

POINT OF SALE

Updates from Benesch's **Retail, Hospitality & Consumer Products** Industry Group

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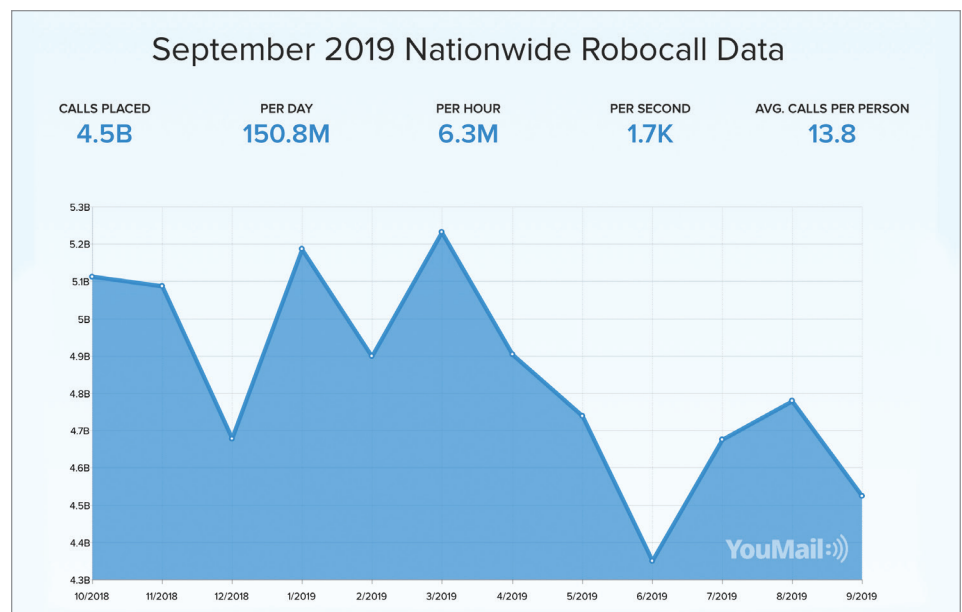
Telephone Consumer Protection Act

Enacted in 1991 to stem the tide of telemarketing calls, the Telephone Consumer Protection Act (TCPA) restricts “the making of telemarketing calls and the use of automatic telephone dialing systems and artificial or prerecorded voice messages,” the Federal Communications Commission (FCC) [explains](#). Regardless of the FCC’s actions to establish a national do-not-call registry, undertaken in coordination with the Federal Trade Commission (FTC), experts say the volume of unwanted telemarketing calls placed via automated means, or “robocalls,” has [grown drastically](#) in recent years. Consequently, consumer complaints continue to rise along with the frequency of these calls.

More Calls, More Complaints

According to YouMail’s [Robocall Index](#), telemarketers placed 4.5 billion calls in September 2019. In the last year, the telemarketers placed the highest volume of calls in March 2019, reaching 5.2 billion calls.

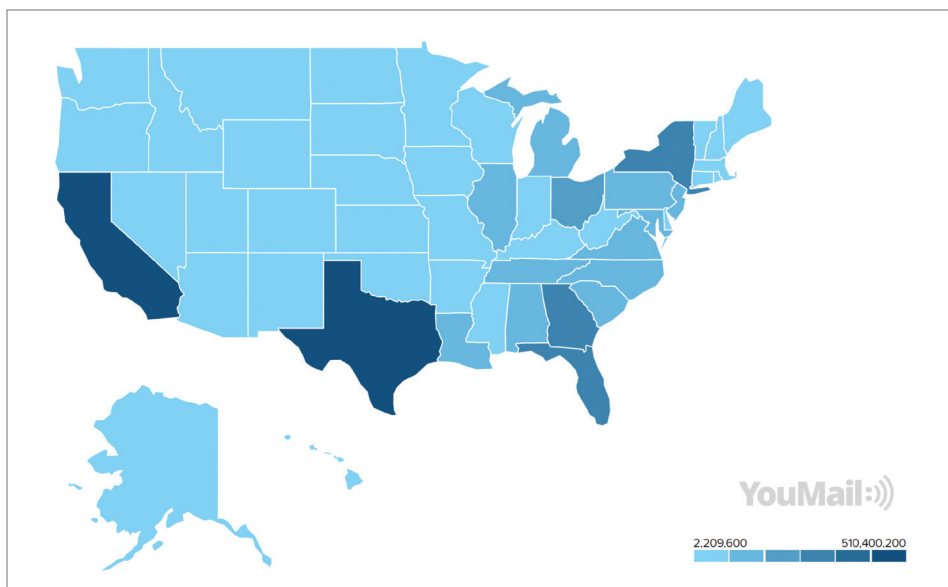
The top affected states in September 2019 were Texas, California, Florida, Georgia, and New York.



