

Breaking Down Florida's New "Mini-TCPA"

Presented by
Contact Center Compliance



Speaker Introduction

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Aaron Weiss is recognized for his national litigation practice focused on telecommunications law, class actions and consumer claims. He has extensive experience in litigating matters under the Telephone Consumer Protection Act, of note is his precedent-setting Florida TCPA decisions. In addition to TCPA Aaron frequently litigates class action cases under a broad variety of consumer protection statutes, including the Fair Credit Reporting Act (FCRA); the Fair and Accurate Credit Transactions Act (FACTA); the Fair Debt Collection Practices Act (FDCPA); the Medicare Secondary Payer Act (MSP Act); the Florida Deceptive and Unfair Trade Practices Act (FDUTPA); the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), and the Florida Consumer Collection Practices Act (FCCPA).



Background on the TCPA

- The Telephone Consumer Protection Act (TCPA) prohibits unsolicited calls or text messages using an artificial voice, prerecorded message, or automatic dialing system.
- In a recent 2021 Supreme Court ruling – Facebook v. Duguid - the Court found that an automatic telephone dialing system (ATDS) under the TCPA is limited to devices that have the capacity to use random or sequential number generators in either storing or producing a telephone number.

Background on the The Florida Telemarketing Act

- The Florida Telemarketing Act has been on the books since 1990 and requires non-exempt businesses that engage in the sale of consumer goods or services by telephone to be licensed by the Florida Department of Agriculture and Consumer Services. The law also requires the salespeople for these businesses to be licensed.
- Telemarketing businesses must post security (surety bond, certificate of deposit, or letter of credit) of no less than \$50,000 prior to soliciting in Florida.
- “Doing business in Florida” includes both telephone solicitation from a location in Florida and solicitation from other states or nations of purchasers located in Florida.

Background on the The Florida Telemarketing Act

- The Florida Act now requires all telephonic sales calls, text messages, and direct-to-voicemail transmissions to have the receiving consumer's prior express written consent if the call will be made using an automated machine to dial the recipient's phone number, or will play a recorded message upon connection with the recipient.
- "Prior Express Written Consent" is defined in the amendment as a written agreement that (1) bears the signature of the called party; (2) Clearly authorizes the person making or allowing the placement of a telephonic sales call . . . to be delivered to the called party a telephonic sales call using an automated system for the selection or dialing of telephone numbers.... and; (3) Includes the telephone number to which the signatory authorizes a telephonic sales call to be delivered and includes a clear and conspicuous disclosure....
 - This language is substantially similar to the "express written consent" definition currently applicable under the TCPA.

What Types of Calls are Covered?

- Fla. Stat. § 501.059(g) defines “telephonic sales calls” to mean “a telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services, soliciting an extension of credit for consumer goods or services, or obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.”
- The definition of “telephonic sales calls” is similar to the TCPA definition of marketing calls.
- We expect that Florida courts will likely attempt to interpret the difference between marketing and information calls – and will look to existing TCPA case law on the issue.

Key New Provisions in Amended Florida Act

- There is now an explicit private right of action under the amended Florida law in Fla. Stat. § 501.059. It largely mirrors the TCPA and allows aggrieved parties to recover actual damages or \$500, whichever is greater, or treble damages if the violation is willful or knowing.
- The Florida statute did not previously include an explicit private right of action—and attempts to imply one were uniformly unsuccessful.
- The new private right of action is now coupled with the existing attorneys fees provision, which previously was only available to the government. This could be similar to FDCPA (or similar) statutory cases with attorneys fees being a big driver on low-call volume cases.

The Amended Florida Law May Be Broader Than the TCPA

- Again, the amendment added provisions that restrict a person from making telephonic sales calls if such call “involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed” without the prior express written consent of the called party.
- In the recent Facebook case, the Court defined an “automatic telephone dialing system” as “equipment which has the capacity...to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers.”
- However, the amended Florida statute does not have a statutory definition that limits its reach to technology that has the capacity to randomly or sequentially generate a number to be called.

What Does This Mean?

- The expectation is that Plaintiff-side TCPA lawyers will likely argue that the amendments to the Florida statute includes dialing from customer lists.
- It will be important to see whether courts interpret the definition of an automated system to include list-based calls.

Key Changes to the Florida Act

- Exceptions for making calls without consent were removed for both prior exempt and non-exempt entities. Specifically, the amendment deletes prior language that allowed the use of an automated telephone dialing system:
 - In response to calls initiated by recipients of prior calls;
 - To numbers that had been screened to exclude telephone subscribers on Florida's "no sales solicitation calls" listing or any unsolicited number; and
 - If the calls made concerned goods or services previously ordered or purchased.

Key Changes to the Florida Act

- A rebuttable presumption was created stating that any sales call made to any area code in Florida is made to a Florida resident or a person in the state at the time of the call.
- “Called party” is now defined as “a person who is the regular user of the telephone number that receives a telephonic sales call.”
- What about the subscriber?

Criminal Penalties Under the Amended Act

- In addition there are amendments to other parts of the statute.
- However, there is no private right of action under Fla. Stat. § 501.616. These will be enforced criminally.
- Fla. Stat. §. 501.616(6) states that: A commercial telephone seller or salesperson may not make any of the following types of phone calls, including calls made through automated dialing or recorded messages:
 - A commercial telephone solicitation phone call before 8 a.m. or after 8 p.m. local time in the called person's time zone location.
 - More than three commercial telephone solicitation phone calls from any number to a person over a 24-hour period on the same subject matter or issue, regardless of the phone number used to make the call.

Criminal Penalties Under the Amended Act

- Fla. Stat. § 501.616(7) states: A commercial telephone seller or salesperson making a commercial telephone solicitation call may not:
 - (a) Intentionally act to prevent transmission of the telephone solicitor's name or telephone number to the party called when the equipment or service used by the telephone solicitor is capable of creating and transmitting the telephone solicitor's name or telephone number;
 - (b) Use technology that deliberately displays a different caller identification number than the number the call is originating from to conceal the true identity of the caller. A commercial telephone seller or salesperson who makes a call using such technology commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.
- The amendment prevents the *use* of technology rather than the *practice* of displaying altered telephone numbers. Sounds like *Facebook* fn. 7?

Impact of the Amendment

- The statute's definition of an autodialer means that it is very important that callers obtain express written consent before calling Florida phone numbers using any system that either automatically dials or that automatically selects numbers to be dialed.
- What about "click to dial" systems? It depends, but a cautious approach may be best.
- Human number selection systems likely will be safe option.
- Callers should also avoid calling Florida consumers more than 3 times in a 24-hour period, even if that consumer has multiple telephone numbers associated with their profile.

Impact of the Amendment

- Big takeaway: The private right of action applies to all of Florida Statute § 501.059, not just the amended section related to autodialing without express written consent which has received most of the press attention.
- This means that there is now a private right of action for:
 - A covered caller's failure to properly identify themselves in a call;
 - A covered caller's failure to prevent calls to numbers on the Florida state do-not-call list;
 - A covered caller's failure to follow a do-not-call request;
 - A covered caller's failure to abide the anti-spoofing provisions of the Act.
- Some provisions don't have TCPA analogs, including
 - A covered caller's failure to prepare a proper contract with a consumer; and
 - A covered caller's premature charge to a consumer credit card.

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