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The Injury in Receiving a Text Message

Introduction

This year, the Ninth Circuit held a single unsolicited call to a woman’s cellphone created enough harm for her to file suit under the Telephone Consumer Protection Act (“TCPA”).¹ The TCPA, codified in 1991, was initially enacted to combat companies sending advertisements to potential consumers through their personal facsimile (“fax”) machines.² Since then, technology has advanced, and while the use of fax advertisements has declined, companies have looked to emerging technologies to reach customers. Text messages are an appealing medium, with six billion text messages sent daily in 2011, and the average person sending or receiving thirty-five messages every day.³

In 2016, the Supreme Court decided *Spokeo v. Robins*, a case analyzing the injury requirement for a claim filed under the Fair Credit Reporting Act of 1970.⁴ Since the decision, lower federal courts have used the decision to analyze other consumer litigation claims.⁵ *Spokeo* holds, “a plaintiff’s injury must be both ‘particularized’ and ‘concrete’ in order to have standing to sue.”⁶

The issue being addressed in recent TCPA litigation is if the harms being alleged under the Act are “concrete and particularized.” This has been difficult for modern courts as they have attempted to address claims that did not exist when the TCPA was enacted in 1991. The unresolved question presents problems for both businesses and consumers, as businesses attempt to market to

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

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 (1991)).

³ Marissa A. Potts, “*Hello, it’s me [Please don’t sue me!]: Examining the FCC’s Overbroad Calling Regulations under the TCPA*,” 82 BROOKLYN L. REV. 281, 283 (2016).

⁴ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1542 (2016).

⁵ *See, e.g. Vann Patten v. Vertical Fitness Group, L.L.C.*, 847 F.3d 1037 (9th Cir. 2017).

⁶ *Spokeo*, 136 S. Ct. at 1544.

consumers through the inexpensive and convenient methods available through modern telecommunication technology, and consumers attempt to preserve their right to privacy.

Both the Third and the Ninth Circuits have addressed TCPA claims and found unwanted messages from businesses to constitute as “particularized” and “concrete” harms under *Spokeo*.⁷ This consumer friendly approach has been the trend of the circuit courts; however, the Fourth Circuit has taken a defendant friendly position in its analysis for the harm requirement when applying the *Spokeo* test.⁸

Interpretation of the TCPA by the courts under the *Spokeo* framework has construed the receiving of an unsolicited text message as an injury to a plaintiff.⁹ While this coincides with the legislative intent of the TCPA, it ignores the realities of the shift in how technology affects consumers. This note will discuss the emerging inquiry on what should constitute a litigious injury for TCPA claims following *Spokeo*.

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

⁷ Van Patten, 847 F.3d at 1041; Susinno, 862 F.3d at 352.

⁸ Dreher v. Experian Info. Solutions, Inc., 856 F.3d 337, 340 (4th Cir. 2017).

⁹ Amanda Bronstad, *Latest TCPA Decision Eases Path for Consumers, Deepens Circuit Split*, 223 N.J. L. J. 1, 1.

I. Telephone Consumer Protection Act

Prior to the TCPA, Congress had not addressed the new technologies that emerged at the end of the twentieth century in the telecommunications industry, leaving them unregulated and prone to abuse by unsolicited advertisers.¹⁰ One prominent marketing medium was the fax machine. Advertisers would gain access to consumers' numbers, then send promotions, often unsolicited, through consumers' fax machines.¹¹ This practice was inexpensive for companies as it placed the financial burden on consumers, whose ink and toner would be used to print the advertisements.¹² Consumers also faced blocked phone lines and general annoyance as they had no control in receiving these advertisements.¹³

States attempted to regulate these burdensome practices, but interstate telecommunication structures made the regulations ineffective.¹⁴ In response to state demand for interstate regulation, the 1991 Telephone Consumer Protection Act was enacted, with the purpose of "imposing restrictions on the use of telephones for unsolicited advertising by telephone and fax."¹⁵ The TCPA was a response to the issue presented by modern telecommunication technology increasing access to consumers.¹⁶ Unlike other advertising regulations that focus on regulating an advertisement's content, the TCPA focuses on regulating the medium of advertisement conveyance.¹⁷

The TCPA protects consumers from unsolicited advertisements; defined as "any material advertising the commercial availability of any property, goods, or services, which is transmitted

¹⁰ Waller, Heidtke & Stewart, *supra* note 2 at 347.

