Eighth Circuit Finds that Telemarketer's Plausible Belief of Consent to Calls Supports Radical Reduction of Statutory Damages Award

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Disproportionate Damages.

In *Golan v. FreeEats.com, Inc., No. 17-3156 (8th Cir. July 16, 2019)*, the Eighth Circuit affirmed a trial court's radical, post-trial reduction of damages in a TCPA case.

Although the trial court originally awarded the plaintiffs more than $1.6 billion in statutory damages, it later slashed the award by 98 percent to approximately $32.4 million. The plaintiffs appealed that decision. (The plaintiffs also appealed the trial court's rejection of their preferred jury instruction on direct liability, which the Eighth Circuit also affirmed.)

At issue in the case were more than 3 million marketing calls made within the course of a week to promote the movie *Last Ounce of Courage*, which was billed by defendants as a "story about taking a stand for religious freedom." The calls were pre-recorded by former Arkansas Governor Mike Huckabee and were structured as a poll. Calls began by asking two initial questions on topics such as "American freedom and liberty" and "religious freedom." If the recipients were still on the line after the two initial questions, they would then be given the option to hear about *Last Ounce of*

Courage. If they opted in with a "yes" response, a message about the movie was played.

Defendant ccAdvertising, the firm hired to conduct the telemarketing campaign, had an existing call list and believed that the calls did not violate the TCPA. Specifically, ccAdvertising maintained that it had prior consent from the individuals on the call list to be contacted about topics such as religious liberty.

Finding that the TCPA-mandated damages of $1.6 billion—which were based on $500 per call under 47 U.S.C. § 227(b)(3)(B)—would violate the Due Process Clause, the trial court reduced the original damages award from $500 to $10 per call. In affirming this decision, the Eighth Circuit focused on the conduct of defendant ccAdvertising, which "plausibly believed it was not violating the TCPA" and "had prior consent to call the recipients about religious liberty, . . . a predominant theme" of the movie. The Eighth Circuit also considered that the marketing campaign was only one week long and that "only the recipients who voluntarily opted in during the call," or about 7% of recipients, "heard the message about the film."

The Eighth Circuit also rejected the plaintiffs' argument that the Due Process analysis turns on the individual award ($500 under the statute) rather than the aggregate award (here, $1.6 billion). The aggregate award, it found, was so "severe and oppressive" and "wholly disproportioned to the offense" that it was "obviously unreasonable" under the test set forth by the Supreme Court in *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919). The reduction in statutory damages ordered by the trial court was upheld.

Golan shines a hopeful light on courts' ability—and willingness—to examine the totality of the circumstances in assessing TCPA damage awards.