



CALIFORNIA LITIGATION ALERT

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California Anti-Spam Law Is Toughest In The Nation, But May Be Superseded By Impending Federal Legislation

On January 1, 2004, a bill recently signed by Governor Gray Davis will take effect that has been hailed by many as the toughest anti-spamming law in the nation. With narrow exceptions, the bill, SB 186, prevents marketers and advertisers from sending unsolicited email advertisements from California, regardless of whether the recipient is located in or outside the state. Targeting marketers and advertisers located outside California, SB 186 also prohibits sending unsolicited commercial email advertisements to a California email address. However, as explained below, SB 186 may well eventually be superseded by impending federal legislation.

In an attempt to address rising concerns regarding so-called spam, the California Legislature passed SB 186, which amends, repeals, and adds certain sections to California's Business and Professions Code. SB 186 is widely regarded as the most restrictive anti-spamming legislation in the country. Unlike anti-spamming laws in other states, SB 186 targets *both* the actual spammers as well as the advertisers who use spam.

SB 186 enacts Section 17529, an entirely new addition to the Business & Professions Code. Under Section 17529.2(a), a person or entity is prohibited from initiating or advertising in unsolicited commercial email advertisements sent from California, irrespective of whether the recipient is located in or outside the state. Importantly, SB 186 also targets persons or entities *outside* of California. Section 17529.2(b) makes it illegal to initiate or advertise in unsolicited commercial email advertisements sent to an email address located in California.

In addition, SB 186 attacks a common method used by email advertisers to reach potential consumers. Specifically, Section 17529.4(a) prohibits any person or entity from collecting email addresses posted on the Internet if the purpose for collection is to send unsolicited commercial email advertisements. Section

17529.4(b) also makes it unlawful to send such unsolicited advertisements where the email address was obtained through automated manipulation of names, letters, or numbers. Likewise, under Section 17529.4(c), it is illegal to use automated means to register for multiple email accounts in order to send such unsolicited advertisements.

SB 186 prohibits certain tactics used by so-called spammers to mislead the recipient to open unsolicited email advertisements. For example, under Section 17529.5(c), it is unlawful to have a subject line that the sender knows will mislead the recipient regarding the actual contents of the email.

SB 186 authorizes a recipient, an email service provider ("ESP"), or the California Attorney General to bring an action against a person or entity violating Section 17529. Under Section 17529.8, the plaintiff bringing such an action may recover actual damages as well as reasonable attorneys fees and costs. Additionally, a defendant may be liable for liquidated damages of \$1,000 for *each* violative email advertisement, with a ceiling of \$1,000,000 *per incident*. "Incident" is defined as "a single transmission or delivery to a single recipient or to multiple recipients of unsolicited commercial e-mail advertisement containing substantially similar content." Under 17529.8(b), if the court finds that the defendant implemented, with due care, policies and procedures designed to prevent such unsolicited advertisements, the court shall reduce the liquidated damages recoverable to a maximum of \$100 for each unsolicited commercial email advertisement or a maximum of \$100,000 per incident.

ESPs will not be held in violation of SB 186 where the

ESP is only involved in "routine transmission"; that is, the ESP was merely delivering spam sent by another to the recipient. Violators of Section 17529 may be found guilty of a misdemeanor pursuant to Section 17534.

SB 186 provides two exemptions to these restrictive rules. An exemption is provided where a recipient has given his direct consent to receive email advertisements. "Direct consent" is defined under Section 17529.1(d) as the recipient "expressly consent[ing] to receive e-mail advertisements from the advertiser, either in response to a clear and conspicuous request for the consent or at the recipient's own initiative."

A second exemption is provided for a "preexisting or current business relationship," defined under Section 17529.1(l) as a recipient who "has made an inquiry and has provided his or her e-mail address, or has made an application, purchase, or transaction, with or without consideration, regarding products or services offered by the advertiser." However, commercial email advertisements sent pursuant to such a preexisting relationship must provide an "opt-out" option for the recipient, via a toll-free number or an "unsubscribe" email to the advertiser. This "opt-out" option does not apply to those receiving free email service where the commercial email advertisements are sent by the provider of the email service (the cost of having a free email account, as it were).

The statutes that governed spam prior to SB 186 are Business & Professions Code Sections 17538.4 and 17538.45. Under SB 186, Section 17538.4 is repealed in its entirety, while Section 17538.45 is partially amended.

Section 17538.45 currently prohibits an individual or business from using the equipment of a California-based ESP to send out unsolicited email advertisements in violation of that ESP's policy on such use. An ESP whose policy is violated is authorized to bring a civil action to recover reasonable attorney's fees, actual damages or liquidated damages of \$50 for each unsolicited advertisement up to a maximum of \$25,000 a day, whichever amount is greater. Under SB 186, Section 17538.45 is amended to state that an ESP may file a cause of action under either Section 17529.8 or Section 17538.45, but not both. Moreover, Section 17538.45 currently exempts violators of that section from being subject to a misdemeanor pursuant to Section 17534. Under the amended Section 17538.45, however, this exemption is absent.

Various pieces of legislation designed to address, on a federal level, the growing concern with spam are currently making their way through Congress. The most likely to be enacted, a Senate bill known as the CAN Spam Act of 2003, was recently passed by unanimous vote in the full Senate. If the bill does become law and is not modified, it will preempt California's SB 186. At this time it is too soon

to ascertain the final disposition of federal legislation in this area. What is certain is that beginning January 1, 2004, California will employ its own measures to address the issue of spam.

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