FLORIDA TELEPHONE SOLICITATION ACT

2022 FTSA Cases Year in Review

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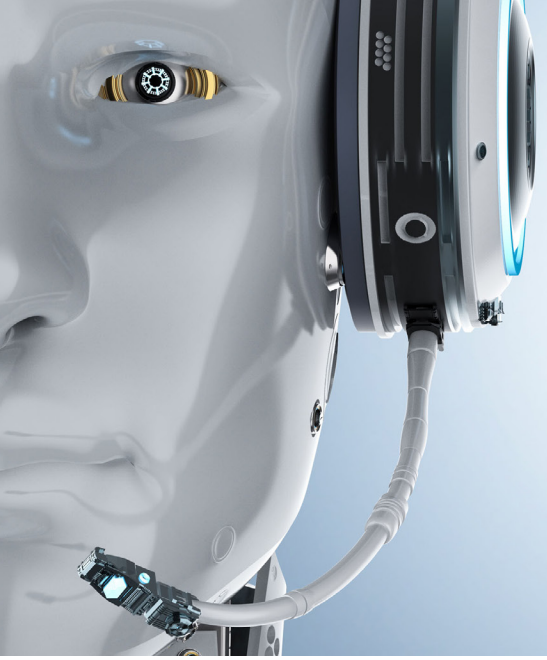

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2022 FTSA CASES YEAR IN REVIEW

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TABLE OF CONTENTS

2 Authors
3 Introduction
4 Federal Jurisdiction
4 Article III Standing
7 Pleading Issues
8 First Amendment and Other Constitutional Challenges
9 Discovery Stays
10 Venue Issues
11 Types of Calls Covered Under the FTSA
12 Arbitration
15 About the Carlton Fields Robocall Defense Team

Introduction

Almost a decade and a half ago, a senior partner at my law firm imparted my first Telephone Consumer Protection Act (TCPA) case — a lawsuit involving a blast fax advertisement from a scuba diving business. Over the ensuing decade and a half, I've spent more time counseling clients related to "robocalls" than on any other part of my practice. I've also had the chance to start the Carlton Fields robocall defense team, acclaimed for its groundbreaking win in *Salcedo v. Hanna*.[1]

Fast forward to early 2021. Consumer protection lawyers and the media alike were closely following the Florida Legislature's work on a potentially groundbreaking data privacy bill. Meanwhile, no press attention was focused on the amendments to Florida's telemarketing laws. The data privacy bill died on the floor, while the amendments to the Florida telemarketing laws sailed through unanimously.

The legal press woke up in the lead-up to the July 1, 2021, effective dates for the amendments. And it was no surprise that dozens of Florida Telephone Solicitation Act (FTSA) cases started to be filed within weeks of the amendments. As of early 2023, we estimate that more than 500 FTSA class action cases have been filed since the amendments, with 2022 marking a banner year for FTSA decisions.

We are therefore pleased to present our annual FTSA year in review for 2022, the first-ever comprehensive review of FTSA case law. This publication reports on significant FTSA cases from federal and state courts in Florida and features unique insights from the Carlton Fields robocall team defense team cultivated from our experience litigating dozens and dozens of these cases.

We hope you find this publication informative, and we invite you to get in touch with us if you have any questions about all things related to the FTSA.

— Aaron Weiss

Federal Jurisdiction

The FTSA is a state statute. This means that unlike the federal TCPA — where there is always federal question jurisdiction — in a case that alleges only violations of the FTSA, a removing defendant must show that there is a sufficient amount in controversy for federal jurisdiction. Multiple cases in 2022 tackled this issue.

Calta v. Vision Solar FL LLC

In *Calta*,[25] the plaintiff brought an FTSA class action against Vision Solar, a Tampa-based solar panel company. The defendant removed the action to federal court under 28 U.S.C. § 1332 and the Class Action Fairness Act (CAFA), alleging that the parties were minimally diverse, the action involved a class greater than 100 persons, and the amount in controversy exceeded $5 million.

The plaintiff moved for remand based on the defendant's failure to establish the requisite amount in controversy. In its notice of removal and subsequent response opposing remand, the defendant argued that the amount in controversy was satisfied on the face of the complaint. The defendant relied on the plaintiff's allegations that it believed "the Class members number in the several thousands" and further asserted that the class representative's own factual circumstances of receiving five allegedly offending calls or texts should be considered "typical" of each class member in calculating the amount in controversy. And finally, because the complaint alleged "knowing" violations of the FTSA, which carry a discretionary penalty of up to $1,500, the amount in controversy could be calculated using the maximum penalty for each call. Thus, the defendant concluded, the amount in controversy easily surpassed $5 million.

Judge Charlene Honeywell of the Middle District of Florida addressed each argument and agreed with the defendant that calculating damages of $1,500 per violation was a reasonable extrapolation from the complaint for the purpose of the amount in controversy. However, the court disagreed with the defendant that it could infer that the average class member would have received five calls, as the class representative did. It also disagreed with the defendant that it should blindly credit the plaintiff's estimate that the number of class members was in the "several thousands."

The court found that speculation alone is inadequate to establish the amount in controversy and that, because the defendant chose to rely solely on the complaint, it could only speculate as to whether, by a preponderance of the evidence, the amount in controversy exceeded $5 million. In the absence of any extrinsic evidence demonstrating that the amount in controversy was met, the court concluded that remand was proper.

The court noted, however, that the defendant was not barred from seeking to invoke federal jurisdiction in the future. Under CAFA, class actions may be removed at any point during the pendency of litigation, so long as removal is initiated within 30 days after the defendant is put on notice that a case that was not removable based on the face of the complaint has become removable.

Article III Standing

Over the last decade, courts have grappled with how to determine Article III standing for cases brought under the federal TCPA in Florida.

Enter *Salcedo v. Hanna*, a 2019 case in which the Eleventh Circuit held that a plaintiff who receives a single text message does not have Article III standing.[2]

Several recent decisions in the Eleventh Circuit, and the district courts applying those Eleventh Circuits precedents, have evaluated the injury in fact required to establish standing for the receipt of text messages in TCPA cases, including analyzing the sufficiency of allegations of "wasted time." In *Salcedo*, the Eleventh Circuit conducted an exhaustive analysis into TCPA standing requirements and held that the receipt of a single unwanted text message does not establish a concrete injury in fact. Contrary to other circuits that have addressed this issue before and after, in *Salcedo*, the Eleventh Circuit fundamentally rejected the argument that *any* TCPA violation *automatically* satisfies Article III standing. Once the court rejected the categorical rule, the court then further rejected Salcedo's argument that the alleged waste of time and temporary loss of use of his phone resulting from the receipt of the single text message rose to the level of concrete injury.[3] Critically, the court also held that a text message, unlike a fax or a phone call, does not immobilize a phone and is substantially less harmful than a phone call in that an individual receiving a text message can "continue to use all of the device's functions, including receiving other messages, while [the phone] is receiving a text message."

