



FTC Files First Lawsuit Against ‘Text Spam’

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Spam seems to be everywhere these days, and it has now invaded your wireless handheld.

Last month, the Federal Trade Commission filed its first lawsuit ever against an alleged perpetrator of “spam texting” – the practice of sending unsolicited commercial text messages to a large number of people.

The FTC is alleging that Phillip Flora of Huntington Beach, Calif., sent some five million unsolicited commercial texts to wireless handhelds to promote his debt relief and loan modification programs. Flora’s mass texting, according to the FTC, violated the Federal Trade Commission Act because his “acts or practices ... are unfair.” Although the allegation may sound vague, a closer review of the FTCA and the FTC’s jurisdiction may show that the case against Flora has a substantial basis in law.

The FTC also charged Flora with other violations of the FTCA as well as of the CAN-SPAM Act, including deceiving consumers by representing a government affiliation and sending commercial e-mails without the required return address and opt-out provisions. The “unfairness” allegation, though, raises the most interesting questions under the law.

The statute that gives the FTC authority to prevent “unfair” commercial practices also limits the agency’s jurisdiction to those practices (1) causing substantial injury to consumers, (2) which are not reasonably avoidable, and (3) which are not outweighed by benefits to consumers or competition. In its suit against Flora, the



FTC alleged that the mass spamming caused substantial injury since text recipients were often charged under their cell phone plans for text messages received. Recipients could not reasonably avoid the messages because the text spam was “foisted upon consumers,” including those who specifically requested to receive no more messages. As for the third part of the “unfairness” test, the FTC merely asserted that there were no benefits outweighing harm to consumers without elaborating.

The biggest question appears to be whether or not text spam in fact causes substantial injury to consumers. Can a charge of less than a dollar be considered substantial? [The Commission itself has previously stated](#) that it “is not concerned with trivial or merely speculative harms.” However, the FTC emphasized the large number of text spam recipients, and it has previously noted that a small harm to a large number of people could be considered substantial. Whether the court will agree is another question, but the FTC does appear to have decent arguments for why it has authority to pursue text spammers.

Consumers themselves have also been going after text spammers. Class actions have been filed recently against, for example, Domino’s Pizza, Burger King, and Simon & Schuster for their text advertising. These lawsuits, which allege violations of the Telephone Consumer Protection Act, have regularly resulted in multimillion-dollar settlements – including up to a \$250 reimbursement to each text recipient.

FTC Beat is authored by the [Ifrah Law Firm](#), a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

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