from a one-minute, prerecorded promotional message left on the plaintiff’s voicemail by WOW.⁹⁰ In opposition to the claim, WOW asserted that “‘the structure of [the TCPA provision] limits the scope of ‘cellular telephone services’ to when ‘the called party is charged for the call.’”⁹¹ Citing the Second Restatement of Torts, WOW argued that “‘two or three’ calls would not be considered ‘highly offensive to the ordinary reasonable [person],’ thus leaving no injury-in-fact for the plaintiff to assert.”⁹²

Sussinno examined whether the TCPA prohibited the defendant’s conduct, and if so, whether the harm would be sufficiently concrete and particularized to establish Article III and prudential standing.⁹³ After

⁸² *Id.*

⁸³ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1540 (2016).

⁸⁴ *Van Patten*, 847 F.3d at 1043.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Sussinno v. Work Out World Inc.*, 862 F.3d 346, 348 (3d Cir. 2017).

⁸⁹ *Id.*

⁹⁰ *Id.* at 348.

⁹¹ *Id.* at 349.

⁹² *Id.* at 351-52 (citing RESTATEMENT (SECOND) OF TORTS § 652B, cmt. d (AM. LAW INST. 1977)).

⁹³ *Id.* at 348.

concluding the TCPA did apply, the Third Circuit analyzed the sufficiency of the plaintiff's standing under the *Spokeo* framework.⁹⁴ The court interpreted *Spokeo* as a "reiteration [of] traditional notions of standing," specifically noting the traditional principle that "the mere technical violation of a procedural requirement of a statute cannot, in and of itself, constitute an injury-in-fact."⁹⁵

In applying the *Spokeo* standard, the court looked to determine whether there was a congressionally defined injury.⁹⁶ The TCPA applies "directly to single recorded calls from cell phones," and in enacting the statute, Congress focused on protecting consumers' privacy interests.⁹⁷ In her complaint, the plaintiff alleged harm in the form of a "nuisance and invasion of privacy."⁹⁸ The court agreed, concluding that the claim was the kind Congress intended to address in enacting the TCPA.⁹⁹

In addition to asserting a congressionally-identified harm, *Spokeo* also requires that the plaintiff show that such harm be concrete and particularized.¹⁰⁰ To determine if the harm was concrete, the Third Circuit looked to historical tradition of both English and American courts to determine if the harm was recognized.¹⁰¹ In conducting such a historical analysis, a court must determine whether "newly established causes of action protect essentially the same interests that traditional causes of action sought to protect."¹⁰² In *Susinno*, the Third Circuit found TCPA claims alleging an "invasion[] of privacy, intrusion upon seclusion, and nuisance" have historically been heard in American courts.¹⁰³

By enacting the statute, Congress "'elevat[ed] a harm that, while previously inadequate in the law,' was of the same character of previously existing 'legally cognizable injuries.'"¹⁰⁴ Because Congress elevated the injury, instead of creating a new kind of injury, the Court determined the harm was sufficient to establish Article III standing.¹⁰⁵ Under this interpretation, the Third Circuit determined that a single one-minute

⁹⁴ *Susinno*, 862 F.3d. at 350.

⁹⁵ *Id.* at 350, 352.

⁹⁶ *Id.* at 351.

⁹⁷ *Id.* at 351 (quoting 47 U.S.C. § 227(b)(2)(C)).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1543 (2016).

¹⁰¹ *Susinno*, 862 F.3d at 350-51.

¹⁰² *Id.* at 351.

¹⁰³ *Id.* (quoting *Van Patten v. Vertical Fitness Grp., L.L.C.*, 847 F.3d 1037, 1043 (9th Cir. 2017)).

¹⁰⁴ *Id.* at 352.

