

Post Spokeo Decision on Standing and the Telephone Consumer Protection Act

By Richard Ernsberger

In *Swetlic Chiropractic & Rehabilitation Center, Inc. v. Foot Leavers, Inc.*, the United States District Court for the Eastern District of Ohio denied the defendant's motion to dismiss for lack of standing because the receipt of the unsolicited fax is sufficient to stratify standing. This case is interesting because the defendant had requested a stay pending the decision in *Spokeo, Inc. v. Robins* and the Sixth Circuit has not had the opportunity to address impact of *Spokeo* on TCPA claims. This article discusses the application of *Spokeo* in the district court's opinion.

In *Swetlic*, the defendant is alleged to have violated the Telephone Consumer Protection Act ("TCPA") by sending advertising faxes without insufficient opt-out notices or without prior express invitation or permission by the recipients. The defendant argued that there was a lack of standing under *Spokeo* for the following reasons:

Foot Levelers argues that both of Plaintiff's alternative theories of liability lack standing. Foot Levelers argues that the unsolicited fax claims have an injury that is vague and *de minimis* such that the injuries are not concrete. ...

The district court stated that under *Spokeo* the plaintiff must have an injury that cognizable under current standing doctrine, it must be particularized meaning it affects the plaintiff in a personal and individual way. The district court stated that the sixth circuit had not address the decision in *Spokeo* yet. In making its determination, the district court looked to prior sixth circuit precedent in *Imhoff Inv., L.L.C. v. Alfocchino* (6th Cir. 2015) and a case from a district court in Eastern District of Michigan that applied the teachings from *Imhoff* to *Spokeo*. The district court in the instant case agreed with reasoning of the Michigan Court and opined as follows:

Finding that *Imhoff* is consistent with *Spokeo*, the court held that the plaintiff had standing because he "evidenced a 'concrete' injury of an 'occupied' fax or telephone line that is not merely a 'procedural harm divorced' from a concrete injury," and that "the injury is 'particularized' as to Plaintiff and the proposed class because they are alleged 'recipients' of the offending fax advertisement." *Id.* at *10. This Court agrees with the *Compressor* court that the receipt of an impermissible fax constitutes a concrete and particularized injury under *Imhoff* and *Spokeo*.

Here, the court determined that the receipt by the plaintiff from the defendant of the impermissible fax was sufficient to satisfy standing. Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.