¹¹ *Id.* at 354.

¹² *Id.*

¹³ 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, 79.

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

¹⁵ *Id.*

¹⁶ *Id.* at 350.

¹⁷ *Id.*

to any person without that person’s prior express invitation or permission.”¹⁸ 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].”¹⁹

TCPA claims are most commonly enforced by private actions.²⁰ The Act allows plaintiffs to bring: (1) an action to recover for a monetary loss from a violation, or (2) an action to recover \$500 in damages for each such violation, or (3) both.²¹ In addition, the court has the discretion to award punitive damages to the plaintiff of up to three times the amount recoverable for compensatory damages if it finds the defendant “willfully or knowingly” violated the TCPA.²² Though the most common method of enforcement, private actions are limited in “incentivizing lawsuits against, and deterring the actions of, intentional violators” of the Act.²³

State governments have the authority to bring civil law suits under the TCPA when a company has shown a “pattern or practice of violations.”²⁴ State governments have not used this power often, instead relying on private actions to enforce the TCPA.²⁵ Because TCPA injuries are not physically harmful or dangerous, state governments do not prioritize enforcement.²⁶

The TCPA also permits administrative action against violators.²⁷ The Federal Communications Commission (“FCC”) is the agency responsible for administrative enforcement.²⁸ The FCC has a form available on its website for consumers to report TCPA

¹⁸ 47 U.S.C. § 227(b)(1)(C) (2017).

¹⁹ *Id.* at § 227(a)(4) (2017).

²⁰ Waller, Heidtke & Stewart, *supra* note 2 at 348.

²¹ 47 U.S.C. § 227(b)(3)(A)-(C).

²² *Id.* at § 227(b)-(c).

²³ Waller, Heidtke & Stewart, *supra* note 2 at 348.

²⁴ 47 U.S.C. § 227(b)(1)(C)(2011).

²⁵ Waller, Heidtke & Stewart, *supra* note 2 at 375.

²⁶ *Id.*

²⁷ Linetsky, *supra* note 13 at 79.

²⁸ *Id.*

violations.²⁹ Under the Act, “[a]ny person that is determined by the Commission . . . to have violated [the TCPA] shall be liable to the United States.”³⁰ The FCC is also responsible for prescribing regulations to implement the statute.³¹ While the FCC has broad authority to enforce and interpret the statute, it is limited by slow processing, leaving a majority of TCPA enforcement in the hands of private litigants.³²

The TCPA has been applied to modern technologies that emerged after its enactment in 1991.³³ The FCC interprets the phrase, “to call,” as “communicat[ing] with a person by telephone.”³⁴ Under this interpretation, the Act applies to both voice calls and text messages.³⁵ 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.”³⁶

II. *Spokeo v. Robins*

In 2016, a claim filed under the Fair Credit Reporting Act made its way to the Supreme Court.³⁷ The defendant operated a company that provided information about people.³⁸ The controversy arose when the company gave incorrect information about the plaintiff to a third party.³⁹ The Supreme Court granted certiorari to determine the sufficiency of the injury claimed by the plaintiff.⁴⁰ The Court held that “a plaintiff’s injury must be both ‘particularized’ and ‘concrete,’ and courts considering the issue must distinguish between those characteristics in their standing

²⁹ *Id.* at 80.

³⁰ 47 U.S.C. § 227 (e)(5)(A)(i).

³¹ *Id.*

³² Waller, Heidtke & Stewart, *supra*, note 2 at 348.

³³ *Id.* at 366.

³⁴ *Id.* at 367.

³⁵ Van Patten, 847 F.3d at 1041 (citing *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C. Rcd. 14014, 14115).