While the plaintiff in *Salcedo* only received one text message, the court's majority opinion made clear that its analysis considered the qualitative nature of the injury as opposed to the quantitative nature, and subsequent courts have applied *Salcedo* to cases involving multiple text messages.[4]

There are several recent Florida district court cases applying *Salcedo* and dismissing TCPA claims based on lack of standing.

In *Daisy Inc. v. Mobile Mini Inc.*,[5] Judge Sheri Polster Chappell applied *Salcedo* to a TCPA case involving unwanted faxes received through an email program, where the plaintiff received one fax message, which it alleged caused it to "waste one minute reviewing the fax, deciding it was junk, and dragging the e-mail to his spam folder." Judge Chappell conducted a thorough analysis, determined that "it is clear Congress did not view one wasted minute spent reviewing a junk fax received through e-mail as a concrete injury," and dismissed the case. As part of her analysis, Judge Chappell cited the "many [Southern District of Florida] decisions [applying *Salcedo* and] dismiss[ing] unwanted text cases for no standing where the only identified injuries were short amounts of wasted time." Those cases are discussed briefly below.

In *Fenwick v. Orthopedic Specialty Institute PLLC*,[6] Judge Jared Strauss applied *Salcedo*'s reasoning to a case in which the plaintiff alleged she received two text messages simultaneously, which caused her to spend 22 minutes of time (one minute reviewing texts, and additional time researching), depleted her cellphone battery, and used memory space on her phone. Judge Strauss interpreted *Salcedo* to apply to multiple text messages and recommended the case be dismissed for lack of standing.

Likewise, in *Eldridge v. Pet Supermarket Inc.*,[7] Judge Kathleen Williams applied *Salcedo* and dismissed a TCPA case, finding no injury in fact where the plaintiff alleged he received five unauthorized text messages over three months, which "invaded his privacy, intruded upon his seclusion and solitude, wasted his time by requiring him to open and read the messages, depleted his cellular telephone battery, and caused him to incur a usage deduction to his text messaging or data plan."

In *Mittenthal v. Florida Panthers Hockey Club, Ltd.*,[8] Judge Roy Altman analyzed the sufficiency of an injury in fact in a case involving approximately 40 text messages received over several months. The court explained that "there is no minimum quantitative limit required to show injury; rather, the focus is on the qualitative nature of the injury, regardless of how small the injury may be." The court found that the plaintiffs did not allege sufficient tangible or intangible harm to establish Article III standing.[9]

Likewise, in *Perez v. Golden Trust Insurance Inc.*,[10] Judge Marcia Cooke dismissed a TCPA suit for lack of standing where the plaintiff allegedly received two unwanted text messages over four days and claimed that he wasted 13 minutes as a result. Judge Cooke determined that, based on *Salcedo*, the two text messages and 13 minutes of disturbance did not create a concrete injury in fact, and disregarded the plaintiff's allegation that the text messages "interrupted business calls" because he could continue to use all of the device's functions while receiving the text messages.

While many other courts — including then-Judge Amy Coney Barrett when she was on the Seventh Circuit — disagreed with that holding,[11] the Eleventh Circuit reaffirmed it last year in *Drazen v. Pinto*.[12] In 2022, several district courts in Florida addressed whether a plaintiff can have Article III standing for receiving a text message in violation of the Florida mini TCPA.

Frater v. Lend Smart Mortgage LLC

The first federal court decision on this came on September 27, 2022, when Miami-based Judge Robert N. Scola of the Southern District of Florida issued a ruling granting a motion to dismiss by a defendant contending that the federal court lacked subject matter jurisdiction, as the plaintiff did not have Article III standing based on *Salcedo*.

Specifically, in *Frater*,[13] the plaintiff brought an FTSA claim against a "mortgage company and retail lender" and alleged that the defendant sent multiple text messages to her cellphone. The plaintiff filed her case in federal court. Her complaint provided examples of two such text messages while asserting that she suffered harm in the form of violations of her statutory rights, inconvenience, invasion of privacy, aggravation, annoyance, and wasted time. The defendant then moved to dismiss for lack of subject matter jurisdiction, arguing that the plaintiff and putative class lacked Article III standing.

However, the court was not persuaded that the plaintiff's allegations demonstrated an injury in fact concrete enough to grant the court subject matter jurisdiction. The court rejected the plaintiff's arguments, citing *Salcedo* as binding Eleventh Circuit precedent. The court also cited *Drazen* for the proposition that, in 2022, the Eleventh Circuit affirmatively relied on and upheld *Salcedo*'s holding on what constitutes standing.

Ultimately, the court granted the defendant's motion to dismiss based on a finding that the plaintiff failed to allege a sufficient concrete injury in fact to demonstrate standing and stated that the appropriate test for determining whether an injury is concrete is qualitative, not quantitative.

Iuliano v. UnitedHealth Group Inc.

Next up, about two and half months and a few hundred miles across Alligator Alley and Interstate 75, Tampa-based Judge Steven Merryday of the Middle District of Florida granted a plaintiff's motion to remand in *Iuliano*[14] for failing to invoke Article III standing because the complaint alleged no facts demonstrating a "concrete injury." Notably, the side advocating for removal was flipped from *Frater*. In *Iuliano*, the plaintiff filed a

complaint in state court alleging that the defendant violated the FTSA. The plaintiff claimed she received four messages from the defendant intermittently over three months. The plaintiff, however, never texted "STOP" or otherwise replied to any of the four messages. The defendant removed the case to federal court. Using the rationale in *Salcedo*, the plaintiff moved to remand and argued that the case should not be in federal court because there was no federal subject matter jurisdiction.

The court made quick work of the motion, citing the standing precedent of *Salcedo* and *Drazen* in remanding the case. The court reasoned that under *Drazen*, because the plaintiff's proposed class would include "all" persons in Florida who received a single text message or voicemail transmission, the class would necessarily include members without a concrete injury. Under these circumstances, the court found that the case could not proceed in federal court and granted the plaintiff's motion to remand.

