Call or Text, it's Your Liability

By Alexis Buese, Gunster

For many businesses, the fear of running afoul of federal anti-solicitation laws like the Telephone Consumer Protection Act ("TCPA") was minimal. The types of sophisticated dialing systems subject to the TCPA were rarely used outside of large-scale call center operations and "outs" like the prior business relationship exception were broad enough to ease even the most troubled minds.

That sense of security was eliminated on July 1, 2021. Effective July 1, 2021, a new law dubbed the Florida Telephone Solicitation Act ("FTSA") - a/k/a, Florida's "Mini-TCPA" – created a private right of action for consumers who receive unwanted calls and text messages. The FTSA applies to businesses even if they are not organized under Florida law and have no physical presence in Florida. The FTSA removed many of the protections businesses rely upon in defending claims under the TCPA and applies to businesses even if they have no physical presence in Florida. Companies that do business in Florida should know about the FTSA, the risks for class action litigation, and incentives to plaintiffs' attorneys to bring suit in Florida. This article provides useful strategies to defend and mitigate the risks of the FTSA.

Like the TCPA, the FTSA prohibits the use of certain automated dialers to call (or text) consumers without their consent and enables consumers to recover $500 per call. Those damages are trebled for willful violations, resulting in a maximum potential liability of $1,500 per call. This level of potential liability can cripple smaller companies that are unaware of the new law or underinsured against exposure.

Unfortunately, the areas where the FTSA departs from the TCPA are largely harmful to businesses. For example, Florida defines an automatic dialer much more broadly than its federal counterpart and, as a result, it covers significantly more dialing systems commonly used by businesses to text or call prospective customers. Florida's new law also requires a consumer to give prior "written consent" before calls or texts can be made, foregoing the TCPA's common law oral rule of consent.

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The FTSA also requires a clear and conspicuous disclosure authorizing the calls and disclosing that the consumer is not required to give consent to such calls as a condition of buying any property, goods, or services.

The FTSA has other nuances that can create pitfalls for businesses operating in Florida, including:

- Prohibiting the use of techniques to conceal or alter the caller's name or telephone number;
- Removing the "established business relationship" exception found in the TCPA;
- Limiting the number of times a business can call a consumer to three per day; and
- Barring calls to consumers before 8:00 a.m. and after 8:00 p.m. in the consumer's time zone. Significantly, Florida crosses two time zones, Eastern and Central, so businesses should be aware of how this may impact their marketing efforts.

Perhaps the only welcome news involves the types of calls the FTSA regulates. The law self-limits itself to "telephonic sales calls" – a definition that excludes things like debt collection and account servicing calls.

The plaintiffs' bar has wasted no time in seeking to test the limits of the FTSA. More than a hundred complaints have been filed as of the writing of this article, in the six months since the FTSA's passage. And, in particular, one law firm active in prosecuting TCPA claims has filed at least half a dozen class action complaints under the FTSA. Some of these cases are being filed against traditional TCPA defendants – large corporations engaged in expansive marketing campaigns – but many of them are not. Family dental practices, local equipment supply companies, and barbecue restaurants have been swept up in the FTSA's catch-all net. Notably, almost all these cases involve text message campaigns rather than solicitation calls – a break from the norm in many TCPA cases.

Recognizing the confusion created by the FTSA's lack of clarity, last month state legislators introduced House Bill 1095 and Senate Bill 1564, both of which include a few important changes to the FTSA. Both bills seek to clean up the definition of "automated system", alter the requirements for obtaining prior express written consent, and implement the ability to recover prevailing party attorney fees. Senate Bill 1564 closely aligns the FTSA with the TCPA's autodialer definition, closing the door more tightly on class action cases against businesses that send marketing messages from a list of subscribers. House Bill 1095's definition of "automated system" is broader, and may be seen as less favorable to businesses, as it includes click-to-dial systems and systems in "which the caller or any person selects telephone numbers from a list to call." House Bill 1095 also includes precise language and font size/location requirements for obtaining consumer consent.

