



PROGRAM MATERIALS
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When Liability Comes Calling: Understanding Florida's New Telephone Solicitation Act

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When Liability Comes Calling: Understanding Florida's New Telephone Solicitation Act

**Presented by: Jeffrey N. Rosenthal
& Thomas F. Brier, Jr.**



December 9, 2021

Introduction



Jeffery N. Rosenthal
Partner, Corporate Litigation
Team Lead, Blank Rome Biometric Privacy Team
Member, Privacy Class Action Defense Team

- **Cyberlaw columnist for *The Legal Intelligencer*:** “*Are States the New Battleground for Robocall Class Actions?*,” THE LEGAL INTELLIGENCER (Sept. 29, 2021)
- **Presenter:** DATA GOVERNANCE, STEWARDSHIP, AND PRIVACY, Rutgers Law School Fourth Annual Corporate Compliance Institute (Apr. 12, 2019); CLASS ACTION CHECK-UP: ALLEVIATING TCPA RISK FOR HEALTHCARE PROVIDERS, Pennsylvania Bar Institute’s 25th Annual Health Law Institute (Mar. 13, 2019); TCPA CLASS ACTIONS: LESSON LEARNED FROM 2017, *The Legal Intelligencer In-House Counsel CLE* (2017); DIALING UP DEFENSES TO TCPA CLASS ACTIONS, *The Legal Intelligencer In-House Counsel CLE* (2016); CLASS ACTION AVOIDANCE STRATEGIES, *The Legal Intelligencer In-House Counsel CLE* (2015)

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Introduction

Thomas F. Brier, Jr.
Associate, General Litigation

- **Author:** *Are States the New Battleground for Robocall Class Actions?*, THE LEGAL INTELLIGENCER (Sept. 29, 2021); *Commonwealths Coalesce on Confronting Biometrics*, THE LEGAL INTELLIGENCER (May 12, 2021); *Biometrics and the New Wave of Class Action Lawsuits*, THE LEGAL INTELLIGENCER (March 1, 2019); *Currency or Security? What United States v. Zaslavskiy Means for the Future of Cryptocurrency Regulation*, FOR THE DEFENSE (Dec. 1, 2018); *Can the Law Keep Up with the Internet of Things?*, THE LEGAL INTELLIGENCER (Nov. 2, 2018); *While Reason Slept* (Aug. 31, 2018).

OVERVIEW

- Class Actions Generally
- TCPA Overview
- Florida Mini-TCPA Overview
- Comparing the TCPA vs. Florida Mini-TPCA
- Case Study
- What can companies do to ensure compliance?

How Class Actions Make Companies Feel



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How Some People Feel About Telemarketing



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Class Actions By the Numbers