Fontanez v. Wolverine World Wide, Inc.

Less than three weeks later, in *Fontanez*,[15] Tampa-based Judge Kathryn Kimball Mizelle, also of the Middle District of Florida, granted a plaintiff's motion to remand to state court.

Similar to the plaintiff in *Frater*, the plaintiff filed a putative class action on behalf of herself and others similarly situated for violation of the FTSA. Here, the plaintiff alleged she received at least one unsolicited text message from the defendant.

The defendant argued that the plaintiff had standing because the Supreme Court either "implicitly overruled *Salcedo*" or "abrogate[d]" its finding in *TransUnion LLC v. Ramirez*.[16] While the court acknowledged that an intervening decision of the Supreme Court can overrule the standing precedent of the Eleventh Circuit on the matter, the court noted such a Supreme Court decision must be clearly on point.

The court concluded that the *TransUnion* decision raised different factual considerations and focused on the proper methodology for evaluating whether intangible harms satisfy the concreteness of Article III. Critically, *TransUnion* revolved around consumers with false alerts associated with their credit files, which led to consumer information being shared with third-party businesses.

The court was not persuaded by the plaintiff's argument. Instead, the court found that (i) *TransUnion* fortified the Eleventh Circuits analysis; (ii) the plaintiff did not allege any actual harm, not even in wasting her time or resources; (iii) the plaintiff did not allege she even read the messages, the messages consumed her battery or data, or she suffered any annoyance; and (iv) the defendant offered no evidence to the contrary.

The court also cited *Salcedo* as binding precedent in finding that the irritation of one unsolicited text message is qualitatively insufficient to create Article III standing. Thus, the motion to remand was granted.

Muccio v. Global Motivation Inc.

On the same day that the *Fontanez* decision issued, across the state, Fort Pierce-based Judge Aileen Cannon of the Southern District of Florida ruled in *Muccio*[17] on similar facts but with inverse interests. In *Muccio*, the defendants filed motions seeking dismissal for lack of Article III standing and failing to state a claim under Federal Rule of Civil Procedure 12(b)(6).

The plaintiff alleged receiving five unwanted text messages from the defendant, Global Motivation Inc., to solicit the sale of consumer goods and/or services. The plaintiff alleged harm including liquidated actual damages, inconvenience, invasion of privacy, aggravation, annoyance, and violation of statutory privacy rights.

The court's analysis was analogous to that of *Frater* and *Fontanez* in finding that *Salcedo* remains binding precedent in the Eleventh Circuit. Judge Cannon also cited *Drazen* as affirmatively upholding *Salcedo*'s holding that "a plaintiff [does not] suffer a concrete injury for Article III standing purposes when she has received a single unwanted text message." Using the *Salcedo* framework, the court found that since no allegations were made consistent with the degree of harm associated with "highly offensive" or objectively intense interference" discussed in *Salcedo*, it was not enough to establish concrete harm under Article III.

The court granted the defendant's motion to dismiss for lack of injury in fact.

Alvarez v. Sunshine Life & Health Advisors LLC

As discussed above, *Fontanez* and *Iuliano* are cases that were originally filed in state court and then removed to federal court. After the remand, these cases are now back in state court. So, the next question is whether the plaintiffs have standing in state court.

So far, only one reported state court decision has addressed this issue under the FTSA. In *Alvarez*,[18] Miami-Dade Circuit Court Judge Lourdes Simon[19] found that "while an actual injury is required to invoke standing in federal court, a legal injury from the violation of a statute constitutes a "case or controversy"... is enough to invoke standing in Florida state court... Thus, in Florida state court, to bring an action under the FTSA, a plaintiff need only allege that he or she received a text message from the defendant without prior express consent." *Alvarez* settled after the standing decision. However, nine months after the decision, the appellate

court that covers Miami-Dade County — Florida's Third District Court of Appeal — issued a decision in a case under the Fair and Accurate Credit Transactions Act that "mere violation of the statute absent harm cannot create a viable claim."[20] The Third District Court of Appeal also has a case on appeal where they will have an opportunity to state whether *Saleh v. Miami Gardens Square One Inc.*[21] extends to robocall cases.[22]

On the other hand, in *Toney v. Advantage Chrysler-Dodge-Jeep Inc.*,[23] Orange County Judge Margaret Schreiber held last year that there is no automatic standing in Florida state court for receiving prerecorded, telephonic, advertising messages to an individual — without first obtaining their written consent allegedly in violation of the TCPA. Incidentally, the state court iteration of *Toney* was a sequel to the federal court case in which Orlando-based Judge Wendy Berger of the Middle District of Florida — a former Florida state appellate judge — previously found there was no Article III standing.[24]

***

If what's past is prologue, 2023 should be an interesting year for lawyers in Florida addressing standing issues under the FTSA. There have been several hundred FTSA class actions filed in Florida over the last two years, and the issue of standing is an important consideration in each case. Given that several cases are now on appeal, it is likely that there will be more clarity this coming year.

Pleading Issues

For many years, plaintiffs and defendants have scuffled over how much detail a plaintiff must include in its complaint. These battles are now being fought in the FTSA arena.

Barnett v. SEE Optics, Inc.

In *Barnett v. SEE Optics Inc.*,[26] the plaintiff alleged that the defendant Florida company violated the TCPA and the FTSA when it sent the plaintiff unsolicited text messages and made multiple sales calls despite the plaintiff being registered with the national do not call registry. The defendant filed its answer, admitting that a store manager sent one text message to the plaintiff using the manager's personal cellphone, and subsequently moved for judgment on the pleadings and/or summary judgment. In its motion, the defendant argued that the plaintiff did not provide sufficient evidence to support its claims.

Judge James Lawrence King of the Southern District of Florida ruled that the defendant's arguments were premature at that point in the case but that it could refile its motions upon the conclusion of discovery.

Zimmerman v. Assured Partners Inc.

In *Zimmerman*,[27] a pro se plaintiff alleged both federal claims for violation of the TCPA and state law claims for violation of the FTSA.

Judge Charlene Honeywell of the Middle District of Florida dismissed the plaintiff's complaint with the opportunity to amend it. The court reasoned that because "each of Plaintiff's counts incorporate[d] all proceeding paragraphs, including prior counts, resulting in the final count constituting a culmination of the entire complaint," the complaint was a shotgun pleading, and dismissal was required.

