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“Game Changer” in Big ViSalus TCPA Trial: Did An FCC Ruling Just Undo The Potential $925MM TCPA Judgment?

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Anyone who doesn’t believe that a petition to the FCC can help in the context of private litigation better listen up.

By now you’re likely well aware of the big jury verdict issued in the ViSalus TCPA trial last month. TCPAWorld.com broke the news that the jury had returned a finding off 1,850,436 unlawful automated calls resulting in an award of $925,218,000.00, or so it seemed.

The last few weeks have seen a pile of post-trial motions as ViSalus’ lawyers have hit back against the verdict, and just last week the court heard the Plaintiff’s request for treble damages—questioning why a judgment of over $1BB was necessary to deter TCPA violations. Still, it looked like the case may be on track to result in the largest privacy judgment in history.

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Against this backdrop, however, something remarkable has happened: the FCC issued an Order last Thursday *retroactively waiving the requirement that ViSalus obtain prior express written consent to make the calls that lead up to the verdict!* Read it here: ViSalus Waiver Order. So ViSalus may have just gone from owing nearly a billion dollars to class members to having their sins entirely wiped clean by the FCC. My head just exploded.

Let’s peel back this onion a bit though.

Back in September 2017—when the case was in its nascent stages and the almost-billion-dollar verdict against ViSalus was just a twinkle in Jay Edelson’s eye— ViSalus did something *very* smart: it submitted a petition to the FCC seeking a retroactive waiver to comply with the FCC’s prior express written consent rules. (Newsflash– it hadn’t complied with those rules, which is why it almost sort of maybe owes about a billion dollars.) The issue is that in 2012 the FCC declared callers had to have very specific telemarketing consent to make telemarketing calls. The declaratory ruling was retroactive-meaning that folks who were “unclear” on the level of written consent needed before the ruling was caught in a trap—all of the calls they had been making in reliance on a lower level of consent had just been declared illegal.

ViSalus raised the unfairness of the issue to the FCC—as others have done—and asked for a waiver of their retroactive liability. Noting there is “no dispute in the record that ViSalus obtained written consent for the calls” the FCC granted the multi-level marketing company’s request and cleared it of any requirement to comply with the FCC’s express written consent rules for calls made up until 90 days after the Commission’s 2015 clarification of the written-consent rule.

Now I’ll admit that I have not dug into every filing here to line up exactly who is in the ViSalus class, what timeframes the calls supporting the verdict pertained to, etc. but sources close to the case—yes, I have anonymous sources—have confirmed that this retroactive waiver hits dead within the class period. Indeed the petition was apparently submitted by ViSalus’ trial counsel with this exact case in mind. So even if the waiver does not entirely wipe out the verdict—and it might—it looks like a new trial to determine what class members did, and did not, provide written consent is going to be needed. And if those issues turn on matters of individualized evidence—and how could they not?—it looks like this case may be headed for decertification.

Holy smokes what a turn around.

Then again, Edelson, P.C. is known for first-in-the-nation sorts of results so you can count on Jay's shop to argue, *inter alia*, the waiver is not effective in private litigation, does not actually impact the claims of class members, and that ViSalus did not have the needed written consent to begin with.

Whatever happens next, this ViSalus trial is shaping into real legal theater, and with the FCC imbuing protection to ViSalus for at last some portion of the calls it made during relevant timeframes the next Act promises to be even more compelling than the first.

Bottom line: this thing isn't over yet. We'll keep you posted TCPAWorld.