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COMMENTARY

## Recent Court Rulings Reinforce the Validity of Florida's Amended Telephone Solicitation Act and Bring Further Clarity

Recognizing the ambiguities and challenges posed by the original FTSA, Florida legislators took action, leading to crucial amendments signed into law by Gov. Ron DeSantis on May 25, 2023. These amendments effectively strike a balance between protecting consumers and offering much-needed clarity, reshaping the FTSA's provisions.

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By Alexis Buese | January 11, 2024 at 09:17 AM



Since its enactment on July 1, 2021, the Florida Telephone Solicitation Act (FTSA) has become a significant pain point for businesses, leading to extensive class action exposure, particularly for those involved in telephonic communications. The FTSA, which initially granted consumers the right to take legal action against unwanted calls and texts, led to an influx of over 500 complaints in its first year. Recognizing the ambiguities and challenges posed by the original FTSA, Florida legislators took action, leading to crucial amendments signed into law by Gov. Ron DeSantis on May 25, 2023. These amendments effectively strike a balance between protecting consumers and offering much-needed clarity, reshaping the FTSA's provisions.

### The Original FTSA

The original FTSA extended beyond Florida's borders, applying to businesses with no physical presence in the state. This broad reach, coupled with the removal of certain protections found in the federal Telephone Consumer Protection Act (TCPA), exposed businesses to increased liabilities. Under the FTSA, consumers could claim \$500 per unauthorized call or text, with this amount being tripled for willful violations.

### The 2023 Amendments

During an open house session on April 25, 2023, Rep. Tom Fabricio, the bill's sponsor, highlighted the necessity of the amendments to the FTSA. He pointed out that these changes were prompted by the "immense amount of litigation spawned by the current version of the statute." A significant change was the narrowing of the definition of an "auto-dialer." The original language allowed for a broader interpretation, encompassing tools for "selection or dialing" of numbers. The amendment refines this to "selection and dialing," thereby excluding systems like click-to-dial that involve manual processes from the definition of an auto-dialer.

Another change is that previously, the FTSA applied broadly to "telephonic sales calls," without distinguishing between solicited and unsolicited calls. The amendment alters the FTSA by prohibiting only an "unsolicited telephonic sales call" using an automated system for the selection and dialing of telephone numbers. An "unsolicited telephonic sales call" is defined as "a telephonic sales call other than a call made" [1] "in response to an express request of the person called," [2] "primarily in connection with an existing debt or contract, if payment or performance of such debt or contract has not

been completed at the time of such call,” [3] “to a person with whom the telephone solicitor has a prior or existing business relationship,” or [4] “by a newspaper publisher or his or her agent or employee in connection with his or her business.”

Additionally, a new 15-day safe-harbor period for responding to unsolicited text messages was introduced. Consumers are required to send a “STOP” message before taking legal action, and the sender has 15 days to comply, thus providing a buffer to prevent immediate lawsuits.

Critically, here the legislature’s intent in enacting the safe harbor to the FTSA, as further explained by Rep. Fabricio, was to “fix the glitch which has caused quite a bit of litigation and its ‘gotcha’ litigation.” In order to effectuate its purpose, the amendment took effect upon becoming law. The amendment provides that “the amendments made by this act apply to any suit filed on or after the effective date of this act and to any putative class action not certified on or before the effective date of this act.” In other words, the various new updates to the FTSA apply to all existing calls and text messages for which a suit has not been filed, and the amendment is applicable if no class has been certified. If effective, this provision was aimed to curtail the massive class action tidal wave the initial FTSA created.

## Legal Challenges and Recent Court Decisions

Despite these changes, the FTSA amendments have not been without contention. Two recent court cases stand out in this regard: *Holton v. eXp Realty* and *Leigue v. Everglades College*.

In *Holton v. eXp Realty*, M.D. Fla. Order (ECF 52) entered Dec. 28, 2023), the Middle District of Florida confronted the issue of whether the FTSA’s amended provisions could apply retroactively to class actions not certified by the amendment’s effective date. In *Holton*, initiated in February 2023 prior to the FTSA amendment, the plaintiff claimed that the defendant employed an auto-dialer to distribute unsolicited marketing texts to both him and a proposed class of consumers in Florida. Nonetheless, the plaintiff did not assert that he replied with a “STOP” to any of the text messages he reportedly received. The defendant moved to strike the class allegations, arguing that the amended FTSA’s text message “STOP” safe harbor applied and, because the plaintiff failed to text “STOP” and wait 15 days before filing suit, his class claims were barred. The court decided that the amended FTSA’s application is prospective and does not violate any vested rights of the plaintiffs to represent a class. This ruling is significant as it suggests that the amended FTSA will govern future class actions and individual claims alike.

In *Leigue v. Everglades College*, (No. 2022-008872-CA-01 (Fla. 11th Jud. Cir. Ct. Orders (ECF 60 and 61) entered Jan. 3, 2024)), the court issued two separate decisions denying class certification and granting the defendant’s motion for partial summary judgment. The rulings in this case are great for businesses for many reasons, including because the court determined the plaintiff must plead and prove actual damages arising out of the challenged telemarketing and a plaintiff may only receive a single statutory damages award per action, rather than per violation. The court decisively tackled the issue of whether a plaintiff can pursue a class action for statutory damages under the FTSA without both alleging and proving actual damages. The ruling was clear: a plaintiff cannot. The court clarified that, regardless of Article III or other standing legal principles, Florida Statute Section 768.734 mandates that a plaintiff in a class action seeking statutory damages under the FTSA must demonstrate actual damages. Merely claiming “liquidated actual damages” or “actual liquidated damages”—terms the court noted do not exist in Florida statutory or common law—is insufficient. Furthermore, the court dismissed the notion that intangible harms, such as annoyance or frustration, could suffice. To successfully initiate an FTSA class action, a plaintiff is required to allege and substantiate actual damages, defined as a tangible, measurable loss or injury. This presents a significant challenge for plaintiffs to overcome.

The *Leigue* court also ruled that statutory damages under the FTSA are limited to \$500 per action, or \$1,500 if trebled, not “per violation.” This decision significantly reduces the potential windfall of many putative class actions, capping the overall financial impact for each case rather than each individual violation.

Finally, the plaintiff argued that the amendment, if applied to absent class members' claims, would impair a vested substantive right and does not survive constitutional challenge. Although the court did not make a definitive ruling on the constitutionality of the amendment as the plaintiff failed to promptly serve the attorney general with notice of the plaintiff's constitutionality challenge, the court affirmatively noted in dicta that it agrees with the defendant: The court "agrees with Defendant that even if Section 768.734 contains some procedural aspects, Florida courts have consistently upheld the constitutionality of statutes containing both substantive and procedural provisions." Together, these rulings, are significant achievements for businesses.

## Implications for Businesses

For businesses entangled in FTSA class action lawsuits, these developments signal a new strategic landscape. The amendments offer a pathway to navigate these complex legal waters more effectively. Key to this is the maintenance of comprehensive records, especially regarding consumer opt-outs from text messaging campaigns. This practice not only ensures compliance but also serves as a critical defensive tool against potential class action exposure.

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