Advertising Law

manatt

March 10, 2011

In This Issue

Editors: Linda A. Goldstein | Jeffrey S. Edelstein | Marc Roth

FTC Files Suit Against Alleged SMS Spammer

The Federal Trade Commission brought its first suit against an alleged Short Message Service ("SMS") spammer who the agency claims sent more than 5.5 million unsolicited messages to consumers' mobile phones.

The agency is seeking to freeze the assets of the California-based defendant, Philip A. Flora, to shut down his operation.

The messages advertised a variety of services, including loan modification assistance and debt relief, according to the FTC, and some messages were designed to deceive consumers into thinking they were sent from a government site.

Sending text messages at a "mind boggling" rate of what the FTC estimates to be 85 per minute, 24 hours per day, the defendant caused consumers to lose money because many were forced to pay fees for the unsolicited messages to their mobile carriers, according to the complaint.

The messages instructed recipients to visit a specific Web site or respond to the message. However, if the recipient responded, the defendant collected the consumer's information and would then sell it to marketers, the FTC alleged, including those who contacted Flora to request that he stop sending them spam texts.

Further, the defendant misrepresented that he was affiliated with a government agency, as one of the sites listed in the messages was "loanmod-gov.net," which purported to provide "Official Home Loan Modification and Audit Assistance Information," and used images like an American flag. "Homeowners, we can lower your mortgage payment by doing a Loan Modification. Late on payments OK. No equity OK. May we please give you a call? loanmod-gov.net" read a text from the defendant.

The FTC also charged the defendant with violations of the federal CAN-SPAM Act for allegedly sending unsolicited e-mails advertising his text message blasting service that failed to include his physical mailing address and a way for recipients to "opt out" of future messages.

To read the complaint in *FTC v. Flora*, click here.

Why it matters: The complaint against Flora, the first filed against an alleged text spammer, is two-fold. The agency alleges that his unsolicited text messages violated Section 5 of the FTC Act (as CAN-SPAM does not cover text messages) as an unfair and deceptive business practice, particularly because many consumers were charged by their mobile carriers for receiving the texts. In addition, the defendant's use of spam e-mail to advertise his spam text services constituted a violation of CAN-SPAM, the FTC claims. While it is the agency's first foray into spam texts, consumers have previously filed their own suits, alleging that spammers have violated the Telephone Consumer Protection Act by sending unwanted text messages.

back to top

Industry Groups Respond to FTC Privacy Report

A number of industry organizations filed comments in response to the Federal Trade Commission's privacy report, saying that self-regulation is an effective measure to protect consumer privacy on the Internet and, therefore, Do Not Track legislation is unnecessary.

On Dec. 1, 2010, the FTC released its preliminary staff report, "A Preliminary FTC Staff Report on Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers."

In addition to laying out three principles for businesses to follow to protect consumer information, the report called for a Do Not Track mechanism for online behavioral advertising.

The agency sought public comment on the report, and in a joint filing, the American Advertising Federation, American Association of Advertising Agencies, Association of National Advertisers, Direct Marketing Association, and the Interactive Advertising Bureau responded.

Calling legislative solutions "too inflexible" to respond to technological developments, the industry groups said that "self-regulation and education constitute the most effective framework for protecting consumer privacy while ensuring the Internet remains a platform for innovation."

The groups advocated for continued utilization of the industry's self-regulatory program with the use of the DMA's accountability program and the National Advertising Review Council, as well as the advertising option icon, which the groups said "realizes the Commission's vision for a Do Not Track mechanism."

"Self-regulation is responsive to government and consumer concerns, feasible in light of existing technology and business practices, and flexible enough to respond to the rapid innovation that is characteristic of this highly complex and technologically sophisticated and rapidly developing marketplace," the groups wrote.

In separate comments, the Promotion Marketing Association similarly argued that a government-mandated Do Not Track mechanism would be "unnecessarily restrictive on the flow of information, and would be detrimental to both online businesses and consumers."

The association expressed concern about the creation of standardized policies across all industries, which use consumer information in significantly different ways. "The implementation of such a mechanism would likely increase the cost of advertising by reducing the availability of behavioral advertising as a valid marketing tool, harming both the consumer and industry members," the PMA wrote in comments co-authored by attorneys at Manatt, Phelps & Phillips.

To read the comments from the 4As, AAF, ANA, DMA, and IAB in their entirety, click here.

To read the PMA's comments, click here.