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Telephone Consumer Protection Act

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State	Est. Calls Received
Texas	510,400,200
California	468,386,700
Florida	330,436,900
Georgia	271,764,100
New York	270,924,700
Ohio	176,006,300
Pennsylvania	166,999,400
Illinois	162,575,800
North Carolina	159,796,100
Tennessee	137,522,800

Ian Barlow, the FTC's Do Not Call Program Coordinator, stated during a recent interview that the agency handles an average of about 500,000 telemarketers complaints a month. He explains that part of the issue is that it is easy to engage in automated telemarketing since anyone with minor technical know-how can operate an automatic dialing system by downloading the proper software. Because the technology is so widely available and affordable, there is no barrier to entry in this market, Barlow notes, adding that the cost of doing business with robocalling technology is also incredibly low. Barlow opines that even if only a small percentage of people respond positively to these telemarketing messages, the decision to engage in such telemarketing still makes financial sense for many businesses, given the low costs of running such a system.

Giving Carriers More Power

In June 2019, in a move to fight the rise of unwanted telemarketing calls, the FCC [voted unanimously](#) to give mobile phone carriers like Verizon and T-Mobile the power to "aggressively block" unwanted calls. "This FCC will stand with American consumers, not with those who are badgering them with these unwanted robocalls,"

FCC Chairman Ajit Pai said. This would allow carriers to block illegal or unwanted calls before they even reach consumers.

The pressure to do something about robocalls had been mounting in the months leading to the FCC's proposal. "In April, Congress expressed frustration with illegal robocalls and reintroduced bipartisan legislation called the Telephone Robocall Abuse Criminal Enforcement and Defense, or TRACED, Act. The bill would improve enforcement policies, criminalize illegal robocalling, and require phone companies to use a new technology that can validate that calls are originating where they claim to be coming from," CNET [explains](#).

While the FCC's move has been welcomed by wireless carriers, some companies believe that the FCC policy may be too broad, leading carriers to potentially block legitimate telemarketing calls from legitimate sources—mislabeling lawful calls as scam or fraud. This concern has been expressed to the FCC by several trade groups, including ACA International, which represents credit and collection agencies, the American Association of Healthcare Administrative Management, the Credit Union National Association, and the American Bankers Association.

In addition to being a nuisance to consumers, the FCC argues that unwanted telemarketing calls are costing American consumers at least \$3 billion annually in lost time alone. This figure would be higher when accounting for monetary losses from fraud, the agency says. By making it more difficult to reach consumers, the FCC hopes it will break the economic model that leads scammers to use automated calling technology.

Ringless Voicemail

The debate over ringless voicemails has been ongoing. In 2017, a marketing company called All About the Message [petitioned](#) the FCC to issue a ruling that would prevent anti-robocall rules from applying to ringless voicemails. The company ended up dropping the petition, but the issue remains divisive. The Republican National Committee supported the petition, claiming that restricting ringless voicemail would be a violation to the First Amendment right. Senate Democrats, on the other hand, argued that it would allow telemarketers, debt collectors, and other businesses to flood American consumers with unwanted voicemails. Whether ringless voicemails violate the TCPA has yet to be clarified by the FCC or resolved by the courts.

More recently, in the case *Picton v. Greenway Chrysler-Jeep-Dodge*, the defendant [argued](#) that ringless voicemails it placed to communicate with consumers were not subject to the TCPA because voicemail services are “information services” under the Communications Act of 1934. However, this argument was rejected by the district court and ultimately lends more credibility to the notion that ringless voicemails are in fact covered under the TCPA.

