

AMENDED IN ASSEMBLY MARCH 27, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL

No. 567

Introduced by Assembly Member Simitian

February 18, 2003

An act to amend ~~Section~~ *Sections 17538.4 and 17538.45* of the Business and Professions Code, relating to advertising.

LEGISLATIVE COUNSEL'S DIGEST

AB 567, as amended, Simitian. Unsolicited electronic mail advertisements.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on these unsolicited e-mailed documents, and prohibits the e-mailing of these unsolicited advertising documents to a person who has requested not to receive any further unsolicited documents. Existing law requires certain unsolicited e-mail advertisements to contain a heading of "ADV:" or "ADV:ADLT."

Existing law prohibits a registered user of an electronic mail service provider from using, or causing to be used, the provider's equipment located in this state in violation of the provider's policy prohibiting or

restricting its use for the initiation of unsolicited electronic mail advertisements. Existing law also prohibits an individual, corporation, or other entity from using or causing to be used a provider’s equipment located in this state in violation of the provider’s policy prohibiting or restricting its use to deliver unsolicited electronic mail advertisements to its registered users. Existing law authorizes a provider whose policy is violated to bring a civil action to recover specified damages, and authorizes the court to award reasonable attorney’s fees.

This bill would authorize the recipient of an advertisement that violates ~~these~~ *any of the above* provisions to bring an action for the recovery of actual damages or \$1,000, whichever is greater, for each violation.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. *Section 17538.4 of the Business and Professions*
2 *Code is amended to read:*

3 17538.4. (a) ~~No~~—A person or entity conducting business in
4 this state shall *not* electronically mail (e-mail) or cause to be
5 e-mailed documents containing unsolicited advertising material
6 for the lease, sale, rental, gift offer, or other disposition of any
7 realty, goods, services, or extension of credit unless that person or
8 entity establishes a toll-free telephone number or valid sender
9 operated return e-mail address that the recipient of the unsolicited
10 documents may call or e-mail to notify the sender not to e-mail any
11 further unsolicited documents.

12 (b) ~~All~~ An unsolicited e-mailed ~~documents~~ *document* subject
13 to this section shall include a statement informing the recipient of
14 the toll-free telephone number that the recipient may call, or a
15 valid return address to which the recipient may write or e-mail, as
16 the case may be, notifying the sender not to e-mail the recipient any
17 further unsolicited documents to the e-mail address, or addresses,
18 specified by the recipient.

19 The statement shall be the first text in the body of the message
20 and shall be of the same size as the majority of the text of the
21 message.

22 (c) Upon notification by a recipient of his or her request not to
23 receive any further unsolicited e-mailed documents, ~~no~~ a person



1 or entity conducting business in this state shall *not* e-mail or cause
2 to be e-mailed any unsolicited documents to that recipient.

3 (d) This section shall apply when the unsolicited e-mailed
4 documents are delivered to a California resident via an electronic
5 mail service provider’s service or equipment located in this state.
6 For these purposes “electronic mail service provider” means ~~any~~
7 *a* business or organization qualified to do business in this state that
8 provides individuals, corporations, or other entities the ability to
9 send or receive electronic mail through equipment located in this
10 state and that is an intermediary in sending or receiving electronic
11 mail.

12 (e) As used in this section, “unsolicited e-mailed documents”
13 means ~~any~~ *an* e-mailed document or documents consisting of
14 advertising material for the lease, sale, rental, gift offer, or other
15 disposition of any realty, goods, services, or extension of credit
16 that meet both of the following requirements:

17 (1) The documents are addressed to a recipient with whom the
18 initiator does not have an existing business or personal
19 relationship.

20 (2) The documents are not sent at the request of, or with the
21 express consent of, the recipient.

22 (f) As used in this section, “e-mail” or “cause to be e-mailed”
23 does not include or refer to the transmission of any documents by
24 a telecommunications utility or Internet service provider to the
25 extent that the telecommunications utility or Internet service
26 provider merely carries that transmission over its network.

27 (g) In the case of e-mail that consists of unsolicited advertising
28 material for the lease, sale, rental, gift offer, or other disposition
29 of any realty, goods, services, or extension of credit, the subject
30 line of each and every message shall include “ADV:” as the first
31 four characters. If these messages contain information that
32 consists of unsolicited advertising material for the lease, sale,
33 rental, gift offer, or other disposition of any realty, goods, services,
34 or extension of credit that may only be viewed, purchased, rented,
35 leased, or held in possession by an individual 18 years of age and
36 older, the subject line of each and every message shall include
37 “ADV:ADLT” as the first eight characters.

38 (h) An employer who is the registered owner of more than one
39 e-mail address may notify the person or entity conducting business
40 in this state e-mailing or causing to be e-mailed documents



1 consisting of unsolicited advertising material for the lease, sale,
2 rental, gift offer, or other disposition of any realty, goods, services,
3 or extension of credit of the desire to cease e-mailing on behalf of
4 all of the employees who may use employer-provided and
5 employer-controlled e-mail addresses.

