

NO. 94162-9

SUPREME COURT OF THE STATE OF WASHINGTON

LYFT, INC., a Delaware corporation,

Appellant,

v.

KENNETH WRIGHT, on his own behalf and on behalf of other similarly
situated persons,

Respondents.

**BRIEF OF AMICUS CURIAE
ATTORNEY GENERAL OF WASHINGTON**

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I. INTRODUCTION

In construing the provisions of the Commercial Electronic Mail Act (CEMA) that relate to unsolicited commercial electronic mail messages and those that relate to unsolicited commercial text messages, and in analyzing the legislative history of both, the Legislature clearly intended that a recipient of an unsolicited commercial text message did not have to prove injury in fact prior to recovering statutory damages. Indeed, by pronouncing its findings of costs borne by recipients of unsolicited commercial text messages and by providing for the recovery of statutory damages by those same recipients, the Legislature signaled its intention to minimize the proof necessary to establish a CPA claim for this CEMA violation in order to maximize the deterrent effect of the overall legislation and to carry out the Legislature's stated intent: "to limit the practice of sending unsolicited commercial text messages to cellular telephone or pager numbers in Washington." Final Bill Report on Substitute H.B. 2007, 58th Leg., Reg. Sess. (Wash. 2003). Imposing financial burdens on individuals to prove injury in fact in litigation, particularly when they are statutorily entitled to liquidated damages, would hamper their ability to obtain legal redress and reduce the deterrent effect of remedial statutes like CEMA.

For these reasons, the Attorney General respectfully submits this amicus curiae brief to urge the Court to give effect to the Legislature's intent and find that the recipient of an unsolicited commercial text message in violation of CEMA does not have to prove injury in fact before recovering liquidated damages pursuant to RCW 19.190.040(1).

II. INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. The Attorney General is specifically authorized under the Washington Consumer Protection Act (CPA), Chapter 19.86 RCW, to bring actions on behalf of the State of Washington to protect Washington consumers from unfair and deceptive acts or practices in trade or commerce. Private parties may also bring actions under the CPA. RCW 19.86.090.

The Attorney General is charged with directly enforcing the CPA and thus has a particular interest in the development of CPA case law. Moreover, the Attorney General has a significant interest in ensuring that the state's consumer protection laws are properly construed and applied in private actions. Legitimate actions by private litigants supplement the Attorney General's efforts and vindicate consumers' rights. If statutes such as CEMA were construed in a manner that would create extra hurdles for private litigants to clear to establish CPA claims – hurdles that the Legislature never intended – it may prevent harmed individuals from

obtaining adequate legal redress for CPA violations and fail to deter companies from discontinuing their unfair and deceptive commercial practices, all to the public's detriment.

The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters that affect the public interest. *See Young Americans For Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978). The Legislature intended for the Attorney General to have the opportunity to participate in such cases, as evidenced by the statutory requirements that the Attorney General be served with any complaint for injunctive relief under the CPA and with any appellate brief that addresses any provision of the CPA. RCW 19.86.095.

Accordingly, the Attorney General respectfully submits this brief to provide the Court with additional briefing on (1) the absence of legislative intent to require recipients of unsolicited commercial text messages to separately prove injury in fact before recovering liquidated damages in a CPA action and (2) the important purpose and function of consumer class actions in relation to CPA enforcement.¹

¹ The Attorney General limits his brief to the second question certified to the Supreme Court and does not take a position on the merits of this action.

III. ISSUE PRESENTED BY AMICUS

Does the liquidated damages provision of CEMA, RCW 19.190.040(1), establish the causation and/or injury elements of a claim under the CPA as a matter of law or must the recipient of an unsolicited commercial text message that violates CEMA first prove injury in fact before he or she can recover the liquidated damage amount?