10th Anniversary Edition

2021

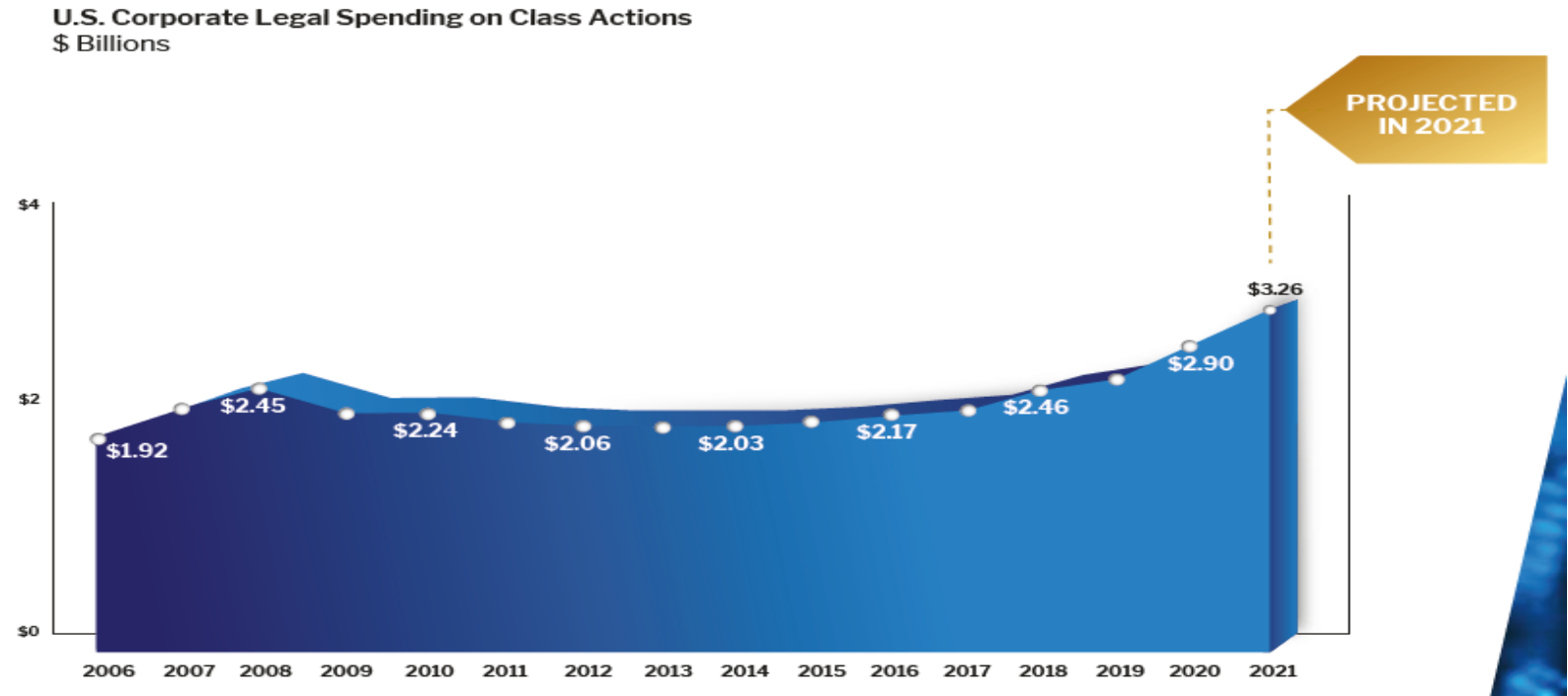
**CARLTON FIELDS
CLASS ACTION SURVEY**

**BEST PRACTICES IN REDUCING COST AND
MANAGING RISK IN CLASS ACTION LITIGATION**

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Class Actions By the Numbers (cont.)

- In 2020, class action defense spending reached a new high of **\$2.9 billion**, which is expected to exceed \$3 billion in 2021.



Source: 2021 Carlton Fields Class Action Survey

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Overview: The Telephone Consumer Protection Act (TCPA)

- Passed in 1991, amending the Communications Act
- Prohibits (among other things) telemarketers, banks, debt collectors, and other companies from using an automatic telephone dialing system (“autodialer” or “ATDS”) to contact consumers without their consent.



Overview: The Telephone Consumer Protection Act (TCPA)

