CLIENT ALERTS & INSIGHTS

Time to RE-act: The Washington Supreme Court's New Email Subject Line Ruling Could Put Retailers on the Hook for Trillions

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On April 17, 2025, the Washington Supreme Court sent a message to all companies that participate in email marketing: Send with caution. The Court held that the Commercial Electronic Mail Act ("CEMA"), RCW § 19.190.020(1)(b), imposes a $500 statutory penalty on every commercial email sent to Washington residents that contains **any** false or misleading information in the email's subject line. See Certification from those United States District Court for the Western District of Washington in Brown v. Old Navy, LLC, No. 102592-1, --- P.3d ---, 2025 WL 1132243 (Wash. April 17, 2025) ("Brown"). In doing so, it rejected Old Navy's argument that a subject line violates CEMA only when it deceives consumers about the subject or purpose of the email; instead, a subject line violates CEMA if it contains **any** false or misleading information.

Key Takeaways for Retailers Using Email Marketing:

- **The Washington Supreme Court adopted a broad interpretation of false or misleading information:** Any false or misleading information in a commercial email's subject line violates CEMA, regardless of whether the misrepresentation conceals the subject of the email or the message's commercial nature.

- **Legal exposure:** CEMA provides for statutory penalties of $500 per violation-which plaintiffs contend means per email sent, and per recipient. In other words, someone who receives one violative email a week for a year could be entitled to $26,000. Multiply that by, say, 100,000 Washington email recipients, **and a company could be facing $2.6 trillion in penalties.** Additionally, Plaintiffs do not need to prove actual damage to recover statutory damages under CEMA.

- **Compliance measures:** Brown poses significant implications for retailers who use email marketing. Retailers should carefully review and revise their marketing practices to ensure that marketing email subject lines do not expose them to steep statutory liability under CEMA.

Statutory and Case Background

Washington enacted CEMA in 1998, with Clinton-era internet technology and infrastructure in mind. Recognizing that many consumers paid by the minute to access the internet and that emails took time to load when opened, the legislature sought to combat the additional costs imposed on consumers by commercial emails that misrepresented their nature or origin. CEMA prohibits anyone from sending commercial emails to Washington residents that either: (a) disguise the sender; or (b) contain false or misleading information in the subject line. RCW § 19.190.020(1). Several other states have similar laws. *See, e.g.*, Cal. Bus. & Prof. § 17529.5 (California); F.S.A. § 668.603 (Florida); Ind. Code § 24-5-22-7 (Indiana).

The *Brown* plaintiffs alleged that Old Navy violated CEMA by sending emails with false or misleading subject lines, causing them to open the messages and purchase items based on a false sense of urgency. For example, Old Navy sent emails with subject lines such as "GAH! This is the last chance to get up to 50% OFF." But the next day, the plaintiffs received an email with a subject line stating, "We've announced UP TO 50% OFF STOREWIDE (starting now)."[1] The plaintiffs claimed that these emails were false and misleading because the announced 50% offer was available for longer than the time stated in the original email's subject line. The Complaint also targeted emails with subject lines suggesting that offers were available for longer than the time stated in the subject line, an old offer was new, and those that falsely stated that a promotion or offer was extended.

After Old Navy removed the case to federal court, it moved to dismiss by arguing that CEMA prohibits only subject lines that mislead consumers by concealing the commercial nature of the email--for example, an email with a subject line that says "I found your wallet" leading the recipient to believe it was a personal email addressed to him or her, but upon opening it discovers the actual content of the email is an advertisement. In other words, Old Navy maintained that it was insufficient for an email subject line to contain *some* false or misleading information; the email subject line had to be written in such a way to conceal that it was commercial or an advertisement.[2] Old Navy relied on the fact that Washington enacted CEMA at a time when fees for dial-up internet were charged on a minute or hourly basis. Therefore, Old Navy contended that the legislature desired a quick way for consumers to filter out messages based on their headers or subject lines.

