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TCPA Is Not Dead Yet – Court Trebles Eight Figure TCPA Award While World Awaits ACA Decision

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While the world eagerly awaits the D.C. Circuit's forthcoming ruling on the proper interpretation of the Telephone Consumer Protection Act (TCPA), a recent federal court ruling imposing tens of millions of dollars of liability is a reminder of the risks associated with outbound calling activities and of the stakes at play in the *ACA International* appeal. The appeal includes challenges to multiple pillars to the FCC's prior interpretations of the TCPA that have helped fuel the TCPA as a major litigation threat to companies making outbound calls to consumers. While the ACA International decision could trim the TCPA, in the meantime the large verdict in *Dish* shows that pending the *ACA International* ruling shows that the TCPA is very much alive and well, and further illustrates the extent of the risks companies face under the TCPA.

On May 22, 2017, in *Krakauer v. Dish Network LLC*, Judge Catherine C. Eagles in the Middle District of North Carolina, trebled the jury's finding of \$20.5 million in statutory TCPA damages against Dish Network, for a total of over \$61 million in damages. The Court's strongly worded opinion held that Dish knew SSN - its vendor- was continuously violating the law and that Dish "repeatedly looked the other way" when it came to SSN's TCPA compliance.

Background

Plaintiff brought a class action suit against Dish Network in 2014, alleging that calls to him and others violated the TCPA and that Dish was liable as SSN's principal. Plaintiff sought injunctive and monetary relief on behalf of a class of all persons whose numbers were on the Registry but who nonetheless received multiple telemarketing calls from SSN to promote Dish between May 1, 2010 and August 1, 2011. After a class was certified, the matter was

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tried before a jury in January 2017. At trial, Plaintiff also presented evidence of Dish Network's willfulness.

The jury ultimately found that SSN acted as Dish's agent when it made the calls at issue, that Dish was liable to the Plaintiff and the certified class for all calls placed during the class period, and awarded \$400 for each call. With over 50,000 calls at issue, the damages totaled \$20.47 million.

The Relationship

Dish argued that its contract with outside calling vendor SSN produced a relationship that did not result in agency or any other similar liability, but rather that SSN was an independent contractor. Dish representatives testified that Dish did not own SSN or direct its day-to-day operations. Dish's argument that SSN was a separate business entity with no agency connection failed, however. Plaintiffs' lawyers pointed to the practical steps SSN took in furtherance of its role as a "retailer" or "marketer" with Dish, which exceeded the scope or deviated from those outlined in the Dish-SSN contract.

Dish's Alleged Failures

While Dish argued that even if SSN was an agent acting on its behalf that Dish required SSN's compliance with the TCPA, the below represents the jury and the Court's findings with regard to Dish's alleged failures:

1. Dish knew SSN was not scrubbing call lists against the Federal National Do Not Call Registry.
2. Dish knew SSN was not maintaining call records.
3. Dish received complaints regarding calls placed by SSN on its behalf and did little about them, even after internal emails at Dish acknowledge these problems.
4. During the year before the class period began, Dish received complaints about telemarketing calls, represented to and entered into an agreement with forty-six attorneys general that it would require its telemarketers to comply with telemarketing laws and would affirmatively investigate complaints against those marketers.
5. Dish's Compliance Department was in name only. It failed to actually enforce requirements or follow up on complaints and dismissively referred to people who filed TCPA lawsuits as "harvester" or "frequent flyers" that "tended to make a living placing TCPA complaints."

Willfulness

To recover treble damages, the plaintiffs must show that Dish "willfully or knowingly violated" the relevant provisions of the TCPA and must persuade the Court, acting in its discretion, that trebling is appropriate. 47 U.S.C. § 227(c)(5). While a finding of willfulness does not

require bad faith, the Court cited to the *Texas v. Am. Blastfax, Inc.* case when it held that it does require that the caller “have reason to know, or should have known, that his conduct would violate the statute.” 164 F. Supp. 2d 892, 899-901 (W.D. Tex. 2001).

The Court found that regardless of the standard applied as to whether Dish had to know that each call placed violated the TCPA, “SSN had to know it was routinely violating the TCPA [because] ... it was not scrubbing all its lists against the Registry, it received ... at least two complaints about this type of call ... and it made over 50,000 calls to persons on the Registry during the class period.” Op., p. 27.

SSN had a “long history of acting in disregard of the requirements of the TCPA.” *Id.* In holding Dish responsible for SSN’s knowing or willful violations of the TCPA, the Court sustained the “well-established” rule that “at a minimum, a principal is liable for the willful acts of his agent committed within the scope of the agent’s actual authority.” *Id.* In so ruling, however, the Court also stated that the result here would be the same even if one were only to look at the willfulness of Dish’s conduct—being that Dish knew that SSN had committed many TCPA violations over the years. In short, because Dish knew or should have known that SSN was violating the TCPA, Dish’s conduct was deemed a knowing and willful violation of the TCPA.

Why Treble TCPA Damages?

“The Court concludes that treble damages are appropriate here because of the need to deter Dish from future violations and the need to give appropriate weight to the scope of the violations. The evidence shows that Dish’s TCPA compliance policy was decidedly two-faced.” Dish disregarded warnings and made false promises to forty-six state attorneys general. This case “involves a sustained and ingrained practice of violating the law.”

The Court also ruled that merely instructing vendors to comply with the law and to scrub its lists is not enough. *Id.* at p. 23. Dish was unable to show that it made any efforts to comply with the TCPA—the Court was disturbed by Dish’s unresponsiveness to consumer complaints and its lack of oversight relating to telemarketing functions performed by SSN. Dish’s failure to monitor SSN’s compliance or take disciplinary action against SSN coupled with its awareness of SSN’s disregard for other instructions from Dish about telemarketing compliance led the Court to its finding of willfulness.

Practical Implications

The decision serves as a reminder that the TCPA remains alive and well even pending the outcome of the *ACA International* appeal out of the D.C. Circuit. From a compliance perspective, this was a costly lesson for Dish, but one from which others can learn.

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