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The FCC Should Halt Bogus Lawsuits Threatening Popular Texting Services

by

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Last year, American consumers sent two trillion text messages. Many of those texts were sent for social purposes. But evidence indicates consumers also prefer texting over other means of communicating with businesses. Yet a federal court decision from August 2019 serves as a reminder that businesses and consumers could be subject to class-action lawsuits for as little as sending a single unwanted text message from a smartphone. The FCC needs to issue new rules to halt frivolous bogus lawsuits over texting.

According to CTIA's [2019 Annual Survey](#), 2 trillion text messages were exchanged in 2018, a 15.8% increase over the year before. That figure includes both short messaging service (SMS) texts of up to 160 characters as well as multimedia messaging service (MMS) transmissions of photos and short videos.

Text message volumes are projected to continue increasing. One reason is that younger consumers text more than older consumers. Another reason is that innovation is supplying new texting functions and opportunities. Texting services are in the process of upgrading to a next-generation technology called Rich Communication Services (RCS). This new protocol, which is being made available for cell phones with Android operating systems, allows more interactive functions, including live group chats, as well as transmission of higher-quality audio and video files.

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Next-generation texting technologies also will spur additional use by businesses in communicating with their customers. And more established business landline phone numbers will be activated to send texts and to enable two-way or conversational texting capabilities. A Juniper Research [study](#) estimated that annual text messages sent by businesses worldwide will reach 2.7 trillion by 2022.

A key reason for growth in business texting is the popularity of such services with consumers. For example, Zipwhip, a leading provider of business texting services, in its "[2019 State of Texting](#)" report found that 74% of consumers said they have zero unread text messages on their phones at a given time, while just 17% said they had zero unread emails. Additionally, a Zipwhip [survey](#) found that 74% of consumers would respond to a business text within an hour, but only 41% of consumers would respond to a business email within an hour. Another survey finding is that 87% of consumers indicated that they often ignore telephone calls from businesses and unknown numbers.

An added draw of texting is that spam rates are exponentially lower for text messages than for email and voice calls. According to estimates by Symantec, Kapersky Lab, and Truecaller, in 2017-2018, the SMS/Texting spam rate was 2.8%, compared to the email spam rate of 53%. Text messaging service providers closely monitor for unwanted messages. Unlike voice calls, the content of text messages can readily be scanned, categorized, and filtered. Also, RCS protocol includes encryption and verification functions that will ensure service integrity for next-generation text messaging.

By contrast, there is an epidemic of scam or unwanted robocalls. YouMail's Robocall Index estimated that [nearly 48 billion](#) such calls were placed in 2018, and over [4.8 billion](#) robocalls were placed nationwide in August 2019 alone. The high volume of unwanted voice calls needs to be curtailed. The problem of robocalls surely deserves the attention it is receiving from Congress, the FCC, state attorneys general, and the wireless industry.

Unfortunately, following recent federal court decisions, misguided interpretations of the Telephone Consumer Protection Act of 1991 (TCPA) now threaten text messaging service providers and consumers with open-ended liability. The law was originally intended to penalize unwanted and nuisance telemarketing calls to residential landlines. In August 2019, the Court of Appeals for the Eleventh Circuit decided *Salcedo v. Hanna*, a putative class action in which the alleged TCPA violation consisted of a single unsolicited text message by an attorney to his former client. According to the Eleventh Circuit, that single text message "allegation is undisputedly a violation of the statute as interpreted by the FCC." Fortunately, the Eleventh Circuit dismissed the lawsuit on the grounds that the allegedly offending lone text message did not constitute an injury sufficient to provide the plaintiff with standing, according to Article III of the U.S. Constitution.

But the Eleventh Circuit's decision dismissing on standing grounds provides little comfort in staving off future lawsuits. In addition to its determination that a single text message amounts to a TCPA violation under existing FCC rules, the court acknowledged that a 2017 decision by the Ninth Circuit reached a different result on the standing issue. In *Van Patten v. Vertical Fitness*

Group, LLC, the Ninth Circuit held that the receipt of two unsolicited text messages did constitute an injury that provided plaintiffs standing to sue in federal court.

Additionally, a 2018 decision by the Ninth Circuit misinterpreted the TCPA by holding that forbidden "autodialers" include callers using equipment that is merely capable of dialing or texting a stored telephone number. In *Marks v. Crunch San Diego, LLC*, the Ninth Circuit disregarded the law's provision that autodialer equipment must also have number generating capability. Even if perhaps unintentionally, the court's decision effectively makes every smartphone owner who sends an allegedly unwanted text message a potential autodialer in violation of the TCPA.

In light of these decisions, and absent FCC action, the TCPA will become a potent – but misguided and harmful – vehicle for class-action lawsuits against alleged autodialers. Unless the FCC steps in to modify its rules implementing the TCPA, these recent federal court decisions could lead to frivolous lawsuits against innocent consumers. This will have the effect of stifling innovation in the future of the thriving text messaging services market, all to the detriment of consumers.

First and foremost, the FCC should adopt a rule to define prohibited "autodialers" to mean equipment with current capacity to store or produce phone numbers using a random or sequential number generator and with capacity to dial those numbers without human intervention. Such a rule would track the plain meaning of the TCPA and also avoid a wrongful harmful overextension of autodialer liability for smartphone owners. A carefully considered interpretive rule also would satisfy First Amendment concerns by avoiding prohibitions on substantial amounts of protected speech. (Free State Foundation President Randolph May and I have provided a more detailed analysis in our *Perspectives from FSF Scholars* [paper](#), "The FCC Should Stop Runaway Liability for Smartphone Owners: The Ninth Circuit's Autodialer Decision Threatens Text Messaging Services.")

Importantly, the FCC also ought to consider adopting a rule clarifying that receipt of a single unsolicited text message from another smartphone-owning consumer does not, by itself, constitute a violation of the TCPA.

To ensure that consumers get to enjoy the benefits of next-generation texting services, the FCC should act promptly to clarify its rules so as to avoid making potential TCPA violators of anyone who sends a single unwanted message.

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Further Reading

Seth L. Cooper, "[FCC Should Close Its Toll-Free Texting Proceeding and Tackle Robocalls](#)," *FSF Blog* (March 29, 2019).

Randolph J. May and Seth L. Cooper, "[The FCC Should Stop Runaway Liability for Smartphone Owners: The Ninth Circuit's Autodialer Decision Threatens Text Messaging Services,](#)" *Perspectives from FSF Scholars*, Vol. 14, No. 5 (February 15, 2019).

Seth L. Cooper, "[FCC Proposal Keeps Text Messaging Free From Unnecessary Regulation and Spam,](#)" *FSF Blog* (December 10, 2018).

Randolph J. May, "[Regulatory Modesty and Toll Free Texting,](#)" *FSF Blog* (October 22, 2018).

[Comments of the Free State Foundation](#), In the Matter of Text-Enabled Toll Free Numbers, WC Docket No. 18-28, CC Docket No. 95-155 (August 23, 2018).

[Reply Comments of the Free State Foundation](#), In the Matter of Petition of Twilio Inc. For An Expedited Declaratory Ruling Clarifying the Regulatory Status of Mobile Messaging Services, WT Docket No. 08-7 (December 16, 2015).

Seth L. Cooper, "[Clearing the Air on Wireless Text Messaging,](#)" *FSF Blog* (January 18, 2010).