³⁶ Satterfield v. Simon & Schuster, 569 F.3d 946, 954 (9th Cir. 2009).

³⁷ *Spokeo*, 136 S. Ct. at 1544.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

analysis.”⁴¹ 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.’”⁴²

III. Jurisdiction for TCPA Claims

a. Article III Standing

For a court to have jurisdiction, the plaintiff must present a claim with standing.⁴³ Standing is the “right to make a legal claim or seek judicial enforcement of a duty or right.”⁴⁴ Article III of the Constitution addresses federal court standing, requiring a case or controversy for a federal court to have jurisdiction.⁴⁵ Article III has three requirements for the case or controversy requirements: (1) an injury-in-fact, (2) that was caused by the defendant, and (3) that is redressable.⁴⁶ 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.”⁴⁷ 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.⁴⁸

In addition to Article III standing, federal courts also require prudential standing.⁴⁹ 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

⁴¹ *Id.* at 1545.

⁴² U.S. CONST. art. III, 2. *See also*, *Spokeo*, 136 S. Ct. at 1544 at 1549.

⁴³ U.S. CONST. art. III, § 2.

⁴⁴ Priya Khangura, *Hurdles to the court: The Doctrine of Standing Under Statutory Violations*, 11 DUKE J. CONST. LAW & PP SIDEBAR 41, 41 (2016) (citing BLACK’S LAW DICTIONARY (10th ed. 2014)).

⁴⁵ *Id.*

⁴⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

⁴⁷ BLACK’S LAW DICTIONARY 405 (Bryan A. Garner ed., Thomson Reuters 5th Pocket ed. 2016).

⁴⁸ U.S. CONST. art. III, § 2.

⁴⁹ Khangura, *supra* note 44.

statute.”⁵⁰ Under the prudential-standing doctrine, a case with Article III standing may lack federal jurisdiction if there is no prudential standing.⁵¹ This requirement was enacted to limit the role of courts in areas of public dispute.⁵²

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.”⁵³ These exceptions do not apply to the Article III standing requirements.⁵⁴ Federal courts require an injury-in-fact to establish jurisdiction, regardless of whether Congress granted a right of action by statute.⁵⁵

b. *Harm Requirement*

In recent TCPA cases, circuit courts have used the “concrete” and “particularized” analysis from *Spokeo* when conducting the standing analysis.⁵⁶ *Spokeo* holds that to satisfy the injury-in-fact requirement under Article III for consumer litigation claims, the plaintiff must show an injury is “concrete *and* particularized.”⁵⁷ An injury is concrete when it is *de facto*, meaning that it actually exists and is not abstract.⁵⁸ A concrete injury does not have to cause a tangible harm.⁵⁹ For many consumer litigation claims, the harm alleged is intangible. While this does not bar an establishment of concreteness, a court must determine if an actual harm has been alleged. An injury is

⁵⁰ BLACK’S LAW DICTIONARY 638 (Bryan A. Garner ed., Thomson Reuters 5th Pocket ed. 2016).

⁵¹ *Id.*

⁵² Khangura, *supra* note 44 (citing Warth v. Seldin, 422 U.S. 490, 499 (1975)).

⁵³ *Id.* (citing Warth v. Seldin, 422 U.S. 490, 501 (1975)).

⁵⁴ *Id.* at 51.

⁵⁵ *Id.*

⁵⁶ *See, e.g.* Susinno, 862 F.3d at 346.

⁵⁷ *Spokeo*, 136 U.S. at 1548 (emphasis added).

⁵⁸ *Id.* at 1547-48.