¹⁰⁵ *Id.*

voicemail was sufficient to confer standing before a federal court.¹⁰⁶

ii. *In re Horizon Healthcare Servs. Data Breach Litig.*

In the Third Circuit case, *In re Horizon*, the court analyzed the harm requirement for consumer litigation under the Fair Credit Reporting Act (“FCRA”).¹⁰⁷ The defendant, Horizon, owned laptops that contained the plaintiffs’ personal information.¹⁰⁸ When those laptops were stolen, the plaintiffs sued the defendants, even though nothing had been done with the stolen information to injure the plaintiffs.¹⁰⁹ The District Court found the plaintiffs did not have standing because “none of them had adequately alleged that the information was actually used to their detriment;” therefore, there was no injury-in-fact.¹¹⁰

In *In re Horizon*, Judge Jordan of the Third Circuit focused on the merit of the plaintiff’s argument that the defendant caused an injury by “plac[ing] [them] at an imminent, immediate, and continuing increased risk of harm from identity theft, identity fraud, and medical fraud”¹¹¹ In making its determination, the Third Circuit first looked to historical precedent, and found there was evidence that “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.”¹¹²

Previous Third Circuit opinions analyzing the sufficiency of a statutory harm for conferring Article III standing were somewhat inconsistent.¹¹³ The Third Circuit reiterated their own precedent, stating that, “[t]he proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated.”¹¹⁴ This contradicts many of the previous district court decisions within the circuit, which had allowed statutory violations to constitute a cognizable injury, without considering if there was an actual harm.¹¹⁵

To resolve the discrepancy within the Third Circuit, the Court looked to *Spokeo*.¹¹⁶ The Circuit Court interpreted *Spokeo* to mean that “Congress ‘has the power to define injuries . . . that were previously

¹⁰⁶ *Id.*

¹⁰⁷ *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625, 629 (3d Cir. 2017).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 634 (citation omitted)

¹¹² *Id.* at 635 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)).

¹¹³ *In re Horizon*, 846 F.3d at 635.

¹¹⁴ *Id.* at 635 n.14.

¹¹⁵ *Id.* at 635.

¹¹⁶ *Id.*

inadequate in law.”¹¹⁷ Under this interpretation, legislatures can “elevate intangible harms into concrete harms.”¹¹⁸

When applying *Spokeo*, the Third Circuit determined that the facts of the current case did not require the “consider[ation] [of] the full reach of congressional power to elevate a procedural violation into an injury in fact” as “this case [did] not strain that reach.”¹¹⁹ Instead, the court determined that case law and common law allowed protection for the plaintiffs’ right to privacy, and that “with privacy torts, improper dissemination of information can itself constitute a cognizable injury.”¹²⁰ While the court conceded this alone may not have been sufficient to confer Article III standing, “with the passage of the FCRA, Congress established that the unauthorized dissemination of personal information by a credit reporting agency causes an injury in and of itself,” and through its enactment of the FCRA, Congress had shown that it “believed that the violation of the FCRA causes a concrete harm to consumers.”¹²¹ The Third Circuit concluded that the plaintiffs had alleged a sufficient injury that was not a “mere technical or procedural violation of the FCRA,” and remanded the plaintiffs’ case so it could proceed to litigation.¹²²

C. Fourth Circuit

i. Dreher v. Experion Info. Solutions

Dreher v. Experion Info. Solutions stands out as one of the most defendant-friendly decision amongst the consumer protection cases that have had standing which the *Spokeo* framework analyzed.¹²³ While *Dreher* was brought under the FCRA, it is significant for its analysis of the concrete and particularized aspect of the alleged injury-in-fact.¹²⁴

The controversy involved a 69,000-member class action, initiated by Dreher, against Experion.¹²⁵ Dreher, while undergoing a background check for a security clearance with the federal government, found a delinquent credit card account on his credit report.¹²⁶ Dreher attempted to contact the company associated with the card to fix the mistake.¹²⁷ The

¹¹⁷ *Id.* at 638.

¹¹⁸ *Id.*

¹¹⁹ *In re Horizon*, 846 F.3d at 638.

¹²⁰ *Id.* at 638-39.

¹²¹ *Id.* at 639.

