

COLUMNS

FTC files suit to end abusive mobile marketing campaign

May 6, 2011



By [David S. Almeida](#)

In addition to reaching settlements with Google and Twitter over their privacy practices, the Federal Trade Commission has stepped into another digital arena and filed its first lawsuit challenging a mobile marketing campaign.

The complaint, filed in the United States District Court for the Central District of California, alleges that California resident Phillip Flora sent millions of unsolicited short message service ("SMS") text messages advertising various loan modification and debt-relief programs to consumers.

Number of issues

According to the complaint, Mr. Flora, beginning August 2009, transmitted or arranged for the transmission of at least 5.5 million allegedly unfair, deceptive and unsolicited commercial electronic text messages.

The messages were sent "for the primary purpose of promoting products and services, including [] loan modification programs and debt relief services."

The FTC contends that the ads violated Section 5 of Federal Trade Commission Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce."

Acts or practices are considered unfair under the FTC Act if they cause substantial injury to consumers that they cannot reasonably avoid.

In addition to the "annoyance, frustration and sense of harassment," the complaint contends that Mr. Flora's transmission of millions of unsolicited texts was unfair because many of the recipients were charged a fee for receipt of the messages.

The FTC charged that the ads were deceptive because they directed users to a site with "gov" in the domain name loanmod-gov.net even though the site was "not a Web site operated by or affiliated with a federal, state or local governmental entity or agency."

Also, the FTC took considerable exception to Mr. Flora's alleged practice of collecting and selling the phone numbers of the wireless devices of many consumers who responded to his unsolicited texts to request that he stop sending them messages.

In addition to his SMS activities, Mr. Flora beginning June 2010 also allegedly sent unsolicited commercial emails to consumers in violation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. 7706(a) ("CAN-SPAM").

The FTC asserted that Mr. Flora's commercial email messages violated CAN-SPAM because they failed to include, among other things, a "clear and conspicuous notice" of the recipients' right to opt-out or a valid physical address.

The FTC's complaint seeks preliminary and permanent injunctive relief to "prevent future violations of the FTC Act and CAN-SPAM by [Mr.] Flora," as well as monetary relief to redress consumers' injuries and the disgorgement of ill-gotten gains.

Consent, or dissent

Although the Flora lawsuit is the FTC's first foray into litigation over mobile marketing, consumers have been seeking judicial redress for receipt of allegedly unsolicited text messages for some time.

A federal appellate court's 2009 ruling that text messages were phone calls and therefore actionable under the Telephone Consumer Protection Act, 47 U.S.C. 227 opened the door to private causes of action against mobile marketing campaigns.

Since that ruling, numerous putative class action lawsuits have been filed across the country based on the alleged receipt of unsolicited text ads.

Companies engaging in this ever-increasing and extremely effective form of marketing are cautioned to ensure prior, express consent for recipients of text ads, as well as the accuracy of any information provided by marketing partners.

David S. Almeida is an attorney with [Sedgwick](#), a law firm in Chicago. Reach him at david.almeida@sedgwicklaw.com.

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