⁵⁹ *Id.*

particularized when it “affects the plaintiff in a personal and individual way.”⁶⁰ To determine the sufficiency of an alleged injury, courts follow the two step inquiry from *Spokeo*.⁶¹

The first step to determine sufficiency of an injury is to define the protected legal interest.⁶² This can be done by looking to the language and legislative history of the statute.⁶³ Though statutory intent indicates a likelihood of a recognizable harm, the *Spokeo* decision affirmed a statute granting a right to file a claim does not “automatically satisf[y] the injury-in-fact requirement.”⁶⁴

If the court finds a protected legal interest, the court then proceeds to step two; determine if the harm violates a legally protected interest.⁶⁵ 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.”⁶⁶ A legally protected interest can also be inferred by looking to the legislature’s intent in enacting the statute.⁶⁷

IV. Circuit Court Cases Following *Spokeo v. Robins*

a. 9th Circuit

i. Van Patten v. Vertical Fitness

A 2017 case that applied the *Spokeo* analysis to a TCPA claim was *Van Patten v. Vertical Fitness*.⁶⁸ The plaintiff filed suit after receiving a series of promotional texts from Vertical

⁶⁰ *Id.* at 1549.

⁶¹ Michael G. McLellan, *Finding a Leg to Stand on: Spokeo, Inc. v. Robins and Statutory Standing in Consumer Litigation*, 31 Antitrust 49, 50 (2017).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Spokeo*, 136 S. Ct. at 1549.

⁶⁵ McLellan, *supra* note 61 at 49.

⁶⁶ 136 S. Ct. at 1549.

⁶⁷ McLellan, *supra* 61 at 49.

⁶⁸ 847 F.3d at 1041.

Fitness.⁶⁹ Vertical Fitness was the company that took over a gym the plaintiff had previously been a member of.⁷⁰ 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.⁷¹ 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.⁷²

In response to the text messages sent by Vertical Fitness, the plaintiff filed a putative class action under the TCPA.⁷³ 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.”⁷⁴

When the Ninth Circuit analyzed the plaintiff’s standing, it used the standard held in *Spokeo*.⁷⁵ In determining if there had been a concrete harm, the court, looked to historically recognized cognizable harms in English and American courts.⁷⁶ When Congress enacted the TCPA, it found that “‘unrestricted telemarketing can be an intrusive invasion of privacy’ and is a ‘nuisance.’”⁷⁷ In traditional English and American law, invasion of privacy and nuisance have been considered substantial harms, warranting judicial relief.⁷⁸ The Ninth Circuit found that unsolicited calls and texts by their nature invade the privacy and disturb the solitude of recipients.⁷⁹ Because the harm addressed by the TCPA had historically been recognized, the Ninth Circuit held

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Van Patten, 847 F.3d at 1041.

⁷⁵ *Id.*

⁷⁶ *Spokeo*, 136 S. Ct. at 1540.

⁷⁷ Van Patten, 847 F.3d at 1043.

⁷⁸ *Id.*

⁷⁹ *Id.*

the text messages were a concrete and particularized harm that entitled the plaintiff to both Article III and prudential standing.⁸⁰

b. *3rd Circuit*

i. *Susinno v. Work Out World, Inc.*

In *Susinno*, The Third Circuit considered the harm requirement for a TCPA claim.⁸¹ The plaintiff in the case received a single unsolicited call to her cellphone from Work Out World, Inc. (“WOW”).⁸² The harm alleged by the plaintiff derived from a one minute prerecorded promotional message left on the plaintiff’s voicemail by WOW.⁸³ In its defense, 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.’”⁸⁴ WOW cited to the Restatement (Second) of Torts, that suggests “‘two or three’ calls would not be ‘highly offensive to the ordinary reasonable [person]’ which would create no injury-in-fact for the plaintiff to assert.”⁸⁵

The issue presented was whether the TCPA prohibited the defendant’s conduct, and if so, if the harm was sufficiently concrete and particularized to have Article III and prudential standing.⁸⁶ After concluding the TCPA did apply, the Third Circuit analyzed the sufficiency of the plaintiff’s standing under the *Spokeo* framework.⁸⁷ 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.⁸⁸

⁸⁰ *Id.*

⁸¹862 F.3d. at 348.

⁸² *Id.* at 352.

⁸³ *Id.* at 348.

⁸⁴ *Id.* at 349

⁸⁵ *Id.* at 351-52.

