

# A Look At The Wave Of 2025 Email Marketing Suits In Wash.

By **Gonzalo Mon** (December 15, 2025)

When retailers send marketing emails, they usually focus on ensuring that those emails comply with the federal Controlling the Assault of Non-Solicited Pornography and Marketing, or CAN-SPAM, Act.

Most retailers tend not to worry too much about state email marketing laws because they assume that if an email complies with the CAN-SPAM Act, it will also comply with state laws. Although that's usually a safe assumption, things changed in 2025.



Gonzalo Mon

A decision by the Washington State Supreme Court, analyzing the scope of Washington's Commercial Electronic Mail Act at the beginning of the year, set a new stage for a wave of email marketing lawsuits in the Evergreen State and beyond in the latter half of the year.[1] These lawsuits focus on how retailers advertise sales and other offers.

Although CEMA is similar in scope to CAN-SPAM, a private right of action and the possibility of statutory damages have made CEMA an attractive tool for plaintiffs to file class actions challenging retailers' advertising practices. Most of those class actions are still playing out, and their impact will stretch into 2026.

## **Brown v. Old Navy**

The changes we saw in 2025 started with a lawsuit that was filed two years earlier — *Brown v. Old Navy LLC*.

In 2023, two Washington consumers filed a proposed class action accusing Old Navy of spamming them with emails that included false or misleading information about the duration of sales. For example, the complaint alleged that:

- Some emails advertised that products were on sale "today only" or "this week only." The next day — or the next week — however, the plaintiffs received emails advertising the same sale.
- Some emails advertised that consumers had one "last chance" to take advantage of a discount. The next day, however, the plaintiffs received emails advertising the same discount.
- Some emails advertised a sale with a fixed deadline. The next day, however, the plaintiffs received emails stating that the sale had been extended.

In addition, some of those emails included images of ticking clocks and language urging consumers to "hurry" or "open quickly." The complaint alleged that these tactics created a false sense of urgency by suggesting that consumers had to act quickly to take advantage of a sale, when that wasn't always accurate.

Exhibits to the complaint included examples of 51 emails received by one plaintiff and 40 received by the other, along with explanations of why the plaintiffs thought the subject lines were false or misleading. In many instances, the plaintiffs pointed to examples of other

emails that allegedly contradicted claims in the subject lines of the challenged emails.

The plaintiffs argued that Old Navy's emails violated CEMA's prohibition against sending a commercial email "to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident that...(b) contains false or misleading information in the subject line." [2]

Because a violation of CEMA is a per se violation of Washington's Consumer Protection Act, the plaintiffs also argued that Old Navy's emails violated this act.

### **Washington Supreme Court Expands CEMA**

Until this year, no Washington state court had addressed the scope of the prohibition against false or misleading subject lines. Thus, the federal court hearing the Brown case asked the Washington Supreme Court to answer the following question: "Does [Revised Code of Washington Section] 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?"

Old Navy urged the Washington Supreme Court to follow a 2023 ruling in which a federal court held that the law "specifically prohibits false and misleading information as to the nature of the email, i.e., that the email is an advertisement." [3] The plaintiffs argued for a more expansive view. On April 17, the Washington Supreme Court took the more expansive view.

In a 5-4 decision, the court held that a company violates the law "even when the false or misleading information in the subject line does not deceive consumers about the advertising purpose or commercial nature of the e-mail." More to the point, the court held that "CEMA protects consumers by requiring that commercial e-mails communicate honestly about the terms of a given promotion or sale in the subject line."

Old Navy had expressed concerns that a ruling for the plaintiffs could lead to a situation in which "instances of banal hyperbole" could lead to "millions of dollars of potential exposure in CEMA liability." The court addressed those concerns by noting that "mere puffery" in subject lines of emails would not violate CEMA.

The Washington Supreme Court explained that "mere puffery is contrasted by representations of fact — like the duration or availability of a promotion, its terms and nature, the cost of goods, and other facts Washington residents would depend on in making their consumer decisions." Only representations of fact can violate the law.

### **Cases on the Rise**

Since the Washington Supreme Court's ruling, we've seen more than 30 lawsuits alleging that a broad range of retailers across industries sent emails that violate CEMA.

Most of the subject lines that are being challenged advertise that a sale is about to end, and many include language urging consumers to act quickly so that they don't miss out. For example:

- In *Shahpur v. Ulta Beauty Inc.*, filed in the U.S. District Court for the Eastern District of Washington on June 26, the plaintiffs alleged that Ulta sent an email announcing that it was the last day to take advantage of "50% off Beauty Steals."<sup>[4]</sup> The next day, though, the company extended the sale with an email announcing it was now the "LAST Chance."
- In *Hutton v. Discount Tire Co. of Washington Inc.*, filed in Snohomish County Superior Court on Sept. 9, the plaintiffs alleged that Discount Tire Co. sent an email announcing that it was the "LAST DAY to save on Cooper and Goodyear tires!"<sup>[5]</sup> The next day, they sent an email with the same subject line.
- In *Liss v. Skechers USA*, filed in the U.S. District Court for the Western District of Washington on Sept. 22, the plaintiffs alleged that Skechers sent an email announcing that a Memorial Day sale would end "tonight," offering an additional discount through the end of the day.<sup>[6]</sup> The next day, though, the company extended the sale and discount.

Each of the complaints includes various other examples of emails announcing that a sale or offer would end, followed by a similar extension.

