

Enrolled
Senate Bill 910

Sponsored by Senator WALKER, Representatives MERKLEY, HASS, CLOSE; Senator DEVLIN

CHAPTER

AN ACT

Relating to electronic mail messages; creating new provisions; and amending ORS 646.607.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) The Legislative Assembly finds:

(a) The economic harm and invasion of privacy resulting from the transmission and receipt of unsolicited commercial electronic mail messages constitute a threat to the welfare of the people of this state.

(b) Unsolicited commercial electronic mail messages cost Oregonians hundreds of thousands of dollars each year because of:

(A) The need to acquire additional capacity for computer systems;

(B) The need to acquire software programs to filter and control unsolicited commercial electronic mail messages;

(C) The transmission of computer viruses by unsolicited commercial electronic mail messages; and

(D) Time and productivity lost when businesses and public bodies must devote personnel resources:

(i) To creating and maintaining local electronic mail message filters;

(ii) To removing infestations of unsolicited commercial electronic mail messages from networks and individual mailboxes;

(iii) To unclogging transmission paths; and

(iv) To repairing and restarting computer systems that have experienced resulting system failures.

(c) Unsolicited commercial electronic mail messages can be used to transmit pornographic material in a manner that is not readily apparent to recipients, which can result in the exposure of minors to pornographic material.

(d) Existing state and federal laws are inadequate to prevent the harm to the public welfare that results from the transmission and receipt of unsolicited commercial electronic mail messages.

(e) Requiring persons that transmit unsolicited commercial electronic mail messages to label the messages in a manner readily recognizable by a recipient will enable recipients to recognize unsolicited commercial electronic mail messages and choose whether to avoid receiving or reading the messages.

(2) The purpose of sections 3 (2) and 4 of this 2003 Act is to prevent the harmful effects set forth in subsection (1)(b) and (c) of this section, which result from the receipt of unsolicited electronic mail messages that are not labeled in a manner readily recognizable by a

recipient as unsolicited electronic mail messages. Requiring persons that transmit unsolicited electronic mail messages to label the messages as set forth in section 4 of this 2003 Act enables recipients of unsolicited electronic mail messages to recognize and choose whether to avoid receiving and reading the messages.

SECTION 2. As used in sections 1 to 8 of this 2003 Act:

(1) "Business relationship" means a voluntary exchange of communication initiated by an electronic mail message recipient's inquiry about, application for or purchase or use of real estate, goods or services.

(2) "Commercial electronic mail message" means an electronic mail message transmitted for the purpose of encouraging the purchase, rental or investment in real estate, goods or services.

(3) "Control" has the meaning given that term in ORS 60.825.

(4) "Domain name" means an alphanumeric designation that is registered with or assigned by a domain name registrar as part of an electronic address on the Internet.

(5) "Electronic mail message" means an electronic message or computer file that contains an image of a message transmitted between computers or electronic terminals. "Electronic mail message" does not include a document transmitted by a facsimile machine as defined in ORS 646.872.

(6) "Electronic mail service provider" means a person that provides:

(a) An end user with electronic mail message services, including the ability to send or receive electronic mail messages; and

(b) A system that connects the user to a computer server and the Internet.

(7) "Person" has the meaning given that term in ORS 646.605.

(8) "Subsidiary" means a person that directly, or indirectly through one or more intermediaries, is controlled by, or is under common control with, another person.

(9) "Unsolicited commercial electronic mail message" means a commercial electronic mail message transmitted without the consent of the recipient.

SECTION 3. In the course of offering real estate, goods or services for sale, rent or other disposition, a person may not:

(1) Transmit, ask another person to transmit or assist in the transmission of an electronic mail message that:

(a) Uses an Internet domain name without permission of the person that holds the license to use the name;

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

(c) Misrepresents or hinders a person from determining the point of origin or transmission path of the electronic mail message.

(2) Transmit, ask a person to transmit or assist in the transmission of an unsolicited commercial electronic mail message to a person in this state.