⁸⁶ *Id.* at 348.

⁸⁷ *Susinno*, 862 F.3d. at 350.

⁸⁸ *Id.* at 350, 52.

In applying the *Spokeo* standard, the court looked to whether there was a Congressionally defined injury.⁸⁹ The TCPA applies “directly to single recorded calls from cell phones,” and in enacting the statute, Congress focused on protecting consumers’ privacy interests.⁹⁰ In her complaint, the plaintiff alleged harm in the form of a “nuisance and invasion of privacy.”⁹¹ The court concluded the claim was the kind Congress intended to address in enacting the TCPA.⁹²

Under *Spokeo*, it is not enough to assert a Congressionally identified harm to satisfy standing; the harm must also be concrete and particularized.⁹³ To determine if the harm was concrete, the Third Circuit looked to historical tradition to determine if the harm was recognized by English and American courts.⁹⁴ In conducting this historical analysis, the court must find “newly established causes of action protect essentially the same interests that traditional causes of action sought to protect.”⁹⁵ Looking at the alleged harm, the Third Circuit found TCPA claims, alleging an “invasion[] of privacy, intrusion upon seclusion, and nuisance,” are those that have historically been heard in American courts.⁹⁶

The Third Circuit conceded that, if the claim had been brought prior to the enactment of the TCPA, the alleged injury would not have been a concrete harm sufficient for establishing Article III standing. But, by enacting the statute, Congress had “elevat[ed] a harm that, while previously inadequate in the law,’ was of the same character of previously existing ‘legally cognizable injuries.’”⁹⁷ Because Congress elevated the injury instead of creating a new kind of

⁸⁹ *Id.* at 351.

⁹⁰ *Id.* at 351 (quoting 47 U.S.C. § 227(b)(2)(C)).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Spokeo*, 136 S. Ct. at 1540.

⁹⁴ *Susinno*, 862 F.3d at 351.

⁹⁵ *Id.*

⁹⁶ *Id.* (quoting *Van Patten*, 847 F.3d at 1043).

⁹⁷ *Id.* at 352.

injury, the court determined the harm was sufficient to establish Article III standing.⁹⁸ Under this interpretation, the Third Circuit found a single one-minute voicemail was sufficient to confer standing before a federal court.⁹⁹

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”).¹⁰⁰ The defendant, Horizon, owned laptops that contained the plaintiffs’ personal information.¹⁰¹ When those laptops were stolen, the plaintiffs sued the defendants, even though nothing had been done with the stolen information to injure the plaintiffs.¹⁰² 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.¹⁰³

In Circuit Judge Jordan’s opinion, the court analyzed 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. . . .”¹⁰⁴ 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.”¹⁰⁵

Within the Third Circuit, there were inconsistent interpretations of the sufficiency of a statutory harm for conferring Article III standing.¹⁰⁶ The Third Circuit reiterated their own

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625, 629 (3d Cir. 2017).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 634

¹⁰⁴ *Id.* at 634 (quoting App. At 40.)

¹⁰⁵ *Id.* at 635 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982)).

¹⁰⁶ *In re Horizon*, 846 F.3d at 635.

precedent, that, “[t]he proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated.”¹⁰⁷ This is contrary to 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.¹⁰⁸

To resolve the discrepancy within the Third Circuit, the Court looked to *Spokeo*.¹⁰⁹ The Circuit Court interpreted *Spokeo* to mean that “Congress ‘has the power to define injuries . . . that were previously inadequate in law.’”¹¹⁰ Under this interpretation, legislatures can “elevate intangible harms into concrete harms.”¹¹¹

When applying *Spokeo*, the Third Circuit determined 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.”¹¹² Instead, the court determined that case law and common law allowed protection for the plaintiff’s right to privacy, and that “with privacy torts, improper dissemination of information can itself constitute a cognizable injury.”¹¹³ 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 it “believed that the violation of the FCRA causes a concrete harm to consumers.”¹¹⁴ The Third Circuit concluded the plaintiffs’

¹⁰⁷ *Id.* at 635, n. 14.