Davis v. Coast Dental Services LLC

In *Davis*[28] — in what appears to be an issue of first impression — Judge Thomas Barber of the Middle District of Florida dismissed a complaint under the FTSA that alleged that "[t]o 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."

The court found that such a bare allegation is insufficient, noting that "[t]he fact that [the defendant] sent [the plaintiff] an unsolicited text message is consistent with the idea that [the defendant] used an automated machine to send advertisements en masse. However, these facts are also consistent with [the defendant] hiring a marketing firm to send individual messages from a personal cell phone in full compliance with the FTSA."

First Amendment and Other Constitutional Challenges

Challenges to the TCPA as an improper restriction on speech under the First Amendment have been part of TCPA jurisprudence for more than a quarter center, and this issue was the focus of the Supreme Court's decision in *Barr v. American Association of Political Consultants Inc.*[29] Defendants in scores of FTSA cases have raised First Amendment and other constitutional arguments.

Turizo v. Subway Franchisee Advertising Fund Trust Ltd.

Judge Rodolfo Ruiz's decision in *Turizo*[30] was the first to address First Amendment challenges to the FTSA.

Specifically, the defendant challenged the FTSA using the First Amendment and argued that strict scrutiny should apply. The court determined instead that intermediate scrutiny, not strict scrutiny, should apply because (1) the Supreme Court likely did not mean to alter the commercial speech framework in *Reed v. Town*[31] *of Gilbert* and *Barr* because commercial speech isn't mentioned in those cases and (2) the Eleventh Circuit has continued to apply the normal commercial speech framework even after those two cases. Next, the court found that the FTSA survives intermediate scrutiny because the governmental interest in consumer protection and privacy is substantial, limiting the use of autodialer equipment directly advances that goal, and is narrowly drawn because it doesn't ban autodialers and leaves open other methods of communication including "unsolicited live calls, consented-to autodialed calls, and unsolicited mail and email advertisements."

Additionally, the court found that (1) the law is not unconstitutionally vague under the Fifth Amendment due process clause because it is clear enough what automated means; (2) the term autodialer is not construed as coextensive with the TCPA's definition of autodialer because the statute is not vague, meaning the court need not resort to the defendant's proposed canons of construction; (3) an FTSA claim does not require that an autodialer be capable of randomly generating phone numbers because, unlike the TCPA, the FTSA does not define autodialer; (4) the FTSA is not preempted by the TCPA but instead serves as a supplement to the TCPA, going further than the TCPA does; and (5) the FTSA does not run afoul of the dormant commerce clause because the FTSA does not regulate wholly interstate conduct (the regulated calls must have some nexus to Florida) and because the measure neither attempts to regulate nor unduly burdens interstate commerce.

Pariseau v. Built USA LLC

Less than three months after *Turizo*, Judge Steven Merryday of the Middle District of Florida followed that ruling in similarly rejecting a First Amendment argument in *Pariseau v. Built USA LLC*.[32]

In *Pariseau*, the defendant argued the statute should be reviewed for a First Amendment violation under strict scrutiny because the FTSA singles out a specific type of speech: unsolicited telephonic sales calls. The court declined to apply strict scrutiny because the FTSA is a commercial speech regulation and commercial speech receives less protection than other forms of speech. The court found the statute survives intermediate scrutiny review because the state has a substantial interest in ensuring residential privacy and tranquility and because the law allows for alternative channels of communication. Additionally, the court found the FTSA survives a Fourteenth Amendment vagueness challenge surrounding the lack of a definition for an automated dialing system because the court found that the statute's warning is definite enough to put a potential violator on notice of the law.

Borges v. SmileDirectClub LLC

Next up was Judge Melissa Damian's decision in *Borges v. SmileDirectClub LLC*.[33] In *Borges*, the defendant challenged the FTSA under the First Amendment as a content-based restriction on speech.

The court found that intermediate scrutiny, not strict scrutiny, should be applied. Even though the law targets a subset of speech (advertising), the court cited the Eleventh Circuit in *NetChoice LLC v. Attorney General, State of Florida*,[34] which found that strict scrutiny would not be triggered if the differential treatment was based on a special aspect of the medium of communication. The court observed that the FTSA is a content-based restriction but ultimately applied only intermediate scrutiny. The court found Florida's interest in the law was substantial because the government has an interest in consumer privacy protection and that the FTSA achieves that interest by reducing the number of automatically dialed sales calls. Finally, the court determined that the restriction is not more restrictive than necessary because it limits unsolicited phone calls made by autodialers without prohibiting autodialers used for other purposes or prohibiting unsolicited phone calls entirely.

Thus, the FTSA survived intermediate scrutiny and was permissible under the First Amendment. Additionally, the court found the FTSA does not run afoul of the Fourteenth Amendment due process clause for vagueness for failure to have a definition of "automated system" because, here, the defendant's conduct would qualify for any definition of an automated system.

Morenski v. Precision Dental, P.A.

Turizo, *Pariseau*, and *Borges* were all decided by federal judges. The first reported state court decision came in *Morenski*.[35] And, following the old saying that goes something like, "once is happenstance, two is a

coincidence, and three is a pattern," the state court followed the federal decisions and found the FTSA did not violate the First Amendment, dormant commerce clause, or Fourteenth Amendment due process clause.

Additionally, the court found (1) the TCPA's health care message exemption does not apply to the FTSA and (2) the FTSA is not preempted by the TCPA.

* * *

Given where the trial courts in state and federal courts have landed on this issue, it may well take action by an appellate court to change the direction on this.

Discovery Stays

Defendants in class action litigation often seek to stay discovery pending rulings on motions to dismiss in class actions. There are many cases in Florida where courts grant stays in such situations and many cases where courts decline to grant stays. The case law on stays pending a ruling on a motion to dismiss in FTSA cases has likewise been split.

Zimmerman v. Assured Partners Inc.

In *Zimmerman*,[36] following the court's dismissal with leave to replead (see page 5), the plaintiff repleaded her case and the defendant filed an answer. In the amended complaint, the plaintiff alleged that the defendant engaged in an aggressive telemarketing campaign that caused her to receive hundreds of autodialed calls on her cellphone, despite her number being on the national do not call list. The complaint raised federal claims for violation of the TCPA and state law claims for violation of the FTSA.