IV. ARGUMENT

A. **The Legislative History of CEMA Demonstrates That the Legislature Intended to Treat Unsolicited Commercial Electronic Mail and Unsolicited Commercial Text Messages in the Same Manner**

Before construing the statutory provisions relating to the transmission of unsolicited commercial text messages, the Court should first review the Legislature's earlier response to the transmission of unsolicited commercial electronic mail, which brought on the enactment of CEMA. Courts "construe an act as a whole, giving effect to all the language used. (Citation.) Related statutory provisions are interpreted in relation to each other and all provisions harmonized. (Citation.)" *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999), *as amended* (Sept. 8, 1999) (citations omitted). *See ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993) (holding that statutory terms should not be view "in isolation, rather than within the context of the regulatory and statutory scheme as a whole. Statutory

provisions must be read in their entirety and construed together, not piecemeal”). As discussed below, the Legislature responded to both unfair and deceptive practices in similar fashion.

1. The Legislature’s response to deceptive spam e-mail

In 1998, the Legislature passed CEMA to address the then-emerging problems of unsolicited commercial electronic mail, also known as spam e-mail. The Legislature noted that with the advent of spam e-mail, “[a]dvertisers can reach thousands or even millions of consumers at little or no cost to themselves.” Final Bill Report on Engrossed Substitute H.B. 2752, 55th Leg., Reg. Sess. (Wash. 1998), attached hereto as Attachment A. By contrast, the Legislature found that spam e-mail came at a cost to consumers and internet service providers (ISPs): “recipients must pay to download these messages, messages must be stored, using memory on each recipient’s computer, and an unsolicited message may delay the receipt of an expected message. . . . [T]here are concerns that traffic over a computer network may slow as the network becomes more congested.” *Id.* ISPs reported that spammers “sometimes disguise advertisements by putting false or misleading information on the subject line of the messages, hide their identities by using third parties’ Internet domain names without permission or otherwise misrepresent the points of origin or transmission paths of messages.” *Id.*

In response, the Legislature specifically declared that initiating the transmission or knowingly assisting the transmission of deceptive spam e-mail was a violation of the CPA. RCW 19.190.030(1) & RCW 19.190.030(2)²; see Final Bill Report on Engrossed Substitute H.B. 2752 (“[A] violation of the Consumer Protection Act occurs when a sender” sends an unlawful e-mail message), cited in *Gragg v. Orange Cab Co., Inc.*, 145 F. Supp. 3d 1046, 1051 (W.D. Wash. 2015). To prevail in a private CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person’s business or property, and (5) causation. *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009), citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). Because the Legislature declared that initiating the transmission or knowingly assisting the transmission of deceptive spam e-mail violated the CPA, the Legislature established that all five elements of a private CPA claim had been met.

The Legislature also included specific findings that the first three elements of a CPA claim were established upon “violation of this chapter,” meaning that such a violation was an unfair or deceptive act or practice occurring in trade or commerce that had a public interest impact.

² Relevant provisions of CEMA are attached hereto as Attachment B.

Final Bill Report on Engrossed Substitute H.B. 2752; RCW 19.190.030(3). Further, “[d]amages to the recipient of a commercial electronic mail message . . . sent in violation of this chapter are five hundred dollars, or actual damages, whichever is greater.” Final Bill Report on Engrossed Substitute H.B. 2752; RCW 19.190.040. Because the Legislature had already declared it to be a CPA violation, private litigants who receive deceptive spam e-mail do not have to separately prove injury in fact in order to recover statutory damages.

2. The Legislature’s response to unsolicited commercial text messages

In 2003, the Legislature was called upon to address the then-emerging problem of unsolicited commercial text messages. In amending CEMA to prohibit unsolicited commercial text messages, the Legislature noted that commercial messages sent by telephone, Internet, and facsimile had already been regulated, but commercial text messages did not fall within existing regulations and restrictions. Final Bill Report on Substitute H.B. 2007, 58th Leg., Reg. Sess. (Wash. 2003), attached hereto as Attachment C. To curb the practice, the Legislature enacted a bill amending CEMA so that, according to the final bill report, “[a] violation of the commercial electronic text messaging law provides penalties similar to those for commercial e-mail messages. . . . In the case of a suit brought

by a recipient, the penalty is the greater of \$500 or actual damages incurred. . . .” *Id.* Moreover, the final bill report noted that “[a] violation of laws relating to the commercial electronic text messages *is also a violation of the Consumer Protection Act . . .*” *Id.* (emphasis added). Thus, the Legislature expressed its intent that violations of CEMA relating to unsolicited commercial text messages are CPA violations, just as it had made similar statements in the final bill report for S.H.B. 2752 that deceptive spam e-mails are CPA violations.