¹²² *Id.* at 640.

¹²³ Bronstad, *supra* note 12.

¹²⁴ *Dreher v. Experion Info. Solutions, Inc.*, 856 F.3d 337, 344 (4th Cir. 2017).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

fact that the company associated with the delinquent card had closed during the 2008 financial crisis was not indicated on the credit report.¹²⁸ The portfolio of that company had been given to another company and was then assigned to CardWorks, Inc. and CardWorks Servicing L.L.C (collectively, “CardWorks”).¹²⁹ Experian chose not to change the name of the company on the plaintiffs’ credit reports to comply with historic practices and prevent consumer confusion.¹³⁰ Dreher brought the class action to federal court, where he argued Experian’s failure to change the name of the company listed on his credit report caused an informational injury.¹³¹

At trial, Experian argued the plaintiff lacked Article III standing.¹³² The district court rejected Experian’s argument, finding “the FCRA ‘creates a statutory right to receive the “sources of information” for one’s credit report,’” which created an injury-in-fact sufficient to meet the burden of establishing Article III standing.¹³³ During the district court trial, held before *Spokeo* was decided; the “concrete” and “particularized” requirements outlined in *Spokeo* were not considered.¹³⁴

Because of the anticipated significance of *Spokeo*, the Fourth Circuit held *Dreher* in abeyance until the decision was announced.¹³⁵ Using *Spokeo*, the Fourth Circuit analyzed the plaintiff’s claim that he had suffered an injury-in-fact, “because he was denied ‘specific information to which [he] w[as] entitled under the FCRA.’”¹³⁶ The Court found the harm claimed by the plaintiff was not concrete; and therefore, there was no Article III standing.¹³⁷

The plaintiff attempted to establish concreteness by arguing the harm he suffered was “a ‘real’ harm with adverse effect.”¹³⁸ The Fourth Circuit rejected the contention, finding Dreher was alleging a pure statutory violation, with very little injury to himself.¹³⁹ The most significant injury the plaintiff alleged was Experian’s failure to comply with the FCRA threatened his security clearance with the federal

¹²⁸ *Id.* at 341.

¹²⁹ *Id.*

¹³⁰ *Dreher*, 856 F.3d at 341.

¹³¹ *Id.* at 342.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 341.

¹³⁵ *Id.*

¹³⁶ *Dreher*, 856 F.3d at 345.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 346.

government.¹⁴⁰ The court found, however, that while an actual harm to his security clearance would constitute an injury sufficient to establish Article III standing, Dreher's security clearance was not affected by Experian's policy, meaning there was "no real world harm on Dreher."¹⁴¹ Because the court found Dreher did not have an injury-in-fact sufficient to establish Article III standing, the case was dismissed for lack of jurisdiction.¹⁴²

VI. INTERPRETING MODERN TCPA CLAIMS

In 1991, one of the leading harms Congress sought to prevent by enacting the TCPA was abuse of consumers' fax machines for unsolicited promotional purposes.¹⁴³ The abuse of this practice led to usage of consumers' tangible resources, including paper, ink, and toner, as well as tying-up landlines and being a general nuisance.¹⁴⁴ Customers receiving promotional faxes often had little control in the faxes being sent, and even if they were given the option to opt-out, it was not until after the advertiser had already used the consumer's resources.¹⁴⁵

Today, cell phones have changed the landscape of TCPA enforcement. Studies show that where once having a home phone was a staple of American households, the trend today is for people to disconnect their home phones and rely exclusively on cell phones.¹⁴⁶ As more people rely on cellphones, advertisers having access to consumers through their phones may cause increasingly detrimental effects.¹⁴⁷ If the proper regulations are not in place, advertisers can establish more invasive telemarketing practices to access to consumers.¹⁴⁸

Following *Spokeo*, most appellate courts have found a phone call constitutes a concrete and particularized harm that can withstand scrutiny under the *Spokeo* standard.¹⁴⁹ These findings are based on the idea that the violation of the statute demonstrates a concrete injury, and that an invasion of privacy is a legally protected interest.¹⁵⁰ An argument that supports this interpretation is that, even with modern technology, the cost

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Dreher*, 856 F.3d at 347.