First Amendment Right

The constitutionality of the TCPA and its associated regulations is routinely challenged in court on the basis that it violates the First Amendment. By way of example, the NHL team the Tampa Bay Lightning [argued](#) in a recent class action that the TCPA’s restriction on using

automated systems to make calls or send text messages without consumer consent ran afoul of the First Amendment. The team also argued that while the law prohibits a number of private institutions from making automated calls, government-backed debt collectors were unfairly exempted from the ban. This prompted the federal government to lodge a notice of its intention to intervene to defend the statute, which it said was “narrowly tailored” to protect the privacy of consumers and prohibit automated calls that Congress found most problematic. However, the First Amendment argument has not yet been resolved.

Similarly, in October 2019 Facebook [asked](#) the U.S. Supreme Court to review whether the TCPA holds up to the First Amendment’s strict

scrutiny analysis. Facebook asked the Supreme Court to strike down the statute’s automated telephone dialing system restrictions, stating in its petition that the Ninth Circuit improperly usurped Congressional lawmaking power by severing the TCPA’s unconstitutional protection for government debt collectors, Reuters [reported](#). Facebook’s argument is that the decision to strike down the TCPA government-backed debt exemption—rather than striking the TCPA’s automatic telephone dialing system prohibition—was an “extraordinary step” that denied “Facebook any relief from the prohibition it was alleged to have violated and which it successfully argued was unconstitutional.”

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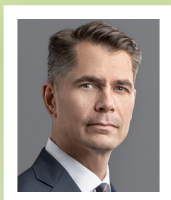
Benesch Ranked in the BTI Litigation Outlook 2020

Benesch has been named to the Honor Roll in Commercial Litigation in BTI’s 2020 Litigation Outlook report. The firm has been named “A Litigation Standout in Class Actions” among the top 23 firms ranked in the BTI Report. Firms in this report are the ones corporate counsel are currently turning to for their most pressing litigation needs.

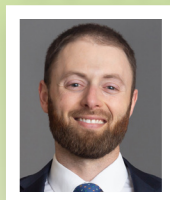
BTI Litigation Outlook 2020 is based solely on in-depth telephone interviews with leading legal decision makers. This comprehensive analysis trends data from more than 350 corporate counsel client interviews. Each year, BTI reaches out to a sample of legal decision makers at large organizations with \$1 billion or more in revenue.

Benesch’s Retail, Hospitality & Consumer Goods Attorneys

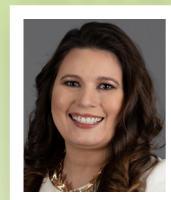
IN THE NEWS



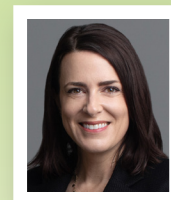
DAVID S. ALMEIDA



MARK S. EISEN



SUZANNE M. ALTON DE ERASO



BRYNA DAHLIN

DAVID ALMEIDA mentioned in Law360
[“11th Circ. To Revisit FACTA Standing Issue In Godiva Suit”](#)

DAVID S. ALMEIDA, MARK S. EISEN, and SUZANNE M. ALTON DE ERASO mentioned in Law360
[“Cannabis Marketing Co. Tossed From Unwanted Calls Suit”](#)

DAVID ALMEIDA and MARK EISEN mentioned in Law360
[“Quest Diagnostics Can’t Use High Court To Evade TCPA Case”](#)

BRYNA DAHLIN quoted in Chicago Tribune
[“SharksBreath, Bio Jesus and Kiwi Skunk: Marijuana companies need to protect their brands. But trademarks are a tricky situation.”](#)

MARK EISEN quoted in Law360
[“11th Circ. TCPA Ruling Could Imperil Class Claims: Experts”](#)

DAVID ALMEIDA, SUZANNE ALTON DE ERASO, and MARK EISEN mentioned in Law360
[“Ill. Biometric Privacy Law Is Unconstitutional, Grocer Says”](#)

