APPEALS COURT RESURRECTS MLM COMPANY CHALLENGE TO $925 MILLION ROBOCALL JUDGMENT

By Larry Steinberg & Artin Betpera

"In the mass communications class action context, vast cumulative damages can be easily incurred, because modern technology permits hundreds of thousands of automated calls and triggers minimum statutory damages with the push of a button."

Hon. Richard C. Tallman, Ninth Circuit Court of Appeals

Every direct selling company is keenly aware that it must comply with a myriad of federal, state, and local laws that apply when selling goods and services to consumers. The overlay of these regulations on a multilevel business model where sales are often conducted by a large network of independent distributors presents unique challenges. This danger is exacerbated by the position routinely taken by regulators and prosecutors (including the Federal Trade Commission) that direct sellers are strictly liable for any transgressions committed by their distributors.

One of the more dangerous of these statutes is the federal Telephone Consumer Protection Act (TCPA), which broadly regulates telephone and text message solicitations.[1] Due to a provision in the law for mandatory statutory damages, the TCPA has received an inordinate amount of attention from the plaintiff's bar. In the direct selling arena, TCPA lawsuits are often based on unauthorized robocall and text message campaigns conducted by a company's distributors[2], though these lawsuits can also be based on corporate advertising activity. Class action waivers contained in a company's policies & procedures are not always effective protection since TCPA lawsuits are frequently brought by consumers who have no contractual relationship with the company.

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[1] Recently, several states (including Florida, Oklahoma, and Washington) have enacted their own state Telephone Consumer Protection Act statutes, imposing, in some respects, broader liability than provided for by the federal TCPA. Additional states (including Georgia, Massachusetts, and Michigan) are likely to follow with their own mini-TCPA's.

[2] Every MLM should have a provision in its Policies & Procedures making it clear that distributors are prohibited from making, directly or indirectly, any automated, outbound telephone call or text message that delivers any prerecorded message (a "robocall") regarding or relating to the company's products, services or business opportunity. Though not an absolute bar to liability, this type of provision would allow a company to argue that distributor robocalls were unauthorized and the company should not be held legally responsible.

The current poster child for the dangers presented by the TCPA is a lawsuit filed in Oregon federal court against ViSalus, a multi-level marketing company that sells weight management products, nutritional supplements and energy drinks. The lawsuit alleges that ViSalus had made pre-recorded calls to its distributors and customers for marketing purposes without the form of express written consent required by the Federal Communications Commission. The lawsuit was filed in 2015, the court certified the case as a class action in June 2017 and, after a three day trial held in April 2019, a jury found that ViSalus had made 1,850,436 illegal robocalls. After extensive (and unsuccessful) motion practice challenging the jury award on numerous factual and legal grounds, the court assessed $500 in statutory damages for each of the robocalls and, in August 2020, judgment was entered against ViSalus in the amount of $925,218,000. ViSalus appealed and, on October 20, 2022, the United States Court of Appeals for the Ninth Circuit issued its decision in *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109 (9th Cir. 2022) ("Wakefield").

Wakefield encapsulates why the Telephone Consumer Protection Act is such a dangerous statute. Telephone and text message marketing is an extraordinarily efficient means of reaching consumers, and modern-day technology has made such marketing campaigns easier than ever to launch with the flick of a virtual switch. But this tool of communication is highly regulated under the TCPA and similar state statutes. Violations carry steep statutory penalties that, in the class action context, could pose catastrophic legal exposure to businesses.

The statute has two key prohibitions. First, it bans making any call or sending any texts for marketing purposes using either an artificial or prerecorded voice, or an "automatic telephone dialing system" without the prior express written consent of the called party. Second, it bans making calls and sending texts for marketing purposes to any telephone number registered on the National Do Not Call Registry unless the caller has: (a) the called party's prior express written consent; or (b) an established business relationship with the called party. The TCPA has a private right of action that allows consumers to sue for minimum statutory damages of $500 which, subject to the court's discretion, can be trebled to up to $1,500 per violation.