The defendants filed a motion to stay the action temporarily and argued that a stay was appropriate pending legislative amendments to the FTSA. In support of their argument, the defendants cited opinions from the Southern District of Florida, where stays had been granted due to the "automated system" language of the FTSA being challenged on constitutional grounds.

Judge Charlene Honeywell of the Middle District of Florida denied the defendants' motion, explaining that the stays in the cases the defendants cited were entered before the expiration of the most recent legislative session. Thus, because the Florida Legislature never reached the matter during that session, the court concluded that the defendants' basis for the temporary stay was moot. Additionally, the court noted that the defendants had not explained why pending legislative amendments to the state law would warrant a stay of the federal claims.

Leigue v. Everglades College Inc.

In *Leigue*,[37] the defendant moved to stay discovery regarding a subpoena served on a third-party advertising agency. The court observed that discovery stays were not favored because they often result in a backlog but recognized that a stay would be granted in situations in which (1) there is a showing of specific prejudice or burden or (2) a motion to dismiss that is clearly meritorious has been filed.

The court found that the discovery was not unduly burdensome and that the motion to dismiss was not clearly meritorious. The court did not elaborate on its reasoning but noted that it did not help that the motion to dismiss had been filed only three days earlier, and the plaintiff had not had an opportunity to respond. The court denied the request to stay discovery.

Davis v. Coast Dental Services LLC

In *Davis*,[38] the defendant requested discovery be stayed due to unique and novel circumstances, i.e., the defendants raising constitutional challenges to the FTSA. The court found it would be inappropriate for it to grant a discovery stay based on the likelihood of the constitutional arguments' successes before the district court judge had ruled on the arguments. Further, the court rejected the defendant's argument that the cost of discovery was unreasonable and thus discovery should be stayed. The court also declined to bifurcate discovery, explaining that the practice is not favored in the Middle District of Florida due to its causing confusion about what certain discovery requests relate to (the class claims or the individual's claims).

Therefore, the motion to stay or bifurcate was denied.

Mancilla v. GR OPCO LLC

In *Mancilla*,[39] the plaintiff alleged federal claims for violation of the TCPA and state law claims for violation of the FTSA against the operator of a Miami nightclub. The defendant removed the case to federal court based on federal question jurisdiction over the federal TCPA claim and supplemental jurisdiction over the state law FTSA claim. The defendant filed a motion to dismiss the action, challenging the sufficiency of the claims pleaded and certain constitutional arguments regarding the TCPA and FTSA. In response, the plaintiff withdrew the federal claim, leaving the state claim as the sole remaining claim before the court.

Judge Beth Bloom of the Southern District of Florida concluded that because withdrawing the federal claim extinguished federal question jurisdiction, the sole remaining basis for subject matter jurisdiction was the court's discretionary exercise of supplemental

jurisdiction. The court explained that, given the early stage of proceedings, judicial economy and comity weighed in favor of remanding the case. The court therefore declined to exercise supplemental jurisdiction over the state claim and remanded the case to state court.

Bales v. Bright Solar Marketing LLC

Bales[40] involved a discovery dispute in a case in which the plaintiff asserted claims under the FTSA against a solar panel marketing company.

In discovery, the plaintiff sought certain "information for each outbound solicitation call sent by you or your vendors" — what the court referred to as "call records" — as well as certain information regarding the affirmative defense that the defendant obtained the "prior express written consent" of the called parties — what the court referred to as "consent records." The defendant objected to producing the call records and the consent records, and the plaintiff moved to compel. Judge Philip Lammens of the Middle District of Florida granted the motion.

As to the call records, the court provided a host of reasons for ordering their production. The court acknowledged the defendant's argument that it is "inappropriate to discover class member information before there is class certification" but explained that this principle did not apply to the call records because they were "relevant to determining the propriety of class certification." The court also acknowledged the concern that putative class counsel can use class member information to solicit new clients but explained that class counsel had disavowed that motive and were not engaged in "advertising for a putative class."

According to the court, in cases in which courts had denied discovery of class member information based on the solicitation concern, the defendants had provided other information to putative class counsel that could "establish the propriety of class certification," while the defendant in this case did not contend that it had done so. Lastly, the court rejected the argument that producing class member information would violate the privacy of putative class members, explaining that the defendant did not cite any particular privacy law as a basis for that argument or show that disclosing the names and phone numbers of putative class members would violate their privacy. The court added that a protective order was in place that would sufficiently protect the privacy of putative class members and that, under Florida law, the defendant did not have standing to invoke its privacy rights anyway.

As to the consent records, the defendant made a technical argument that it had actually complied with the document request at issue. This argument did not persuade the court. The court observed that the "consent records will go to establishing the predominance factor for class certification, because it implicates standing, which a large portion of the class would lack if they gave consent to the calls."

Muccio v. Global Motivation Inc.

In *Muccio*,[41] the defendant asked for a discovery stay in light of its pending motion to dismiss challenging Article III standing. Judge Aileen Cannon of the Southern District of Florida found that because of the possibility that the motion to dismiss may render additional discovery unnecessary, discovery should be stayed pending a decision on the motion to dismiss.

Borges v. SmileDirectClub LLC

In *Borges*,[42] the defendant challenged the FTSA under the First Amendment as a content-based restriction on speech. Judge John O'Sullivan of the Southern District of Florida ordered that the case be "stayed until the Attorney General of the State of Florida responds to the District Court Certification of Constitutional Challenge."

Venue Issues

Since the FTSA is a Florida Statute, almost all the cases under the statute have been filed in state or federal court in Florida. However, there have been a handful of cases filed in other states — and one decision addressing whether a forum outside of Florida is suitable for such a case.

Simpson v. J.G. Wentworth Co.

In *Simpson*,[43] the plaintiff in a TCPA and FTSA class action moved to transfer the case from the Eastern District of Pennsylvania to the Middle District of Florida. The plaintiff argued that transfer was appropriate because the defendant's recent discovery responses showed that the calls at issue were placed by a vendor with a principal place of business in the Middle District of Florida, which is also where the plaintiff resides.

Judge Karen Marston of the Eastern District of Pennsylvania found both venues to be proper under section 1404(a) — the Middle District of Florida is a proper venue because the plaintiff resides and received the allegedly unlawful telephone calls in the Middle District of Florida. The court also found that the Middle District of Florida had personal jurisdiction over the defendant under Florida's long-arm statute because the alleged injury occurred in Florida. Further, the plaintiff's discovery of the vendor's identity constituted a change

in circumstances sufficient to support transfer. After balancing the private and public interest factors, which weighed in favor of transfer, the court granted the plaintiff's motion to transfer the case to the Middle District of Florida.

