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Mercy Rule?: Court Declines to Treble Huge $925MM Potential TCPA Award Against Visalus

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As readers of TCPAWorld are already well aware, back in April an Oregon jury returned a verdict in favor of a certified class that received 1.8MM telemarketing calls from multi-level marketing company ViSalus. The verdict would potentially sustain a $925MM judgment assigning the TCPA's *minimum* $500.00 per call award.

While that number was impressive, ViSalus lawyers almost immediately called the propriety of the verdict into question given the jury's inability to discern how many of the "illegal" calls were made to cell phone numbers. Then, as we reported just last week, the FCC threw class counsel another curveball by issuing an order granting ViSalus' request for a waiver of its retroactive liability under the FCC's express consent rules.

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Well, the class is now in for more bad news—just yesterday the Court ruled on the Plaintiff's request to enhance any potential damage award under the TCPA's discretionary trebling provision for willful violations. Had the Court agreed with the Plaintiff ViSalus could have been staring at an other-worldly $2.7BB (billion with a b) judgment. Luckily for Visalus—and all of us that like measured judicial temperament—the Court refused to enhance a punishment that already far outpaces the crime. See *Wakefield v. ViSalus,* Case No. 3:15-cv-1857-SI, Doc. No. 326 (D. Or. June 24, 2019)(*Wakefield III)*.

In *Wakefield III,* the Court begins its analysis of the trebling issue by adopting a relatively low threshold for willfulness—it concludes that an act is willful for TCPA purposes where only an unlawful was "done intentionally or volitionally, as opposed to inadvertently." *Wakefield III* at * 3. But it also rules that a Defendant must have a more or less complete understanding of the predicate facts to be held liable for punitive trebling. Specifically the Court rules a Defendant must have known: "(1) that it was placing telemarketing calls; (2) to a mobile (or cellular) telephone number or to a residential telephone landline; (3) the call used an artificial or prerecorded voice, and (4) the person being called had not given prior express written consent." While TCPA defendants would undoubtedly prefer the stouter approach adopted by many courts that a Defendant must actually know it is violating the TCPA to qualify for trebling, the *Wakefield* court's approach provides a clear and firm standard that should be workable in most cases.

After deriving the applicable rule, the Court reviewed the evidence on willfulness concluding that because ViSalus had never been sued before under the TCPA and had received a mere 2 complaints about calls it may have properly concluded it did not have a serious problem with its marketing calls. Moreover, the Court notes that ViSalus stopped making marketing calls almost immediately after the suit was filed so an enhanced damage award would serve no deterrent effect.

Most importantly, however, the Court finds that the minimum statutory damages available to the class of $925MM are, themselves, sufficient to deter further conduct. It writes:

> The damage award in this case of more than $925 million is more than sufficient to accomplish the purposes of the TCPA, and Defendant has stopped making the type of violative calls at issue in this case. The Court believes that an award of statutory minimum damages is sufficient to deter Defendant, and others, from committing future violations of the TCPA and that a further award of

enhanced damages are not warranted.

So there you go TCPAWorld. At least one court has found that a $925MM verdict is enough to deter TCPA violations. If only Jay had earned that first billion-dollar verdict we know he was after. Maybe next time pal.

Notably, the Court specifically references the FCC's big waiver of ViSalus' requirement to comply with the express written consent rules triggering liability in the suit. Might this mean a new trial is on its way? More to come.

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