¹⁴³ Waller, Heidtke & Stewart, *supra* note 2, at 347.

¹⁴⁴ Waller, Heidtke & Stewart, *supra* note 2, at 354.

¹⁴⁵ Waller, Heidtke & Stewart, *supra* note 2, at 357.

¹⁴⁶ Waller, Heidtke & Stewart, *supra* note 2, at 384.

¹⁴⁷ Waller, Heidtke & Stewart, *supra* note 2, at 387.

¹⁴⁸ Waller, Heidtke & Stewart, *supra* note 2, at 387.

¹⁴⁹ Bronstad, *supra* note 12, at 12. *See also* McLellan, *supra* note 68, at 53.

¹⁵⁰ McLellan, *supra* note 68, at 53.

of advertising is shifted to the consumer.¹⁵¹ This shifting in cost is especially detrimental to the twenty-three percent of all wireless subscribers who have prepaid cellphone plans.¹⁵²

Most courts uphold a plaintiff's claim of harm under the TCPA under the justification that the harm alleged is rooted in common law.¹⁵³ As suggested in *Spokeo*, when the concrete and particularized harm element is uncertain, it can be helpful to look to traditional English and American law.¹⁵⁴ American common law has long recognized a right against "unreasonable intrusion upon the seclusion of another."¹⁵⁵ Since the Congressional intent in enacting the TCPA was in part to protect the privacy interests of consumers, circuit courts have rationally concluded that the harm is concrete and particularized, and thus sufficient to establish Article III standing.¹⁵⁶

Consumers can still be harmed if advertisers are allowed to send promotional text messages, even with opt-out options.¹⁵⁷ When consumers respond to a promotional text message to opt-out of receiving future messages, the advertiser has confirmation that they have reached an active cell phone number.¹⁵⁸ These entities can then sell that information to others, putting consumers at risk for continued privacy invasion.¹⁵⁹

Additionally, advertisers can include links that may lead consumers to accidentally sign up for services through the same messages offering the opt-out option.¹⁶⁰ The prevalence of cellphone use, as well as the savviness of advertisers, can put consumers at risk for prolonged and unwanted invasions of privacy.

Though the TCPA was enacted to protect consumers from predatory businesses, businesses themselves are at risk if the TCPA is too broadly interpreted. This is especially true for small businesses, which often form marketing plans without knowledge of the extent of the TCPA or the ramifications for violating the TCPA.¹⁶¹ Businesses are facing confusion as a result of inconsistent enforcement of the TCPA.¹⁶² This is further

¹⁵¹ Waller, Heidtke & Stewart, *supra* note 2, at 366.

¹⁵² Waller, Heidtke & Stewart, *supra* note 2, at 366.

¹⁵³ McLellan, *supra* note 68, at 53.

¹⁵⁴ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

¹⁵⁵ McLellan, *supra* note 68, at 53.

¹⁵⁶ *See, e.g., Susinno v. Work Out World Inc.*, 862 F.3d 346, 348 (3d Cir. 2017).

¹⁵⁷ Waller, Heidtke, & Stewart, *supra* note 2, at 396.

¹⁵⁸ Waller, Heidtke, & Stewart, *supra* note 2, at 396.

¹⁵⁹ Waller, Heidtke, & Stewart, *supra* note 2, at 396.

¹⁶⁰ Waller, Heidtke, & Stewart, *supra* note 2, at 396.

¹⁶¹ Linetsky, *supra* note 18, at 72.

