



FEATURES

SPAM, SPAM, AND MORE SPAM

Is attorney Dan Balsam a consumer crusader, or just a "spambulance" chaser?

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by Tom McNichol

Dan Balsam is a 41-year-old sole practitioner who hates spam the way many personal injury lawyers hate medical malpractice. On the one hand, he seems genuinely appalled by the scores of unsolicited emails he sees every day. But, then again, he does make something of a living off of them.

One morning, I dropped by his home office in San Francisco's Laurel Heights neighborhood to get a closer look at some of the recent messages he's received.

One, from something called the Google Promotion Award Team, congratulates him for winning an unspecified award that he will be able to claim just as soon as he provides them with some personal information. Another sender offers him a chance to become a "mystery shopper" at retail outlets such as Walmart and the Gap. Also, FBI Director Robert Mueller has taken time from his busy crime-busting schedule to let Balsam know he has money piled up overseas, ready to be claimed. And another message tells him that someone is waiting for him at JFK International Airport in New York.

As subject line after subject line cascades down his computer screen like a waterfall, he observes: "Looks like we're a little light on Viagra today."

Balsam, a thin, quietly intense man with close-cropped hair graying at the temples, is very serious about what he does. But there's a whimsical quality to his operation as well. This is conveyed by the framed can of Spam--the processed meat product--hanging on the wall next to his computer. Balsam also has within easy reach a dog-eared copy of California Business and Professions Code Section 17529.5--California's anti-spam law--which serves as the bible for the anti-spam work that takes up more than two-thirds of his time.

Strictly speaking, Balsam comes into small claims court as a plaintiff rather than as an attorney, seeking the statutory maximum of \$1,000 in damages against spammers for email solicitations that aren't on the up-and-up. At this writing, he claims 43 such victories--usually for the full



photo by Gary Laufman
"I didn't go to law school to sue spammers. I went to law school to make me better at it."—Dan Balsam

amount--and only a handful of defeats over nine years. He also has a few larger victories to his name in other courts. Last year, after one of the few California trials that tested the validity of a spam-related complaint, a superior court judge awarded him \$7,000 plus fees for the attorney he teamed up with against a Redwood City-based advertising firm (*Balsam v. Trancos Inc.*, No. 471797 (San Mateo Super. Ct. judgment by court entered Mar. 10, 2010)).

Then in 2008 he scored his biggest win yet: a whopping \$1.1 million default judgment in federal court against AdultActionCam.com. Over a seven-month period, the porn site sent Balsam more than 1,100 emails that he said contained fake sender addresses, deceptive subject lines, and other false representations (*Balsam v. Angeles Technology, Inc.*, No. C-06-04114 (N.D. Cal. judgment entered March 28, 2008)). That victory, though, remains somewhat hollow since he has yet to collect a dime.

"I wouldn't say spam is an obsession with me; that's going a little far," Balsam tells me with lawyerly precision. "But I really believe in what I'm doing. I do this because it should be done. And I hope other people do it. If enough people start suing spammers, maybe it will make a difference."

As Balsam points out, spam is more than a mere annoyance. According to Ferris Research, it costs businesses and consumers around the world about \$130 billion a year in lost productivity, wasted IT staff time, and the cost of technology like spam filters. This alone, some would say, puts Balsam on the side of the angels. But not everyone feels that way about him. Internet attorney Bennet Kelley of Santa Monica has both beaten and been beaten by Balsam in several court cases over the years. Kelley calls Balsam a "spambulance chaser."

"Do I dislike the guy?" Kelley muses. "Yes, I do. I don't think he's good for the legal system. I'm not saying that he's always wrong or that spam isn't a problem, but he can take some pretty extreme positions to try and get more money out of the system."

Balsam, Kelly adds, is a "zealot."

Another California technology lawyer who has crossed swords with Balsam but doesn't want to be named contends that he takes advantage of small claims court rules by targeting out-of-state companies that are more apt to settle rather than bear the expense of flying someone to San Francisco to contest the claim in person. "How much of what he does is because he hates spam, and how much of it is trying to pad his wallet with easy settlements and judgments?" this attorney asks.

But Balsam says his winning record speaks for itself. "I'm not abusing the small claims process. I'm doing exactly what the Legislature wanted me to be able to do."

Going after spammers is not as easy as it sounds. First of all, it's not against the law to send unsolicited commercial email--the common definition of *spam*. What is illegal in California, though, is deliberately sending false or deceptive email solicitations. But even then the legal remedy for unhappy recipients is not always clear.

Spam is regulated by a federal law known as CAN-SPAM, an acronym for the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (15 U.S.C. §§ 7701 – 7713). CAN-SPAM regulates spam on a national basis, mandating that commercial email messages contain valid headers (the From, To, and Reply To routing information), a valid street address, and a mechanism by which recipients can opt out of receiving further messages.