Given the high risk of FTSA class actions companies should consider this when examining their compliance risks and hiring outside counsel. Virtually any business that contacts consumers using mobile marketing is at risk if doing business in Florida, regardless of industry or location. The fixed statutory damages provided under the FTSA eliminates plaintiff-specific inquiries around causation and damages, tearing down a common defense to class certification.

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Perhaps most critically, the potentially lucrative nature of class-wide FTSA damages awards compared to more modest individual plaintiff damages awards makes class relief a more attractive proposition for the Plaintiffs' Bar.

Depending on your particular business' situation, FTSA claims can escalate from a new compliance nuisance to bet-the-company litigation overnight. Companies should take proactive steps to mitigate the risks posed by the FTSA, such as:

(1) Obtain written consent before a text is sent, use clear disclosures and affirmative checkboxes and consider the use of the double-opt in for text messages;

(2) Update your sign-in procedure to make sure your disclaimer complies with the new requirements in the FTSA disclosures, including that the consumer is entering into an agreement and that no purchase is necessary;

(2) Incorporate FTSA compliance into training for advertising and marketing employees;

(3) Create mechanisms to capture, retain, and recall individual consumers' prior express written consent, including sufficient information to constitute an electronic signature;

(4) Develop systems to recognize and honor opt out requests, including considering the use of help features; and

(5) Consider the incorporation of FTSA compliance into indemnity clauses in contracts when using third-party advertising and marketing services and other vendors.

If accused of violating the FTSA, businesses should immediately consider their strategy to successfully defend against liability. Digital records that prove prior written consent should be identified, preserved and secured. Create a timeline of events that shows when the consumer first made contact with the company, when consent was provided and when consent was withdrawn (if ever). Importantly, retain an attorney who understands the law and litigating these claims.

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Alexis Buese practices in all aspects of commercial litigation, including class action, contract disputes, and real estate and consumer class action litigation. She serves as a co-leader of Gunster's Class Action Defense team. She has broadly defended the consumer products and services industries against the expanding array of class actions that challenge their products, methodologies, and procedures. Her clients include numerous consumer goods manufacturers and retailers, including apparel, furniture, food, vitamin and dietary supplement companies, and e-commerce companies.

A Closer Look at the 2022 ACC CLO Survey: Four Ways to Use Flexible Legal Talent to Stay Nimble, Control Costs, and Preserve the Well-Being of Your Legal Team

By Andy Chagui, Latitude

The annual ACC Chief Legal Officers Survey ("CLO Survey") reveals information about the trends, opportunities, and challenges that lie ahead for CLOs. Three key findings from the 2022 CLO Survey are: (i) CLOs continue to play a pivotal role in the company's leadership, (ii) increasing responsibilities are being placed on CLOs (specifically related to compliance, ESG, ethics, and privacy), and (iii) CLO workload is likely to increase mainly due to higher regulatory enforcement. Given these findings, in particular the expected increased workload, it is not surprising that CLOs expect to have a greater need in 2022 for legal talent, especially attorneys and paralegals.

When a legal department has more in-house work than it can handle (without burning out the team), often the primary go-to solutions are sending the work to a law firm, seeking a law firm secondment, or adding permanent headcount. While these are good solutions in specific cases, there are many circumstances when the use of contract attorneys and paralegals – i.e., flexible legal talent – can be the optimal solution.

In the past, peer-level attorneys and paralegals were not generally available on a flexible basis. Now, however, there are many highly qualified and experienced attorneys and paralegals with Big Law and in-house experience who enjoy working on a contract basis. As a result, many legal departments now routinely rely on flexible legal talent to achieve the types of objectives identified in the CLO Survey, including shortening delivery times, providing more coverage and better service, and improving costs and efficiencies for the legal department – all without overburdening existing staff.

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Here are four ways to leverage flexible legal talent to help solve legal department challenges:

1. Rethink Traditional Secondments (Your Law Firm Will Likely Thank You)

For more than half a century, corporate legal departments have used seconded law firm employees as a way to solve the department's need for high-caliber, interim attorneys and paralegals to alleviate leaves of absence or sudden increases in legal work. Traditional secondments, however, have long been a pain point for law firms because they cause internal staffing shortages, workflow disruption,

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