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As an analog to venue, we also note that several defendants — including some represented by our Carlton Fields robocall defense team — raised arguments that the FTSA should not apply if the relationship between the plaintiff and the defendant is covered by written terms and conditions governed by a state law *other* than Florida.

Florida courts consistently enforce choice-of-law provisions to preclude statutory claims. As now-Eleventh Circuit Judge Robin Rosenbaum observed, under Florida law, "a choice-of-law provision that provides for the application of non-Florida law precludes a claim under the" Florida version of the unfair, deceptive, or abusive acts and practices act.[44]

Types of Calls Covered Under the FTSA

When the FTSA was amended, much of the commentary around the statute centered on what types of calls are covered under the statute. A few of the decisions issued in 2022 and early 2023 have addressed these types of issues.

In Suescum v. Family First Life LLC

In *Suescum*,[45] the plaintiffs alleged in an amended complaint that the defendant insurance agency violated the TCPA and the FTSA when it sent unsolicited text messages to the plaintiffs after one plaintiff opted out of the text message communication and the other plaintiff's number was on the national do not call registry. The defendant moved to dismiss the amended complaint on the basis that the text messages were merely recruiting messages rather than solicitations, citing various cases holding that the opportunity to earn money does not constitute solicitation. The plaintiffs argued that the text messages were solicitations because they prompted the plaintiffs to view a website that encouraged the purchase of leads to insurance agents.

Judge Wendy Berger of the Middle District of Florida distinguished the present case cited by the defendant and held that the plaintiffs had sufficiently alleged that the defendant's unsolicited texts served as a pretext for commercial activity, which made dismissal improper at this stage.

Soto Leigue v. Everglades College Inc.

In *Soto Leigue*,[46] the plaintiff alleged that she submitted an inquiry to a university through a form on its website but did not consent to receive automated text message solicitations on her cellphone. Nevertheless, the defendant allegedly called the plaintiff 11 times and sent her multiple solicitation emails and text messages. The defendant's messages did not include opt-out instructions, but the plaintiff responded in an attempt to opt out. Despite this opt-out attempt, the defendant continued to send promotional texts. The plaintiff alleged that the purpose of the defendant's messages "was to solicit the sale of consumer services — which she identifies as educational services in the form of university courses."

The FTSA prohibits automated sales calls without the prior express written consent of the called party. The statute defines a telephonic sales call as "a telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services." "Consumer goods and services are defined in relevant part as "real property or tangible or intangible personal property that is normally used for personal, family, or household purposes."

The defendant filed a motion to dismiss, arguing that "college degrees and college courses are not 'consumer goods or services' as defined in the FTSA." Specifically, "an offer to enroll in college courses or to obtain an education is not personal property that can be owned or conveyed." The plaintiff argued in response that "educational services are consumer services, and under the FTSA, the purpose, and not just the content, of a communication controls."

Judge Beth Bloom denied the defendant's motion to dismiss, finding that the communications alleged by the plaintiff were sufficient to state a claim under the FTSA. The court noted that, although the FTSA does not define "personal property," Florida's telemarketing laws suggest the legislature did not intend for communications related to educational services to be exempt from the FTSA. "[The Florida] Telemarketing Act's definition of 'consumer goods or services' is the same as the definition contained in the FTSA … yet unlike the Telemarketing Act, the FTSA does not contain a specific exemption for communications related to educational purposes." The court further noted that "had the Florida Legislature intended to exclude communications related to educational services or university courses from the ambit of the FTSA, it certainly could have done so explicitly."

The court also rejected the defendant's alternative argument that, even if the text messages fell within the purview of the FTSA, they were not actionable because the defendant sent them in response to the plaintiff's online inquiry form, which included consent language. The court found that this was a question of fact that it could not consider at that stage of the case. Further, "[e]ven if it were proper for the Court to determine the extent and validity of the consent language in the form on Defendant's website, as alleged by Plaintiff, the consent language does not include consent to receive telephonic sales calls."

The defendant also moved in the alternative to strike certain paragraphs of the complaint "as immaterial and scandalous allegations regarding the defendant's status as a non-profit entity." The court denied the motion to strike, finding that the defendant had "not demonstrated that the challenged allegations ... [had] no possible relation to the controversy and that they [might have caused] prejudice, such that the drastic remedy of striking is warranted."

Arbitration

It has long been clearly established that TCPA cases — both class and non-class — are subject to arbitration. Several decisions issued this year confirmed that FTSA cases are likewise subject to arbitration.

Helly v. Shutterfly Lifetouch Inc.

In *Helly*,[47] the communications at issue arose out of the plaintiff's use of the defendant's website to place orders for school photos and alleged subsequent violations of Florida Statutes section 501.59. The defendant moved to compel arbitration and dismiss or, in the alternative, to stay proceedings. The defendant argued that pursuant to the terms of service on its website, the plaintiff was contractually bound to pursue her claim through binding individual arbitration.

Judge Patrick Hunt explained that the defendant was required to show the following to establish that the plaintiff's interaction with its website constituted an enforceable arbitration agreement: "(1) its website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms."

With respect to the reasonably conspicuous notice requirement, the court ruled in favor of the defendant. In doing so, Judge Hunt noted that the "terms and conditions" hyperlink that appeared on the defendant's website was both underlined and set off from the otherwise black text in blue. The court held that under the principles set forth in *Berman v. Freedom Financial Network LLC*,[48] the text at issue provided reasonably conspicuous notice of the terms and conditions. The court also found that the plaintiff gave unambiguous assent to those terms because the website stated "[b]y clicking 'submit payment' I agree to the Privacy Statement and Terms and Conditions."

Gaudreau v. My Pillow Inc.

In *Gaudreau*,[49] the plaintiffs alleged that the defendants violated the TCPA and FTSA by sending unsolicited text messages without first receiving express written consent authorizing text message or phone call solicitations. The defendants answered the complaint and then subsequently moved to compel arbitration. In their motion to compel arbitration, the defendants argued that the MyPillow website included a link to its terms of service and its messaging terms and conditions. The messaging terms and conditions stated that a user agreed to receive automated messages to the telephone number provided when signing up and included a mandatory arbitration provision.

