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9th Circ.'s Weariness Of TCPA Award May Quell Big Paydays

By **Allison Grande**

Law360 (November 2, 2022, 9:38 PM EDT) -- The Ninth Circuit handed a "parachute" to companies staring down massive damages awards under the Telephone Consumer Protection Act in ordering a lower court to rethink a $925 million robocall verdict, providing what defense attorneys say is new insulation against quick settlements and large certified classes.

Businesses in a wide range of industry sectors, from social media companies to retailers to banks, have for years had to face the possibility that marketing phone calls and texts to recipients who haven't provided consent could expose them to uncapped statutory damages of between $500 and $1,500 per violation.

With modern technology able to quickly blast out automated messages to troves of recipients at once, the potential for staggering damages has been high. But a **recent Ninth Circuit ruling** raising concerns about the constitutionality of a $925 million robocall award against health supplement maker ViSalus may help turn the tide, defense attorneys say.

"This Ninth Circuit decision changes the dynamic in TCPA litigation," said Eric Troutman, founder of the Troutman Firm, which specializes in TCPA litigation and compliance work.

"Moving forward, this is really a weapon that defendants can use to challenge unfairly punitive aggregate damages, and will likely help them develop more of a stiff upper lip in litigation, knowing that they have a nice parachute and a last potential silver bullet if something goes really bad," Troutman said.

The decision may also "give plaintiffs lawyers pause" and make them think "long and hard about whether TCPA class actions in the Ninth Circuit really make sense since they don't have a guaranteed avenue of recovery" for the maximum amount of statutory damages, Troutman added.

John Kristensen, a partner at plaintiffs firm Carpenter & Zuckerman, on the other hand characterized the Ninth Circuit's ruling as more of a matter of the appellate panel "wanting to see the trial court fill in the record a little bit more" rather than a wholesale rejection of massive aggregate damage awards permitted under the TCPA.

"I'm not sure how much the court can really change what Congress set up as a structure to prevent this type of conduct," Kristensen said, adding that he doesn't expect the Ninth Circuit ruling to change the way he litigates TCPA cases and that he still plans to press for the "full amount" of damages in the cases he pursues.

"Businesses might have some sympathetic ears with some courts, but Congress has the ability to say that, if you're going to do illegal things, we're going to put you out of business," Kristensen said. "To say that violates due process rights ignores Congress' will."

In sending the matter back to the lower court for reconsideration, the Ninth Circuit panel unanimously found that an Oregon federal judge had failed to apply the necessary test for determining if the $925 million statutory damages award that ViSalus is facing after a jury found it blasted consumers with nearly 2 million unsolicited robocalls is unconstitutionally excessive.

Depending on how the lower court responds, the Ninth Circuit's ruling is poised to have "interesting

legal ramifications" for the TCPA and other statutory regimes that include minimum penalties with no cap, Troutman Pepper partner David Anthony and associate Brooke Conkle said in a joint email.

"On its face, the $925 million award makes theoretical sense based on a $500 fine for each of the 1.8 million calls at issue," they said. "[But] the decision begs the question — at what point are collective damages simply too much where a company can engage in multiple violations, either intentionally or unintentionally, at the single push of a button?"

In enacting the TCPA in 1991, Congress set a floor of statutory damages at $500 per unlawful call but no ceiling for cumulative damages. Defendants have argued that the framework was meant to be used primarily to compensate individuals that had been directly plagued by annoying calls and not be wielded by massive classes in the crush of TCPA litigation that has sprung up over the past decade.

The Ninth Circuit panel appeared to be receptive of this stance in its ruling last month, where it pointed out that there have been instances where minimum fines, when levied collectively in large quantities, can cross into a territory that is so "severe and oppressive" that it violates the defendant's constitutional due process rights.

"It's refreshing to see a court understand the unintended consequences of the TCPA's statutory damages provision, which clearly wasn't meant to be used to put companies out of business, and to adopt a common sense view and put the brakes on," said Mark Eisen, partner and co-chair of the class action practice at Benesch Friedlander Coplan & Aronoff.