¹⁰⁸ *Id.* at 635.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 638.

¹¹¹ *Id.*

¹¹² *In re Horizon*, 846 F.3d at 638.

¹¹³ *Id.* at 638-39.

¹¹⁴ *Id.* at 639.

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.¹¹⁵

c. *Fourth Circuit*

i. *Dreher v. Experion Information Solutions*

Dreher v. Experion Information Solutions stands out as a defendant friendly decision amongst the consumer protection cases that have had standing analyzed with the *Spokeo* framework. 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.¹¹⁶

The controversy involved a 69,000-member class action, initiated by Dreher against Experian.¹¹⁷ Dreher, in undergoing a background check for a security clearance with the federal government found a delinquent credit card account on his credit report.¹¹⁸ Dreher attempted to contact the company associated with the card to fix the mistake.¹¹⁹ Not indicated on the credit report was the fact that the company associated with the delinquent card had closed during the 2008 financial crisis.¹²⁰ 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”).¹²¹ Experian chose not to change the name of the company on the plaintiffs’ credit reports to comply with historic practices and to prevent consumer confusion.¹²² *Dreher* brought the class action to federal court; he argued Experian’s failure to change the name of the company listed on his credit report caused an informational injury.¹²³

¹¹⁵ *Id.* at 640.

¹¹⁶ *Dreher*, 856 F.3d. at 340.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 341.

¹²¹ *Id.*

¹²² *Dreher*, 856 F.3d at 341.

¹²³ *Id.* at 342.

At trial, Experian argued the plaintiff lacked Article III standing.¹²⁴ 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.¹²⁵ During the district court trial, *Spokeo* had not yet been decided; therefore, the concrete and particularized requirements outlined in *Spokeo* were not considered.¹²⁶

Because of the anticipated significance of *Spokeo*, the Fourth Circuit held *Dreher* in abeyance until the decision was announced.¹²⁷ 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.’”¹²⁸ Using the *Spokeo* analysis, the court found the harm claimed by the plaintiff was not concrete, and therefore, there was no Article III standing.¹²⁹

The plaintiff attempted to establish concreteness by arguing the harm he suffered was “a ‘real’ harm with adverse effect.”¹³⁰ The Fourth Circuit rejected the contention, finding Dreher was alleging a pure statutory violation, with very little injury to himself.¹³¹ The most significant injury the plaintiff alleged was the fact that his security clearance with the federal government was threatened by Experian’s failure to comply with the FCRA.¹³² 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

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Dreher*, 856 F.3d at 345.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 346.

¹³² *Id.*

there was “no real world harm on Dreher.”¹³³ 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.¹³⁴

V. 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.¹³⁵ 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.¹³⁶ The 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.¹³⁷

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.¹³⁸ As more people rely on cellphones, having access to consumers through their phone may cause increasingly detrimental effects.¹³⁹ If the proper regulations are not in place, advertisers can establish more invasive telemarketing practices to access to consumers.¹⁴⁰

Following *Spokeo*, most appellate courts have found a phone call constitutes a concrete and particularized harm that can withstand scrutiny under the *Spokeo* standard.¹⁴¹ These findings are

¹³³ *Id.*

¹³⁴ Dreher, 856 F.3d at 347.

¹³⁵ Waller, Heidtke & Stewart, *supra* note 2 at 347.

¹³⁶ *Id.* at 354.

¹³⁷ Waller, Heidtke, & Stewart, *supra* note 2 at 357.

¹³⁸ *Id.* at 384.

¹³⁹ *Id.* at 387.

¹⁴⁰ Waller, Heidtke & Stewart, *supra* note 2 at 387.

¹⁴¹ Bronstad, *supra* 9. *See also*, McLellan, *supra* 61 at 53.

