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Ninth Circuit rules that excessive, aggregated awards of statutory damages are subject to review on constitutional due-process grounds

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Takeaway: Statutes that impose per-violation statutory damages, like the Telephone Consumer Protection Act (TCPA), can lead to astronomical class action verdicts. In *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109 (2022), a Ninth Circuit panel evaluated a jury's award of close to $1 billion under the TCPA – an award based on the TCPA's *minimum* statutory damage penalty of $500 per violation – ruling that the district court erred by not determining whether the award was constitutionally excessive. While *Wakefield* provides a mechanism for large awards to be reviewed in the Ninth Circuit, the panel emphasized that any such challenge would only rarely succeed.

In *Wakefield*, Lori Wakefield filed a putative class action in the District of Oregon against ViSalus, Inc. (ViSalus), a multi-level marketing company, for violating the TCPA by making targeted robocalls to her and members of a nationwide class. After a three-day jury trial, a jury found that ViSalus had sent close to two million (1,850,440) prerecorded calls to the nationwide class, awarding a nearly $1 billion damage award against ViSalus ($925,220,000) based on the TCPA's minimum statutory damages award of $500 per call.

ViSalus attacked the aggregate award (but not the $500 per-violation penalty) on a number of grounds, contending that the jury's "astronomical" aggregate award was "unconstitutionally excessive." *Id.* at 1116. The district court, however, refused to reduce award, observing "that no Ninth Circuit precedent existed to guide lower courts in reducing statutory damages awards that are found to be unconstitutionally excessive," and further ruling "that it was within Congress's discretion to fix damages for a violation of the TCPA at $500, and that due process did not require the court to consider the constitutionality of the statutory damages award in the aggregate." *Id.* at 1116-1117.

Reviewing the issue *de novo*, a Ninth Circuit panel vacated the district court's order refusing to evaluate the award on constitutional due process grounds. Construing the U.S. Supreme Court's century-old opinion in *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), the panel concluded "that the aggregated statutory damages here, even where the per-violation penalty is constitutional, 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. As with punitive damages awarded by juries and per-violation statutory damages awards, 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." *Id.* at 1123 (quoting *Williams*, 251 U.S. at 67). Moreover, the panel found that there was some Ninth Circuit "guidance for determining whether a particular statutory damages award is disproportionately punitive in the aggregate." *Id.* (citing *Six (6)*

Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990)). In that case, the Ninth Circuit adopted the following factors to evaluate awards of liquidated damages:

"1) the amount of award to each plaintiff, 2) the total award, 3) the nature and persistence of the violations, 4) the extent of the defendant's culpability, 5) damage awards in similar cases, 6) the substantive or technical nature of the violations, and 7) the circumstances of each case." *Id*. (quoting *Six Mexican Workers*, 904 F.2d at 1309).

The panel emphasized, however, that such challenges face a very high bar: "We stress that only very rarely will an aggregated statutory damages award meet the exacting *Williams* standard and exceed constitutional limitations where the per-violation amount does not." *Id*.

Accordingly, the panel vacated and remanded "the district court's denial of ViSalus's post-trial motion challenging the constitutionality of the statutory damages award to permit reassessment of that question guided by the applicable factors." *Id*. at 1125.