Substitute House Bill 2007, the legislation amending CEMA to include unsolicited commercial text messages tracks the language of the final bill report and gives further indication that the Legislature intended to treat unsolicited commercial text messages in a similar fashion to deceptive spam e-mail. As enacted, S.H.B. 2007 appended the phrase “or a commercial electronic text message” after instances of “commercial electronic mail message” occurring in the existing CEMA. Final Bill Report on Substitute H.B. 2007, § 2. As with deceptive spam e-mail, the Legislature established that the first three elements of a CPA claim were met with the initiation or assistance in transmission of an electronic commercial text message, outside of two particular exemptions. RCW 19.190.060; RCW 19.190.070 (no violation of RCW 19.190.060 if (1) the commercial text message transmitted at the direction of text

recipient's cellular or pager service provider or (2) the recipient clearly and affirmatively consented in advance to the receive the text messages). The damages provision in CEMA was also amended to include commercial text messages along with the deceptive spam e-mail already covered. Final Bill Report on Substitute H.B. 2007, § 5 (June 27, 2003); RCW 19.190.040(1) ("Damages to the recipient of a commercial electronic mail message or a commercial electronic text message sent in violation of this chapter are five hundred dollars, or actual damages, whichever is greater.").

In summary, the Legislature's responses to deceptive spam e-mail and unsolicited commercial text messages were identical in (1) noting costs borne by recipients of these unsolicited transmissions, discussed *infra*, (2) establishing a CPA violation, and (3) allowing recipients of these unsolicited messages to recover statutory damages. While the legislation amending CEMA to include unsolicited commercial text messages may not have included as explicit a declaration of a CPA violation as it had for deceptive spam e-mail, nothing in the legislative history of S.H.B. 2007 indicates that unsolicited commercial text messages and deceptive spam were intended to be treated any differently; rather, the context and subject matter of the legislation and the express intent language of S.H.B. 2007 indicates just the opposite. *See Lynch v. State*, 19 Wn.2d 802, 806, 145

P.2d 265 (1944) (“In the process of arriving at the intent of the legislative body, the first resort of the courts is to the context and subject matter of the legislation, because the intention of the lawmaker is to be deduced, if possible, from what it said.”).

3. The Legislature recognized injury to the business or property of the text message recipient upon receipt of unsolicited commercial text messages and provided for statutory damages as a result

As with recipients of deceptive spam e-mail, the Legislature did not intend for recipients of unsolicited commercial text messages to have to prove injury in fact before recovering statutory damages. The Legislature’s intent should be carried out. *See Lynch*, 19 Wn. 2d at 806.

In RCW 19.190.060(2), the Legislature declared that a violation of the law prohibiting the transmission of an unsolicited commercial text message established the first three elements of a CPA claim, but in RCW 19.190.040(1), the Legislature also provided that unsolicited commercial text message recipients may recover statutory damages, obviating their need to prove injury and causation. Not only did the Legislature explicitly provide for liquidated or actual damages, it expressly stated its intent for the legislation, which demonstrates the Legislature’s view that unsolicited commercial text messages cause injury to their recipients:

The legislature recognizes that the number of unsolicited commercial text messages sent to cellular telephones and pagers is increasing. . . .These unsolicited messages often result in costs to the cellular telephone and pager subscribers in that they pay for use when a message is received through their devices. The limited memory of these devices can be exhausted by unwanted text messages resulting in the inability to receive necessary and expected messages. The legislature . . . [intends] to limit the practice of sending unsolicited commercial text messages to cellular telephone or pager numbers in Washington.