Telephone Consumer Protection Act

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Class Action Lawsuits

Recent Class Action Settlements

- In August 2019, Rack Room Shoes [agreed to pay](#) up to \$25.97 million to resolve a class action claiming that the retailer violated the TCPA by inundating millions of consumers with unwanted text messages. The Florida resident who filed the class in 2018 alleged that Rack Room had sent him a handful of messages advertising its rewards program. He said the unwanted messages looked to have been sent using an automatic dialing system, as they were “impersonal and generic in nature” and they came from a “short code” number.
- In October 2019, the Tampa Bay Lightning [reached a settlement](#) in a fan class action suit alleging the NHL team violated the TCPA by flooding him with telemarketing text messages without his consent. In his complaint, the plaintiff said the organization used a ticket contest as a “bait-and-switch” tactic to obtain his and other fans’ phone numbers, and then sent him on an almost daily basis telemarketing and advertising messages. The plaintiff claimed he saw an advertisement offering the chance to win four tickets to the Lightning’s game held on December 6, 2018, a Tampa Bay Lightning Fan Pack, and an exclusive seat visit from mascot ThunderBug if he texted “PARENT” to the short code number 61873. He said that almost immediately after doing so, he received two text messages from the number regarding the “Bolts Text Club,” whose text messages he did not consent to receive.

Other Class Action Developments

- In September 2019, a federal judge [granted class certification](#) in a TCPA suit against health club operator Work Out World (WOW). The judge rejected WOW’s argument that the plaintiff lacked standing because her employer paid her mobile phone bill as well as the argument that the plaintiff spoliated evidence

By making it more difficult to reach consumers, the FCC hopes it will break the economic model that leads scammers to use automated calling technology.

because she failed to preserve the voicemail message she claimed the company left on her phone without consent. The lawsuit alleged that WOW contracted with a vendor to make automated calls to solicit former members to rejoin. WOW’s telemarketing vendor, Global Connect, estimated that 11,389 telephone numbers answered the prerecorded calls and a prerecorded voicemail message was left for 14,419 telephone numbers.

- In September 2019, a California federal judge [entered](#) a \$267 million judgment against debt collection agency Rash Curtis & Associates. A jury had found the agency liable for bombarding consumers with more than 534,000 unsolicited robocalls. The court found that Rash Curtis made more than 501,000 calls with its Global Connect dialer, nearly 2,600 calls using a VIC dialer, and more than 31,000 calls using a TCN dialer.



Biometrics in Retail Spaces

The market for retail biometrics remains in its infancy, but nonetheless continues. Most [trials and deployments](#) in North America remain primarily focused on security and loss prevention. More and more retailers are exploring biometric technology as a way to track customer in-store behavior, using the collected data for advertising and promotional targeting. Biometric tools [enable](#) retailers to identify and track shoppers in brick-and-mortar stores and learn their preferences, similar to how online retailers use cookies. Retailers can then use the information to interact with shoppers via their phones, in-store signage, or other ways.

Given the sluggish nature of brick-and-mortar retail outlets, some U.S. malls have started to use biometric technology to detect facial features and individuals' movement anonymously. "Artificial intelligence is then used to mine that data to determine traffic patterns, worker performance and consumer reaction to displays and marketing," *The Wall Street Journal* [explains](#). For instance, NewMark Merrill Cos., which owns 80 shopping centers in California, Colorado, and Illinois, has rolled out facial recognition technology at its Janss Marketplace in Thousand Oaks, California, and plans to deploy the technology in more locations. "Landlords are hoping they can mine insights on consumer behavior from aggregate data to demonstrate and increase the value of bricks-and-mortar," the article notes.

In September 2019, for example, Microsoft launched a suite of software tools to help brick-and-mortar retailers track customers and adjust services accordingly. The offering "will utilize a combination of computer vision, cameras, and IoT sensors to track customers inside stores and personalize recommendations based on their browsing and buying behavioral data," VentureBeat [reports](#).

As CB Insights [notes](#): "Linking facial recognition to personalization for shoppers presents a big opportunity in retail." The technology is able to capture what a shopper is looking at and enable retailers to offer related promotions to shoppers.



Facial recognition technology is also tied to improved customer service in the hospitality industry. CB Insights [explains](#): "Starting with a photo on one's account, for example, this technology could allow a guest to simply walk into a hotel to activate her check-in. The person could use her image to enter her room as well." This technology could free up staff to serve guests with more personalized services.

