LITIGATION MINUTE: CEMA-INGLY ENDLESS LITIGATION MEETS LEGISLATIVE LIMITS: WASHINGTON STATE'S LEGISLATIVE RESPONSE TO THE EMAIL MARKETING LITIGATION SURGE

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By: Peter A. Talevich, Avril G. Love, Chief Coleman

Last year, the firm warned that the Washington Supreme Court's decision in *Brown v. Old Navy*[1] significantly expanded the scope of Washington's Commercial Electronic Mail Act (CEMA), exposing businesses to lawsuits based on allegedly false or misleading email subject lines.[2] The court held that CEMA prohibits *any* false or misleading information in a commercial email's subject line—not merely statements that misrepresent the commercial nature of the message. The ruling created substantial risk for advertisers using common promotional practices in email subject lines, such as offering a free gift or advertising a limited time sale, with qualifying information explained only in the email's body. Following *Brown*, plaintiffs filed more than 100 lawsuits in Washington, seeking statutory damages—per-email—for routine marketing campaigns.

The Washington Legislature responded to this litigation onslaught with House Bill 2274, which took effect on 11 June 2026. Although lobbying efforts for further amendments are expected in the next legislative session, the enactment represents the state's first effort to balance exposure to businesses with the actual harm to consumers while preserving protections against genuinely deceptive marketing practices. The new law makes two significant changes. Here's what you need to know in a minute or less.

WHAT CHANGED?

First, House Bill 2274 reduces statutory damages from US$500 to US$100 per violation. While businesses still face potential exposure for large-scale email campaigns, the amendment substantially lowers the damages available in many cases.

Second, the Legislature added a knowledge requirement for email subject-line claims. Plaintiffs must now establish that the sender knew—or that such knowledge can be fairly implied from objective circumstances—that the subject line was false or misleading when the email was sent. This change introduces a scienter requirement that was absent under the version of CEMA interpreted in *Brown*.

For example, if a retailer in good faith intends to end a promotion on a particular date but later extends the sale due to unforeseen circumstances, the amendment confirms that the retailer can assert that good faith belief and change in circumstances in contesting liability. The enactment thus confirms the retailer's ability to adjust promotions in light of changed circumstances.

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WHY THE AMENDMENTS MATTER

The reforms address several concerns raised after *Brown*. Our 2025 alert raised critical questions regarding traditional fraud concepts such as scienter, reliance, and damages. The Washington Legislature has now addressed at least part of that uncertainty by expressly linking liability to what the sender knew or reasonably should have known at the time an email was sent.

The amendments also recognize that routine marketing practices have increasingly become targets of high-stakes class action litigation. Many lawsuits challenge practices they say create "false urgency," such as limited time promotions that are later extended or discounts that applied only to certain products. The amendments—particularly the scienter requirement—aim to curb the commercially and judicially undesirable trend of opportunistic challenges to these types of marketing practices, which were at issue in the *Brown* ruling.

WHAT HAS NOT CHANGED

The law still prohibits knowingly false or misleading commercial email subject lines, and violations remain linked to Washington's Consumer Protection Act. Washington residents also may continue to challenge allegedly deceptive email marketing practices. Companies marketing to Washington consumers should continue to ensure that email subject lines accurately describe sales, discounts, deadlines, and other promotional claims.

LOOKING AHEAD

The 2026 amendments represent an important recalibration of Washington's anti-spam law. While consumers retain protections against deceptive marketing, businesses now have additional safeguards against liability arising from good-faith marketing communications that change over time or simply cannot fit in a single subject line.

The legal landscape surrounding CEMA continues to evolve. The Legislature's action suggests that Washington is seeking a middle ground—preserving consumer protections while reducing the risk of widespread litigation over ordinary advertising language. Whether these reforms achieve that balance will likely be tested in the courts over the coming years.

We are continuing to work with our clients to help shape amendments to CEMA and counsel litigation avoidance strategies, informed by our litigation experiences defending these claims. We will update with developments as courts address the parameters of the CEMA statute as amended.

FOOTNOTES

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

[2] Joseph C. Wylie, Peter A. Talevich, Abraham M. Weill, *Washington Supreme Court Increases Risks of Lawsuits for False or Misleading Email Subject Lines* (Aug. 7, 2025), https://www.klgates.com/Washington-Supreme-Court-Increases-Risks-of-Lawsuits-for-False-or-Misleading-Email-Subject-Lines-8-7-2025.

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KEY CONTACTS



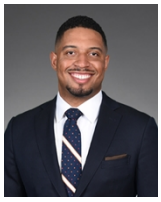
PETER A. TALEVICH
PARTNER

SEATTLE
+1.206.370.8070
PETER.TALEVICH@KLGATES.COM



AVRIL G. LOVE
PARTNER

LOS ANGELES
+1.310.552.5064
AVRIL.LOVE@KLGATES.COM



CHIEF COLEMAN
ASSOCIATE

LOS ANGELES
+1.310.552.5051
CHIEF.COLEMAN@KLGATES.COM

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