Final Bill Report on Substitute H.B. 2007, § 1 (June 27, 2003). In doing so, the Legislature quantified a compensable injury to property, which amounts to more than mere “inconvenience.” *Panag*, 166 Wn. 2d at 57. The Legislature intended to curb the practice of sending unsolicited commercial text messages for causing this injury by providing for these statutory damages.

The Legislature’s reasoning is clear. Consumers may bear costs for purchasing additional mobile device storage to accommodate unsolicited commercial text messages. Pay-as-you-go wireless plans, including those that may appeal to low-income and credit-challenged consumers by not requiring deposits or a credit check, often charge a fee per text received. *See, e.g.*, T-Mobile Pay-As-You-Go Plan, <https://prepaid-phones.t-mobile.com/pay-as-you-go> (last accessed Sept. 25, 2017) (“Get 30

minutes of talk, 30 texts, or any combination of minutes and texts that add up to 30, for only \$3/mo. After that, additional minutes and texts are only \$0.10/each.”). Unsolicited commercial text messages represent a real cost to consumers, even if the cost of each text message is minimal. *Cf. Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990) (“The injury element will be met if the consumer’s property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.”), *cited in Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014).

Because the Legislature found that injury results from the receipt of an unsolicited commercial text message and approved liquidated damages of \$500 or actual damages, whichever is greater, to recipients of a commercial electronic text message sent in violation of CEMA, RCW 19.190.040(1), the Legislature did not intend to require private litigants to prove a cognizable injury before recovering statutory damages. *See Gragg*, 145 F. Supp. 3d at 1053 (holding “there is . . . no indication that the legislature intended to regulate the two forms of communications differently (between unsolicited (deceptive) e-mails and unsolicited texts): the legislature used identical language to declare an unfair or deceptive act in trade or commerce that affects the public interest. . . . The only way to give effect to the legislature’s stated intent is to construe the liquidated

damages provision as establishing the injury and causation elements of a CPA claim”).

To the extent that the intent of the statutory damages provision of CEMA, with respect to unsolicited commercial text messages, is not clear – here, whether injury in fact must be proved before recovering damages – the Court may resort to extrinsic aids, such as legislative history, including the final legislative reports, to determine legislative intent. *Cherry v. Municipality of Metro. Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991) (holding that “[i]f . . . the intent of the statute is not clear from the language of the statute by itself, the court may resort to statutory construction. Such construction may include the consideration of legislative history”). The purpose of an enactment should prevail over express but inept wording. *Whatcom Cty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303, 1308 (1996).

Lyft argues that because RCW 19.190.060(2) – addressing unsolicited commercial text messages – only establishes the first three elements of a CPA claim, “the Legislature [has] specifically define[d] the exact relationship between [RCW 19.190.060] and the CPA.” Op. Br. on Certified Questions, at 25 (citation omitted). Lyft points to the text of RCW 19.190.030 – addressing deceptive spam e-mail – as proof that when the Legislature *intends* to establish all five elements of a CPA claim, it

knows how to do it. *Id.* at 26. But in making this argument, Lyft ignores all indications that the Legislature intended to treat deceptive spam e-mail and unsolicited commercial text messages in similar fashion, including evidence from the Legislature’s express intent language in S.H.B. 2007, where the Legislature clearly found that injury to recipients was sustained in receiving unsolicited commercial text messages, and from the Legislature’s decision to allow recipients of unsolicited commercial text messages to recover statutory damages. In construing the provisions of CEMA that relate to deceptive spam e-mail and those that relate to unsolicited commercial text messages, and in analyzing the legislative history of both, including final legislative reports and the Legislature’s statutory intent language in S.H.B. 2007, it is clear that the Legislature intended that a recipient of an unsolicited commercial text message, much like a deceptive spam recipient, did not have to prove injury in fact prior to recovering damages.³ Moreover, in providing for statutory damages, the

