Questions Persist After Ruling Skirts $925M TCPA Award Issue

By **Michael Klotz** (April 12, 2024)

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In Wakefield v. ViSalus Inc., the U.S. Court of Appeals for the Ninth Circuit in 2022 **vacated** a statutory damages award under the Telephone Consumer Protection Act for more than $925 million and remanded the case to the U.S. District Court for the District of Oregon to

> assess in the first instance, guided by [prior case law] and this opinion, whether the aggregate award ... in this class action is so severe and oppressive that it violates [the defendant's] due process rights and, if so, by how much the cumulative award should be reduced.[1]

The Wakefield decision promised to help clarify an important legal question that has persisted for more than a century: When does a statutory damages award violate due process because it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable?"[2]

In February, the district court in Wakefield issued an order holding that the doctrine of constitutional avoidance precluded it from deciding whether the damages award — a penalty of $925 million based upon $500 in damages for each of the 1.85 million prerecorded phone calls ViSalus allegedly made in violation of the TCPA — was constitutionally sound.[3]

The court instead ordered class members to be notified and claims to be processed and:

> [I]f the claims process results in a typical claims participation rate of 15% or less, then there is unlikely to be any constitutional concern raised by the claimed aggregate statutory award . . . [a]nd given the potential constitutional concerns, the Court may order the unclaimed funds, or some percentage of them, to revert to ViSalus, thus avoiding any potential constitutional implications.[4]

The court offered no explanation for why 15% of the damages award, $139 million, would satisfy due process.

While the Wakefield district court had been "directed by the Ninth Circuit as a matter of first impression to consider a possible constitutional concern," the district court concluded that it would "defer[] until resolving that question is unavoidable and absolutely necessary [after the claims process], as directed by the Supreme Court."[5]

The Problem

The district court decision in Wakefield provides no further guidance on when a statutory damages award violates due process. That lack of clarity is a problem under the TCPA — which authorizes $500 in damages per violation and treble damages at $1,500 per willful violation — as well as other federal and state statutes, which similarly provide for substantial per-violation penalties that can create sizable statutory awards.

For instance, the Fair Credit Reporting Act provides for statutory damages of between $100 and $1,000 for each violation, and state consumer fraud statutes may authorize a plaintiff to recover statutory damages of $1,000 per violation or more.[6]

As a result, defendants in lawsuits brought under these and other statutes can be subject to multimillion-dollar statutory damages awards and, as a result, are often under tremendous pressure to settle cases even when the underlying conduct was unintentional or caused minimal, if any, harm.

A Potential Solution

The U.S. Supreme Court has developed a robust framework for evaluating when a punitive damages jury award violates due process, and further clarification is needed about how that framework applies to evaluating the constitutionality of statutory damages awards.

For example, in TXO Production Corp. v. Alliance Resources Corp., the Supreme Court held in 1993 that reasonableness is the touchstone for evaluating whether a punitive damages award comports with due process.[7]

In addition, in BMW of North America Inc. v. Gore in 1996, the high court established "three guideposts" for evaluating the reasonableness of a punitive damages award: "the degree of reprehensibility" of the conduct; the ratio between the punitive damages award and the "actual harm inflicted on the plaintiff"; and the "difference between this remedy and the civil penalties authorized or imposed in comparable cases."[8]

But in applying the second factor, no bright-line rule exists on when a ratio between punitive damages and compensatory damages is unacceptable, although, according to the high court's 2003 ruling in State Farm Mutual Automobile Insurance Co. v. Campbell, "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."[9]

The Ninth Circuit in Wakefield referenced this punitive damages framework and observed that:

> [B]y analogy these cases teach that where statutory damages no longer serve purely compensatory or deterrence goals, consideration of an award's reasonableness and proportionality to the violation and injury takes on heightened constitutional importance.[10]

Although the Ninth Circuit declined to directly apply this framework, it instructed that:

> 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.[11]

Other appellate courts have expressed uncertainty about how — or if — the Supreme Court's decisions regarding punitive damages should be used to evaluate the constitutionality of a statutory damages award.[12]

Courts should continue to clarify — following the Ninth Circuit in Wakefield — when a statutory damages award violates due process with reference to the analysis used to evaluate punitive damages awards so that district courts have guidance about how to assess whether a statutory damages award is "so severe and oppressive" that it violates due process.[13]

With this guidance, district courts should try to answer the threshold question of whether a statutory damages award is unconstitutional as early as possible so that defendants have notice of whether a fixed judgment against them can survive constitutional scrutiny.

Michael Klotz is counsel at O'Melveny & Myers LLP.

[1] 51 F.4th 1109, 1125 (9th Cir. 2022), cert. denied, 143 S. Ct. 1756 (2023).

[2] St. Louis, I. M. & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919).

[3] Wakefield v. Visalus, Inc., Case No. 3:15-cv-1857, ECF No. 459 at 3 (D. Or. Feb. 16, 2024).

[4] Id. at 3-4.

[5] Id. at 4.

[6] See, e.g., W. Va. Code § 46A–5–101(1).

[7] 509 U.S. 443, 458 (1993).

[8] 517 U.S. 559, 575, 580 (1996).

[9] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

[10] 51 F.4th at 1122–23.

[11] Id. at 1123.

[12] See Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 588 (6th Cir. 2007) (refusing to apply Supreme Court decisions regarding punitive damages to a statutory damages award "until the Supreme Court" does so); Capitol Recs., Inc. v. Thomas-Rasset, 692 F.3d 899, 907 (8th Cir. 2012) ("The Supreme Court never has held that the punitive damages guideposts are applicable in the context of statutory damages").

[13] St. Louis, I. M. & S. Ry. Co., 251 U.S. at 67.