Privacy & Cybersecurity Update

March 2024

Companies Facing New Text Marketing Claims in Florida

On May 25, 2023, Governor Ron DeSantis signed House Bill (HB) 761 into law, which amended and narrowed the scope of the Florida Telephone Solicitation Act (FTSA). The primary purpose of these amendments was to curtail frivolous telecommunications-related litigation, especially concerning claims arising from Short Message Service (SMS) marketing activities. After a brief downtime following HB 761, organizations are seeing a rise in FTSA-related legal claims again. These new claims often allege that text-marketing violates FTSA's anti-spoofing provision when they are sent without a "call back" number. They also argue the "cure period" created by HB 761 does not apply and cannot be used as a defense in these types of lawsuits. Organizations need to understand the scope of these new FTSA claims and ensure they have established a comprehensive compliance program to limit their litigation risk.

The 2023 FTSA Amendments and Cure Period

The FTSA defines a "telephonic sales call" as a telephone call, text message, or voicemail transmitted to a consumer to solicit "a sale of any consumer goods or services" or to collect information that could be used for such a sale. As we have previously noted, privacy advocates have relied on the FTSA as the basis to bring a significant amount of SMS marketing-related class action lawsuits against organizations through the statute's "private right of action" framework.

HB 761 significantly narrowed the FTSA's scope of applicability and made it more difficult for individuals to bring FTSA-related lawsuits. For example, before a recipient of a text message (i.e., the "called party") is permitted to commence a legal action under the FTSA for receiving an unsolicited message, they must notify "the telephone solicitor that [they do] not wish to receive text messages from the telephone solicitor by replying 'STOP' to the number from which the called party received text messages from the telephone solicitor." Thereafter, within 15 days after receipt of such notice, the telemarketer must cease sending text messages, except for certain "confirmation" messages.

Under HB 761, an individual may only bring a lawsuit against a telemarketer under the FTSA if they continue to receive telemarketing messages after this 15-day "cure period" timeframe. Accordingly, this amendment gives businesses the opportunity to cure any of their non-compliant practices before a consumer can bring legal action for such activities.

Anti-Spoofing/Call-Back Number Claims

Many of the recent FTSA-related claims focus on the FTSA's anti-spoofing clause (also known as the "call-back number" or the "caller ID" clause), which provides, in relevant part:

> *It shall be unlawful for any person [to facilitate] a* ***telephonic sales call*** *[without transmitting] the* ***originating telephone number*** *and, when made available by the telephone solicitor's carrier, the name of the telephone solicitor to any caller identification [Caller ID] service in use by a recipient of a telephonic sales call ….* ***If*** *a telephone number is made available through a [Caller ID] service as a result of a telephonic sales call, the* ***solicitor must ensure that telephone number is capable of receiving telephone calls and must connect the original call recipient****, upon calling such number, to*

> *the telephone solicitor or to the seller on behalf of which a telephonic sales call was placed.*
> FTSA, section 501.059(8)(b) (emphasis added).

Plaintiffs have been arguing that this clause requires organizations that transmit a text message to a consumer to ensure (i) there is a telephone number that corresponds to that communication, (ii) this telephone number is also transmitted to the consumer's Caller ID service, and (iii) the telephone number can receive telephone calls (i.e., call-backs). In other words, whenever a marketing text is transmitted to a consumer without a corresponding telephone number that can receive telephone calls, then, according to these legal claims, this violates the FTSA's anti-spoof provision, and the consumer may bring an action for liquidated damages and injunctive relief.

What about FTSA's Cure Period?

The complaints related to the FTSA's anti-spoofing clause often argue that the 15-day cure period clause does not apply and that the cure period clause was only intended to address claims for damages arising from receiving text messages without consent. This argument primarily focuses on the cure period's requirement of the consumer to notify a telephone solicitor that they do not want to receive text messages by replying "STOP" to the number from which the called party received text messages and, therefore, it should only apply to the law's consent provisions. Given the recency in which the cure period clause was adopted, there is no case law supporting or contradicting these arguments. However, given the plain meaning and legislative history of HB 761, there is substantial evidence to argue the cure period applies to the anti-spoofing clause, in addition to the law's consent and opt-out requirements.