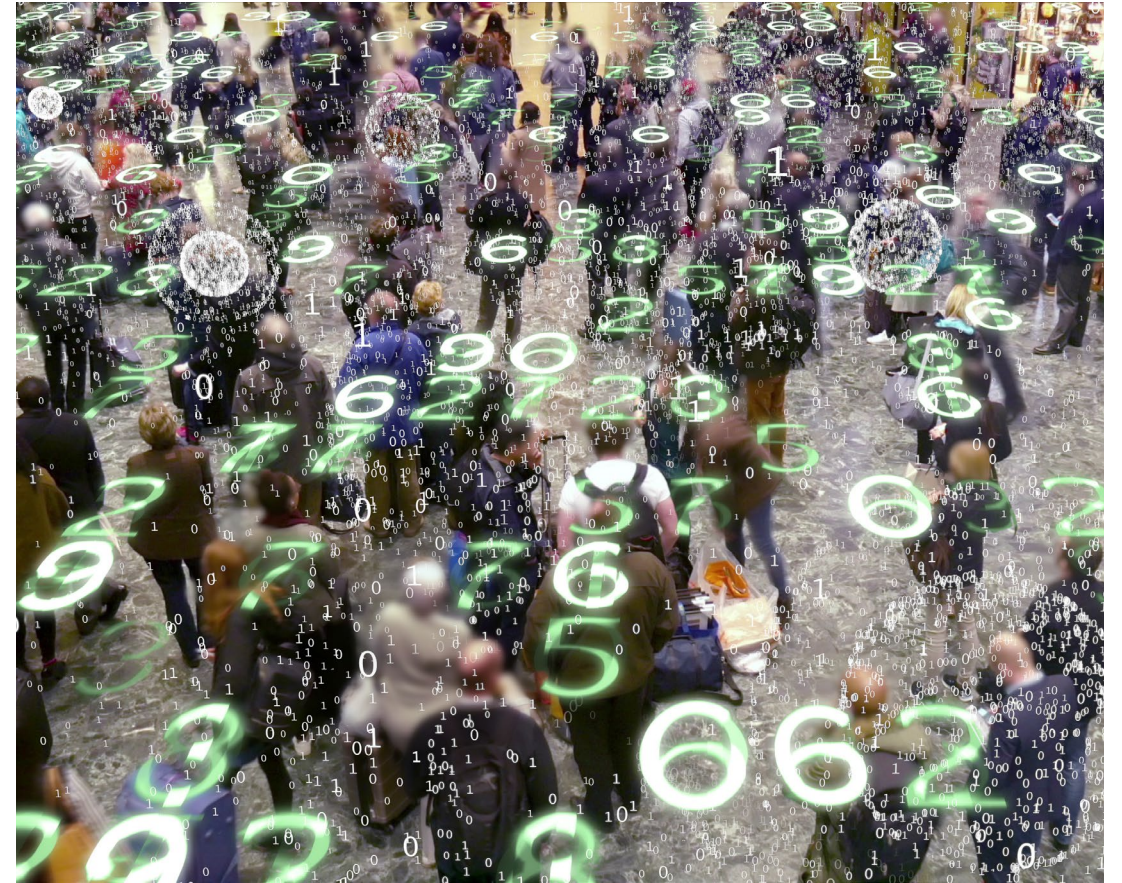
- Applies to phone calls, text messages, junk faxes, and prohibits the use of prerecorded voice messages in certain situations.
- With an estimated 45.9 billion robocalls made in 2020 (that's 1,455 calls every second!) the TCPA's import grows by the day



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TCPA: Key Provisions

- **“Telephone solicitation”**: “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services”
 - **Exceptions**: prior written consent; established business relationship; tax exempt nonprofit organization
 -
- **Autodialer**: a device that has the capacity either to (1) “store a telephone number using a random or sequential number generator” or (2) “to produce a telephone number using a random or sequential number generator.”
 - *Facebook v. Duguid*, 141 S. Ct. 1163 (2021)



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What Does the TCPA Really Stand For?

Total
Cash [for]
Plaintiff's
Attorneys



ADONIS E. HOFFMAN, ESQ.

- *Chief of Staff & Senior Legal Advisor **at the FCC** (2013-2015) when TCPA was under consideration*
- *Chairman of Business in the Public Interest and Adjunct Professor of Communication, Culture & Technology at **Georgetown University**.*

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TCPA: Key Provisions (cont.)

- **Do-not-call list**: companies must maintain a list of consumers who asked not to be called; request must be honored for 5 years.
- **Time limitation**: calls/texts can be placed only between 8 a.m. and 9 p.m. of consumer's local time zone.
- **Damages**: aggrieved persons may bring a private cause of action for up to **\$500 per violation (\$1,500 for each willful violation)**.



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Autodialer under *Duguid*: Clarity or confusion?

- ***Duguid* Autodialer Definition:**
 - a device that has the capacity either to:
 - (1) “store a telephone number using a random or sequential number generator” or
 - (2) “to produce a telephone number using a random or sequential number generator.”
- **Majority Position:** *Camunas v. Nat’l Republican Senatorial Comm.* (E.D. Pa. 2021) (device that calls numbers from a “stored list” is not an autodialer);
- **Minority Position:** *Clark v. First Nat’l Bank of Omaha* (D. Me. 2021) (device may qualify as an autodialer if it “use[s] a random number generator to determine *the order* in which to pick phone numbers from a preproduced list [and] then store[s] those numbers to be dialed at a later time.”)