6 (i) *The recipient of an advertisement transmitted in violation of*
7 *this section may bring an action for the recovery of actual damages*
8 *or one thousand dollars (\$1,000), whichever is greater, for each*
9 *violation.*

10 (j) This section, or any part of this section, shall become
11 inoperative on and after the date that federal law is enacted that
12 prohibits or otherwise regulates the transmission of unsolicited
13 advertising by electronic mail (e-mail).

14 SEC. 2. Section 17538.45 of the Business and Professions
15 Code is amended to read:

16 17538.45. (a) For purposes of this section, the following
17 words have the following meanings:

18 (1) “Electronic mail advertisement” means an electronic mail
19 message, the principal purpose of which is to promote, directly or
20 indirectly, the sale or other distribution of goods or services to the
21 recipient.

22 (2) “Unsolicited electronic mail advertisement” means an
23 electronic mail advertisement that meets both of the following
24 requirements:

25 (A) It is addressed to a recipient with whom the initiator does
26 not have an existing business or personal relationship.

27 (B) It is not sent at the request of or with the express consent of
28 the recipient.

29 (3) “Electronic mail service provider” means a business or
30 organization qualified to do business in California that provides
31 registered users with the ability to send or receive electronic mail
32 through equipment located in this state, and that is an intermediary
33 in sending or receiving electronic mail.

34 (4) “Initiation” of an unsolicited electronic mail
35 advertisement refers to the action by the initial sender of the
36 electronic mail advertisement. It does not refer to the actions of an
37 intervening electronic mail service provider that may handle or
38 retransmit the electronic message.



1 (5) “Registered user” means an individual, corporation, or
2 other entity that maintains an electronic mail address with an
3 electronic mail service provider.

4 (b) No registered user of an electronic mail service provider
5 shall use or cause to be used the provider’s equipment located in
6 this state in violation of the provider’s policy prohibiting or
7 restricting the use of its service or equipment for the initiation of
8 unsolicited electronic mail advertisements.

9 (c) No individual, corporation, or other entity shall use or cause
10 to be used, by initiating an unsolicited electronic mail
11 advertisement, an electronic mail service provider’s equipment
12 located in this state in violation of the provider’s policy prohibiting
13 or restricting the use of its equipment to deliver unsolicited
14 electronic mail advertisements to its registered users.

15 (d) An electronic mail service provider shall not be required to
16 create a policy prohibiting or restricting the use of its equipment
17 for the initiation or delivery of unsolicited electronic mail
18 advertisements.

19 (e) Nothing in this section shall be construed to limit or restrict
20 the rights of an electronic mail service provider under Section
21 230(c)(1) of Title 47 of the United States Code, or any decision of
22 an electronic mail service provider to permit or to restrict access
23 to or use of its system, or any exercise of its editorial function.

24 (f) (1) The recipient of an advertisement transmitted in
25 violation of this section may bring an action for the recovery of
26 actual damages or one thousand dollars (\$1,000), whichever is
27 greater, for each violation.

28 (2) In addition to any other action available under law, an
29 electronic mail service provider whose policy on unsolicited
30 electronic mail advertisements is violated as provided in this
31 section may bring a civil action to recover the actual monetary loss
32 suffered by the provider by reason of that violation, or liquidated
33 damages of fifty dollars (\$50) for each electronic mail message
34 initiated or delivered in violation of this section, up to a maximum
35 of twenty-five thousand dollars (\$25,000) per day, whichever
36 amount is greater.

37 (3) In an action brought pursuant to paragraph (2), the court
38 may award reasonable attorney’s fees to the prevailing party.

39 (4) (A) In an action brought pursuant to paragraph (2), the
40 electronic mail service provider shall establish as an element of its



1 cause of action that prior to the alleged violation, the defendant had
2 actual notice of both of the following:
3 (i) The electronic mail service provider’s policy on unsolicited
4 electronic mail advertising.
5 (ii) That the defendant’s unsolicited electronic mail
6 advertisements would use or cause to be used the electronic mail
7 service provider’s equipment located in this state.
8 (B) In this regard, the Legislature finds that with rapid
9 advances in Internet technology, and electronic mail technology in
10 particular, Internet service providers are already experimenting
11 with embedding policy statements directly into the software
12 running on the computers used to provide electronic mail services
13 in a manner that displays the policy statements every time an
14 electronic mail delivery is requested. While the state of the
15 technology does not support such a finding at present, the
16 Legislature believes that, in a given case at some future date, a
17 showing that notice was supplied via electronic means between the
18 sending and receiving computers could be held to constitute actual
19 notice to the sender for purposes of this paragraph.
20 (5) A violation of this section shall not be subject to Section
21 17534.

