Washington Email Law Still Puts Marketers At Litigation Risk

By **Adam Bialek and Taylor Bialek** (October 30, 2026)



Adam Bialek



Taylor Bialek

Despite legislative efforts to curtail abusive litigation after a Washington Supreme Court decision extended the state's Commercial Electronic Mail Act to misleading email subject lines, promotional email marketing still carries significant exposure. Marketing governance should therefore become part of a company's standard operating procedure.

In 2025, the Washington Supreme Court decided Brown v. Old Navy LLC, expanding CEMA to reach misleading email subject lines.[1] The resulting wave of litigation prompted H.B. 2274, which was introduced to balance consumer protection with business compliance obligations.

Effective June 11, the amendment makes liability harder to establish and reduces exposure. Yet CEMA still governs the veracity of promotional email subject lines — not just email content — and can still trigger class actions with statutory damages, even for national campaigns run by companies with no physical presence in Washington. Before the next campaign, companies should audit subject line language that signals urgency, scarcity, discounts or "free" offers.

A promotional email subject line must stand on its own. If it overstates a sale, discount or "free" offer, or makes scarcity or deadline claims more urgent than reality, the campaign may draw state law class actions, statutory damages pressure and customer trust harm — even if it satisfies the federal Controlling the Assault of Non-Solicited Pornography and Marketing, or CAN-SPAM, Act, which primarily addresses sender identification, deceptive headers and opt-out mechanics.

CEMA prohibits false or misleading statements in commercial emails and can apply to any commercial email received by a Washington resident, regardless of the sender's location. National campaigns using urgency, scarcity, "free" or discount claims may also face scrutiny under other states' electronic mail, false advertising and consumer protection laws.

The issue is of particular concern for companies using automated, national or third-party managed email programs.

Why the Urgency Now

CEMA is an older antispam statute that predates automated marketing systems, dynamic pricing and "always-on" promotional calendars. Testimony summarized in Washington's 2026 legislative record indicated that only about eight CEMA lawsuits had been filed from the statute's enactment through June 2025, followed by more than 100 in the year after Brown. That surge has made routine promotional subject lines an active target for litigation.

Earlier this month in Aaland v. Costco Wholesale Corp., in the King County Superior Court, Costco agreed to pay $14 million to resolve a class action accusing the retailer of sending advertising emails with false or misleading subject lines in violation of CEMA, according to a

settlement a state judge has given final approval to.

The agreement ends claims on behalf of roughly 3.5 million Washington residents who received Costco emails with subject lines that plaintiff Michael Aaland alleged created a "false sense of urgency," for example by touting "hot buys" available for "5 days only," despite the deals being available for longer.

In Brown, plaintiffs Roxann Brown and Michelle Smith alleged that "Old Navy violated RCW 19.190.020(1)(b) when it sent them e-mails that, for example, announced that a 50 percent off promotion was ending even though the retailer continued to offer the 50 percent off promotion in the days following the initial e-mail." Other emails announced time-limited promotions (e.g., "today only") that were later extended.

The court held that CEMA reaches false or misleading information in a subject line, not just statements that hide an email's commercial nature. A misleading subject line may, therefore, remain problematic even if body copy, footnotes, landing pages or fine print later explain the limits.

The court also confirmed that a "violation of CEMA's e-mail regulations is a per se violation of the Consumer Protection Act," so no separate proof of unfair or deceptive conduct is required. Proof of actual damages is also not required, because the injury is receipt of the noncompliant email. Each email to each recipient is generally treated as a separate violation, so a single campaign sent to a large list could involve thousands of violations.

H.B. 2274 was a direct response to increased litigation, but it is a partial reset, not a full stop. Previously, CEMA required no knowledge of falsity and carried $500 per message in statutory damages without proof of actual damages. For lawsuits filed on or after June 11, plaintiffs must show the sender had actual knowledge — or knowledge inferred from the circumstances — that the subject line was false or misleading, and statutory damages drop to $100 per violation.