³ On other occasions where the Legislature has established a *per se* unfair trade practice and *per se* public impact by statute to address a particular unfair or deceptive practice that may result in minimal injury to an individual consumer, the Legislature has included a statutory damages provision to deter the practice. *See, e.g.*, RCW 80.36.400(3) (prohibiting automatic dialing for commercial solicitation) (“A violation of this section is a violation of chapter 19.86 RCW. It shall be presumed that damages to the recipient of commercial solicitations made using an automatic dialing and announcing device are five hundred dollars.”); RCW 80.36.530 (a violation of the statutory requirements for alternate operator service companies constitutes the establishment of the first three elements of a CPA action, and “[i]t shall be presumed that damages to the consumer are equal to the cost of the service provided plus two hundred dollars. Additional damages must be proved.”); RCW 80.36.540 (unsolicited transmission of telefacsimile messages

Legislature signaled that it did not intend to create any extra burden for the recipients of unsolicited commercial messages to prove their CPA claims; in fact, the Legislature intended to minimize the proof necessary to maximize the deterrent effect of the overall legislation.

B. Consumer Class Actions Under the CPA Further an Important Public Interest

The CPA’s purpose “is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition.” RCW 19.86.920; *see also Fisher v. World-Wide Trophy Outfitters, Ltd.*, 15 Wn. App. 742, 747, 551 P.2d 1398 (1976) (CPA’s purpose is to protect the public by prohibiting and eliminating injurious acts or practices). Washington courts shall liberally construe the CPA and remedial statutes like CEMA to serve their beneficial purposes. RCW 19.86.920; *see Carlsen v. Glob. Client Sols., LLC*, 171 Wn.2d 486, 498, 256 P.3d 321 (2011) (holding that “a remedial statute enacted to stem

promoting goods or services for purchase by the recipient constitutes the establishment of the first three elements of a CPA action, and “[d]amages to the recipient of telefacsimile messages in violation of this section are five hundred dollars or actual damages, whichever is greater”); RCW 19.162.010 & RCW 19.162.070 (deceptive use of pay-per-call information delivery services constitutes the establishment of the first three elements of a CPA action, and the court “may award the greater of three times the actual damages sustained by the person or five hundred dollars”); RCW 19.170.060 & RCW 19.170.070 (deceptive promotional advertising of prizes constitutes the establishment of the first three elements of a CPA action and the court “may award the greater of five hundred dollars or three times the actual damages sustained by the person”).

the ‘numerous unfair and deceptive practices’ . . . should be construed liberally in favor of the consumers it aims to protect”) (citations omitted).

When the CPA was enacted in 1961, the Attorney General had sole authority to enforce its provisions. *See Hangman Ridge Training Stables, Inc.*, 105 Wn. 2d at 783–84. In 1971, the Legislature responded to the need for additional enforcement capabilities by providing for “a private right of action whereby individual citizens would be encouraged to bring suit to enforce the CPA.” *Id.* at 784. This Court has held that the purpose of the private right of action is “to enlist the aid of private individuals . . . to assist in the enforcement of the [CPA].” *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976). In order to prevail in a private right of action under the CPA, consumers must show that the acts or practices complained of affect the public interest. *Hangman Ridge Training Stables, Inc.*, 105 Wn. 2d at 788. Thus, the CPA is not a vehicle for resolving purely private disputes. *Id.* at 790. When consumers bring a private CPA action, they represent the public interest. *Id.* at 780. This Court has held that a private consumer may obtain injunctive relief in addition to recovering damages in a private CPA action, even if the injunction would not directly affect the consumer's private interests. *Hockley v. Hargitt*, 82 Wn.2d 337, 349–50, 510 P.2d 1123 (1973). The Court also held that allowing private consumers to enjoin future violations

of the CPA served the public interest by preventing fraudulent practices from continuing unchecked. *Id.* at 350.

