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Check Your Phone: States Continue to Enact Mini-TCPAs

Privacy & Cybersecurity Newsletter

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Companies that use the latest technology to contact customers and prospects by telephone or text messages breathed a huge sigh of relief after the United States Supreme Court issued its decision in *Facebook, Inc. v. Duguid*[1] adopting the correct and narrow definition of an automatic telephone dialing system ("ATDS") under the Telephone Consumer Protection Act ("TCPA"). While we had all hoped that *Facebook* would put an end to most of the TCPA class actions, the relief at the federal level is quickly turning into a minefield as state legislatures have begun to enact and revise "mini-TCPAs" at the state level. These mini-TCPAs go beyond the regulations in federal law to include more restrictive provisions and additional state penalties that can be stacked on top of federal penalties.

How the Supreme Court Case Narrowed the TCPA

In *Facebook*, the plaintiff alleged that Facebook violated the TCPA by using a notification system that stored phone numbers linked to Facebook accounts and sent automated text messages to those phone numbers to alert individuals of login activity from new devices or browsers.[2] The district court and the Ninth Circuit Court of Appeals followed existing precedent that had greatly expanded the definition of an ATDS to capture technology that did not exist in 1991 when the TCPA was passed. Facebook appealed.

The Supreme Court determined that "[b]ecause Facebook's notification system neither stores nor produces numbers 'using a random or sequential number generator,' it is not an autodialer"[3] as defined by the TCPA.[4] Accordingly, the restrictions in the TCPA do not apply to Facebook's notification system. This decision altered the landscape of telephone solicitation law because it narrowed the category of equipment falling under the TCPA's definition of "automatic telephone dialing system" (or "autodialer"). The *Facebook* holding served as notice that the TCPA's application was less broad than some consumers, attorneys, and lower court judges might have thought. But state legislatures were listening too. And since *Facebook*, states have stepped in to add new telephone solicitation protections.

Florida Leads the Charge in States' Response to *Facebook, Inc. v. Duguid*

Only three months after the *Facebook* decision, Florida became the first state to amend its state telephone solicitation law.[5] Unlike the federal TCPA, the amended Florida Telephone Solicitation Act ("FTSA") does not restrict application to autodialers to systems with the capacity to randomly or sequentially generate phone numbers. Instead, Florida's FTSA expansively defines an "automated" dialer to include any "automated system for the selection or dialing of telephone numbers or the playing of a recorded message."[6] Additionally, the FTSA

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added new restrictions including prior express *written* consent for all telephonic sales calls using an automated system and *removed* certain exemptions such as (1) calls in response to calls initiated by persons to whom the automatic calls or live messages were directed and (2) calls concerning previously ordered good or services.

But the change most dangerous to businesses is the FTSA's inclusion of a private cause of action that allows called parties to recover at least $500 per violation.[7] The penalty per violation can go up to $1,500 if the court finds that the defendant willfully or knowingly violated the FTSA.[8] In response to these provisions opening up new paths to liability and high damages calculations, Florida plaintiffs' lawyers have jumped in to file more than 100 new FTSA putative class action lawsuits since July 2021.[9]

New State Law Landscape of Mini-TCPAs

Although Florida's mini-TCPA was met with strong pushback from business groups, efforts to amend the law failed during Florida's regular legislative session. This means the rules in Florida's FTSA will remain as amended on July 1, 2021. Because the law is here to stay, businesses should review their policies and vendor contracts related to automatic calling and mass text messages to ensure compliance with the FTSA.

Florida is not the only state changing the rules of the game. Activity in state legislatures across the country means that business need to look to multiple state laws before picking up the phone. State laws regulating telephone solicitation are changing this year, with more changes likely to come next year.

