

CEMA expands liability for text-based referral marketing in Washington

Plaintiffs' attorneys are increasingly turning to Washington's CEMA to challenge text-based refer-a-friend programs, drawn by its broad liability standards, statutory damages, and fee-shifting provisions.

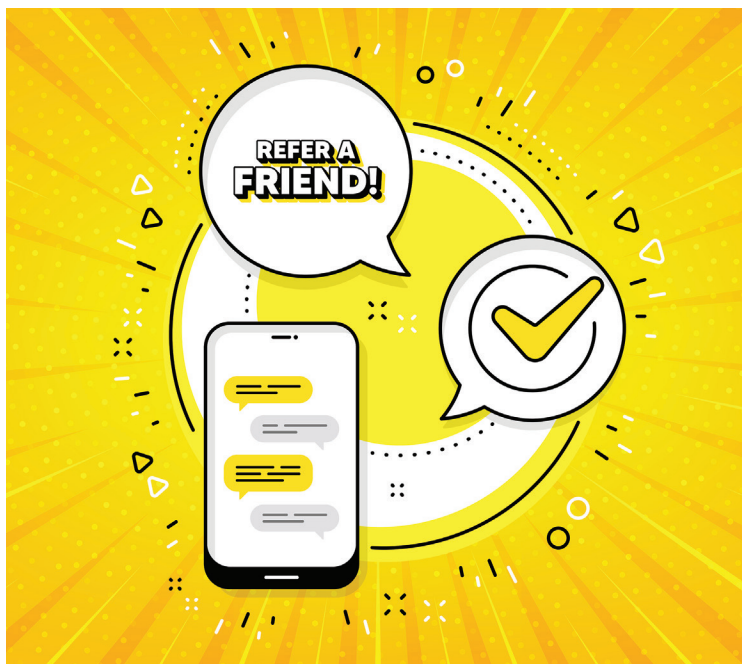
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A new wave of class action litigation is emerging under Washington State's Consumer Electronic Mail Act (CEMA), targeting companies that utilize refer-a-friend marketing programs via text message. CEMA's expansive liability framework – combined with statutory damages of \$500 per violation and the availability of attorneys' fees – has made it an increasingly attractive tool for plaintiffs' counsel.

CEMA vs. TCPA: A broader liability framework

The federal Telephone Consumer Protection Act (TCPA), enacted to curb unwanted telemarketing, has long governed text message marketing. Under the TCPA, marketing texts sent via an automated telephone dialing system (ATDS) require prior express written consent, while informational texts require prior express consent. TCPA liability is generally limited to the initiator of the message – typically the sender. As a result, refer-a-friend messages, often sent manually by users without an ATDS, have historically fallen outside the scope of TCPA litigation.

CEMA, by contrast, casts a wider net. It imposes liability not only on the initiator of a commercial text message but also on any party that “assists in the transmission.” The



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statute defines assistance as providing “substantial support” that enables another party to “formulate, compose, send, or transmit a commercial electronic text message.” In turn, a “commercial electronic text message” is broadly defined as any message sent to “promote real property, goods, or services for sale or lease.”

Recent litigation

Plaintiffs' attorneys are increasingly targeting refer-a-friend programs under CEMA, particularly those that incentivize users to send promotional texts. Courts have interpreted “substantial assistance” ex-

pansively, finding liability where companies engineer the “chain of events” that lead to message transmission. Relevant factors include:

- Designing and incentivizing referral programs (for example, cash or stock rewards);
- Creating app flows that surface contact lists and reduce sending to a few clicks;
- Pre-composing promotional messages that resemble advertisements;
- Auto-generating referral links and branded landing pages; and
- Enabling access to native SMS apps to streamline sending.

Importantly, courts have declined to dismiss CEMA claims at the

pleading stage, even where users retain control over message timing and content – an argument that often defeats TCPA claims. The focus under CEMA is on the facilitation of transmission, not just initiation.

Finally, in a pivotal September 2025 decision, the Washington Court of Appeals further broadened CEMA's reach, holding that a “commercial electronic text message” encompasses not only messages that directly promote goods or services but also those that “contribute to the growth or prosperity of a business.” This interpretation significantly expands the statute's scope beyond traditional marketing, capturing a wide range of referral and promotional communications that may indirectly benefit a company.

Implications for businesses nationwide

Washington should be treated as a high-risk jurisdiction for text-based referral marketing. Companies should consider:

- Segmenting Washington from SMS referral campaigns.
- Redesigning referral mechanics to remove inapp facilitation – for example, removing pre-composed messages or contact list access.
- Decoupling incentives from text outreach.
- Documenting user independence in message creation and transmission, and minimizing company control over message content and timing.

Conclusion

CEMA's expansive liability framework and generous statutory remedies have transformed it into a potent vehicle for consumer privacy class actions. As courts continue to interpret "substantial assistance" and "commercial messaging" broadly, companies must reassess their digital marketing strategies – especially those involving text outreach to Washington residents.

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