¹⁶² Linetsky, *supra* note 18, at 74.

complicated for the businesses operating across state lines. With varying interpretations of the TCPA amongst federal and state jurisdictions, it can be difficult for companies to know if a marketing strategy will lead to a TCPA violation.¹⁶³ This inconsistency increases the likelihood a business will accidentally violate the TCPA. Under a broad interpretation of harm, these companies may be found liable, irrespective of the business' lack of intent. Congress' goal in enacting the TCPA was to punish "malicious and intentional violators," therefore, businesses may be unduly harmed under the current trend of interpretation.¹⁶⁴

Additionally, common payment plans that consumers subscribe to for text messaging allows them to send and receive unlimited messages for a fixed price.¹⁶⁵ Customers with this type of plan pay the same amount for text messages, regardless of whether the message is promotional.¹⁶⁶ When consumers brought the initial TCPA claims in 1991, they were able to show a financial detriment in receiving unwanted fax correspondences.¹⁶⁷ For consumers today, receiving a text message does not involve the same detriments the TCPA was enacted to prevent. The discrepancy between the amount of harm demonstrated by the initial claims and claims filed today is rarely considered. It should be further analyzed by the legislature and the FCC to determine if current TCPA claims warrant the same degree of protection granted for consumers in 1991.

VII. IS A TEXT MESSAGE AN INJURY?

As telecommunications technology has advanced, courts have attempted to interpret legislation that was enacted before the commonplace technology used today existed.¹⁶⁸ The prevalence of text messaging has led to businesses using it for marketing.¹⁶⁹ As explained previously, the TCPA has been interpreted to govern text messages.¹⁷⁰ Because of this, claims are beginning to arise under the TCPA alleging

¹⁶³ Linetsky, *supra* note 18, at 74.

¹⁶⁴ Potts, *supra* note 4, at 284.

¹⁶⁵ Shannon, Victoria, *15 Years of Text Messages, 'A Cultural Phenomenon'*, THE N.Y. TIMES (Dec. 5, 2007), <https://www.nytimes.com/2007/12/05/technology/05iht-sms.4.8603150.html>.

¹⁶⁶ *Id.*

¹⁶⁷ See Waller, Heidtke, & Stewart, *supra* note 2, at 354.

¹⁶⁸ See, e.g., Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037 (9th Cir. 2017).

¹⁶⁹ See, e.g., Susinno v. Work Out World Inc., 862 F.3d 346, 348 (3d Cir. 2017).

¹⁷⁰ FEDERAL COMMUNICATIONS COMMISSION, FCC 03-153, Report and Order, In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991 (July 3, 2003).

that promotional text messages from companies amount to sufficient harm to confer Article III standing.¹⁷¹

When *Spokeo* was released, it applied to a wide variety of consumer litigation claims, including TCPA claims, to aid courts in determining if the injuries alleged were sufficient to support Article III standing.¹⁷² After the *Susinno* decision held that a single unsolicited phone call was sufficient to confer Article III standing, some legal scholars, including Amanda Bronstad, opined that the TCPA was being interpreted in a consumer friendly fashion, with a decidedly broad interpretation of what could constitute harm.¹⁷³

As previously noted, text messaging has taken up prominence in today's society. For businesses, it is an efficient and inexpensive method to market products and services, and has the ability to reach a large population over various demographics.¹⁷⁴ For consumers, however, receiving text messages from businesses can feel like an invasion; and along with being a nuisance, it can lead to accidental purchases if businesses send misleading promotions.¹⁷⁵

As of now, one case alleging an injury by way of text message has made it to the Circuit Court level.¹⁷⁶ While that case found that the text message was not sufficient to confer an injury, an analysis of similar cases shows that other courts would find a text message a sufficient injury to confer Article III standing.¹⁷⁷ Because of the influence text messaging has on today's society, it is imperative to consider its effects because (1) businesses should be aware of the extent they can use text messages as a promotional device; (2) consumers who are truly being harmed by a business's promotional tactics should be able to find recourse; and (3) consumers should be made aware of their rights so businesses cannot evade liability just because the injury is relatively minor.

Additionally, it is important that higher federal courts reach a consensus on this issue because text messaging allows businesses to reach consumers across a wide range of jurisdictions. Consistency in judicial interpretation will allow companies to better comply with the law.

