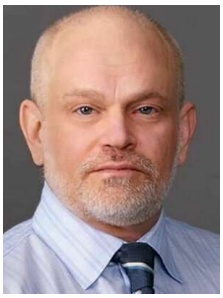
TCPA Verdict Remand Is A Boon For Class Action Defendants

By **Elliot Johnson, Joel Tasca and Jenny Perkins** (December 16, 2022)

Elliot Johnson



Joel Tasca

Jenny Perkins

Defendants facing potential classwide statutory damages awards are certainly in an unenviable position. Even though class members may have suffered de minimus, if any, actual damages, defendants in these cases can still be tagged with enormous jury verdicts based on the availability of statutory damages.

The U.S Court of Appeals for the Ninth Circuit recently provided such defendants a glimmer of hope.

In Wakefield v. ViSalus Inc.,[1] the Ninth Circuit vacated the U.S. District Court for the District of Oregon's denial of the defendant's post-trial request to vacate a classwide jury verdict of $925 million in aggregate statutory damages under the Telephone Consumer Protection Act,[2] remanding the case for determination by the district court as to whether the verdict violated the defendant's constitutional due process rights.

Class members in Wakefield alleged ViSalus unlawfully sent automated telephone calls featuring prerecorded voice messages without prior express consent. Federal Communications Commission rules require, among other things, a written disclosure explicitly stating that, by providing a signature and phone number, the recipient consents to receive artificial voice messages.

After a three-day trial, the jury delivered a verdict against ViSalus, finding that it sent over 1.8 million prerecorded calls to class members without prior express consent, in violation of the TCPA. Since the TCPA sets the minimum statutory damages at $500 per call, the total damages award against ViSalus was a staggering $925 million.

On appeal, the Ninth Circuit vacated and remanded the district court's denial of ViSalus' post-trial motion challenging the constitutionality of the statutory damages award under the due process clause of the Fifth Amendment to permit reassessment of that question.

Turning to U.S. Supreme Court precedent from 1919 in St. Louis, Iron Mountain & Southern Railway Company v. Williams,[3] the Ninth Circuit reasoned that in certain extreme circumstances, a statutory damages award violates due process if it is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable.

The court of appeals held that this constitutional due process test should apply to aggregated statutory damages awards even where the statutory per-violation award is constitutional, which has been the case in individual TCPA actions.

In ruling on Wakefield, the Ninth Circuit revitalized its holding from 1990 in Six Mexican Workers v. Arizona Citrus Growers.[4] In that case, a class composed of 1,349 workers without legal status alleged various violations of the Farm Labor Contractor Registration Act, including failure to register, failure to make written disclosures and recordkeeping violations, to name a few.

The lower court entered an aggregate damages award of $1.8 million based on the defendants' violations. The Ninth Circuit reviewed the damages award and determined that it was unnecessarily punitive and remanded the matter for a reduced aggregate damages award of approximately $850,000.

The Ninth Circuit in Wakefield recognized that Six Mexican Workers was factually distinguishable in that Six American Workers dealt with the reduction of damages per violation to an amount within the statutorily defined range; whereas, Wakefield considered whether a damages award, already at the statutory minimum, should be upheld.

However, the Ninth Circuit ruled that this distinction is immaterial and does not undermine the relevance of the Six Mexican Workers holding in determining the constitutionality of cumulative damages awards.

Accordingly, the Ninth Circuit identified the factors considered in Six Mexican Workers as a road map for district courts to determine whether an aggregated statutory damages award is disproportionately punitive and therefore unconstitutional. Those factors include:

1. The amount of award to each plaintiff;
2. The total award;
3. The nature and persistence of the violations;
4. The extent of the defendant's culpability;
5. Damages awards in similar cases;
6. The substantive or technical nature of the violations; and
7. The circumstances of each case.

There has been no activity in the district court since the Ninth Circuit's Oct. 21 remand. The foregoing factors are expected to be at the forefront of the district court's reassessment of the constitutionality of the $925 million statutory damages award.

Wakefield demonstrates that due process considerations are increasingly receiving traction from the courts of appeals.

In 2003, in the matter of Parker v. Time Warner Entertainment Co.[5], the U.S. Court of Appeals for the Second Circuit addressed this issue but only as a hypothetical in the context of a prospective aggregate statutory damages award under the Cable Communications Policy Act.

The court noted "there are due process concerns when the prospect of stunningly large damages award loom as the result of violations of the Cable Act that affect potentially millions of subscribers."

More recently, in 2009, the U.S. Court of Appeals for the Eighth Circuit in Golan v. FreeEats.com Inc.[6], affirmed a district court's drastic reduction of a statutory damages award under the due process clause.

In that case, similar to Wakefield, the damages award was composed of cumulative TCPA minimum threshold violations. The court in Golan held that the damages award was so severe and oppressive as to be wholly disproportionate to the offense and "obviously unreasonable."

Accordingly, the Second Circuit affirmed the lower court's throttling of the TCPA's statutorily

set minimum of $500 per violation, to just $10 per violation. As a result, the $1.6 billion aggregate damages award was reduced to just over $32 million.

In light of this increasing trend, Wakefield may have powerful implications for putative class actions based on statutes like the TCPA, which permit large aggregate awards. A few of those implications are set forth below.

Restructuring Settlement Leverage

The Ninth Circuit has now made a clear framework that aggregate statutory damages may be unconstitutional.

The Wakefield ruling has opened the door for defendants to push back on the threat of prodigious damages — such as those often made in TCPA cases — at the outset of litigation.

Hypothetical aggregated jury statutory damages awards often drive outrageous settlement demands and results in less room for negotiation post class certification. The risk of a challenge to an unfairly punitive damages award provides new settlement leverage to defendants.

New Challenge to Class Certification

If aggregate statutory damages have a potential to become unconstitutional, a class action should not be viewed as a superior vehicle to litigating individual claims, if the class members cannot get the full amount of statutory damages. Therefore, defendants will have an additional feather in their quiver to defeat motions for class certification.

Traction for Constitutionality Defenses

Companies in the Ninth Circuit have been raising affirmative defenses that damages on a class wide basis are unconstitutional for years. However, those companies have found little success until the Wakefield ruling. This case may signal that affirmative defenses contesting constitutionality have some teeth.

Reconsideration of Statutory Damages by Congress

The TCPA, which provides statutory damages of $500 to $1,500 per call, was enacted in 1991 — a much less automated time. In Wakefield, the Ninth Circuit recognized that "modern technology permits hundreds of thousands of automated calls and triggers minimum statutory damages with the push of a button."

The Ninth Circuit implicitly suggests that Congress may want to revisit the damages it assigned to the more antiquated statutes.

Elliot Johnson is an associate, and Joel Tasca and Jenny Perkins are partners, at Ballard Spahr LLP.

[1] Wakefield v. ViSalus, Inc., 51 F.4th 1109 (9th Cir. 2022).

[2] 47 U.S.C. § 227.

[3] St. Louis, I. M. & S. R. Co. v. Williams, 251 U.S. 63, 67, 40 S. Ct. 71, 73 (1919).

[4] Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990).

[5] Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2nd Cir. 2003).

[6] Golan v. FreeEats.com, Inc., 930 F.3d 950 (8th Cir. 2009).