While companies for years have been immediately raising the affirmative defense that damages on a classwide basis would be unconstitutional, there's been no traction for those arguments, noted Becca Wahlquist, co-chair of the consumer class action defense practice at Kelley Drye & Warren LLP.

"But now, with the ViSalus decision, the Ninth Circuit has made clear that aggregate statutory damages might indeed be unconstitutional, and that district courts must consider a range of factors in assessing an excessive damages claim," Wahlquist noted.

This reasoning is likely to apply to not only eye-catching sums like those ViSalus is facing, but also to seven- or eight-figure penalties that could cripple smaller companies, according to Wahlquist.

"It might have taken a $925 million award to recognize how quickly these things can aggregate, but with this ruling, the Ninth Circuit has acknowledged that the damages set out in the TCPA over thirty years ago may not have contemplated the high ceiling of statutory damages that could be incurred with modern technologies," Wahlquist said.

This development opens the door for defendants to push back at the pressure they often confront at the outset of TCPA litigation to settle the matter quickly rather than take their chances at a trial that could result in hefty monetary liability, according to defense attorneys.

"It is no secret that plaintiffs use the specter of astronomical aggregate awards to obtain substantial settlements in marginal cases," said Michael Daly, a partner at Faegre Drinker Biddle & Reath LLP. "Although the court cautioned that awards should be reduced only in 'extreme' cases, it has at least provided an analytical framework for doing so."

The appellate court's endorsement of lowering aggregate damages "takes off the table as the driver of the conversation" in the early stages of litigation that a company could face billions in statutory damages, according to Benesch Friedlander's Eisen.

"For over a decade, we've been seeing these incredibly high settlements and conversations being driven by hypothetical damages awards that are so divorced from reality," Eisen said. "But the Ninth Circuit is really taking a step back and saying they're functionally not okay with these aggregate awards, and that's a pretty telling sign that the pendulum might be swinging back a little."

With more defendants likely to push the envelope in TCPA cases, the Ninth Circuit's ruling could also become critical in fighting class certification, according to defense attorneys.

"This opens up a great new avenue of assault on TCPA class certification," Troutman said. "If

aggregated damages are unconstitutional, then courts shouldn't be certifying classes because a class can't be viewed as being superior to individual claims when class damages are reduced and individual claimants can get the full amount."

As the ViSalus dispute continues to play out, attention will turn to how the lower court responds to the Ninth Circuit's directive to reassess the constitutionality of the aggregate damages award.

The appellate panel instructed the lower court to use the guidance for determining whether a statutory damages award is disproportionately punitive that it laid out in its 1990 decision in Six Mexican Workers v. Arizona Citrus Growers.

In that decision, the Ninth Circuit considered several relevant factors to evaluate the constitutionality of a liquidated damages award, including the amount of the award to each plaintiff, the total award, the nature and persistence of the violations, the extent of the defendant's culpability, damage awards in similar cases, the substantive or technical nature of the violations, and the circumstances of each case.

During **oral arguments in May**, the appellate panel was "clearly focused on — and concerned about — the size of the award," with Circuit Judge Richard C. Tallman, who authored the court's opinion, likening the result to "a runaway jury," Faegre Drinker's Daly noted.

However, given the highly subjective nature of the Six Mexican Workers balancing test, it remains to be seen how the lower court will apply the factors and whether it will find an award reduction to be warranted, attorneys say.

"Let's just say that there is enough uncertainty here to litigate for a long, long time if parties so desire," said George "Buck" T. Lewis, a partner and leader of the appellate group at Baker Donelson Bearman Caldwell & Berkowitz PC.

With the lower court in unprecedented territory in applying the reasonableness test to TCPA damages, attorneys will be keeping a close eye on which elements receive the most weight in the lower court's analysis.

