WASHINGTON SUPREME COURT INCREASES RISKS OF LAWSUITS FOR FALSE OR MISLEADING EMAIL SUBJECT LINES

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US Litigation and Dispute Resolution Alert

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The Supreme Court of Washington recently clarified the scope of violative practices under the Washington Consumer Electronic Mail Act (CEMA). In *Brown v. Old Navy, LLC*[1], the Court ruled 5-4 that CEMA prohibits advertisers from disseminating any false or misleading information in the subject line of a commercial email, not just information that is false or misleading about the nature of the communication. In the wake of this decision, plaintiffs have filed multiple lawsuits seeking to expand traditionally limited liability for the content of commercial emails.

ANALYSIS

In *Brown v. Old Navy, LLC*, the plaintiffs asserted that the defendant impermissibly sent emails with false or misleading information, in violation of CEMA. The plaintiffs alleged that the defendant, for example, announced that a 50%off promotion was ending even though the retailer continued to offer the promotion in the days following the initial e-mail.[2] Other examples included e-mails that announced time-limited promotions (e.g. *today only* or *three days only*) that were extended beyond the specified time limit.[3] The case was before the Washington Supreme Court on a question certified by a federal court in the Western District of Washington, in which the case against the defendant is pending.[4]

CEMA prohibits sending a commercial e-mail that "[c]ontains false or misleading information in the subject line."[5] The defendant argued for the same outcome as in *Chen v. Sur La Table*, where the Western District of Washington recently held that subsection (1)(b) "specifically prohibits false and misleading information *as to the nature of the email*, i.e. that the email is an advertisement."[6] Essentially, the defendant in *Brown* sought to have the Washington Supreme Court adopt the standard that federal courts have applied to claims under the Controlling the Assault of Non-Solicited Pornography And Marketing Act of 2003 (CAN-SPAM), which has been interpreted to prohibit only false and misleading information as to the nature of the email (i.e., that it is commercial in nature).[7] The plaintiffs argued the prohibition was not limited to information as to the commercial nature of the email.[8] Instead, the plaintiffs asserted that any false and misleading information was prohibited by CEMA.[9]

Because the outcome of this case required statutory interpretation that would "have far-reaching effects" on those subject to Washington law, the Western District of Washington certified the following question to the Washington Supreme Court: "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*?"[10]

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The court ultimately sided with the plaintiffs, finding that a subject line does not need to deceive consumers about the subject or purpose of the email but rather merely needs to contain false or misleading information.[11]

The court was careful to limit the scope of its holding, however. It clarified that promotions that constitute statements of opinion, not of fact, are not "misrepresentations" actionable under CEMA, specifically stating that a "Best Deals of the Year" promotion would not be actionable.[12] The court further held that "subjective, unverifiable claims about a product or service are 'mere puffery'" and that "instances of mere puffery are not prohibited by [CEMA]."[13]

The Western District of Washington will still need to resolve two key questions that the *Brown* decision did not touch: (a) whether a plaintiff bringing suit under CEMA needs to establish traditional elements of fraud liability, such as scienter, reliance and damages; and (b) if not, whether CEMA is preempted by CAN-SPAM's express preemption provision, which bars any state statutes that purport to impose liability for false statements in emails other than statutes prohibiting "falsity or deception." Both of these questions are before the Western District on the defendant's motion to dismiss.

Since the Washington Supreme Court's decision, plaintiffs have filed a number of putative class actions under CEMA alleging the use of false or misleading information in subject lines. Most of these cite to subject lines supposedly creating "false urgency" as to the duration of promotions, or subject lines that tout specific discounts (e.g., *50% off*) that are only available on limited categories of products. These cases are in the very early stages of litigation. How courts will evaluate CEMA claims in particular contexts remains to be seen.

IMPLICATIONS FOR ADVERTISERS

The opinion in *Brown v. Old Navy, LLC*, emphasizes the importance of ensuring material in advertising is not false or misleading. A violation of CEMA's e-mail regulations is a per se violation of the Consumer Protection Act.[14] CEMA sets statutory damages of US$500 for sending Washington residents commercial e-mails that violate its regulations.[15] CEMA's US$500 statutory damages does not require a showing of actual damages, as is incurred per recipient.[16] Thus, there is real financial risk in failing to adhere to the newly-clarified CEMA parameters.

CONCLUSION

The *Brown v. Old Navy* decision underscores the heightened risks of CEMA lawsuits for advertisers who fail to adhere to the law's false and misleading prohibitions. By implementing the recommended practices, advertisers can better protect themselves from legal challenges and maintain compliance with CEMA. As the legal landscape continues to evolve, staying informed and proactive is essential for minimizing risks and safeguarding business operations. We will continue to monitor court decisions as the CEMA provisions are interpreted in litigation, and are available to answer any questions you might have.

FOOTNOTES

[1] *Brown v. Old Navy, LLC*, 567 P.3d 38 (Wash. 2025) (opinion published April 17, 2025).

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[2] *Id*. at 42.

[3] *Id*.

[4] *Id*. (citing *Brown v. Old Navy, LLC*, 2:23-CV-00781-JHC, 2023 WL 12071921, at *1 (W.D. Wash. Nov. 29, 2023))

[5] RCW 19.190.020(1)(b).

[6] *Brown v. Old Navy*, 567 P.3d at 42 (citing *Chen v. Sur La Table, Inc.*, 655 F. Supp. 3d 1082, 1092 (W.D. Wash. 2023)) (emphasis added by citing Court).

[7] *Id*. at 46.

[8] *Id*. at 44.

[9] *Id*.

[10] *Brown v. Old Navy, LLC*, 2:23-CV-00781-JHC, 2023 WL 12071921, at *1 (W.D. Wash. Nov. 29, 2023) (emphasis in original).

[11] Brown v. Old Navy, 567 P.3d at 42.

[12] *Id*. at 47.

[13] *Id*.

[14] See RCW 19.190.030(1), .100; ch. 19.86 RCW.

[15] RCW 19.190.040.

[16] *Brown v. Old Navy*, 567 P.3d at 42.

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