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Plaintiffs May be Moving Away from TCPA Cases due to *Duguid*



	Current Month:	Previous Month:		Previous Year:		Year to Date:	Year to Date Comp:	
	Sep 01, 2021 Sep 30, 2021	Aug 01, 2021 Aug 31, 2021		Sep 01, 2020 Sep 30, 2020		Jan 01, 2021 Sep 30, 2021	Jan 01, 2020 Sep 30, 2020	
CFPB	5874	6064	-3.1%	4732	24.1%	53957	39646	36.1%
FDCPA	529	601	-12.0%	578	-8.5%	5036	5396	-6.7%
FCRA	392	473	-17.1%	458	-14.4%	4066	3885	4.7%
TCPA	112	120	-6.7%	172	-34.9%	1389	2744	-49.4%

Source: [Boo! Everything is down in the WebRecon Stats for Sept 2021 - WebRecon LLC](#)

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Florida Telephone Solicitation Act (FTSA): Overview

- Passed unanimously by the Florida Legislature (Senate Bill 1120).
- Signed into law by Gov. Ron DeSantis on July 1, 2021.
- Amends Florida's consumer protection law and the Florida Telemarketing Act.



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FTSA Overview (cont.)

- The “bill requires all sales telephone calls, text messages, and direct-to-voicemail transmissions to have the receiving consumer’s prior express written consent if the call will be made using an automated machine to dial the recipient’s phone number, or will play a recorded message upon connection with the recipient.”
 - Florida Senate Commerce and Tourism Committer
- Over 6 class actions were filed under the FTSA within two months of its effective date!



FTSA: Key Provisions

- **Telephonic sales call**: The FTSA applies broadly to:
 - “a telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services, soliciting an extension of credit for consumer goods or services, or obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.”
 - The FTSA applies only to telephone sales calls. It excludes things like debt collection and account servicing calls.



FTSA: Key Provisions (cont.)

- **Safe harbors eliminated:**
 - The FTSA eliminates several safe harbors from the prior law.
 - These safe harbors had allowed an automated call where:
 - the calls were made, or texts were sent, in response to calls initiated by the called party;
 - if the telephone numbers have been screened to include persons on Florida’s “no sales solicitation calls” listing; or
 - if the call concerns goods or services previously ordered or purchased.
- **Florida and beyond: Applies to businesses even if they have no physical presence in Florida.**



FTSA: Key Provisions (cont.)



- **Automated system:** “an automated system for the selection or dialing of telephone numbers”
 - Note: no mention of a “random or sequential generator”
- **Prior written consent** requires consumer give prior “written consent” before calls/texts can be made.
- Must include:
 - The signatory’s phone number;
 - a clear and conspicuous disclosure informing the called party that they authorize the call; and
 - a notification that the called party is not required to directly or indirectly sign the written agreement or to agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

FTSA: Key Provisions (cont.)

- **3-call limit**: a business can call a consumer a maximum of three times per day, and only between 8am-8pm in the consumer's time zone.
- **Called party**: “a person who is the regular user of the telephone number that receives a telephonic sales call.”
 - Under the TCPA, some courts have interpreted “[c]alled party” to mean the subscriber of the phone line when the call is placed.
 - Florida’s definition opens the possibility that the regular user could be someone other than the subscriber.
 - Confirming that the person giving express written consent is the “regular user of the telephone number” could be challenging.
- **Damages**: up to **\$500/violation**; **\$1,500/willful violation**.



FTSA: Key Provisions (cont.)

- **Certain Calls Exempted:**
 - Those calling for religious, charitable, political, or educational purposes;
 - A “supervised financial institution”:
 - Commercial banks and lenders; insurance brokers; and business-to-business calls (with specific limitations).
 - A person “engaging in commercial telephone solicitation where the solicitation is an isolated transaction and not done in the course of a pattern of repeated transactions of like nature”
 - Any “person who has been lawfully providing telemarketing sales services continuously for at least 5 years under the same ownership and control and who derives 75 percent of its gross telemarketing sales revenue from contracts with persons exempted in this section.”



