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Fifth Circuit rules that a single unwanted text is sufficient for TCPA standing

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Federal appeals courts are split over how to treat unsolicited text messages in the context of the Telephone Consumer Protection Act (TCPA). On May 26, 2021, in *Cranor v. 5 Star Nutrition*, the Fifth Circuit Court of Appeals ruled that the receipt of a single unsolicited text message was enough to give a Missouri man standing to pursue his putative class action against 5 Star Nutrition. In so holding, the court acknowledged a variety of “intangible harms” caused by an unsolicited text message that satisfied Article III’s constitutional minimum. This decision reinforces a low standing threshold for recipients of unsolicited text messages and also creates a split in authority among the federal circuit courts of appeal.

The *Cranor* decision, however, directly conflicts with the Eleventh Circuit’s 2019 decision in *Salcedo v. Hanna*, which held that a plaintiff whose damages theory was premised on the time wasted reviewing a single unsolicited text message had not alleged a concrete injury sufficient to confer Article III standing under the Supreme Court’s 2016 decision in *Spokeo v. Robins*.

Although faced with a fact pattern analogous to *Cranor*, the Eleventh Circuit distinguished the harm arising from the “brief, inconsequential annoyance” of an occasional unwanted text from the “real but intangible harms” that the TCPA is intended to protect against. Specifically, the court focused on the TCPA’s underlying concern for privacy within the “sanctity of the home,” finding that text messages to cell phones present “less potential for nuisance and home intrusion” than telemarketing calls to home phone subscribers.

The Fifth Circuit, however, rejected the distinction drawn in *Salcedo* by emphasizing the TCPA’s express coverage of cell phones under the auto-dialer ban, as well as the TCPA’s broad application in non-residential contexts. The court also analyzed the close relationship between the text recipient’s injury and the actionable public nuisance caused by an unsolicited text message. It found that even one “aggravating and annoying” commercial text message trespasses on the recipient’s time and can deplete her cell phone’s battery life and consume the limited allotment of available minutes under a

cell phone plan. In the course of its decision, the Fifth Circuit criticized the *Salcedo* decision as threatening “to make this already difficult area of law even more unmanageable.”¹

While the *Cranor* decision may be unwelcome news for TCPA defendants, it will not necessarily lead to the filing of additional TCPA actions, as some TCPA plaintiffs’ lawyers have already reacted to the Eleventh Circuit’s ruling in *Salcedo* by bringing TCPA suits in state courts with more liberal standing requirements.

In any event, given the development of a clear circuit split, the issue of standing under the TCPA could be ripe for a trip to the Supreme Court.

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¹ *Id.* at *5.