Biometric experts [believe](#) the technology could be tied to customer loyalty programs. Peter Trepp, CEO of Los Angeles-based biometric FaceFirst, explains that linking facial recognition technology to consumer loyalty programs would have to be done in a "friendly opt-in environment, where privacy is not the cornerstone issue." With consumers opting-in to the systems, this would allow retailers to engage and interact with them.

While retailers may be tempted to collect as much data about their customer as possible for the sake of offering them promotions or personalized experiences, experts [warn](#) that companies must be judicious about the data they collect. Such retailers must be aware of emerging privacy regulations and become more transparent about their data-collection activities. Failure to do so could not only impact their reputation but could also result in unwanted biometric litigation.

The Wall Street Journal [reports](#) that there is currently no federal legislation regulating how transparent companies have to be about their use of biometric technology or how to obtain authorization from individuals in commercial

spaces. Three states so far have adopted bills to protect biometric information collected from individuals—Illinois, Texas, and Washington. Numerous other states are in various stages of adopting similar legislation. However, presently only the Illinois version of the law allows individuals to file private lawsuits to enforce violations.

Class Action Lawsuits

Bloomberg Law [reports](#) that law firms are forming new practice groups and hiring lawyers to take on the rise in biometric privacy litigation in Illinois. In January 2019, the Illinois Supreme Court ruled that consumers do not have to show specific harm to sue companies under the state's Biometric Information Privacy Act (BIPA). The ruling is opening the door for more plaintiffs to file class action suits to seek damages for alleged misuse of personal data.

In fact, a number of BIPA-related class action lawsuits have recently made headlines in Illinois:

- A class action lawsuit was [filed](#) against Walmart in January 2019. The suit claims the company obtains employee fingerprints without worker consent in violation of BIPA. The class action against Walmart claims that the retailer's failure to comply with the BIPA exposed workers who had their information scanned to privacy and security risks.

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Biometrics in Retail Spaces

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- In September 2019, an employee of Hilton Hotels [filed](#) a lawsuit against the company over its use of biometric fingerprint technology, which she says is a violation of Illinois BIPA. According to the complaint, employees are required to scan their fingerprints into a biometric scanner when clocking in and out of their work shift and when taking breaks. The plaintiff also alleges that employees never gave their informed consent to have their personal information collected.
- In October 2019, class action suits were [filed](#) against Midwest Gaming & Entertainment, the owner of Rivers Casino in Des Plaines, Illinois, and another was filed against pharmacy retail giant Walgreens. The lawsuit against Rivers Casino points to the casino's use of facial recognition in its video surveillance system to track the movements of people. The lawsuit alleges that the technology creates a digital record, unique to each person, using each person's facial geometry. When paired with information from the casino's customer rewards program, the biometric system can create a way for the casino to identify individuals as they move about the gaming floor and elsewhere in the casino. Furthermore, the complaint alleges that the casino did not obtain written consent from patrons before scanning and storing their biometric data. In the Walgreens case, the complaint related to the chain's deployment of digital cooler doors. The doors use a system of sensors and cameras to scan and record consumers' choices at the coolers, which display an assortment of chilled beverages, ice creams, and other refrigerated foods and drinks. The technology then allows Walgreens to target customers with advertisements and coupon offers, displayed on the cooler doors, as they browse the stock. The plaintiff claims Walgreens did not obtain consent from customers before scanning their faces, and then allegedly sharing that data with third parties.

Businesses and law-enforcement organizations around the U.S. are starting to embrace facial recognition technology.

Stadiums

Biometric technology has started to make its way into stadiums. In Denmark, for example, soccer club Brøndby IF has [installed](#) security cameras and software developed by Panasonic at its stadium to identify banned fans in a crowd of up to 25,000. In the past, the club would hand out printed photographs of blacklisted guests to security staff before games—a system that had little success. The biometric system uses machine learning to spot guests whose faces match uploaded photographs. If a banned guest is detected, a security guard is sent out to ask the guest to leave. As *The Wall Street Journal* [notes](#): “Brøndby sought permission from the Danish Data Protection Agency to use the technology and agreed to certain conditions for handling fan images. The stadium must clearly indicate to guests that it is processing their biometric data and keep the system disconnected from the internet.”