But that law is hardly an effective deterrent. In fact, CAN-SPAM actually legitimizes many types of commercial email that would otherwise be illegal under some tougher state laws. It also exempts emailers from having to get permission before they send marketing messages, just like direct mail marketers don't need permission to send out junk mail. Moreover, individuals can't sue under CAN-SPAM; only Internet service providers, the Federal Trade Commission, and state attorneys general may do so. (15 U.S. § 7706(f).)

But because Congress does allow states to regulate commercial email that is false or deceptive, some provisions of California's anti-spam law remain in effect. (See 15 U.S.C. § 7707(b).) Most important, no email advertisement in this state can use a third-party Internet domain name without that party's permission. (For example, a sender can't say a message is from Amazon.com without authorization from the online retailer.) The code also prohibits commercial emails with "falsified, misrepresented, or forged header information," and those that have "a subject line that ... would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message." The law sets damages at \$1,000 per violation. (Cal. Bus & Prof. § 17S29.5.)

This is where Balsam comes in. Back in 2002, four years after he obtained a business degree from UCLA's Anderson School of Management, he began taking notice of the spam phenomenon. On a whim, he decided to file two small claims in San Francisco against alleged spammers. To his amazement, he won both cases.

Balsam was onto something.

"Those first two suits were really just for kicks to see if I could do it," he confides.

Over the next few years, it turned into a hobby. And then it turned into a career change: "I didn't go to law school to sue spammers," he adds. "I went to law school to make me better at it."

Indeed, while he attended UC Hastings College of the Law, Balsam continued to file claims against alleged spammers, documenting his progress on a website he created called DanHatesSpam.com. By the time he passed the bar in 2008, Balsam had more experience litigating against spammers than most lawyers in practice for years.

"Spam cases [filed outside of small claims] are phenomenally technical," observes John Levine, a New York author and Internet consultant who has given expert testimony in several spam cases (none of them Balsam's). "There's usually a long slog of discovery, and it becomes a battle of experts where the plaintiff experts try to show that the email received is traceable back to the defendant and the defendant's experts say: 'No, it wasn't us, it was a mistake or it was someone else.' Very few judges have any experience with these cases. [They're] usually only worth doing

if [a defendant] can pay you enough for the cost of the lawsuit."

In small claims court, though, things are considerably more straightforward. And because the stakes are much lower, defendants often prefer to settle rather than mount a costly defense. In small claims court, Balsam represents himself (attorneys aren't allowed for either side). But when he sues spammers in any other court he retains an Aptos attorney named Timothy Walton, who has more than a decade of experience in Internet law.

In 2008 Balsam and Walton won a \$200,000 judgment against Internet marketer DSG Direct for sending false and deceptive commercial emails (*Balsam v. DSG Direct, Inc.*, No. CGC-05-441630 (San Francisco Super. Ct. judgment entered Feb. 28, 2008)). Then in 2009 the pair won a default judgment for just over \$25,000 against a New York Internet marketer. Balsam contended that Amanda Greiner sent him 20 unsolicited commercial emails containing falsified, misrepresented, or forged information. (Among the subject lines: "6 Bottles of Free Holiday Wine," "Clean Your Insides for a Dollar, Don't Gain Holiday Fat," and "Your Most Recent Free Credit Score Has Arrived.") (*Balsam v. Greiner*, No. CGC-08-473383 (San Francisco Super. Ct. judgment entered Sept. 17, 2009).)

But as with his other big cases, Balsam is having a very hard time collecting. In the DSG Direct case, Balsam levied against American Express payments and managed to seize 1 percent of the judgment before the company shut down. He's going after what Greiner owes him by attempting to garnish her wages. Meanwhile, the Redwood City firm, Trancos, has appealed Balsam's \$7,000 victory, and after five years he's seen none of the \$1.1 million judgment he won against AdultActionCam .com. (According to federal court records, the case was dismissed with prejudice after the parties settled in 2009, but Balsam insists that the record is in error and continues to pursue the judgment.)

"Dan's big claim is that he wants to clean up the Internet, but that's complete bullshit," says Ken Magill, publisher of the Magill Report, a weekly online marketing newsletter. "He's not going to come close to putting the tiniest dent in the spam problem with these lawsuits. He may get a couple of marketers to change their practices, but he's not having any effect whatsoever on spam. Most spam is coming from places like Russia, Vietnam, and China. Guys like Dan Balsam sue the companies they can find, but those companies aren't the problem."

Maybe so. But in the final analysis Balsam insists that he is doing his part by making spamming less profitable.

"I've gotten fan mail from thousands all over the world," he says. "Ninety nine percent of the people love me. I'm their hero."

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