

Throttled: TracFone Enters \$40 Million Settlement With FTC over “Unlimited” Plans

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On January 28, 2015, TracFone Wireless, Inc. – the largest prepaid mobile provider in the United States – agreed to pay \$40 million in restitution to the Federal Trade Commission (FTC) over charges that the company deliberately misled millions of consumers when it promised, and deceptively failed to provide, “unlimited” data plans.

The FTC alleged that TracFone advertised \$45 per month unlimited plans, but systematically throttled and/or suspended customers’ connections after they passed a certain usage threshold, in violation of Section 5 of the FTC Act, which prohibits “unfair and deceptive” trade practices.

In addition to the blockbuster settlement figure, the Order stipulates that TracFone must comply with a number of stringent compliance reporting requirements.

The Allegations

Throttling

According to the complaint, since 2009, TracFone has widely advertised “unlimited talk, text, and data” plans to millions of mobile consumers.

However, after a subscriber on an “unlimited” plan met a certain data threshold within a single month, TracFone would throttle data speeds or suspend data services for the remainder of the billing period.

The purpose of the throttling policy was to control costs associated with provisioning service for heavy-use subscribers. TracFone ultimately suspended mobile data service for allegedly hundreds of thousands of customers and throttled data speeds for millions more.

Consumer Deception

According to the complaint, TracFone advertisements displayed the “unlimited” claim of this monthly plan in a variety of advertisements without any qualifying disclosures.

After September 2013 TracFone began including data limit stipulations in its terms and conditions, on product packaging, and on its webpages, but the FTC charged that these statements “often were not clear or conspicuous.”

The Settlement

Terms of the Settlement

TracFone agreed to a \$40 million restitution payment, which the FTC will distribute to affected TracFone customers. In addition, TracFone must:

- Submit a compliance report one year after the entry of the order including, among other things, a description of TracFone’s products and services and a detailed description of “whether and how” TracFone complies with the order.
- Submit compliance notifications for ten years.
- Create and retain certain accounting and personnel records.
- Comply, within 14 days of receipt, with written requests from the FTC for document production, deposition appearance, additional compliance materials, and other requested information.

Analysis

The settlement with TracFone demonstrates many emerging trends in data access and mobile advertising enforcement.

- First, the order shows the FTC’s continued resolve in enforcing consumer protection provisions against Internet service providers (ISPs).
- Second, the action reemphasizes federal regulatory disapproval of undisclosed or improperly disclosed throttling.
- Third, the FTC complaint discussed high and growing consumer demand for data intensive mobile phone uses and mentioned that data-intensive applications often came pre-installed on TracFone’s mobile devices. This suggests that default inclusion of data intensive applications contrasted with an advertising claim in conflict with anticipated data usage of those applications may have exacerbated TracFone’s transgression in the eyes of federal authorities.

Recent Throttling Enforcement: A Tale of Two Agencies

Both the FTC and the Federal Communications Commission (FCC) actively pursue enforcement actions against mobile data providers for alleged consumer protection violations – the former under Section 5 of the FTC Act, and the latter under the transparency requirement in the FCC’s Open Internet rules and under Section 201(b) of the Communications Act, as amended.

These actions have provoked close regulatory scrutiny of mobile carriers’ data practices, including:

- A 2010 settlement with Verizon Wireless over “mystery fees” for mobile data usage;
- A pending FTC enforcement action against AT&T for its advertising claims and throttling practices; and
- A public letter from FCC Chairman Wheeler admonishing Verizon for basing its “‘network management’ [practices] on distinctions among its customers’ data plans.”

However, despite similarities in policy focus, there is a lingering uncertainty regarding the scope of the respective agencies’ jurisdictions. While the FCC has jurisdiction over communications by wire or radio, FTC jurisdiction is not limited to particular types of services but explicitly excludes any

jurisdiction over “common carriers.”

The FTC has taken a narrow view of this exemption, asserting that it has jurisdiction over carriers when they engage in non-common carrier activity. Thus, when the FTC asserted jurisdiction over TracFone’s data management practices, it took the position that the practice was not a common carrier activity. In the pending lawsuit by the FTC against AT&T for its advertising claims and throttling practices, AT&T is challenging the FTC’s investigation, arguing that the common carrier exemption applies to all activities of a common carrier.

The Imminent Net Neutrality Order

A new round in this debate is approaching with the FCC’s “net neutrality” proceeding. The FCC is widely expected to reclassify broadband Internet access as a Title II (i.e. common carrier) service, to apply non-discrimination and other obligations to broadband. If the FCC reclassifies mobile broadband under Title II, it could cut off the FTC’s jurisdiction over carriers and ISPs.

The FCC already regulates broadband providers’ practices through its Open Internet transparency rule, which requires broadband providers to publicly disclose certain information about their network management practices. If the FCC applies Title II regulation to broadband in general and mobile broadband in particular, the common carrier exemption could reduce the FTC’s jurisdiction over practices like AT&T’s data throttling.

Key Takeaways

Regardless of which agency is enforcing consumer protection obligations, it is clear that the robust enforcement from the FTC, and possibly the FCC, likely will shrink the field of “unlimited” plans offered by mobile carriers, and exact more conspicuous disclosures in broadband-related advertising about applicable limitations to data use.

Carriers should strongly consider the regulatory risks before offering “unlimited” data plans to consumers and should carefully convey all material terms and conditions of such plans to consumers, as well as consider whether any default settings (and anticipated consumer use based on such settings) may conflict with the advertising claims and constitute a potential deceptive or unfair business practice.

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