MARCH 17, 2017

Spokeo and the TCPA: Mere Receipt of Fax with Non-Compliant Opt-Out Notice is Not "Concrete Injury"

, *John Jett* and *Mike Breslin*

In *ARcare v. Qiagen N. Am. Holdings, Inc.*, No. CV 16-7638 PA (ASX), 2017 WL 449173, at *1 (C.D. Cal. Jan. 19, 2017), the district court granted the defendant's motion to dismiss a TCPA class action, finding that the simple receipt of a facsimile lacking a TCPA-compliant opt-out notice does not, without more, constitute a "concrete and particularized harm" conferring standing to sue for a TCPA violation. Although there are cases to the contrary, *ARcare* provides a valuable weapon in the TCPA defendant's arsenal.

The plaintiff in *ARcare*, a non-profit medical provider, alleged that it received five unsolicited fax advertisements from the defendant, Qiagen, advertising a test for tuberculosis. The faxes contained an opt-out notice stating that if the recipient no longer wished to receive fax advertisements from Qiagen it could send an email to QFTinfo@qiagen.com. The TCPA, however, requires that the opt-out notice include notice of other means of opting-out, specifically, "a domestic contact and facsimile machine number." 47 U.S.C. § 227(b)(1)(D)(ii).

Although the opt-out notice did not comply with the TCPA's technical requirements, Qiagen argued that the complaint should be dismissed for lack of standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). In *Spokeo*, the Supreme Court held that allegations of a "bare procedural violation" of a statute, "divorced from any concrete harm," is insufficient to satisfy the injury-in-fact requirement for Article III standing. Qiagen argued that its violation of the TCPA was nothing more than a "*de minimis* injury" and that any *concrete* injury to the plaintiff was "not traceable to Qiagen's violation of the TCPA." *ARcare*, 2017 WL 449173, at *3.

The Central District of California agreed and granted Qiagen's motion to dismiss. The court recognized that the plaintiff's allegations that it had "lost paper, toner, ink, and time" as a result of receiving unsolicited faxes were "sufficiently concrete and particularized to satisfy Article III's injury in fact requirement." *Id.* at *3. But it concluded that the plaintiff failed to show that its injury was "traceable or related to Qiagen's alleged violation of the TCPA." *Id.* In other words, even if Qiagen had included a TCPA-compliant opt-out notice, the plaintiff "would have lost the same amount of ink, toner, paper and time." *Id.* The court therefore dismissed the TCPA complaint for lack of standing.

Although *ARcare* appears to be the first case dismissing a TCPA claim for lack of standing due to a non-compliant fax opt-out notice, a number of courts have dismissed TCPA claims on analogous grounds. For example, the Southern District of California recently dismissed two TCPA cases alleging

improper use of an automatic telephone dialing system, reasoning that the plaintiff "would have been no better off had Defendants dialed his number manually." *Ewing v. SQM US, Inc.*, No. 3:16-CV-1609-CAB-JLB, 2016 WL 5846494, at *3 (S.D. Cal. Sept. 29, 2016); *see also Romero v. Dep't Stores Nat'l Bank*, 199 F. Supp. 3d 1256, 1265 (S.D. Cal. 2016). But even since *ARcare*, a number of courts have rejected the *ARcare* court's broad application of *Spokeo*, finding similar violations of the TCPA constitute concrete injuries. *See e.g.*, *Swetlic Chiropractic & Rehab. Ctr., Inc. v. Foot Levelers, Inc.,* No. 2:16-CV-236, 2017 WL 373514, at *4 (S.D. Ohio Jan. 26, 2017) (finding failure to include proper opt-out notice constitutes concrete injury, noting that if defendant had used proper opt-out language "there would be no statutory violation and thus, no damage whatsoever"); *O.P. Schuman & Sons, Inc. v. DJM Advisory Grp., LLC*, No. CV 16-3563, 2017 WL 634069, at *2 (E.D. Pa. Feb. 16, 2017) (rejecting standing challenge to TCPA claim, collecting cases).

ARcare is a well-reasoned district court decision applying *Spokeo* to a TCPA claim. The law in this area is rapidly evolving, however, with district court decisions being published nearly every week. Only time will tell whether the district court's reasoning in *ARcare* is adopted on a wider basis.