Lawsuits filed before that date remain governed by the prior standard. Depending on volume, class size and available defenses, even $100 per violation can create material settlement pressure.

What This Means in Practice

According to Market.us, the number of email users worldwide is projected to approach 5 billion by 2027, with 93% checking email daily.[2] Market.us also reported that 38% of marketers primarily use generative artificial intelligence to compose emails, and 47% of recipients decide whether to open an email based solely on its subject line.

Market.us also reports an average return of $36 for every dollar spent on email marketing. That economic pull is especially significant for small businesses, which often rely on automated programs run by third-party vendors and lack budgets for formal clearance. Subject line accuracy is thus a critical business issue, not simply a creative decision.

Operational Risk of Automated Flows

This risk is easy to miss. If an automated flow keeps sending "Ends Tonight" after a sale is extended, each email to each recipient may be alleged as a separate violation, turning a routine campaign defect into a high-dollar class action demand.

Puffery vs. Factual Claims

Marketing teams should separate creative puffery from factual claims, which are specific, measurable representations on which a consumer can rely.

General enthusiasm, such as "fresh picks" or "summer favorites," usually presents a lower risk profile than statements about timing, price, inventory, purchase conditions or whether something is truly "free."

Lessons From Truth-in-Advertising Clearance

Truth-in-advertising review offers a useful comparison. Printers' Ink published a model statute in 1911, adopted by 23 states by 1929. As Federal Trade Commission oversight grew, "clearance attorneys" became part of the advertising process, substantiating claims and checking disclaimers. Television networks still commonly require clearance and substantiation before ads run.

Subject lines have now replaced the ad headline as the first claim many consumers see, yet they rarely receive comparable clearance. That gap is an operational risk.

Not Just a Washington Issue

Indiana, Maryland, California, Florida and other jurisdictions have their own consumer protection and false advertising statutes — some with private rights of action and statutory damages similar to CEMA — that plaintiffs are increasingly using to challenge the same categories of subject line claims (e.g., urgency, scarcity, "free" and discount representations), though the details vary by jurisdiction.[3]

Companies with national campaigns should consider reviewing subject lines under the most protective practical standard.

CAN-SPAM Is Only a Baseline

CAN-SPAM requires accurate sender information, nondeceptive subject lines, and functioning, timely opt-outs. Compliance is necessary but may not defeat state law deception claims.

Recent federal decisions in Washington have rejected — at least at the pleading stage — arguments that CAN-SPAM preempts CEMA, or that applying CEMA to out-of-state senders violates the dormant commerce clause.[4]

Some defendants also contend that CEMA plaintiffs lack Article III standing in federal court because they cannot show a concrete, particularized injury.[5] The landscape remains unsettled, and companies should not assume federal compliance will shield them from state law exposure.

Potential Implications for Businesses

If you run or manage a business that sends promotional emails, audit your subject line library before your next send, and pay extra attention to any claim designed to create urgency to purchase.

If you are an insurer or risk manager, treat subject line class actions as an emerging claims

category. As commerce shifts online, consider whether underwriting guidelines and insured questionnaires should be updated, risk management services should be offered, or coverage should be limited.

If you are a small business, designate an individual accountable for approving outgoing communications, including automated communications sent by third-party vendors. Tech-savvy junior employees may post content quickly, but a more experienced employee should ensure compliance. Employee education on these rules should be part of onboarding and continuing training.

Operational Safeguards

A marketing governance plan may include the following safeguards.

- Review subject lines as stand-alone claims: Revise any line that needs body text, footnotes or fine print to be true.

- Check artificial urgency: Use "Ends Tonight" only when the offer definitively and permanently expires then. Do not let urgency bleed into later sends.

- Match campaign mechanics: Align calendars, coupon engines, inventory feeds, subject lines, body copy and landing pages before launch and after any extension.

- Assign clear ownership: Marketing drafts, operations verifies mechanics, legal/compliance reviews high-risk claims, and the email owner archives approvals.

