

Ninth Circuit Expands Article III Standing For TCPA Claims

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Authors: [David M. Krueger](#)

In the intricate and often convoluted realm of TCPA litigation, the Ninth Circuit's recent decision in *Hall v. Smosh Dot Com, Inc.* stands as a beacon, illuminating the complexities of Article III standing and the implications of unsolicited text messages. The plaintiff, Kristen Hall, alleged that Smosh Dot Com, Inc. (Smosh), a digital entertainment company, and its parent company, Mythical Entertainment, LLC, sent her unwanted text messages. These messages, she claimed, were in violation of the Telephone Consumer Protection Act (TCPA), a federal law designed to protect consumers from unwanted and intrusive communications, and she sought to represent a nationwide putative class.

The crux of the dispute, and the aspect that makes this case particularly noteworthy, revolved around a question of legal standing. Specifically, the court was tasked with determining whether Hall, as the owner and subscriber of the phone that received the messages, had suffered an injury in fact sufficient to confer Article III standing, even though it was her minor child who had possession of, and used, the phone.

The concept of standing is fundamental. It refers to the requirement that a plaintiff must have a sufficient connection to the harm caused by the violation of a law to sue for that violation. The district court originally concluded that Hall lacked Article III standing because she failed to allege that she was the "actual user" of the phone or the "actual recipient" of the text messages. In other words, the court believed that Hall had not demonstrated a sufficient connection to the harm caused by the alleged TCPA violation. This makes sense—if a person isn't actually using a phone, can they credibly claim to be "harmed" by a phone call or message they never actually received or had knowledge of (absent the actual user informing the subscriber)?

Apparently, the Ninth Circuit believes the answer is "yes." Reversing the district court's decision, the Ninth Circuit held that the owner and subscriber of a phone with a number listed on the Do-Not-Call Registry has suffered an injury in fact sufficient to confer Article III standing when unsolicited telemarketing calls or texts are sent to the number in alleged violation of the TCPA. The court reasoned:

Nothing in our precedent or the text of the TCPA suggests that the owner of a cell phone must also be the phone's primary or customary user to be injured by unsolicited phone calls or text messages sent to its number in violation of the TCPA. ... The fact that the primary or customary user of a phone may suffer a concrete injury from an unwanted call or text message does not preclude the phone's owner and subscriber from suffering the same.

This is-or at least should be viewed as-a significant expansion of the standards for Article III standing in TCPA cases. The court essentially concluded that the subscriber of the phone suffers a concrete injury when their right to be free from such communications is violated, even if they aren't actually using the phone.

The Ninth Circuit's reasoning is subject to substantial criticism. As the Ninth Circuit noted, it may be true that when two persons (one a subscriber and another a regular user) are jointly using a phone, they might both suffer "intrusion" on solitude by unsolicited phone calls. But this assumes both persons are, at some point, actually using the phone at issue and would therefore be mutually exposed to the allegedly unwanted phone calls. But in *Smosh*, only Hall's son was the alleged user of the phone, and Hall's standing was predicated simply on the fact that she was paying the bill. In other words, how can Hall genuinely have experienced "intrusion" on her right to privacy for a phone she is not using? Or to modernize an age-old question, if a phone rings in the forest and no one is around to hear to it, does it make a sound?

The Ninth Circuit's decision in *Smosh* unfortunately follows a recent trend expanding Article III standing in TCPA cases (most notably on the heels of the Sixth Circuit's recent decision in *Dickson v. Direct Energy*, holding that the receipt of a single voicemail is sufficient to create "concrete harm"). But *Smosh* goes even further than any other Article III cases to date in interpreting the TCPA. Even more troubling is the potential for *Smosh* to sidestep the Supreme Court's decision in *Ramirez v. TransUnion* (which holds that putative class members must also have Article III standing), since *Smosh* appears to effectively create a de facto rule that putative class members have suffered harm in TCPA cases.

Businesses must take note of this ruling and review their communication practices to ensure compliance with the TCPA, and consider *Smosh*'s impact on pending TCPA class action litigation. When in doubt, consult with your legal counsel to ensure your practices align with the evolving legal landscape. Stay informed, stay compliant, and navigate the TCPA regulations with confidence.

For more information on this topic, contact [David M. Krueger](#) at dkrueger@beneschlaw.com or 216.363.4683.