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.¹⁴² An argument that supports this interpretation is that, even with modern technology, the cost of advertising is shifted to the consumer.¹⁴³ This shifting in cost is especially detrimental to the twenty-three percent of all wireless subscribers who have prepaid cellphone plans.¹⁴⁴

Most courts uphold a plaintiff's claim of harm under the TCPA under the justification that the harm alleged is rooted in common law.¹⁴⁵ 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.¹⁴⁶ The American common law has long recognized a right against "unreasonable intrusion upon the seclusion of another".¹⁴⁷ Since the Congressional intent in enacting the TCPA was in part to protect the privacy interests of consumers, the circuit courts have rationally concluded that the harm is concrete and particularized, and thus sufficient to establish Article III standing.¹⁴⁸

Consumers can still be harmed if advertisers are allowed to send promotional text messages, even with opt-out options.¹⁴⁹ When consumer respond to a promotional text message to opt-out of receiving future messages, the advertiser has confirmation they reached an active cell phone number.¹⁵⁰ These entities can then sell that information to others, putting consumers at risk for continued privacy invasion.¹⁵¹

¹⁴² McLellan, *supra* 61 at 53.

¹⁴³ Waller, Heidtke & Stewart, *supra* note 2 at 366.

¹⁴⁴ *Id.*

¹⁴⁵ McLellan, *supra* note 61 at 53.

¹⁴⁶ *Spokeo*, 136 S. Ct. at 1549.

¹⁴⁷ McLellan, *supra* note 61 at 53.

¹⁴⁸ *See, e.g.* Susinno, 862 F.3d at 346.

¹⁴⁹ Waller, Heidtke, & Stewart, *supra* note 2 at 397.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

Additionally, advertisers can include links that may lead consumers to accidentally sign up for services through the same messages offering the opt-out option.¹⁵² 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, today, 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.¹⁵³ Businesses are facing confusion as a result of inconsistent enforcement of the TCPA.¹⁵⁴ This is further 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.¹⁵⁵ This inconsistency increases the likelihood a businesses 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.¹⁵⁶

Additionally, a common payment plans consumers subscribe to for text messaging allows them to send and receive unlimited messages for a fixed price. For a customer with this type of plan, the customer pays the same amount for text messages, regardless of if it is a promotional message. When consumers brought the initial TCPA claims in 1991, they were able to show a

¹⁵² *Id.*

¹⁵³ Linetsky, *supra* note 13 at 72.

¹⁵⁴ Charvat, 630 F.3d at 461.

¹⁵⁵ *Id.*

¹⁵⁶ Potts, *supra* note 3 at 284.

financial detriment in receiving an unwanted fax.¹⁵⁷ For consumers today, receiving a text message does not involve the same detriments the TCPA was enacted to prevent. The discrepancy in the amount of harm demonstrated by the initial claims and claims filed today is rarely considered, and should be further analyzed by the legislature and the FCC to determine if current TCPA claims warrant the same degree of protection that was granted for consumers in 1991.

VI. Is a Text Message an Injury?

As telecommunication technology has increased, courts have attempted to interpret legislation that was enacted before the commonplace technology used today was in existence.¹⁵⁸ The prevalence of text messaging has led to businesses using it for marketing.¹⁵⁹ As explained previously, the TCPA has been interpreted to govern text messages.¹⁶⁰ Because of this, claims are beginning to arise under the TCPA from plaintiffs alleging promotional text messages from companies amount to sufficient harm to confer Article III standing.¹⁶¹

When *Spokeo* was released, it was 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.¹⁶² After the *Susinno* decision held a single unsolicited phone call was sufficient to confer Article III standing, it was an opinion of legal scholar, Amanda Bronstad, that the TCPA was being interpreted in a consumer friendly fashion, with a decidedly broad interpretation of what could constitute harm.¹⁶³

¹⁵⁷ See Potts *supra* note 3 at 354.

¹⁵⁸ See, e.g. Van Patten, 847 F.3d 1037.

¹⁵⁹ See, e.g. Susinno, 862 F.3d at 348.

¹⁶⁰ *Report and Order, In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 03-153 P 165* (July 3, 2003).