Compliance and Litigation Defenses

There are several issues that organizations should consider in terms of their legal compliance measures and defending against these types of FTSA claims.

Consent and Opt-Out Processes. To comply with FTSA and other data protection laws, marketers should ensure they satisfy basic compliance measures for text marketing, which could help mitigate their legal exposure and "pile on" anti-spoofing claims. For instance, they need to ensure that they have proper consent before sending text messages using certain automated technology, and a double opt-in process is traditionally the safest method to ensure compliance. They also need to ensure that consumers are aware of the process of opting out of receiving text messages and that this process is routinely tested and operational. They should also only transmit text messages during permissible calling hours.

Do-Not-Call Lists. Organizations that transmit marketing texts need to ensure they (or their third-party service providers) have processes and procedures to frequently check their customer telephone lists with federal, state, and internal Do-Not-Call Registries. This is especially important when marketers are sending text messages to individuals on a "purchased" list and therefore do not have a direct relationship with the message recipient.

Written Agreements. The consent agreements between marketers and consumers must contain basic terms (e.g., the marketing organization must be clearly identified, how SMS messages will be delivered must be addresses, and consent is not a condition to purchase disclaimers must be included). However, these and other contractual terms between the parties should address other key issues. For example, marketers should ensure their contractual terms require consumers to confirm that they have the legal authority to provide the telephone number to them to receive text messages (i.e., it is not a third-party's telephone number), warrant that they will notify the marketer immediately upon relinquishing such authority, acknowledge the company's privacy policy on how their personal data will be used, agree that any violation of these terms by the consumer is a material breach of contract, and agree to indemnify the marketer, and its affiliates and service providers, for damages they incur from a breach of the terms by the consumer. In addition, when appropriate, organizations should require consumers to agree to mandatory arbitration to avoid class action-based claims arising from the SMS marketing service.

Lack of Standing. If an organization is subject to an FTSA-related class action, it should consider moving the case to federal court and exercising jurisdictional challenges. For example, when analyzing the Telephone Consumer Protection Act, the Eleventh Circuit Court of Appeals has stated that the "receipt of a single unsolicited text message" does satisfy an Article III "concrete injury" standard and "[t]he chirp, buzz, or blink of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face." Other federal district courts in Florida have indicated that the same logic applies to the FTSA, and receiving a single or even a "handful" of unsolicited text messages does not constitute a concrete injury for standing purposes and the courts would lack jurisdiction to review such a claim.

SMS Campaigns Are Outside the Scope of the FTSA's Anti-Spoofing Provision. The FTSA's anti-spoofing clause requires, in relevant part, that telephonic sales calls include "the originating telephone number" and if such a telephone number is made available through a Caller ID service, it must be able to receive telephone calls." An SMS is a "wireless messaging service that enables users to send and receive short text messages, typically 160 characters or fewer, to or from mobile phones and can support a host of applications." In other words, an SMS is not a telephone number, but rather, it is an "abbreviated phone number" and the "equivalent of a company email address" in the telephonic context. Therefore, because the caller ID and call-back requirements in FTSA only apply to telephone numbers, text messaging that relies on SMS does not apply to this framework. This interpretation is supported further by the statute's structure, which triggers call-back obligations only *if* a telephone number is made available and therefore anticipates not all telephonic sales calls (such as SMS communications) involve telephone numbers.

FOR MORE INFORMATION

For more information, please contact:

Steven G. Stransky
216.566.5646
202.263.4126
Steve.Stransky@ThompsonHine.com
Certified Information Privacy Professional/Government (CIPP/G)
Certified Information Privacy Professional/United States (CIPP/US)

Jennifer A. Adler
404.407.3694
Jennifer.Adler@ThompsonHine.com

Marla M. Izbicky
312.998.4253
Marla.Izbicky@ThompsonHine.com
Certified Information Privacy Professional/United States (CIPP/US)