



Washington Courts Clear the Way for Class Actions Over Misleading Email Subject Lines

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Washington's Commercial Electronic Mail Act (CEMA) prohibits sending commercial emails to Washington residents that contain false or misleading information in the subject line. Given the availability of \$500 in statutory damages per violation, consumer class actions challenging aggressive marketing emails have become common. The conduct at issue typically involves subject lines such as "Today only!" or "Ends in hours!" used to promote sales that in fact continue for days or reappear shortly after their purported expiration. Plaintiffs contend that this messaging manufactures a sense of urgency to induce consumers to make purchases they otherwise might not have.

Defendants in these cases have sought dismissal on two principal grounds. First, some argue that federal law, specifically the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, preempts CEMA. So far, district courts have rejected this argument, holding that CAN-SPAM explicitly permits states to prohibit "falsity or deception" in "any portion of a commercial electronic mail message." 15 U.S.C. § 7707(b)(1). And CEMA does just that, imposing liability for commercial emails containing false or misleading subject lines. Second, defendants have argued that the Dormant Commerce Clause renders CEMA unconstitutional. Courts have rejected this argument as well, holding that CEMA neither discriminates in favor of Washington interests nor improperly regulates commerce occurring wholly outside the state.

These types of class actions have been filed against various national retailers, claiming that their marketing emails contain false or misleading subject lines. With CEMA's legal footing now firmly established, the pace of such filings is likely to accelerate.

Any company that uses time-sensitive email promotions sent to Washington residents should take note of this trend. CEMA's \$500

statutory damages per violation provide class action plaintiffs with enormous incentive to challenge mass commercial emails where the subject line arguably promotes a false sense of urgency — and the potential class-wide exposure could be substantial. Retailers with marketing email campaigns that reach Washington residents should carefully review their email marketing practices to ensure that any time-sensitive claims in subject lines accurately reflect the terms and durations of their promotions.

For more information or assistance auditing your marketing practices to ensure compliance with applicable laws, contact the authors or any attorney with FBT Gibbons' [Class Actions](#) team.

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