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How does the TCPA compare to the FTSA?



- **Broader autodialer definition**: Unlike the TCPA, the FTSA does not limit the definition of an autodialer to “a random or sequential generator.” It also expressly covers more dialing systems commonly used by businesses to text or call prospective customers.
 - We expect plaintiffs’ lawyers will argue that this includes dialing from customer lists.
- **Written consent always required**: Under the FTSA, written consent is always required before a call or text can be made, foregoing the TCPA’s common law rule of consent in which oral consent is sufficient.

FTSA Case Example: *Pezzatini v. Levitating Enters., Inc.*

Filing # 138172237 E-Filed 11/09/2021 11:16:51 AM

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

AGOSTINO PEZZATINI, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

LEVITATING ENTERPRISES INC d/b/a
HERBAN DELIVERY,

Defendant.

CLASS ACTION

Case No.

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff Agostino Pezzatini brings this class action against Defendant Levitating Enterprises Inc d/b/a Herban Delivery and alleges as follows upon personal knowledge as to Plaintiff and Plaintiff's own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by Plaintiff's attorneys.

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FTSA Case Example: *Pezzatini v. Levitating Enters., Inc.* (cont.)

FACTS

11. On or about October 11, 2021, Defendant sent the following telephonic sales call to Plaintiff's cellular telephone number:



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FTSA Case Example: *Pezzatini v. Levitating Enters., Inc.* (cont.)

15. To transmit the above telephonic sales calls, Defendant utilized a computer software system that automatically selected and dialed Plaintiff's and the Class members' telephone numbers.

Case Study: *Teblum v. MerrickDaemon Real Estate LLC*

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.

DARYL TEBLUM,
individually and on behalf of all,
others similarly situated,

CLASS ACTION

Plaintiff,

JURY TRIAL DEMANDED

v.

MERRICKDAMON REAL ESTATE LLC,

Defendant.

