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CLASS ACTION BLOG

Eighth Circuit Declares $1.6 Billion TCPA Class Action Award Violated Due Process So Appropriately Reduced to $32 Million.

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Multiple defendants involved in the promotion of a movie with religious and political themes were sued for TCPA violations for their telephone marketing campaign of the movie, “Last Ounce of Courage”. After the Eighth Circuit found there was Article III standing in an earlier appeal, the matter proceeded to trial which resulted in a statutory damages award of $1.6 billion against one defendant. The district court judge found that award was “obviously unreasonable and wholly disproportionate to the offense,” leading him to reduce the statutory damages award from $500 per call down to $10 per call. Otherwise, there was a Fifth Amendment due process clause violation. In round numbers, the more than 3.2 million calls would have resulted in a $1.6 billion judgment against the defendant unless the statutory damages award was reduced.

The court did not spend much time reviewing the Article III standing issue which had caused the earlier reversal and reinstatement of the case, but did review its earlier ruling in light of the Supreme Court’s ruling in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016). Like many other courts of appeals which found post-*Spokeo* Article III standing in TCPA cases, so did the Eighth Circuit. It stated rather simply that it did not “matter that the harm suffered here was minimal,” rather a “standing analysis [considers] the nature or type of the harm.” The court “conclude[d] [Plaintiffs] suffered a concrete injury and have standing”.

The greatest challenges the court considered had to deal with a jury instruction issue not likely to occur in other cases and whether the district court properly reduced the statutory damages. The court acknowledged the TCPA statutory language provides for awards of the “actual monetary loss” or “$500 in damages” for each violation, whichever is greater. Furthermore, the statute does not provide for any statutory damages reduction. For that reason, the court found there could be a reduction in the damages awarded only if the award was unconstitutional.

The court looked to a 1919 Supreme Court holding that a "penalty assessed pursuant to a statute violates the Due Process Clause if it is 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'" The Eighth Circuit had reaffirmed that standard in 2012 in *Capitol Records, Inc. v. Thomas-Rasset*, 692 F. 3d. 899, 907 (8th Cir. 2012). At the same time, the court recognized that Congress has "a wide latitude of discretion" whenever it establishes statutory penalties and damages.

The court concluded that under that test, the $1.6 billion damage award violated the Due Process Clause, because the award was obviously "a shocking large amount." That was especially true when the amount of the award was compared to the actual harm done. The evidence established the defendant thought that it had "prior consent to call the recipients about religious liberty," one of the predominant themes of the movie, the calls were made over roughly one week, the "harm to the recipients was not severe," and "only the recipients who voluntarily opted in during the call heard the message about the film." The Eighth Circuit panel unanimously agreed the district court judge did not erroneously conclude that "the statutory damages would violate the Due Process Clause."

Interestingly, in the footnote the court noted the defendant had not cross-appealed arguing that its calls (which had both political and commercial purposes) did not qualify as advertisements within the meaning of the TCPA, that the consent regarding religious liberty issues was the equivalent of consent to receive calls "regarding a commercial film relating to religious liberty," or that all the recipients opting in to obtain the "information about the film supplied the necessary consent." For those reasons, the court did not express any opinions on the merits of any of those arguments. However, the fact the court mentioned them suggests that the panel would have seriously considered such arguments. For practical reasons, it was reasonable the defendant did not raise those issues having been successful in reducing the statutory award to 2% of what the statute allowed. Nevertheless, other TCPA defendants under similar circumstances may want to raise such issues where the stakes for doing so are not quite as high.

The *Golan* case is noteworthy primarily because of the way the Eighth Circuit chose to reduce the TCPA statutory damages award. Such huge statutory damages awards are often mandated under the TCPA and other federal and state statutes. The Eighth Circuit's opinion provides a roadmap for challenging such awards and, at the same time, provides a roadmap for plaintiffs to formulate alternative reduction proposals which are not nearly as severe. No matter how one looks at it, a 98% reduction of the damages award is significant. The litigators in *Patel v. Facebook* may want to take note.

Case citation: *Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019)