¹⁶¹ Van Patten, 847 F.3d 1037.

¹⁶² See, e.g., *id.*

¹⁶³ Susinno, 862 F.3d 346. See also, Bronstad, *supra* note 9.

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. For consumers however, receiving text messages from businesses can feel like an invasion, and alongside being a nuisance, can lead to accidental purchases if companies send misleading promotions.

As of now, one case alleging an injury by way of text message has made it to the Circuit Court level.¹⁶⁴ While that case found the text message was not sufficient to confer an injury, an analysis of similar cases presents an argument that other courts would find a text message a sufficient injury to confer Article III standing.¹⁶⁵ Because of the influence text messaging has on today's society, it is imperative to consider 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 for a consensus by the higher federal courts as text messaging can and often does allow a business to reach consumers across a wide range of jurisdictions. Consistency in judicial interpretation will allow companies to better comply their practices to the law.

a. *Spokeo* Analysis

The *Spokeo* analysis has been important for determining the injury requirement of consumer protection claims, and is therefore important for determining if a text message is a sufficient injury for TCPA claims. Courts utilizing *Spokeo* have used it to determine if injuries

¹⁶⁴ Van Patten, 847 F.3d 1037.

¹⁶⁵ *See, e.g.* Susinno, 862 F.3d 346 at 352.

alleged by plaintiffs are “concrete and particularized.”¹⁶⁶ Justice Alito defined a particularized injury as one that “affect[s] the plaintiff in a personal and individual way.”¹⁶⁷ The Court defines a “concrete” injury as one that is real as opposed to abstract.¹⁶⁸ The opinion in *Spokeo* specifically differentiates these two terms and requires that both be met to confer standing.¹⁶⁹ Without an “appreciat[ion] [for] the distinction between concreteness and particularization,” a court’s standing analysis is incomplete.¹⁷⁰

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*.¹⁷¹ In *Spokeo*, the Court specifically states that being “tangible” is not a requirement for a concrete injury¹⁷²

In analyzing if an intangible harm would constitute a concrete injury, Justice Alito points to an analysis of “history and the judgment of Congress” to aid in the analysis.¹⁷³ Historical practices are useful, as 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.¹⁷⁴ 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.”¹⁷⁵ Though

¹⁶⁶ *See, e.g. id.*

¹⁶⁷ *Spokeo*, 136 U.S at 1548.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1549.

¹⁷² *Id.*

¹⁷³ *Spokeo*, 136 S. Ct. at 1549.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S 555, 578 (1992)).

a legislative act may be indicative of a concrete injury, it is not conclusive.¹⁷⁶ It would not be considered sufficient for a plaintiff to allege a “mere procedural violation, divorced from any concrete harm”¹⁷⁷

In *Sussino*, the court summarized 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”¹⁷⁸ 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 and it was the very injury Congress 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.’”¹⁷⁹ It was based on this analysis the court found the plaintiff had alleged a concrete injury.¹⁸⁰

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.¹⁸¹ 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”¹⁸² Protection of a consumer’s privacy by businesses wanting to send unsolicited promotional text messages would fit into the legislative intent.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (citing to *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009)).

¹⁷⁸ *Susinno*, 862 F.3d at 351.

¹⁷⁹ *Id.* (quoting *Van Patten*, 847 F.3d at 1043).

¹⁸⁰ *Id.* at 352.

¹⁸¹ *Waller*, *supra* note 2 at 367.

¹⁸² *Waller*, *supra* note 2 at 355 (quoting S. Rep. No. 102-178, at 1 (1991)).

Additionally, as referenced in *Susinno*, TCPA claims are rooted in the common law protection of privacy, intrusion of seclusion, and nuisance.¹⁸³ 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 effects the plaintiff as an individual.¹⁸⁴ 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*.”¹⁸⁵

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.

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

¹⁸³ *Susinno*, 862 F.3d at 351.

¹⁸⁴ *Spokeo*, 136 U.S at 1540.

¹⁸⁵ *Id.* at 1548.

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 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.