A. *Spokeo* Analysis

The *Spokeo* analysis has been important for determining the injury

¹⁷¹ *Van Patten*, 847 F.3d 1037.

¹⁷² *Id.*

¹⁷³ *Susinno*, 862 F.3d 346. *See also*, Bronstad, *supra* note 12.

¹⁷⁴ Waller, Heidtke, & Stewart, *supra* note 2, at 354.

¹⁷⁵ Waller, Heidtke, & Stewart, *supra* note 2, at 354.

¹⁷⁶ *Van Patten*, 847 F.3d 1037.

¹⁷⁷ *See, e.g., Susinno*, 862 F.3d 346 at 352.

requirement of consumer protection claims and is therefore important for determining if a text message is a sufficient injury for TCPA claims. Courts following *Spokeo* have used it to determine if injuries alleged by plaintiffs are “concrete and particularized.”¹⁷⁸ Justice Alito defined a particularized injury as one that “affect[s] the plaintiff in a personal and individual way.”¹⁷⁹ The Court defines a “concrete” injury as one that is real as opposed to abstract.¹⁸⁰ The opinion in *Spokeo* specifically differentiates these two terms and requires that both be met to confer standing.¹⁸¹ Without an “appreciat[ion] [for] the distinction between concreteness and particularization,” a court’s standing analysis is incomplete.¹⁸²

i. Concreteness

Using the *Spokeo* analysis, a single unsolicited text message from a business can constitute a concrete injury. An injury is concrete if “it . . . actually exist[s]” or is *de facto*.¹⁸³ In *Spokeo*, the Court specifically states that tangibility is not a requirement for a concrete injury.¹⁸⁴

When analyzing whether an intangible harm constitutes a concrete injury, Justice Alito points to an analysis of “history and the judgment of Congress.”¹⁸⁵ Historical practices are useful because an “intangible harm [that] has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English and American courts” is more likely to constitute a sufficient concrete injury against a plaintiff.¹⁸⁶ Legislative Acts are important because (1) the legislature is in a “position[] to identify intangible harms that meet minimum Article III requirements” and (2) “Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law.’”¹⁸⁷ Though a legislative act may be indicative of a concrete injury, it is not conclusive.¹⁸⁸ It would be considered insufficient for a plaintiff to allege a “bare procedural violation, divorced from any

¹⁷⁸ *See, e.g., id.*

¹⁷⁹ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 1550.

¹⁸⁴ *Id.* at 1548.

¹⁸⁵ *Spokeo*, 136 U.S. at 1549 (citing *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 775-77 (2000)).

¹⁸⁶ *Id.* (citing *Vermont Agency*, 529 U.S. at 775-77).

¹⁸⁷ *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992)) (alteration in original).

¹⁸⁸ *Id.*

concrete harm”¹⁸⁹

In *Susinno*, the court noted that an injury is concrete when the plaintiff “sues under a statute alleging ‘the very injury [the statute] is intended to prevent,’ and the injury ‘has a close relationship to a harm . . . traditionally . . . providing a basis for a lawsuit in English or American courts”¹⁹⁰ When applying this to the plaintiff’s claim regarding a single phone call from the defendant, the court noted that (1) Congress had identified the injury that it was attempting to protect plaintiffs from, and (2) “TCPA claims closely relate to traditional claims for ‘invasions of privacy, intrusion upon seclusion, and nuisance [which] have long been heard by American courts.’”¹⁹¹ It was based on this analysis that the court found the plaintiff had alleged a concrete injury.¹⁹²

Based on the *Spokeo* analysis and the subsequent analysis of “concreteness” in the circuit cases that followed, it seems likely that sending an unsolicited text message constitutes a concrete injury. The TCPA has been construed to apply to text messages.¹⁹³ The intent of Congress in enacting the TCPA was to “protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls”¹⁹⁴ Protection of a consumer’s privacy by businesses wanting to send unsolicited promotional text messages would fit into the legislative intent.