- Oklahoma – House Bill 3168 ("Telephone Solicitation Act of 2022") passed the Oklahoma House on May 12, 2022. With signature from the governor, the Telephone Solicitation Act of 2022 goes into effect on November 1, 2022. Like Florida, Oklahoma's mini-TCPA permits a civil litigant to recover at least $500 per violation.[10]
- Georgia – Senate Bill 364 (proposed amendment to Ga. Code § 46-5-27) passed the Georgia Senate on February 14, 2022. In April 2022, the Georgia House revised the bill, just before the end of the 2022 legislative session. The bill remains viable to be enacted during the 2023 legislative session. The current version of the bill (LC 36 5291S) permits a civil litigant to recover at least $1,000 per violation but also includes a specific provision facilitating participation in "a class action . . . for which the damages limitation in . . . this paragraph shall not apply."[11]
- Washington – House Bill 1497 passed the Washington Senate on March 3, 2022 and is set to go into effect on June 9, 2022. This bill adds new requirements (i.e., potential violations) to Washington telephone solicitation law—requiring a telephone solicitor to end a call within 10 seconds if a "called party states or indicates they want to end the call" and prohibiting "calls to any person which will be received before 8:00 a.m. or after 8:00 p.m. at the call recipient's local time."[12] Although House Bill 1497 only changes a few telephone solicitation provisions, Washington's House Bill 1650 includes broader potential changes to Washington's telephone solicitation law.
- House Bill 1650 (proposed amendment to RCW Chapter 19.190) passed the Washington House on February 10, 2022. Since passage in the Washington House, the Washington House amended the bill, just before the end of the 2022 legislative session. The bill remains viable to be enacted during the 2023 legislative session. The current version of the bill (ESHB 1650) permits a civil litigant to recover at least $1,000 per violation. And in the case of a violation for the use of an "automatic dialing and announcing device"[13] (specifically deemed "an unfair method of competition for the purpose of applying [Washington's] consumer protection act"), a civil litigant may recover at least $1,000 per violation **in addition to** all the remedies available in Washington's consumer protection act, chapter 19.86 RCW.

With telephone solicitation rules changing in many states, now is the time for businesses to take a second look at existing state laws regulating telephone solicitation. Several states include unique requirements that can lead to severe penalties.

- Texas – The Texas Business and Commerce Code requires a person making a telephone solicitation from a location in Texas to hold a registration certificate with the Texas Secretary of State.[14] If a person fails to register before making a telephone solicitation, each violating call is a separate offense[15] that carries a penalty of up to $5,000.[16]
- Virginia – The Virginia Telephone Privacy Protection Act requires a telephone solicitor who makes a telephone solicitation call to identify himself by his first and last names and the name of the person on whose behalf the telephone solicitation call is being made promptly upon making contact with the called person.[17] A failure to include both first and last names at the start of a call can exposure a company to statutory damages in the amount of $500 for a first violation, $1,000 for a second violation, and $5,000 for each subsequent violation.[18]

In light of the rapidly changing legal landscape governing telemarketing and the use of the latest technology to contact customers and prospects, companies should not just rely on what they have done in the past to continue calling consumers. Each new calling campaign provides an excellent opportunity to update policies and procedures to make sure you are up to date on your compliance efforts.

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[1] Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021).

[2] Id. at 1168.

[3] Id. at 1169.

[4] 47 U.S.C. § 227(a)(1).

[5] Florida Senate Bill 1120, effective July 1, 2021.

[6] Fla. Stat. § 501.059(8).

[7] Id. § 501.059(10)(a).

[8] Id. § 501.059(10)(b).

[9] Florida Senate Bill 1564, Bill Analysis and Fiscal Impact Statement.

[10] Okla. Stat. 15 § 775C.6 (to be codified).

[11] Ga. Code § 46-5-27(i) (proposed).

[12] RCW 80.36.390 (to be amended).

[13] The bill currently defines “automatic dialing and announcing device” as “any device or system of devices that is used, whether alone or in conjunction with other equipment, for the purpose of automatically selecting or dialing telephone numbers and transmitting a voice communication” without reference to the capacity to randomly or sequentially generate phone numbers.

[14] Tex. Bus. & Com. Code § 302.101(a).

[15] Id. § 302.251.

[16] Id. § 302.302.

[17] Va. Code § 59.1-512.

[18] Va. Code § 59.1-517.

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