One element that could play a prominent factor is the contention that the Federal Communications Commission had granted ViSalus a limited waiver of liability for calls where the company had obtained some form of written consent due to confusion over a 2012 commission order on the topic.

The Oregon federal judge overseeing the dispute has **refused to entertain** this argument in the past, finding that the company couldn't use the waiver to decertify the class or set aside the verdict due to the company's failure to raise the issue earlier in the dispute. The Ninth Circuit panel affirmed this portion of the lower court's decision in its recent ruling, finding that ViSalus had waived a consent defense by making "no effort to assert the defense, develop a record on consent, or seek a stay pending the FCC's decision."

"It will be interesting to see if the fact that the FCC granted ViSalus a waiver factors into the test, because that could be a very strong reason to reduce damages on the grounds of a due process violation, even though the company maybe didn't preserve the defense the way it should have," Kelley Drye's Wahlquist said.

Another element of the Ninth Circuit's ruling that went against ViSalus was the finding that the certified class of robocall recipients had alleged a concrete injury necessary to establish Article III standing to press their claims. The holding was consistent with the Ninth Circuit's **2017 ruling** in Van Patten v. Vertical Fitness Group, which established that the receipt of an unsolicited phone call constitutes a sufficiently concrete injury for Article III purposes.

The panel also took no issue with the $500 statutory minimum set by the legislature and didn't quibble with the Oregon federal jury's finding that ViSalus had placed more than 1.8 million unsolicited robocalls, raising concerns only about whether the aggregate damages award violates due process.

"We are pleased that the Ninth Circuit affirmed the jury's verdict that ViSalus violated the TCPA

millions of times by placing unwanted robocalls to class members," Gregory S. Dovel of Dovel & Luner LLP, one of the attorneys representing plaintiff Lori Wakefield and the certified class, said in a statement provided to Law360.

ViSalus didn't respond to a request for comment on the ruling.

Several defense attorneys expressed surprise that the directive for the lower court to review the constitutionality of the aggregate damages award came out of the Ninth Circuit, which in the past has embraced broad interpretations of what's required to establish standing and what **constitutes an autodialer** covered by the TCPA.

"If any court were to push back on the notion that there's a due process issue with the TCPA's catastrophic damages, it would be the Ninth Circuit," Troutman said. "The fact that it backed the argument that aggregate damages can be reduced in TCPA cases really sends a message across the country."

While most TCPA cases don't get to the point where the court or a jury needs to impose an aggregate damages award, attorneys will still be watching to see if a circuit split develops on the issue and if the U.S. Supreme Court, which has picked up several TCPA-related cases in the past five years, has any interest in the topic.

"Because the damages award is so massive, and given that the FCC later gave a waiver to ViSalus, but it's still facing annihilating liability, that could be something that could pique the interest of the Supreme Court," Kelley Drye's Wahlquist said.

The Ninth Circuit's ruling could also reinvigorate the push for legislative reforms to the decades-old TCPA, which has been lambasted by critics for not only its uncapped damages but also for unclear statutory language that doesn't account for modern dialing technologies.

"This decision alone may not prompt legislative reform," Wahlquist said. "But it should serve as reminder of why reforms such as putting a cap on damages [like other statutes have] is so important."

U.S. Circuit Judges Richard C. Tallman, Morgan Christen and Marsha S. Berzon sat on the panel for the Ninth Circuit.

ViSalus is represented by Becky S. James, Lisa M. Burnett and Ryan J. Vanover of Dykema Gossett PLLC.

The consumers are represented by J. Aaron Lawson, Rafey S. Balabanian, Jay Edelson, Ryan D. Andrews and Benjamin H. Richman, of Edelson PC; Greg S. Dovel and Simon Franzini of Dovel & Luner LLP, and Scott F. Kocher of Forum Law Group LLP.

The case is Lori Wakefield v. ViSalus Inc., case number 21-35201">21-35201, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Dave Simpson. Editing by Emily Kokoll and Kelly Duncan.