Judge David Baker denied the defendants' motion to compel arbitration. The court found that the messaging terms and conditions did not constitute a valid written agreement between the parties because the defendants failed to show that the plaintiffs visited MyPillow's website or provided their phone numbers to MyPillow.

The court also determined that, even if MyPillow had established a written arbitration agreement, it waived its right to arbitrate. Judge Baker found that the Supreme Court's recent holding in *Morgan v. Sundance Inc.*[50] abrogated the Eleventh Circuit's existing precedent on waiver of arbitration. Under the traditional Eleventh Circuit test, waiver only occurred when "(1) [u]nder the totality of the circumstances, the party has acted inconsistently with the arbitration right, and (2) the party's conduct has in some way prejudiced the other party." The Eleventh Circuit's precedent also imposed a "heavy burden" on any party arguing waiver of arbitration due to the federal policy favoring arbitration. Judge Baker found that the holding of *Morgan* "clearly struck down both the prejudice and burden-of-proof requirements, since both are arbitration specific rules justified by the policy favoring arbitration." The court also determined that the first prong of the Eleventh Circuit's test was arbitration-specific and that such a heightened standard for considering waiver of arbitration is impermissible under *Morgan*. Judge Baker reasoned that the court must "start anew" in developing a rule for waiver in arbitration agreements and looked to Florida law as the starting point. Under Florida law,

the court found that MyPillow had waived any purported arbitration right by answering the complaint.

Amargos v. Verified Nutrition LLC

In *Amargos*,[51] the plaintiff filed a class action complaint alleging violations of the FTSA. The defendant originally filed an answer and less than two months later filed a motion to compel arbitration. The plaintiff opposed the motion to compel arbitration, arguing that the defendant waived its right to arbitrate by answering the complaint. In doing so, the plaintiff relied on recent decisions from the Middle District of Florida to support its position, *Gaudreau* and *Steward v. Sage Software Inc.*[52]

The court found that the Supreme Court's holding in *Morgan* abrogated both prongs of the Eleventh Circuit's test. However, relying on the binding precedent set forth in *E.C. Ernst Inc. v. Manhattan Construction Company of Texas*[53] and *S&H Contractors Inc. v. A.J. Taft Coal Co.*,[54] the court ruled that federal law, not state law, governs the waiver of the right to compel arbitration. The court explained that, under federal law, the applicable standard was a totality of the circumstances test to determine whether the defendant acted inconsistently with its contractual right to arbitration.

The relevant factors considered by the court in *Amargos* were that the defendant filed an answer that did not seek arbitration; participated in a court-ordered scheduling conference and submitted a joint planning and scheduling report; participated in the selection of a mediator and the filing of a joint notice of mediator selection; and filed a motion to compel arbitration two months after filing its answer. Under these circumstances, the court found that the defendant's participation was not significant enough to support a finding that it acted inconsistently with its contractual right to arbitrate. The court also noted that the defendant did not remove the case to federal court, did not participate in mediation, exchange discovery, or seek deposition testimony.

Endnotes

1 936 F.3d 1162 (11th Cir. 2019). We are extremely grateful for the assistance of several of our associates who helped with this project: Nathan Foell, Sarah Barney, David McConnell, James Czodli, Holli Credit, Ted Delcima, and Brianna Donet. They are all experienced members of the Carlton Fields robocall defense team.

2 *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019).

3 *Id.* (describing "Salcedo's allegations of a brief, inconsequential annoyance" as "annoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts").

4 *See, e.g.*, *Eldridge v. Pet Supermarket Inc.*, 446 F. Supp. 3d 1063, 1071 (S.D. Fla. 2020) (rejecting plaintiff's argument that *Salcedo* only applies to single text message cases, and noting that "the standing analysis in *Salcedo* focused on the qualitative nature of the alleged harm; the fact that the plaintiff received only one text message did not alter its conclusion that the alleged injuries 'are categorically distinct from those kinds of real but intangible harms' sufficient to confer a plaintiff standing"); *Mittenthal v. Fla. Panthers Hockey Club, Ltd.*, 472 F. Supp. 3d 1211, 1221 (S.D. Fla. 2020) ("*Salcedo* did not turn on the fact that the plaintiff received only one text message. Nor could it have.").

5 489 F. Supp. 3d 1287 (M.D. Fla. 2020).

6 No. 0:19-cv-62290, 2020 WL 913321 (S.D. Fla. Feb. 4, 2020).

7 446 F. Supp. 3d 1063 (S.D. Fla. 2020).

8 472 F. Supp. 3d 1211 (S.D. Fla. 2020).

9 *Id.* at 1224-25 ("The Complaint never says, for example, that reviewing the text messages took an inordinate amount of time.").

10 470 F. Supp. 3d 1327 (S.D. Fla. 2020).

11 *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 463 (7th Cir. 2020); *see also Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 92–95 (2d Cir. 2019); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017); *Cranor v. 5 Star Nutrition, LLC*, 998 F.3d 686, 693 (5th Cir. 2021) (collecting sources).

12 41 F.4th 1354 (11th Cir. 2022).

13 No. 1:22-cv-22168, 2022 WL 4483753 (S.D. Fla. Sept. 27, 2022).

14 No. 8:22-cv-02299, 2022 WL 18456982 (M.D. Fla. Dec. 9, 2022).

15 No. 8:22-cv-2538, 2022 WL 17959844, at *1 (M.D. Fla. Dec. 27, 2022).

16 141 S. Ct. 2190, 2203 (2021).

17 No. 9:22-cv-81004, 2022 WL 17969922 (S.D. Fla. Dec. 27, 2022).

18 No. 2021-020996-CA-01, 2022 WL 2293449 (Fla. 11th Cir. Ct. Apr. 11, 2022).

19 This is the court of general jurisdiction for claims in Florida where there is more than $30,000 at issue.

20 *Saleh v. Miami Gardens Square One, Inc.*, 353 So.3d 1253 (Fla. 3d DCA 2023).

21 353 So.3d 1253 (Fla. 3d DCA 2023).

22 *See Eldridge v. Pet Supermarket Inc.*, No. 2020-006035 CA-01, 2020 WL 13413441 (Fla. 11th Cir. Ct. Sept. 16, 2020).