Additionally, as referenced in *Susinno*, TCPA claims are rooted in the common law protection of privacy, intrusion of seclusion, and nuisance.¹⁹⁵ Based on both the legislation’s aim to protect the consumer’s privacy interest as well as the common law’s interest in protecting similar interests, an unsolicited text message would constitute a harm to a plaintiff.

ii. Particularized

If a plaintiff were to receive a text message and file suit in response to that text message, it would constitute a particularized injury. A particularized injury is one that affects the plaintiff as an individual.¹⁹⁶

¹⁸⁹ *Id.* (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)).

¹⁹⁰ *Susinno v. Work Out World Inc.*, 862 F.3d 346, 351 (3d Cir. 2017) (quoting *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625, 639-40 (3d Cir. (2017)) (alterations in original).

¹⁹¹ *Id.* (quoting *Van Patten*, 847 F.3d at 1043) (alterations in original).

¹⁹² *Id.* at 352.

¹⁹³ Waller, Heidtke, & Stewart, *supra* note 2 at 367.

¹⁹⁴ Waller, Heidtke, & Stewart, *supra* note 2 at 355 (quoting S. Rep. No. 102-178, at 1 (1991)).

¹⁹⁵ *Susinno*, 862 F.3d at 351.

¹⁹⁶ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1540 (2016).

The plaintiff argued in *Spokeo* that the defendant had “violated *his* statutory rights, not just the statutory rights of other people,” and that his, “interests . . . [were] *individualized rather than collective*.”¹⁹⁷

If a plaintiff is filing suit in response to receiving a text message, then that person’s statutory rights under the TCPA have been allegedly violated. This is sufficient to confer a particularized injury.

VIII. CONCLUSION

While it may seem outlandish given the proclivity of text messages and the lack of significant harm, the law as it stands today, when considering both the TCPA and *Spokeo*, allows plaintiffs to sue for the receipt of an unsolicited text message.

While general standing may be conferred, other issues should factor into the allowance of litigation on the grounds of a text message, such as prudential standing and implied consent by consumers. There should also be a consideration of the logic in allowing such litigation to commence on the basis of the TCPA. When the TCPA was enacted, consumers were facing abuses by businesses that resulted in a nuisance, a waste of consumer’s resources, and potential inability of consumers to use their fax machines. In comparison, the detriment of receiving a text message is arguably minor. Consumers are often able to block numbers they no longer wish to receive calls or messages from. Additionally, single text messages are inexpensive, and for many, come as part of a plan that makes it so the consumer does not spend additional money for receipt of that message. Further, when a text message is received, it seems unlikely that the phone will be unable to function as the consumer wishes it to for any significant amount of time.

That being said, it is well recognized that consumers have a right to privacy and the U.S. legal system has recognized that right as telecommunication technologies have advanced. While technology was once limited in location, today, cell phones allow consumers to have their mobile devices almost anywhere, making it so messaging from an unsolicited caller is arguably more intrusive than ever before. Additionally, given the wide variety of cellphone plans offered, many consumers still face a financial burden, especially if businesses malicious and abusive promotional strategies.

Ultimately, businesses should be able to formulate a clear marketing plan, without fear of inadvertently intruding on the rights of consumers, and consumers should have the right to protect their privacy. As it stands, the TCPA is outdated. When the TCPA was enacted in 1991, text

¹⁹⁷ *Id.* at 1548 (emphasis added).

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messaging was not yet in existence, but today accounts for a substantial part of many people's lives. Even given its importance, Congress has yet to pass specific legislation to address the duties and rights of businesses and consumers in regards to promotional text messages.

To better accommodate both businesses and consumer's interests, new legislation should be considered to address the role of text messages in advertising. By conducting their own research and considering the voice of the people, Congress is in the best position to determine when there should be standing for a single text message. Until then, under *Spokeo*, plaintiffs will be injured by receiving a text message.