Businesses and law-enforcement organizations around the U.S. are starting to embrace facial recognition technology. This is also true for stadiums hosting major sport teams. Biometric is being used to improve the ticketing process. For instance, biometric identification platform CLEAR has [partnered](#) with a few Major League Baseball teams, including the Texas Rangers, Baltimore Orioles, Minnesota Twins, and New York Mets. With this technology, fans attending games can enter the ballpark with a fingerprint scan instead of a paper or mobile ticket. Out of the MLB's 30 teams, 11 allow fans to [enter a stadium](#) using biometric systems. To use biometric ticketing,

a fan must be a CLEAR member and link their CLEAR profiles with an MLB.com account.

As [reported](#) in *Crain's New York Business*, CLEAR is pitching itself as the company that will make customers' wallets obsolete. The company has made the most progress through its stadium access technology, speeding up fans' entry to major sport events (NFL, MLB, and others) at 19 venues around the country. The article notes that “CLEAR sees the free offering as far more than a promotional tool. Stadium access sign-ups feed the payment-service systems that the firm has been operating at concession stands in CenturyLink Stadium and T-Mobile Park, both in Seattle.” For example, in September 2019, the New York Mets [rolled out](#) AI and biometric powered self-checkout kiosks developed by CLEAR at its Citi Field stadium, letting fans pay for their drinks and snacks using just a touch of their finger.

False Labeling in Cannabis Industry

There has been an explosion of consumer interest for products containing CBD oil in recent years. While CBD oil can be extracted from cannabis, it can also be [derived](#) from hemp, making it legal in the U.S. at both the federal and state levels. With the number of CBD oil companies and products growing at a rapid pace, there is bound to be a wide difference between the quality of the products and questions about the ingredients inside of them. The challenge in this space is that regulations for many other types of supplements or products on the market are not yet present for CBD products. Furthermore, many consumers are not aware of this lack of regulatory oversight and assume that the labeling is accurate with respect to what ingredients are inside these products or the claims made about them.

Class Action Lawsuits

The growing consumer interest in CBD products has also led to a greater number of class action lawsuits. Some [predict](#) that many future lawsuits are expected to focus on allegation of false or misleading labeling, accusing companies selling these products of falsely representing their CBD content. This trend has already started:

- In October 2019, a class action suit was [filed](#) in Florida against Just Brands USA alleging that the company's JustCBD line of cannabidiol product contains more than CBD. The complaint, which was filed in Illinois district court, claims that the product also contains tetrahydrocannabinol (THC), the main psychoactive component found in cannabis and an element the company explicitly said was absent from its JustCBD products. The lawsuit focuses on the company's allegedly false advertising of its gummies, vape oils, bars, creams, and dried fruits, which all prominently display "No THC" on their labels.
- A separate lawsuit targeting Just Brands USA was filed in Florida in August 2019. The company is [accused](#) of overstating the amount

of CBD in its products. The complaint alleges that JustCBD Liquid Honey is advertised as containing 100 mg of CBD, but independent testing concluded the product only contains 48.92 mg. The complaint also alleges that some of the company's products contain an undetectable quantity of CBD while the products are specifically advertised as containing the ingredient. "By misrepresenting the true quantity of CBD in their CBD products, defendants are able to charge a substantial price premium on account of these fictitious CBD quantity claims," the lawsuit argues.

- In September 2019, a class action suit was [filed](#) in Massachusetts district court against Global Widget, which does business under the name Hemp Bombs. The company is accused of intentionally under-dosing the amount of CBD in its products. Specifically, Hemp Bombs, according to the complaint, has allegedly created a marketing strategy meant to benefit from the growing demand for CBD products. The complaint notes that Hemp Bombs "make[s] numerous false and misleading claims" on its labels and website with respect to the CBD potency of its products. The complaint alleges that the products contain less CBD than what is indicated on product labels. The lawsuit adds that CBD dosage is important for consumers, as they rely on this information when buying a product and pay a premium for higher dosages of cannabidiol.
- In a class action lawsuit [filed](#) in the Southern District of Florida, plaintiffs are accusing Green Roads of Florida of misrepresenting the amount of CBD that is actually contained in its products. The complaint claims the company uses its packaging, labeling, and website to make potential customers believe they have consumed more CBD than its products contain. The lawsuit describes the booming CBD industry as a market in which unscrupulous players can sell their products almost unchecked. The

lawsuit points to Green Roads of Florida's CBD gummies, "Relax Bears," which are advertised as containing a total of 300 mg of CBD when they actually contain about 258 mg. Similarly, the complaint alleges Green Roads claims its oil contains 17 mg of CBD per milliliter, when the product only contains about 13 mg of CBD per milliliter. The plaintiffs allege they would not have paid the listed price for these products if the product contained less CBD than indicated on the product label. The complaint alleges unjust enrichment and violation of Florida's deceptive and unfair trade practices.