23 No. 2021-CA-002428, 2022 WL 2679934 (Fla. 9th Cir. Ct. Feb. 24, 2022).

24 *Toney v. Advantage Chrysler-Dodge-Jeep, Inc.*, No. 6:20-cv-00182, 2021 WL 3910135, at *1 (M.D. Fla. Sept. 1, 2021).

25 No. 8:22-cv-00897, 2022 WL 17730114 (M.D. Fla. Dec. 16, 2022).

26 No. 1:22-cv-20183, 2022 WL 834907, at *1 (S.D. Fla. Mar. 21, 2022).

27 No. 8:21-cv-02155, 2021 WL 4427087 (M.D. Fla. Sept. 27, 2021).

28 No. 8:22-cv-00941, 2022 WL 4217141 (M.D. Fla. Sept. 13, 2022).

29 140 S. Ct. 2335 (2020).

30 603 F. Supp. 3d 1334 (S.D. Fla. 2022).

31 576 U.S. 155 (2015).

32 No. 8:21-cv-02902, 2022 WL 3139243 (M.D. Fla. Aug. 5, 2022).

33 No. 1:21-cv-23011, 2022 WL 4269564 (S.D. Fla. Sept. 15, 2022).

34 34 F.4th 1196, 1223 (11th Cir. 2022).

35 No. 2022-CA-003763-O, 2022 WL 17998465 (Fla. 9th Cir. Ct. Oct. 4, 2022).

36 No. 8:21-cv-02155, 2022 WL 1045752 (M.D. Fla. Apr. 4, 2022).

37 No. 1:22-cv-22307, 2022 WL 4110315 (S.D. Fla. Sept. 8, 2022).

38 No. 8:22-cv-00941, 2022 WL 4553071 (M.D. Fla. Sept. 1, 2022).

39 No. 1:22-cv-21211, 2022 WL 3017334 (S.D. Fla. July 29, 2022).

40 No. 5:21-cv-00496, 2022 WL 17272426 (M.D. Fla. Nov. 29, 2022).

41 No. 9:22-cv-81004 [ECF No. 39] (S.D. Fla. Dec. 13, 2022).

42 No. 1:21-cv-23011 [ECF No. 40] (S.D. Fla.).

43 No. 2:22-cv-02911, 2023 WL 349251 (E.D. Pa. Jan. 19, 2023).

44 *Herssein Law Grp. v. Reed Elsevier, Inc.*, No. 1:13-cv-23010, 2014 WL 11370411, at *9 (S.D. Fla. Mar. 5, 2014); *Hardee's Food Sys., Inc. v. Bennett*, No. 9:89-cv-08069, 1994 WL 1372628, at *6, n.4 (S.D. Fla. Mar. 24, 1994) (concluding that where a contract provided that North Carolina law would govern the parties' relationship, "[t]he choice of law provision … preclude[d] Defendants' statutory claim [under Florida law]"); *Martin v. Creative Mgmt. Grp., Inc.*, No. 1:10-cv-23159, 2013 WL 12061809, at *9 (S.D. Fla. July 26, 2013) ("Where the parties agreed to a choice-of-law provision in their contract, claims brought under the statutes of other states are generally inapplicable."); *Arndt v. Twenty-One Eighty-five, LLC*, 448 F. Supp. 3d 1310, 1317 (S.D. Fla. 2020) (finding that an "Agreement's choice-of-law provision precludes Plaintiffs' state-law claim under the FCCPA").

45 No. 6:21-cv-01769, 2023 WL 311144, at *1 (M.D. Fla. Jan. 19, 2023).

46 No. 1:22-cv-22307, 2022 WL 11770137 (S.D. Fla. Oct. 20, 2022).

47 No. 0:22-cv-61270, 2022 WL 18281745 (S.D. Fla. Dec. 29, 2022).

48 30 F.4th 849 (9th Cir. 2022).

49 No. 6:21-cv-01899, 2022 WL 3098950 (M.D. Fla. 2022).

50 142 S. Ct. 1708, 1714 (2022).

51 No. 1:22-cv-22111, 2023 WL 1331261 (S.D. Fla. Jan. 31, 2023).

52 No. 6:22-cv-00012, 2022 WL 4537682, at *2 (M.D. Fla. Sept. 28, 2022).

53 551 F.2d 1026, 1040 (5th Cir. 1977).

54 906 F.2d 1507, 1514 (11th Cir. 1990).

About the Carlton Fields Robocall Defense Team

The federal Telephone Consumer Protection Act (TCPA) restricts telemarketing and the use of automated telephone equipment and limits the use of automatic dialing systems and prerecorded voice messages, text messages, and faxes. The statute touches on virtually every industry and poses a growing threat to any company that uses cellphone texts and calls, as well as faxed messages, to communicate with consumers. Enacted in 1991, the TCPA has recently been reinvigorated by the prevalence and rapid evolution of digital communications.

Likewise, the Florida Telephone Solicitation Act (FTSA) was substantially amended in 2021 and allows for state law claims for unwanted telemarketing calls and text messages.

Lawsuits, including high-exposure class actions, arising from alleged TCPA and FTSA violations are complex and increasingly attractive to plaintiffs' attorneys. Unlike many consumer protection statutes, the TCPA and FTSA place virtually no limit on recoverable damages. It imposes strict statutory penalties of $500 per negligent violation and up to $1,500 per willful or knowing violation, even absent actual injury. Additionally, the four-year statute of limitations can translate to large nationwide class sizes.

Companies struggle to keep up with technological and legal developments in this rapidly evolving and unsettled area of the law. The TCPA and FTSA have been applied inconsistently by courts across the country and are subject to changing regulations and interpretations by the Federal Communications Commission, including, most recently, new rules regarding the meaning of prior consent to receive communications, and agency liability.

Our Services

We defend corporate clients, including financial services and telecommunications firms, against individual and class action lawsuits arising from alleged violations of the TCPA and FTSA. Our extensive national experience encompasses TCPA and FTSA cases stemming from calls to cellphones, text messages, and faxes.

Our robocall defense team regularly handles cutting-edge appellate issues in TCPA and FTSA litigation. We also advise on compliance with the federal statute, its evolving implementing regulations, and related rules and regulations including the Telemarketing Sales Rule, federal and state do not call registries, the Fair Debt Collection Practices Act, and state statutes, such as the Florida Consumer Collection Practices Act regarding call center recordings.

Ultimately, our efforts help our clients achieve their marketing, advertising, and promotional goals while complying with the highly complex laws that are increasingly being used against them in the digital age.

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