As we reported last week, this N.L. v Credit One Bank case ended up a real disaster for the defense. The court rejected the “intended recipient” approach to the TCPA’s “called party” definition--i.e. the only one that actually makes sense--and allowed a jury to hammer a Defendant for merely calling a number provided by its customer.

Although the result sounds unfair it was perhaps unsurprising since the case did involve automated collection calls made to an eleven year old boy. I mean, come on.

But let’s set aside the bad-facts-make-bad-law angle (and the why-does-an-eleven-year-old-have-a-cell-phone-? angle) and focus on a lesser-appreciated aspect of the decision: Plaintiff’s counsel was awarded attorney’s fees in this case.

The TCPA does not allow a fee recovery-just enormous statutory damages- so how is that possible?

Glad you asked.

Plaintiff’s lawyers have long been filing state law debt collection claims along with their TCPA causes of action in a--seemingly--misguided attempt to double dip. If they...
win, they get the big statutory damages for the TCPA violation and—they imagine—they also win a big award of attorney’s fees under the state law enactment for litigating the exact same claim. Pretty sweet right?

Sure. Except its not supposed to work that way. Yes, the Plaintiff’s lawyer can recover under the state law claim—assuming the claim wasn’t inoculated by an offer of judgment or other procedural maneuver—but what work really goes into litigating those claims? The TCPA—with its huge dollar recoveries and endless nuance—form the meat of these cases. Indeed, a recent settlement demonstrates the state law component of these cases are worth mere pennies compared to the great heft of the TCPA component. So the Plaintiff’s fee request must be limited to account for the minuscule amount of work that is done solely to advance the state law claim—they simply cannot recover for work done to advance the TCPA claim.

Yet in N.L. the Ninth Circuit affirmed an award to the Plaintiff of over 90% of the attorney’s fees incurred in the case, even though the state law component of the damage award amounted to only ~1% of the total verdict.

Huh?

Now some of this was due to some errant procedural practice by the Defendant—bad facts and bad procedural awareness really makes bad law— but most of it was attributable to the rather odd standard applied by the Court.

Rather than make the Plaintiff prove what work was done on the claim that allows for fees, the Court held that the Plaintiff could recover for any work that was not done exclusively to advance the TCPA claim. In other words, the N.L. panel found that work was presumptively done to advance the state law debt collection claim, even though the TCPA claim was far more valuable.

That’s a real head scratcher. But here’s the reasoning:

[F]ees need not be apportioned when incurred for representation of an issue common to both a cause of action for which fees are permitted and one for which they are not... Here, all of N.L.’s claims share a common factual core. We therefore cannot conclude that the district court’s apportionment was “implausible” or that the district court otherwise abused its discretion.

Again there appears to have been way better ways to attack this fee award than the “implausible” course Appellant landed on, but the N.L. ruling still poses a formidable setback for Defendants hoping to limit the recovery of Plaintiffs seeking fees following success on a state law debt collection enactment alongside a TCPA claim.

In the end the Court awarded fees on 503.3 of a total of 557.2 or a total of 90.3% of the fees incurred in the entire case—on a debt collection claim that amounted to $1,000 of the $95,500.00 awarded in the case.

Go figure.

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