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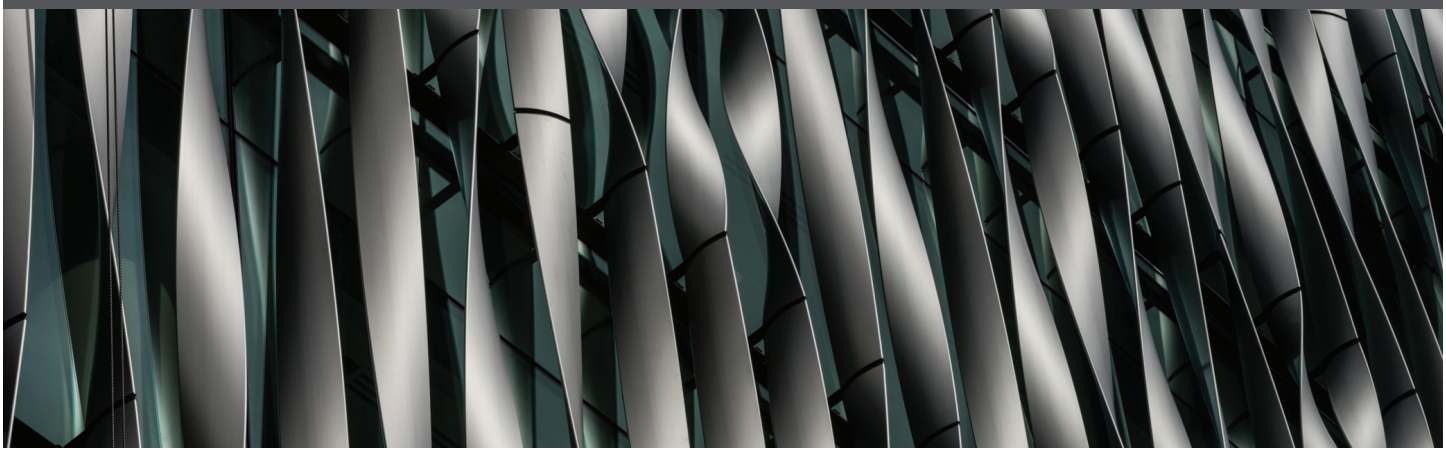
Privacy Class Action Defense



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Florida Dials Back State's Mini-TCPA

On May 25, 2023, Florida Governor Ron DeSantis signed HB 761 into law, amending the Florida Telephone Solicitation Act ("FTSA") to significantly restrict the scope of liability and ability to sue, which should work to limit the number of abusive class actions filed for technical violations without any resulting harm. The amendment is effective immediately and will apply retroactively to "any putative class action not certified on or before the date of this act."

The FTSA has also been commonly referred to as Florida's "**Mini-TCPA**," in reference to the federal Telephone Consumer Protection Act ("**TCPA**"). However, bolstered by an arguably expansive definition of an autodialer which exceeded the scope of the definition under the TCPA and emboldened by the potential to recover statutory damages of up to $1,500 per call, the volume of litigation arising under the FTSA has been far from "mini."

As previously reported, the FTSA was amended in 2021 to impose strict consumer opt-in requirements for companies making "telephonic sales calls" to Florida consumers with automated technology. The newly modified FTSA critically amends the statute and brings it closer to its federal counterpart, while also trying to minimize lawsuits arising from mere technical violations.

AUTODIALER DEFINITION SIGNIFICANTLY NARROWED

As recently clarified by the U.S. Supreme Court, under the federal TCPA, to qualify as an autodialer, a device must have the capacity to either store a telephone number using a random or sequential number generator or produce a telephone number using a random or sequential number generator. Merely having the capacity to store numbers and dial them automatically is not enough to make a device qualify as an autodialer.

Prior to the 2023 amendment, the FTSA restricted the use of automated systems used for the selection or dialing of telephone numbers. Plaintiffs successfully argued at the pleadings stage that this language included systems that did not automatically dial, as long as the system used an automated process to select numbers to be called. Thus, a device that would not otherwise constitute an autodialer under the federal TCPA might still have been considered an autodialer under the FTSA.

The new FTSA clarifies that an autodialer must both select and dial numbers. This change narrows the range of systems which could be considered autodialers and brings the Florida definition closer to the federal definition.

SPECIFIC WRITTEN OPT-IN REQUIRED ONLY FOR UNSOLICITED CALLS

Previously, the FTSA prohibited making automated "telephonic sales calls," whether solicited or unsolicited, without first obtaining the consumer's express written consent.

In contrast, the new FTSA requires express written consent only for "*unsolicited* telephonic sales calls." The statute makes several carve-outs from this definition, including calls made in response to a consumer's express request, calls made primarily in connection with a debt or contract, and calls made pursuant to a business relationship with a consumer.

BROADER ARRAY OF ONLINE ACTIONS QUALIFY AS SIGNATURES TO SATISFY PRIOR EXPRESS WRITTEN CONSENT

Prior to the 2023 amendment, the FTSA required, among other things, a consumer's signature to satisfy the prior express written consent exception to receive covered communications. The statute defined a "signature" to include electronic or digital signatures if the form of such signatures were recognized as valid under applicable federal or state law (e.g., the federal E-Sign Act), but did not specify what actions constituted a signature in the digital age.

As modified, the FTSA now clarifies that the signature requirement may be satisfied by an array of online actions taken by a consumer, such as by clicking a checkbox indicating consent on a webpage or responding affirmatively to a text message or email advertisement campaign. The amendment specifically addresses these two forms of affirmative consent that plaintiffs had previously challenged as invalid forms of a "signature" under the FTSA. Therefore, the volume of litigation generated on this topic is expected to drop significantly.

RETROACTIVE APPLICATION TO CLASS ACTIONS

The FTSA, as amended, applies retroactively to pending putative class action lawsuits, so long as the class was not certified on or before May 25, 2023. Individual actions commenced before the 2023 amendment are unaffected.

Pending putative class action litigation is expected to face a massive compliance hurdle to meet the changes imposed by the amendment. However, the Plaintiffs' Bar has suggested that it intends to challenge the constitutionality of this retroactivity provision.

PRE-FILING REQUIREMENT FOR TEXT MESSAGES

The FTSA, as amended, imposes a new obligation upon consumers to reply "STOP" to unwanted text message solicitations, and limits the circumstances under which a consumer may bring a text message FTSA claim to situations where the business fails to stop texting the consumer within 15 days of the "STOP" request. A consumer cannot assert a claim for damages under the FTSA without demonstrating that the consumer requested the text messages stop, and that the caller failed to honor the request within 15 days.

This 15-day requirement is expected to substantially reduce the volume of FTSA lawsuits by giving businesses a reasonable period of time in which to process an opt-out request.

CONCLUSION

The business-friendly provisions of the amendment have realigned the scope of applicability and definitions of the FTSA with those of its federal counterpart, the TCPA, and, in doing so, reaffirmed its title as Florida's Mini-TCPA. However, it remains to be seen if the Florida courts will interpret the new terms of the FTSA as coextensive with the TCPA, or how the unique provisions will fare in practice.

For further information or assistance, contact Harrison Brown, Ana Tagvoryan, Tianmei Ann Huang, or a member of Blank Rome's Privacy Class Action Defense group.

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