Businesses that communicate with consumers through telemarketing calls, text messages or faxes to residential telephone lines, cellular telephones, or fax machines, are likely familiar with the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (“TCPA”). If not, they should be. The TCPA allows for actual damages or statutory damages ranging between $500 per violation and trebled damages up to $1,500 per violation for willful or knowing violations. With the proliferation of TCPA class actions in recent years, even for businesses who think they have received an appropriate level of consent to reach out to particular consumers, this strict liability statute has become infamous for routinely generating uncapped statutory damages awards and class settlements in the tens of millions of dollars or more, even when a violation is accidental.

This week, a decision out of the District of Oregon, in *Wakefield v. ViSalus Inc.*,
highlights the significant exposure and at times draconian nature of liability under the TCPA. After a three-day trial in April, the jury found that health supplement marketer ViSalus had made 1,850,440 robocalls to residential and cellular phone lines in violation of the TCPA. At $500 per violation, ViSalus faced a minimum statutory damages award of more than $925 million. In addition, Wakefield sought enhanced damages of at least 1.2 times and up to triple damages of more than $2.7 billion arguing the company willfully violated the law. ViSalus argued that it did not willfully violate the TCPA because it had, apparently mistakenly, believed it obtained valid written consent from consumers before the FCC imposed new and stricter consent requirements in October 2013.

In a decision earlier this week, District Judge Michael H. Simon denied Wakefield’s request for enhanced statutory damages finding that a minimum statutory damages award of just over $925 million was high enough. In a six-page opinion and order, Judge Simon held that “the circumstances of this case do not call for the imposition of enhanced damages.” Stating the obvious in light of the plaintiff’s request for more, the Court noted “the minimum statutory damages award in this case exceeds $925 million dollars, and Plaintiff cannot credibly argue that this amount of damages would be trivial to Defendant or insufficient to deter unlawful conduct by others.”

As such, the Court found that the deterrent and punitive effect of such a large award obviated the need to decide whether ViSalus willfully violated the TCPA, a determination that the Court side-stepped finding “[t]he 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.”

In sum, while the Court, apparently somewhat sympathetic to Defendant, refused to award enhanced statutory damages, the decision, as a practical matter, was a relatively small victory for ViSalus who still faces a significant liability finding for minimum statutory damages of almost one billion dollars, when the company thought it had the necessary consent. This case, like others, reminds us of the vast statutory liability exposure presented by the TCPA and the need for companies affected by the statute to take preventative steps in their consumer contact programs, including routinely reviewing and updating their protocols with changing law.

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