

# How Fla. Amendment Changes the State's Mini-TCPA

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Last month, Gov. Ron DeSantis signed H.B. 761/S.B. 1308, a law that will amend the Florida Telephone Solicitation Act. Reports of the FTSA's death cannot be exaggerated.

As I will discuss below, while there are some other modest changes, the biggest changes are that the law gets rid of the capacious definition of an autodialer and instead adopts a definition that is close to that of the Telephone Consumer Protection Act. It also includes a presuit notice and an opportunity to comply with suits relating to unwanted text messages.

The amendments, to quote a popular Miley Cyrus song, "came in like a wrecking ball" to the legacy of the FTSA and posed a major compliance challenge for businesses of all stripes, both in and out of Florida.

Let's start with a tiny bit of history. Two years ago, with little fanfare, the statute was passed and really did come in like a wrecking ball.

It didn't work as Florida's answer to the U.S. Supreme Court's 2021 Facebook v. Duguid [ruling](#) — which affirmed that the TCPA narrowly covers only random-fired calls and texts to cellphones and was expected to significantly reduce class actions under the statute — as many commentators suggested.

But it really had a sweeping effect. In the following two years, hundreds of class actions were filed in Florida against businesses of all stripes for violations of the statute.

The statute had the most capacious definition of an autodialer anywhere in the country. That was probably why some people really did think it was Florida's solution for Facebook v. Duguid.

For the most part, while many cases were filed, litigation moved pretty slowly. Some takeaways include:

- Defendants did not fare well with First Amendment arguments.
- There was some convoluted Article III standing fighting. Plaintiffs in the U.S. District Court for the Middle District of Florida generally opposed federal jurisdiction while plaintiffs in the U.S. District Court for the Southern District of Florida favored federal jurisdiction. The courts favored the defendants' position that plaintiffs didn't have standing to sue, though that may be changing.
- Parties are jockeying over what types of calls and texts are covered by the statute.

Here is a summary of the changes and impacts brought by the new amendments:

### **New Definition of Autodialer**

The amendments change the autodialer definition to include only those systems that both automatically select and dial telephone numbers. To the extent that FTSA litigation continues in a meaningful way, the courts will sort out where the lines fall under the new definition.

Systems that fit into the predictive dialer rubric that was established in the pre-Facebook TCPA era may still be covered. On the other hand, systems that had hallmarks of human intervention — such as click-to-dial systems — should be exempt.

One note: Some earlier versions of the amendments tracked the TCPA's "random or sequential number generator" language. This concept, however, did not make it into the final amended statute. Until the text message safe harbor discussed below, this change from "or" to "and" was the big-ticket item.

Before Florida Rep. Tom Fabricio, R-Miami, put the text message safe harbor on the table, I speculated that the amendments would have a meaningful impact in FTSA litigation, but that it could take a while for courts to sort out whether particular types of autodialers were covered by the statute.

As TCPA veterans know from the pre-Facebook era and, to some extent, continuing in the post-Facebook era, sometimes artful pleading can get a case past the motion to dismiss stage with respect to the autodialer issue.

### **FTSA Now Will Cover Only Unsolicited Calls**

The 2021 version of the FTSA applied to all telephonic sales calls using an automated system for calling — as these terms were defined in the statute — unless the caller had express written consent.

In practice, this meant that a familiar call based on an established business relationship and response was treated as an inquiry under the statute. The new amendments change the statute to cover callers making unsolicited calls. Callers will be able to use robocalls to contact customers to sell products and services so long as the consumer is a current customer.

## **15-Day Notice Required Before Suit Can Be Filed for Text Messages**

Now for the wrecking ball.

A few weeks into the amendment process, Fabricio — the House sponsor of the amendments — added in a safe harbor provision that provides that before a consumer can sue for unwanted text messages, they must first give a 15-day notice to the sender by texting "STOP." And then only text messages after that notice are actionable.

This part of the amendments will be the class action killer, whether under Florida Rule of Civil Procedure 1.220 or Federal Rule of Civil Procedure 23.

One note, though: This part of the amendments only applies to text messages and to cases filed as putative class actions.

## **Amendment Applies Retroactively**

The amendments to the statute will apply to any suits filed after the effective date of the law. That is the easy part.

The likely most heavily litigated issue arising from the statute is the part that says it applies to already filed cases unless a class has already been certified.

This is different from language that has previously been used for retroactive amendments.

## **What Happens Next?**

Or really, what is already happening? In the few days following the passing of H.B. 761/S.B. 1308, several dozen FTSA cases were filed around the state. Plaintiffs counsel presumably tried to get their stake in the ground before the amendments took effect, and they may try to rush out class certification motions.

## **What Should You Do?**

Let me be clear here. If you are a defendant sued in an FTSA text message case, you should get your case into federal court — if it isn't there already — and then seek a stay pending *Drazen v. Pinto* in the U.S. Court of Appeals for the Eleventh Circuit, which will decide whether a plaintiff has Article III standing if they have only received a single text message.

And then sit back, relax and watch the fireworks.

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## Authored By



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