_____ /

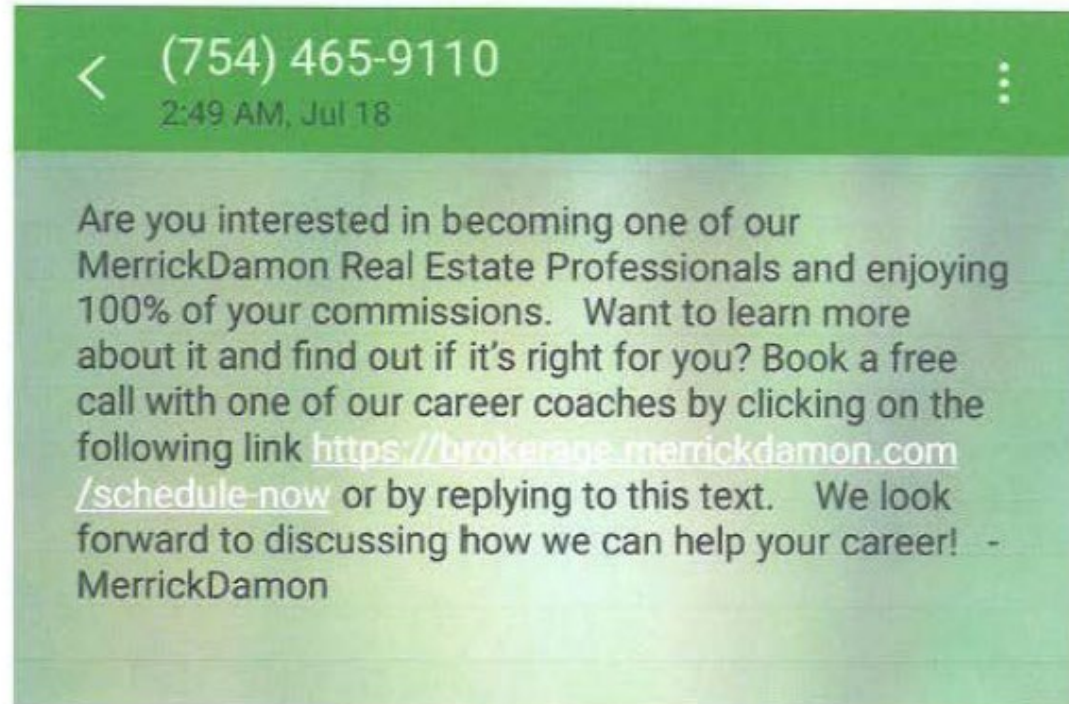
CLASS ACTION COMPLAINT

Plaintiff Daryl Teblum brings this class action against Defendant Merrickdamon Real Estate LLC and alleges as follows upon personal knowledge as to Plaintiff and Plaintiff's own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by Plaintiff's attorneys.

Case Study: *Teblum v. MerrickDaemon Real Estate LLC (cont.)*

FACTS

11. On July 18, 2021, Defendant sent the following telephonic sales call to Plaintiff's cellular telephone number:



Scant Case Law Exists on the FTSA



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Scant Case Law Exists on the FTSA (cont.)

- *Zimmerman v. AssuredPartners, Inc.*, (M.D. Fla. Sept. 27, 2021) (dismissing FTSA claim for shotgun pleading)



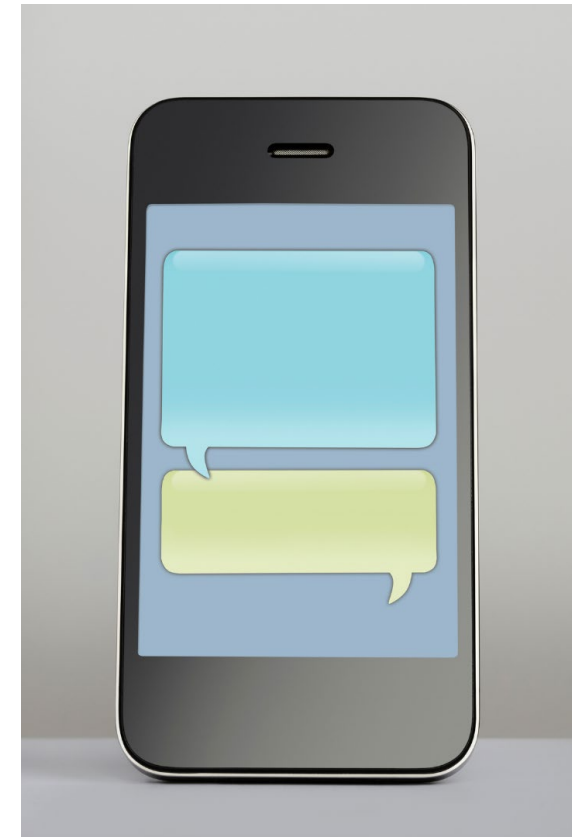
How does the TCPA compare to the FTSA? (cont.)

- **Availability of attorneys' fees**: The FTSA allows for recovery of attorneys' fees and costs; TCPA does not.
- **Rebuttable presumption**: The FTSA creates a rebuttable presumption that a sales call made to any area code in Florida "is made to a Florida resident or person in this state at the time of the call."
 - Class definitions will likely fit within this language.



How does the TCPA compare to the FTSA? (cont.)

- **Telephone Sales Calls**: The FTA is limited to “telephonic sales calls” —a definition that, unlike the TCPA, *excludes* things like debt collection and account servicing calls.
- **Text message onslaught?**: Almost all FTSA cases to date involve text messages, a break from the norm in TCPA cases.



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COMPLIANCE

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Compliance Steps

- Obtain written consent before a text is sent, use clear disclosures and affirmative checkboxes;
- Incorporate FTSA compliance into training for advertising and marketing employees;
- Create mechanisms to capture, retain, and recall individual consumers' prior express written consent;
- Develop systems to recognize/honor opt out requests; and
- Considering the incorporation of FTSA compliance into indemnity clauses in contracts when using third-party advertising and marketing services and other vendors.



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Questions?



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