The rules around "prior express written consent," were created by the Federal Communication Commission in 2012. Before that time, callers could establish consent to make marketing calls by showing the call recipient voluntarily provided their phone number to the caller. The FCC's rules around "prior express written consent" are now more stringent and technical. These heightened consent requirements apply specifically to telemarketing and solicitation calls, and require that callers obtain a signed writing from the called party that specifically authorizes calls using an automatic telephone dialing system, and/or pre-recorded or artificial voice message, and contains other mandated legal disclosures.

ViSalus' marketing campaign was directed to the telephone numbers of sellers and customers with whom the company had a pre-existing relationship, and who had voluntarily provided their phone numbers to the company. Prior to enactment of the FCC's 2012 rule tightening up the requirements for prior express written

consent,, that would have been sufficient. Unfortunately, under the 2012 FCC rules, ViSalus' automated calls were in violation of the TCPA -- with disastrous consequences to the company.[3]

ViSalus appealed the judgment to the Ninth Circuit. During the appeal ViSalus raised a number of issues, only one of which had traction with the appeals court. ViSalus had argued to the trial court, and argued again on appeal, that the Billion Dollar Judgment was so “severe and oppressive” that it violated the Due Process Clause of the United States Constitution. Though the trial court had ruled that case law did not provide any principled Due Process standards which would allow it to reduce the judgment, the Ninth Circuit -- obviously shocked by the magnitude of the award -- disagreed, and sent the case back down to the trial court for further proceedings on this issue.

The Ninth Circuit found that, even if the TCPA’s $500 per call penalty passed constitutional muster (which ViSalus did not challenge), when those penalties are aggregated they “can, in extreme circumstances, result in awards that may greatly outmatch any statutory compensation and deterrence goals, resulting in awards that are largely punitive.” The Ninth Circuit held that "the aggregated statutory damages . . . are subject to constitutional limitation in extreme situations—that is, when they are 'wholly disproportioned' and 'obviously unreasonable' in relation to the goals of the statute and the conduct the statute prohibits. . . . a district court must consider the magnitude of the aggregated award in relation to the statute’s goals of compensation, deterrence, and punishment and to the proscribed conduct." The Ninth Circuit stressed that “only very rarely will an aggregated statutory damages award meet [this] exacting . . . standard and exceed constitutional limits where the pre-violation amount does not.”

Though ViSalus will now get the opportunity in the lower trial court to test the constitutionality of plaintiffs' judgment according to the standards delineated by the Ninth Circuit, it still faces the prospect of a possible large judgment. Either way, the distractions and financial cloud under which the company has been operating for the last eight years are regrettable, and were avoidable.

No business, of course, wants to risk being in the position that ViSalus has found itself. This verdict should be taken as a wakeup call to companies that are not already vigilant regarding TCPA compliance, both by the company itself and by its MLM distributors. There is significant momentum building amongst the states in passing new and enhanced laws to regulate telemarketing. The regulatory environment around telephone and text message marketing is only heating up. As the *Wakefield* case demonstrates, it is imperative that businesses have proper compliance infrastructure, and legal risk mitigation protocols in place before flipping the switch on any of telephone or text message marketing campaigns.

[3] One of the ironic twists in this case is that, after trial, the FCC granted ViSalus a retroactive waiver of the "prior express consent" requirements. However, the court refused to consider this because, in its view, ViSalus hadn’t sufficiently raised "consent" as an affirmative defense. Even though ViSalus had consent under the former rules, and even though the FCC had granted a ViSalus a retroactive waiver, this did not absolve the company of TCPA liability. ViSalus has advised that it will be petitioning the United States Supreme Court to review the consent issue.

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Larry Steinberg and **Artin Betpera** are experienced counselors, business litigators, and trial lawyers. Larry is Chair of the firm's MLM Industry practice group. Artin has handled a panoply of lawsuits asserting violations of the alphabet soup of state and federal consumer protection laws (including TCPA, FCRA, RESPA, TILA, and FDCPA), and has successfully defended numerous class actions brought under the Telephone Consumer Protection Act.

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