As this Court has noted, class actions serve an important function in our justice system. *Darling v. Champion Home Builders Co.*, 96 Wn.2d 701, 706, 638 P.2d 1249 (1982). Class actions facilitate judicial economy because they resolve individual claims in a single action, avoiding repetitious and possibly inconsistent results. *Id.* Class actions also improve access to justice because they “establish effective procedures for redress of injuries for those whose economic position would not allow individual lawsuits.” *Id.* (citing 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE § 1754, at 543 (1972)). Where, as here, consumers may have suffered nominal individual harm, a class action may be their only effective redress. *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980). Otherwise, consumers “might not consider it worth the candle” to pursue their claims. *Id.* at 338.

The private consumer action is a vital feature of the CPA. Therefore, Washington courts should refrain from creating obstacles that would impair Washington citizens’ ability to bring private CPA actions. Shifting the financial burden on consumers to prove injury in fact in litigation – where once proven they are statutorily entitled to liquidated damages – would impede consumers’ abilities to bring these violations to

light and greatly diminish the deterrent effect of remedial statutes like CEMA. *See Carlsen*, 171 Wn. 2d at 498. It would undermine the dual enforcement scheme the Legislature intended and the efficacy of the CPA as a means to foster a fair and honest market place.

V. CONCLUSION

The Attorney General respectfully urges the Court to find that the recipient of a unsolicited commercial text message that violates CEMA does not have to prove injury in fact before recovering liquidated damages pursuant to RCW 19.190.040(1).

RESPECTFULLY SUBMITTED this 29th day of September, 2017.

ROBERT W. FERGUSON
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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing on the following party/parties via the following methods:

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I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 29th day of September, 2017, at Seattle, Washington.

/s/ Sarah Laycock
SARAH LAYCOCK
Legal Assistant

Attachment A

FINAL BILL REPORT

ESHB 2752

C 149 L 98

Synopsis as Enacted

Brief Description: Prohibiting unsolicited electronic mail.

Sponsors: By House Committee on Energy & Utilities (originally sponsored by Representatives Bush, Crouse, Gardner, Cairnes, Dyer, Mulliken, Morris, Linville, Reams, Romero, Smith, McDonald, Ogden, Dickerson, Butler, O'Brien, Ballasiotes, Talcott and Appelwick; by request of Attorney General).

House Committee on Energy & Utilities

Senate Committee on Energy & Utilities

Background: The Internet is an international network of computer networks, interconnecting computers ranging from simple personal computers to sophisticated mainframes. It is a dynamic, open-ended aggregation of computer networks, rather than a physical entity. Internet users can access or provide a wide variety of information, purchase goods and services, and communicate with other users electronically.

As a network of interconnected computers, the Internet also provides a new forum for advertising. Electronic mail messages sent over a computer network may advertise real property, goods, or services for sale or lease. In some cases, a computer user may request information about the property, goods, or services. In other cases, the computer user may receive the advertisements as unsolicited commercial electronic mail messages.

The Office of the Attorney General reports that it received 322 complaints over a five-month period in 1997 about unsolicited electronic messages. Although some of the unsolicited messages were non-commercial in nature, many of the messages were commercial advertisements.

Many consumers connect to the Internet through interactive computer services that charge fees for time spent utilizing a dial-up connection to their computer servers. Via an interactive computer service's server, individual consumers are able to reach the Internet.

Summary: A commercial electronic mail message means a message sent for the purpose of promoting real property, goods, or services for sale or lease. A person who initiates the transmission of a commercial electronic mail message from a computer located in Washington or to a Washington resident that contains untrue or

misleading information may violate the Consumer Protection Act. Specifically, a violation of the Consumer Protection Act occurs when a sender:

- uses a third party's Internet domain name without the permission of the third party, or otherwise misrepresents any information in identifying the point of origin or transmission path of the message; or
- puts false or misleading information in the subject line of the message.

A sender is responsible for knowing that a recipient is a Washington resident, if that information is available, upon request, from the registrant of the Internet domain name contained in the recipient's electronic mail address.