- Do not assign this task to an AI agent: Human involvement is necessary for accountability and to catch nuances in the subject line pitch.

- Simplify for small teams: Designate a final reviewer and use a short presend checklist covering expiration, price, availability, "free" offer terms and opt-out functionality. For small businesses, the liability could be crippling.

- Keep a litigation-ready file: Preserve subject line approvals, screenshots, offer terms, pricing support, inventory data, send dates, suppression lists, opt-out records and vendor approvals.

- Review vendor controls: Check agency, affiliate and email service provider contracts for approval rights, audit rights, indemnification, CAN-SPAM compliance obligations and escalation procedures. Confirm vendors carry insurance covering the risk, obtain a certificate of insurance, and seek additional insured status where possible.

Brand, Insurance and Next Steps

A subject line is the first promise a customer sees. Tricks may produce a lead, but they can cost consumer trust. Other email marketing exposure points include unlicensed copyrighted images, missing disclaimers or disclosures, and false endorsements or affiliations.

Companies should discuss subject line class actions with their insurance broker — including potential media, cyber or general liability coverage — and should timely report demand letters and potential claims to carriers promptly. High-volume statutory damages theories can create defense cost exposure, policy exclusion disputes and reputational risk.

At $100 per violation, an inaccurate subject line can create $100,000 in exposure for every 1,000 recipients. Violations add up fast if the process is not monitored and verified. Marketing governance must, therefore, be a clear business objective with someone accountable for its implementation.

After Brown, subject lines are front-line compliance claims, and CAN-SPAM compliance alone will not eliminate state law, class action and reputational risk.

Adam Bialek is a partner and co-chair of the intellectual property and technology practice at Wilson Elser Moskowitz Edelman & Dicker LLP

Taylor Bialek is an associate at the firm.

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[1] Brown v. Old Navy LLC, 4 Wn.3d 580 (2025).

[2] https://market.us/statistics/digital-marketing/email/.

[3] Indiana: Indiana Code § 24-5-22-7(b)(3) ("contains false or misleading information in the subject line"); Maryland: Md. Code Ann., Comm. Law §§ 14-3001 through 14-3003 (14-3002(b)(2)(iii) ("Contains false or misleading information in the subject line that has the capacity, tendency, or effect of deceiving the recipient; damages – "to the recipient of commercial electronic mail, in an amount equal to the greater of $500 or the recipient's actual damages"); California: California Business & Professions Code § 17529.5(a)(3) ("The e-mail advertisement has a subject line that a person knows 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."; damages are $1,000 for each unsolicited commercial email transmitted in violation of this section, up to one million dollars ($1,000,000) per incident.); Florida: Florida Electronic Mail Communications Act (FEMCA),

codified at Florida Statutes §§ 668.60-668.610 (§ 668.603(1)(c) ("Contains false or misleading information in the subject line"; damages are "Compensatory damages equal to any actual damage proven by the plaintiff to have resulted from the initiation of the unsolicited commercial electronic mail message or liquidated damages of $500 for each unsolicited commercial electronic mail message that violates s. 668.603").

[4] See Jerde v. BYLT LLC, 2026 U.S. Dist. LEXIS 30489 (W.D. Wash. February 13, 2026) (rejecting preemption); Agnew v. Macy's Retail Holdings LLC, 2026 U.S. Dist. LEXIS 56737 (W.D. Wash. Mar. 18, 2026); and Kempf v. Fullbeauty Brands Operations LLC, 2026 U.S. Dist. LEXIS 29632 (W.D. Wash. Feb. 12, 2026) (rejecting preemption and application of the Dormant Commerce Clause).

[5] See Montes v. Catalyst Brands LLC, 2025 (E.D. Wash. Dec. 4, 2025) (finding that a plaintiff asserting CEMA claims lacked Article III standing because she failed to allege a concrete injury). Montes is currently on appeal at the Ninth Circuit.