- In September 2019, another Florida-based retailer, Diamond CBD, and its parent companies, Capital Ventures and PotNetwork Holdings, were hit by a class action lawsuit [claiming](#) their products didn't contain the advertised amount of CBD and that customers were thus cheated through false and deceptive product labels. Plaintiff Kathryn Potter says she purchased about \$120 worth of CBD gummies from Diamond CBD's website. The site claimed that each product contained anywhere from 150 mg to 550 mg of CBD. The complaint alleges the actual amount of CBD contained in these products was far less, although the complaint does not indicate how the actual amount of CBD was determined to be allegedly false by plaintiff. The company's "unfair and/or deceptive acts were likely to deceive reasonable consumers," the complaint says.

A Need for Regulations?

Experts [believe](#) the slew of class action lawsuits filed over the mislabeling of CBD products, especially in the state of Florida, suggests a growing need for more stringent regulation and enforcement of the hemp and CBD industries. As [noted](#) in Law360, "with the dramatic expansion of the cannabis industry, many felt it was only a matter of time before the consumer class actions began. That's especially true given the lack of federal standards for these products."

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False Labeling in Cannabis Industry

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The FDA has yet to [issue](#) regulations on cannabis products, including CBD. Because CBD is an active ingredient in an approved pharmaceutical drug, Epidiolex, which is used to prevent seizures, it cannot be considered as a dietary supplement or food under the Federal Food, Drug, and Cosmetic Act. So far, the FDA's stance is that it does not need to issue regulations on products containing CBD. "The FDA has sent warning letters to companies selling CBD products about making unsupported health claims, but that's the extent of the agency's enforcement so far," Law360 reports. Experts believe that until there are federal standards in place for CBD products, companies will continue to take advantage of this unregulated market.

The mislabeling of a CBD products is not itself a new trend. A 2017 [study](#) published in the *Journal of the American Medical Association* [showed](#) 70% of CBD products purchased at 31 different companies were inaccurately labeled, with labels claiming that the products contained a certain amount of CBD and no other compounds. The study also found that in 26% of cases, the products did not contain as much CBD as was actually advertised on the accompanying product label. In many other cases, the study found that

there was THC present in products that were labeled as only containing CBD.

That said, the FDA has intervened in cases related to health claims made by companies selling CBD products. For instance, in July 2019, the FDA [told](#) Wakefield, Massachusetts-based cannabis company Curaleaf that it was "illegally selling" CBD products with "unsubstantiated claims" that the products treated cancer, Alzheimer's disease, opioid withdrawal, pain, and pet anxiety. The company was forced to remove from its website and social media accounts health claims that were made about its products.

[Research](#) from the Grocery Manufacturers Association (GMA) shows that 40% of Americans who have heard of CBD believe it is a synonym for cannabis. Furthermore, 76% of Americans assume CBD is regulated at the federal level, including 53% who believe the FDA oversees the safe use and marketing of CBD. The widespread confusion among consumers is one significant reason why some stakeholders [believe](#) the FDA needs to create clear, uniform guidelines to regulate the manufacturing of CBD products. "Without regulatory oversight and little confirmable information, consumers are confronted with

a Wild West-style CBD market, featuring over 1,000 CBD products that promise a dizzying array of unsupported claims," says Geoff Freeman, president and CEO at GMA. There are others, however, who believe that it does not make sense to regulate CBD, pointing to the fact there are very few risks related to CBD consumption and arguing that it should be treated more like a vitamin than a drug. The FDA does not regulate supplements so long as manufacturers do not make extraordinary claims about a supplement's benefits. Some argue that if manufacturers want to seize the opportunity of the CBD market and avoid government regulations and restrictions, they should move quickly to regulate themselves. As Kevin Murphy, chairman and CEO of cannabis operator Acreage Holdings, writes in *Forbes*: "If the industry wants to make the case for self-regulation, producers will have to do a better job of taking their responsibility seriously. It's not enough to treat CBD like a marketing gimmick. There is huge demand for CBD right now, but if customers buy products that have less CBD than advertised or that over-sell the benefits to be derived from taking it, there's a huge risk of turning people off CBD."