Like the Brown complaint, most of these complaints generally allege that the retailers created a false sense of urgency to get people to act quickly by suggesting that a sale or offer was about to end. The plaintiffs claim, though, that the retailers often extended those sales or ran similar ones shortly after the end date. Thus, the subject lines are allegedly misleading.

Newer complaints are casting wider nets. For example, in *Lee v. Nordstrom Inc.*, filed in the Western District of Washington on Nov. 3, the plaintiffs challenged subject lines in which the retailer advertised that products were discounted — such as a claim that certain products were up to 40% off — even without an end date.<sup>[7]</sup> The plaintiffs allege that the discounts were exaggerated because, based on their investigation of the prices Nordstrom charges, "Nordstrom never or almost never offers or sells its products at their list price."

Why are these cases on the rise? CEMA provides for statutory damages of \$500 per email, without a plaintiff having to prove damages. Under the Consumer Protection Act, a court may treble damages. Thus, plaintiffs can seek up to \$1,500 per violation.

Depending on the number of emails a retailer sends to Washington residents, those numbers can quickly add up. Class action attorneys are paying attention.

These cases are all pending, and some retailers have asserted that CEMA is preempted by the CAN-SPAM Act.

Others have argued that CEMA is unconstitutional. For example, in its motion to dismiss, Ulta argued both that CEMA is preempted by CAN-SPAM and "'implicitly preempt[ed]' by the dormant commerce clause, as it 'regulate[s] commerce in a manner that is disruptive to economic activities in the nation as a whole.'"

It's too early to predict how these arguments will play out, but it's likely that these types of lawsuits will continue in Washington in 2026 and that they may spread to other states. For example, we've started to see a few lawsuits in Maryland<sup>[8]</sup> under that state's antispam law, which has a similar scope and statutory damages.<sup>[9]</sup>

## Reducing Risk in 2026

Retailers looking for specific answers about what subject lines are likely to violate CEMA are unlikely to find clear answers yet.

Again, the Washington Supreme Court was simply asked to opine on the scope of CEMA — the court didn't opine on any of the subject lines the plaintiffs had cited in their complaint. So far, other courts haven't either.

Nevertheless, by looking at the allegations in the pending complaints, it's easy to see what types of subject lines currently seem to present the lowest-hanging fruit for plaintiffs attorneys. Those are subject lines that advertise that a sale or offer is going to end on a specific date. Of course, there's nothing wrong with stating that a sale or offer is going to end on a specific date if it does end on that date.

Accordingly, retailers should avoid express claims about the end dates of sales and offers — such as "Sale Ends Tonight" or "\$10 Off Expires on Sunday" — unless they are certain the sale or offer will end as advertised. Extending those sales could expose retailers to a risk of a legal challenge, especially if those extensions happen on a regular basis.

Beyond that, retailers will need to consider how they advertise discounts. When retailers advertise that products are offered at a discount off a previous price, they generally need to ensure that the advertised products were actually offered at that previous price for a reasonable period of time. How long that is will differ across states.

Bottom line, retailers should carefully review all objective claims about sales. Subjective claims may be a different story, though.

As noted above, the Washington Supreme Court suggested that retailers have more flexibility with subjective statements that constitute puffery. For example, Old Navy provided a hypothetical subject line advertising "Best Deals of the Year," and worried that senders could be subject to statutory damages if they knew that "they might have excess inventory at the end of the year and might offer that inventory at a steep discount."

The court noted that "while this is outside the scope of the certified question," it didn't think those emails would open a sender to liability:

CEMA protects consumers by requiring that commercial e-mails communicate honestly about the terms of a given promotion or sale in the subject line. Promotions that state "Best Deals of the Year" are not misrepresentations and do not communicate information that retroactively becomes false (and actionable) under CEMA because market conditions change such that a better sale is later available.

That may provide retailers with some flexibility, but it's best to proceed with caution. As the National Advertising Division — a self-regulatory body that hears advertising disputes — has observed, defining puffery is "more art than science."<sup>[10]</sup> Reasonable minds can disagree about what side of the line a particular statement falls on.

As we wait for more clarity in 2026, retailers should take a close look at the subject lines they use in promotional emails to ensure that they don't include any statements that could come across as false or misleading. They may also want to explore what types of statements may constitute puffery and fall outside the scope of CEMA.

Everyone likes a sale, but if you aren't careful with how you advertise it in your emails, your company could end up paying a high price in the end.

---

*Gonzalo Mon is a partner at Kelley Drye & Warren LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] RCW § 19.190.020.

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

[3] *Chen v. Sur La Table Inc.*, 655 F. Supp. 3d 1082, 1092 (W.D. Wash. 2023).

[4] *Shahpur et al v. Ulta Beauty Inc.*, Case No. 2:25-cv-00284 (E.D. Wash 2025).

[5] *Hutton v. Discount Tire Co. of Washington Inc. et al*, Case No. 2:25-cv-02008 (W.D. Wash. 2025).

[6] *Liss et al v. Skechers USA INC.*, Case No. 3:25-cv-05861 (W.D. Wash. 2025).

[7] *Lee et al v. Nordstrom Inc.*, Case No. 2:25-cv-02180 (W.D. Wash. 2025).

[8] See, e.g., *Kimberly Smith v. Lane Bryant Brands Opco LLC*, No. C24C25008480 (Md. Balt. Cir. Ct.).

[9] Md. Commercial Law Code Ann. § 14-3001 - 14-300.

[10] *The Procter & Gamble Company, Pampers Easy Ups*, NAD Case No. 6045 (Jan. 5, 2017).