The Plaintiffs, in turn, argued that CEMA prohibits any subject line that is misleading in any way, and asked the trial court to certify a question to the Washington Supreme Court regarding the scope of CEMA. The trial court certified the following question: "Does RCW 19.190.020(1)(b) prohibit the transmission of a commercial email with a subject line containing any false or misleading information, or is the prohibition limited to subject lines containing false or misleading information about the commercial nature of the email message?"[3]

Before the *Brown* decision, no Washington state court had addressed the scope of Section 19.190.020(1). But one federal court had. In 2023, the United States District Court for the Western District of Washington rejected a broad interpretation of the subject-line provision, holding that the context of CEMA as a whole and its legislative history dictate that the prohibition applies only to false or misleading information regarding the substance and commercial nature of an email. The court held that CEMA does not create an all-purpose false advertising prohibition in email subject lines. *See Chen v. Sur La Table, Inc.*, 655 F. Supp. 3d 1082 (W.D. Wash. 2023).

The Washington Supreme Court's Decision

In a 5-4 decision, the Washington Supreme Court rejected Old Navy's proposed interpretation and held that CEMA's plain language prohibits sending Washington residents commercial emails that contain ***any*** false or misleading information in the subject line of such emails, for two reasons:

1. "The plain language of [CEMA] is not ambiguous;" therefore, the court need only rely on the statute's text and not on any on legislative history to determine the legislature's intent.[4] CEMA's plain language does not limit the prohibition to misrepresentations about the content of the email. Therefore, a commercial email could violate the subject line provision "even when the false or misleading information in the subject line does not deceive the recipient about the advertising purpose or commercial nature of the email."[5]
2. The legislature sought to relieve consumers from spam emails. To do this, CEMA requires truthfulness and accuracy in the header and subject lines of emails-"the two pieces of information consumers first glean when faced with the choice of deleting a message or engaging with its content."[6]

In dissent, four justices disagreed with the majority's interpretation of CEMA "in isolation from its context and legislative intent" and endorsed Old Navy's narrower interpretation because CEMA was enacted to "to combat the flood of spam to consumers' in-boxes and to prevent consumers from having to sort through unsolicited commercial e-mails disguised as something else."[7]

Actionable Email Subject Lines After-*Brown*

The majority cautioned that its holding does not create a free-for-all or invite every consumer who receives a marketing email to collect $500. It emphasized that even under its broad interpretation, an email sender's use of "mere puffery," opinion, or hyperbole in a subject line is not actionable under CEMA. Only false or misleading, objective statements of fact constitute CEMA violations.

For example, a subject line that reads "30% off sale, today only!" becomes actionable if the discount is, in fact, not available for "today only." In contrast, a subject line that reads "Best Deal of the Year" is hyperbole and not necessarily a misrepresentation, even if a better deal is later offered, because "market conditions change such that a better sale is later available."[8]

Legal Exposure

A violation of CEMA is a *per se* violation of the Washington Consumer Protection Act ("WCPA"), and beyond the actual damages that WCPA authorizes, CEMA violations trigger statutory penalties of $500 per violation. Unlike WCPA, however, CEMA does not require a plaintiff to prove actual damages to collect statutory damages. To state a claim under CEMA, a Washington plaintiff must prove only that she received a commercial email that either disguised the sender's identity or contained any false or misleading information in the subject line. As the majority put it, "the injury is receiving the email that violates CEMA."[9]

Subject lines have already been an increasingly popular area for both consumer class actions and mass arbitrations. *Brown* will inevitably make these claims more widespread. To avoid the potentially devastating exposure, retailers should work with experienced counsel to review and revise their

marketing practices to comply with CEMA's requirements. Benesch has been defending retailers against CEMA claims for nearly a decade and is well positioned to help.

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[1] *Brown v. Old Navy, LLC*, No. 2:23-cv-781 (W.D. Wash. 2023), ECF No. 1-2, ¶¶ 53-59, PageID #212-13.

[2] *Brown*, 2025 WL 1132243 at ¶¶ 15-18 & 24.

[3] *See Brown v. Old Navy, LLC*, No. 2:23-cv-00781, 2023 WL 12071921, *1 (W.D. Wash. Nov. 29, 2023).

[4] *Brown*, 2025 WL 1132243 at ¶ 25.

[5] *Id.* at ¶ 15.

[6] *Id.* at ¶ 18.

[7] *Id.* at ¶¶ 36 & 67 (Madsen, J., dissenting).

[8] *Id.* at ¶ 32.

[9] *Id.* at ¶ 22.