Why it matters: When the time period for public comment expired February 18, 439 comments had been filed with the FTC. Reactions to the agency's report varied, from the advertising industry's concerns to a comment filed by a coalition of 15 states, encouraging the FTC to consider the size, scope, and resources of businesses, as well as emphasizing the need to protect the privacy of children. Several consumer groups also weighed in, supporting the Do Not Track feature among other limitations on the collection and use of consumer data.

back to top

NAD Recommends Sherwin-Williams Discontinue "Line Claim"

In a challenge brought by competitor Benjamin Moore, the National Advertising Division determined that Sherwin-Williams should modify claims for its Harmony line of paints, which it advertised as being completely free of volatile organic compounds ("VOCs"). Claims included "No-VOC formula" and "Zero-VOC formula," as well as an implied claim that the entire line of paints – including base paint and color paint – contained no VOCs.

The parties agreed that a "zero VOC" or "no VOC" claim is substantiated if the VOC content of the paint contains less than 5.0 grams per liter (g/L) VOC.

While the base paint of the Harmony line paints may contain a de minimis VOC level, Benjamin Moore argued that when conventional colorant is added, the VOC levels increase dramatically, in some cases, up to 17 and 47 g/L, far exceeding the de minimis standards. Nowhere in Sherwin-Williams' advertisements did the company disclose that its zero-VOC claims apply only to the base paint and not to its combined paint color choices, Benjamin Moore contended.

Sherwin-Williams countered that the NAD should recognize that both consumers and paint manufacturers interpret zero-VOC claims to be applicable to the majority of possible tints and colorants – but not to every possible formulation.

But the NAD disagreed.

Even though most of the Harmony line colors fall below the 5.0 g/L, the NAD said that "in the absence of a disclaimer, there is no reason to assume that such consumers inherently understand the variability of ingredients in different colors of paint such that they would know that certain colors of a zero-VOC line of paint may exceed a 5.0 g/L or other acceptable threshold."

"A line claim reasonably communicates that the performance promised (zero-VOC) is true for all of the products in the line. The evidence in the record demonstrates that not all of the paint colors in the Harmony line perform as promised," the NAD determined.

The NAD said that Sherwin-Williams might be able to limit its zero-VOC claims to the Harmony base paint, or provide clarification that exceptions to the line claim existed, using clear and conspicuous indications that use of some colorants may result in higher VOC levels.

To read the NAD's press release about the decision, click here.

Why it matters: "An advertiser must provide a reasonable basis for all express and implied claims in its advertising," the NAD wrote. "In order to substantiate a line claim, an advertiser must produce evidence demonstrating that all of the products in the line will perform as promised."

back to top

Groupon Accused of Violating Gift Card Laws

Groupon violates California state and federal gift certificate laws that prohibit or restrict expiration dates, according to a recent class-action lawsuit.

Plaintiff Anthony Ferreira claims that Groupon's Daily Deals, a list of discounts at local businesses, constitute gift certificates. Ferreira paid $25 for a Groupon gift certificate redeemable for $50 at retailer Nordstrom Rack on Nov. 21, 2010, which expired on Dec. 31, according to the complaint, and he did not use his Groupon deal before it expired.

Under some state laws, expiration dates on gift certificates are prohibited; under the federal Credit Card Accountability Responsibility and Disclosure Act, gift certificates must be valid for at least five years.

"Groupons" constitute promises that meet the statutory definition of "gift certificate," the suit alleges, because they are promises purchased on a prepaid basis in exchange for payments that are issued in a specified amount not to be increased or reloaded, and are redeemable at a single merchant that honors it upon presentation.

Groupon also subjects its almost 40 million international members to other deceptive and unfair conditions, such as requiring consumers to redeem the deals in the course of a single transaction and preventing them from redeeming an unused portion for a cash amount, according to the complaint.

The suit, which also names Nordstrom and other Groupon retail partners as defendants, seeks to certify a national class of plaintiffs, estimated in the millions. In addition to restitution and punitive damages, the plaintiffs want the defendants to fund a corrective advertising campaign.

To read the complaint in *Ferreira v. Groupon*, click here.

Why it matters: Groupon faced a similar lawsuit in 2010, which the company settled. While financial details of the settlement are unknown, the company changed its terms of service to require that merchants honor any Groupons for the period of time required by the relevant gift card law in the state in which it was purchased. In addition to federal gift card requirements, states have enacted various laws that prohibit or restrict expiration dates on gift cards. Companies should be aware of the patchwork of laws and consider whether their offers might constitute a gift certificate under statutes.