As a reminder, this Advisory is being sent to draw your attention to issues and is not to replace legal counseling.

UNITED STATES TREASURY DEPARTMENT CIRCULAR 230 DISCLOSURE: TO ENSURE COMPLIANCE WITH REQUIREMENTS IMPOSED BY THE IRS, WE INFORM YOU THAT, UNLESS EXPRESSLY STATED OTHERWISE, ANY U.S. FEDERAL TAX ADVICE CONTAINED IN THIS COMMUNICATION (INCLUDING ANY ATTACHMENTS) IS NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (i) AVOIDING PENALTIES UNDER THE INTERNAL REVENUE CODE, OR (ii) PROMOTING, MARKETING OR RECOMMENDING TO ANOTHER PARTY ANY TRANSACTION OR MATTER ADDRESSED HEREIN.

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Summary Findings

Development	Summary	Implications
<p>More Robocalls, More TCPA Complaints</p>	<p>The number of automated telemarketing calls, or “robocalls,” has risen in recent years. The technology is easily accessible and is cheap to use. This trend has led to more complaints being filed to the FTC, more class action lawsuits being brought to court, and more pressure from consumers to have regulators do something about it.</p>	<p>The FCC is looking to give mobile phone carriers the power to block unwanted automated telemarketing calls, but some believe this could block calls from legitimates sources.</p> <p>The constitutionality of the TCPA and its associated regulations has been contested on the basis of First Amendment rights. The federal government argues that the rule is “narrowly tailored” to prohibit the most problematic calls. Facebook has asked SCOTUS to review whether TCPA holds up to First Amendment strict scrutiny analysis.</p> <p>Several TCPA-related class action lawsuits have been filed in the last quarter. Most of these suits focus on automated calls made to consumers without their proper consent.</p>
<p>Biometrics in Retail Spaces</p>	<p>More retailers are exploring the use of biometric technology, including facial recognition software, to track the movement and behavior of customers in their stores. Initially focused on security and loss prevention (i.e., theft), some retailers are using biometric systems to observe customers and then interact with them by sending advertisements or tailored promotions.</p> <p>Biometric tools are also starting to make their way into stadiums. Several MLB teams are using the technology—mostly through vendor CLEAR—for ticketing and concessions sales purposes.</p>	<p>These practices have led to concerns and lawsuits over personal privacy and consumer consent. This is especially the case in Illinois under the state’s Biometric Information Privacy Information Act, which allows consumers to file class action suits over alleged misuse of personal data.</p> <p>Walmart and Hilton Hotels are involved in lawsuits over the use of the technology to track employees, while Rivers Casino and Walgreens are currently being sued for tracking the movement of customers or patrons without their informed consent.</p> <p>Sports teams or stadium operators have yet to appear in any lawsuits related to the use of biometric technology. This is probably related to the fact that fans have to register an account (i.e., they have the choice to register for one) to be able to use the technology.</p>
<p>False Labeling in Cannabis Industry</p>	<p>The explosion of consumer interest in products containing CBD oil has led to the rapid growth of this yet-to-be-regulated market. More companies are entering the space, offering an assortment of products.</p> <p>Consumers are not always aware of the lack of regulation in the CBD industry and assume that product labeling is accurate.</p>	<p>Class action lawsuits focused on mislabeling and false advertisement have been filed against a number of companies selling products containing CBD oil. Most of them point to misleading claims about the ingredients (i.e., “No THC”) or amount of CBD in the products being sold.</p> <p>Experts believe the growing number of class actions suggests the need for regulations and federal standards. The FDA only intervenes when these products make unsubstantiated health claims. Some stakeholders are asking for the industry to self-regulate before government restrictions start affecting commercial opportunities.</p>