When a sender violates the Consumer Protection Act, the recipient of the commercial electronic mail message may bring a civil action against the sender for the greater of \$500 or actual damages. An interactive computer service provider may also bring an action against the sender for the greater of \$1,000 or actual damages. Additionally, a plaintiff who brings a civil suit against a sender may recover the costs of bringing the action, including attorney's fees. The court may also treble a plaintiff's damage award up to a maximum of \$10,000.

In addition to seeking civil remedies, an interactive computer service provider may block the receipt or transmission through its service of any electronic mail which it reasonably believes is, or will be, sent in violation of the Consumer Protection Act. An interactive computer service provider cannot be held liable for any action voluntarily taken in good faith to block the receipt of commercial electronic messages sent in violation of the Consumer Protection Act.

A select task force on commercial electronic messages is created. The select task force will consist of two Representatives, two Senators, and one person appointed by the Governor. The select task force will study technical, legal, and cost issues related to the transmission and receipt of commercial electronic messages over the Internet. The select task force will evaluate whether existing laws are sufficient to resolve technical, legal, or financial problems created by the increasing volume of commercial electronic mail messages. The select task force will also review efforts made by the federal government and other states to regulate the transmission of commercial electronic messages. The select task must prepare a report identifying policy options and recommendations for the House Energy and Utilities Committee by November 15, 1998.

Votes on Final Passage:

House 97 1
Senate 42 0 (Senate amended)

House 96 0 (House concurred)

Effective: June 11, 1998

Attachment B

[RCWs > Title 19 > Chapter 19.190 > Section 19.190.030](#)[19.190.020](#) << [19.190.030](#) >> [19.190.040](#)**RCW 19.190.030****Unpermitted or misleading electronic mail—Violation of consumer protection act.**

(1) It is a violation of the consumer protection act, chapter **19.86** RCW, to conspire with another person to initiate the transmission or to initiate the transmission of a commercial electronic mail message that:

(a) Uses a third party's internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or

(b) Contains false or misleading information in the subject line.

(2) It is a violation of the consumer protection act, chapter **19.86** RCW, to assist in the transmission of a commercial electronic mail message, when the person providing the assistance knows, or consciously avoids knowing, that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any act or practice that violates the consumer protection act.

(3) The legislature finds that the practices covered by this chapter are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter **19.86** RCW. A violation of this chapter is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the consumer protection act, chapter **19.86** RCW.

[[1999 c 289 § 3](#); [1998 c 149 § 4](#).]**Site Contents**

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RCW 19.190.040

Violations—Damages.

(1) Damages to the recipient of a commercial electronic mail message or a commercial electronic text message sent in violation of this chapter are five hundred dollars, or actual damages, whichever is greater.

(2) Damages to an interactive computer service resulting from a violation of this chapter are one thousand dollars, or actual damages, whichever is greater.

[[2003 c 137 § 5](#); [1998 c 149 § 5](#).]

NOTES:

Intent—2003 c 137: See note following RCW [19.190.060](#).

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[Section 19.190.060](#)

[19.190.050](#) << [19.190.060](#) >> [19.190.070](#)

RCW 19.190.060

Commercial electronic text message—Prohibition on initiation or assistance—Violation of consumer protection act.

(1) No person conducting business in the state may initiate or assist in the transmission of an electronic commercial text message to a telephone number assigned to a Washington resident for cellular telephone or pager service that is equipped with short message capability or any similar capability allowing the transmission of text messages.

(2) The legislature finds that the practices covered by this section are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter [19.86](#) RCW. A violation of this section is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the consumer protection act, chapter [19.86](#) RCW.

[[2003 c 137 § 3.](#)]

NOTES:

Intent—2003 c 137: "The legislature recognizes that the number of unsolicited commercial text messages sent to cellular telephones and pagers is increasing. This practice is raising serious concerns on the part of cellular telephone and pager subscribers. These unsolicited messages often result in costs to the cellular telephone and pager subscribers in that they pay for use when a message is received through their devices. The limited memory of these devices can be exhausted by unwanted text messages resulting in the inability to receive necessary and expected messages.

