

BASIS FOR PETITION

Judgment was rendered in this case not on a factual finding, but wholly on an incorrect or erroneous legal basis. The judgment was decided on the basis of an invalid legal conclusion concerning the private right of action provided by the Telephone Consumer Protection Act of 1991, 47 U.S.C. §227 and the California Consumers Legal Remedies Act, Civil Code §1750, et seq. As a consequence, the Court exceeded its jurisdiction in this case by either denying the Plaintiff the valid protections and private right of action granted by federal law in 47 U.S.C. §227 or reducing the damage award from a federal mandated minimum of \$500 per violation to zero.

A Request to Vacate is proper and permitted under the California Code of Civil Procedure §116.725.

HISTORY OF THE CASE

This case involves the use of prerecorded telemarketing messages in violation of the Telephone Consumer Protection Act of 1991, 47 U.S.C. §227 (“TCPA”) and the California Consumers Legal Remedies Act, Civil Code §1770(a)(22)(A) (“CLRA”).

The case was heard on May 9, 2003, the Honorable Martin G. Engquist presiding. During the trial, Plaintiff alleged that an unsolicited, prerecorded commercial telephone solicitation was initiated to Plaintiff’s residential telephone number by or on behalf of the Defendant on or about November 8, 2002 in violation of 47 U.S.C. §227(b)(1)(B) and Civil Code §1770(a)(22)(A).

Plaintiff alleged the call was a prohibited nuisance and violation of privacy. Plaintiff alleged no actual monetary damages, but was seeking statutory minimum damages as provided by the TCPA.

Prior to hearing the full facts of the case, judgment was entered in favor of the Defendant on the sole basis that the Plaintiff must endure “actual damages in order to bring suit”.

**THE TCPA PROVIDES FOR A DAMAGE AWARD IN STATE COURT WITHOUT A
REQUIREMENT FOR ACTUAL DAMAGES**

In pertinent part, 47 U.S.C. §227(b)(3) provides:

“A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation,

whichever is greater, or

(C) both such actions.”

The TCPA created a private right of action with an exclusive state jurisdiction. This was affirmed by the 9th Circuit. “We join the Second, Third, Fourth, Fifth, and Eleventh Circuits in ‘the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by’ a federal statute, the Telephone Consumer Protection Act of 1991.” *Murphey v. Lanier*, 204 F.3d 911, 914 (9th Cir. 2000).

The TCPA established *minimum* damages of \$500 per violation. “A person or entity may... bring in an appropriate court of that State an action to recover for actual monetary loss from such a violation, **or** to receive \$500 in damages for each such violation, **whichever is greater**” 47 U.S.C. §227(b)(3)(B) [emphasis added]. No actual damages of any sort are required in order to have a cause of action as provided by the TCPA and be awarded minimum damages of \$500.

The courts have generally affirmed the statutory minimum damages provided by the TCPA. “Congress made a legislative determination that the appropriate penalty for violating 47 U.S.C. § 227 was \$500 per violation or, in the court’s discretion, \$1,500 per willful violation. 47 U.S.C. § 227(b)(3). In doing so Congress established a penalty designed not only to compensate for the actual damages and

unquantifiable harm, but also to deter the offensive conduct. *Texas v. American Blastfax, Inc.*, 121 F. Supp.2d 1085, 1090-91 (W.D. Tex. 2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1166 (S.D. Ind. 1997). The penalty is not so disproportionate to actual damages as to violate due process.” *American Blastfax*, 121 F. Supp. 2d at 1090; *Kenro*, 962 F. Supp. At 1166.

The legislative history of the TCPA affirms the clear intent of Congress to establish minimum damages for violations of the TCPA. “Unless Congress makes it easier for consumers to obtain damages from those who violate this bill, these abuses will undoubtedly continue... The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer.” *137 Cong. Rec. S.16,204, 16,205-6* (daily ed. Nov. 7, 1991) (statement of Senator Hollings).

THE CLRA PROVIDES FOR A PUNITIVE DAMAGE AWARD WITHOUT A REQUIREMENT FOR ACTUAL DAMAGES

In pertinent part, Civil Code § 1780(a) provides

“Any consumer who suffers *any damage* as a result of the use...of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain any of the following:

- (1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars (\$1,000).
- (2) An order enjoining the methods, acts, or practices...
- (4) Punitive damages.
- (5) Any other relief that the court deems proper.” [emphasis added]

Plaintiff suffered a prohibited nuisance and a violation of privacy, which should be included within the term “any damage”. The courts have affirmed a violation of privacy to be actionable, thereby attesting to the fact that a violation of privacy is a legitimate damage to a person. “Article I, section 1 of

the California Constitution provides: ‘All people are by nature free and independent and have inalienable rights. Among these are...and pursuing and obtaining safety, happiness, and *privacy*.’ (Italics added) This provision ‘creates a right of action against private as well as government entities.’ (See *Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th 1, 20.” *Kraslawsky v. Upper Deck* 56 CA4 179.

The legislative history, as evidenced by the enrolled bill report for AB 4084 (1990), shows that the bill “is part of an ongoing effort by the Attorney General to limit intrusive telephone marketing schemes in California...the bill should discourage the most annoying calls, i.e., unsolicited calls from telemarketers...” *AB 4084 Enrolled Bill Report*, September 24, 1990. To this end, it would be hard to conceive that the California Legislature intended to require offending companies to cause *actual* monetary damages when “Disseminating an unsolicited prerecorded message by telephone” in order to be held liable under the *Consumers* Legal Remedies Act. If that were the case, it would be hard to conceive that the Legislature would have had a reasonable expectation that the enacted law would “discourage” these type of calls.

CONCLUSION

The Court summarily made judgment based on an incorrect or erroneous legal basis without allowing testimony as to the complete facts of the case. The legal basis for the judgment was contrary to law, published court interpretations of law, and legislative intent. The judgment, therefore, should be vacated pursuant to California Code of Civil Procedure §116.725.

Should the Court deny this petition, Plaintiff respectfully requests that the Court prepare an informal memorandum for the record citing its legal reasoning and factual determination in denying Plaintiff due consideration of a valid cause of action.