The legislature intends [intends] to limit the practice of sending unsolicited commercial text messages to cellular telephone or pager numbers in Washington." [[2003 c 137 § 1.](#)]

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Attachment C

FINAL BILL REPORT

SHB 2007

C 137 L 03

Synopsis as Enacted

Brief Description: Prohibiting unsolicited commercial text messages.

Sponsors: By House Committee on Technology, Telecommunications & Energy (originally sponsored by Representatives Nixon, Ruderman, Bush, Dickerson and Hudgins).

House Committee on Technology, Telecommunications & Energy
Senate Committee on Technology & Communications

Background:

Commercial messages that are sent by telephone or by the Internet are subject to state and federal regulations. Text messages sent by a fax machine are also regulated. However, text messages sent to cellular phones or pagers do not fall within their regulations and restrictions.

State telemarketing laws prohibit unfair or deceptive commercial telephone solicitations. Commercial telephone solicitors must not make any calls before 8 a.m. or after 9 p.m., and a commercial solicitor may not engage in any conduct that intimidates or harasses a person in connection with the telephone call. Commercial solicitors must also be registered with the Department of Licensing prior to doing business in the state. Federal rules restrict the use of the telephone network for unsolicited commercial messages including faxed messages.

Commercial electronic mail (e-mail) messages that contain deceptive or false information may not be sent from a computer located in Washington or to an e-mail address held by a Washington resident. A violation occurs when the message: (1) uses a third party's Internet domain name without permission of the third party, (2) misrepresents any information in identifying the point of origin or transmission path of the message, or (3) puts false or misleading information in the subject line of the message. A commercial e-mail message is an e-mail message sent for the purpose of promoting real property, goods, or services for sale or lease.

A recipient of a commercial e-mail message or the Internet service provider may bring a civil action against a sender who violates the laws relating to commercial e-mail messages. In the case of a suit brought by a recipient, the penalty is the greater of \$500 or actual damages incurred. In the case of a lawsuit brought by an Internet service provider, the penalty is the greater of \$1,000 or actual damages. A violation of laws relating to commercial e-mail messages is also a violation of the Consumer Protection Act

and may be enforced by the Attorney General. A violation of the Consumer Protection Act may result in a civil fine, treble damages, court costs, and attorneys' fees.

Summary:

Commercial electronic text messages may not be sent by businesses in the state of Washington to a telephone number assigned to a Washington resident for cellular or pager service equipped with short message capability. A commercial electronic text message is a message sent to promote real property, goods, or services for sale or lease. An electronic text message is a message sent to a cell phone or a pager equipped with short message service. The message can be initiated as a short message or as an e-mail message.

Certain messages are exempt from this prohibition. A cellular or pager service provider may send commercial text messages to existing subscribers at no cost to the subscriber unless the subscriber has indicated they are unwilling to receive these text messages. A sender of an unsolicited commercial text message may send messages to a subscriber only if the subscriber has consented in advance to receive these messages.

A cellular phone or pager service provider may not be held liable for acting merely as an intermediary between the sender and the recipient of a commercial electronic text message sent in violation of the law, but may be liable if they knowingly assist in transmitting messages sent in violation of the law. A wireless network is not considered a initiator of an electronic mail message if the wireless network is the intervening transmitter of the message.

A violation of the commercial electronic text messaging law provides penalties similar to those for commercial e-mail messages. A recipient of a commercial electronic text message or the cellular or pager service provider may bring a civil action against a sender who violates the laws relating to commercial electronic text messages. In the case of a suit brought by a recipient, the penalty is the greater of \$500 or actual damages incurred. In the case of a lawsuit brought by a cellular or pager service provider, the penalty is the greater of \$1,000 or actual damages. A violation of laws relating to commercial electronic text messages is also a violation of the Consumer Protection Act and may be enforced by the Attorney General. A violation of the Consumer Protection Act may result in a civil fine, treble damages, court costs, and attorneys' fees.

Votes on Final Passage:

House 96 0
Senate 47 0 (Senate amended)
House 97 0 (House concurred)

Effective: July 27, 2003

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