SECTION 4. (1) Section 3 (2) of this 2003 Act does not apply if:

(a) The person that transmits the electronic mail message:

(A) Has established a business relationship with the person that receives the electronic mail message;

(B)(i) Controls the person that established the business relationship; and

(ii) Offers to the person that receives the electronic mail message real estate, goods or services offered by the person that established the business relationship;

(C)(i) Is a subsidiary of the person that established the business relationship;

(ii) Shares the principal name of the person that established the business relationship;

(iii) Is located on the same premises as the person that established the business relationship; and

(iv) Offers to the person that receives the electronic mail message real estate, goods or services offered by the person that established the business relationship;

(D) Is an organization and the electronic mail message is solely to communicate with a member, employee or contractor of the organization; or

(E) Labels the message by including in the subject line the term "ADV:" in a type size readily visible to the recipient. The label shall immediately follow the colon after the word "subject" or some abbreviation of the word "subject"; or

(b) The predecessor of the person that transmits the electronic mail message had a business relationship with the person that receives the electronic mail message.

(2) Section 3 of this 2003 Act does not apply to an electronic mail service provider acting only as an intermediary between the persons that transmit and receive the electronic mail message.

SECTION 5. (1) A person whose Internet domain name is used without permission in violation of section 3 (1)(a) of this 2003 Act may bring an action against the person that violated section 3 (1)(a) of this 2003 Act to recover actual damages or liquidated damages of \$500, whichever is greater.

(2) A person that receives an electronic mail message transmitted in violation of section 3 (1)(b) or (c) of this 2003 Act may bring an action against the person that violated section 3 (1)(b) or (c) of this 2003 Act to recover actual damages or liquidated damages of \$500, whichever is greater.

(3) A person that receives an electronic mail message transmitted in violation of section 3 (2) of this 2003 Act may bring an action against the person that violated section 3 (2) of this 2003 Act to recover actual damages or liquidated damages of \$200, whichever is greater.

(4) The remedies provided by subsections (1) to (3) of this section apply to each electronic mail message transmitted in violation of section 3 of this 2003 Act. If the person elects to recover liquidated damages in lieu of actual damages, the court may not award the person more than \$25,000 per day.

(5) An award of liquidated damages on a claim under this section is not subject to ORS 18.535, 18.537 or 18.540.

(6)(a) A person who is an individual may bring the action in the circuit court of the county in which the individual resides.

(b) A person that is not an individual may bring the action in the circuit court of a county in which the person maintains an office.

(7) The court may award reasonable attorney fees to a plaintiff that prevails in an action on a claim under this section.

(8) The remedies provided in this section are in addition to and not exclusive of any other remedy provided by law of this state.

SECTION 6. (1) An electronic mail service provider whose service is used by a person to transmit an electronic mail message in violation of section 3 (1) of this 2003 Act may bring an action against the person that violated section 3 (1) of this 2003 Act to recover actual damages or liquidated damages of \$1,000, whichever is greater.

(2) An electronic mail service provider whose service is used by a person to transmit an electronic mail message in violation of section 3 (2) of this 2003 Act may bring an action against the person that violated section 3 (2) of this 2003 Act to recover actual damages or liquidated damages of \$1,000, whichever is greater.

(3) The remedies provided by subsections (1) and (2) of this section apply to each electronic mail message transmitted in violation of section 3 of this 2003 Act. If the person elects to recover liquidated damages in lieu of actual damages, the court may not award the person more than \$25,000 per day.

(4) An award of liquidated damages on a claim under this section is not subject to ORS 18.535, 18.537 or 18.540.

(5) The electronic mail service provider may bring the action in the circuit court of a county in which:

(a) The provider maintains an office; or

(b) The person that violated section 3 of this 2003 Act has sufficient contacts for the court to exercise personal jurisdiction over the person.

(6) The court may award reasonable attorney fees to an electronic mail service provider that prevails in an action on a claim under this section.

(7) The remedies provided in this section are in addition to and not exclusive of any other remedy provided by law of this state.

SECTION 7. If an electronic mail service provider acts in good faith to block the receipt, or transmission through the provider's service, of electronic mail messages that the provider anticipates persons will transmit in violation of section 3 of this 2003 Act, a court may not, for blocking receipt or transmission of the electronic mail messages, find the provider to be in violation of section 3 of this 2003 Act.

SECTION 8. Notwithstanding ORCP 32, a court may not order an action to be maintained as a class action if the action includes a claim under section 5 of this 2003 Act and the person against which the claim is asserted had, at the time of the transmission of the electronic mail message that forms the basis of the claim, established a business relationship with the person that received the message.

SECTION 9. ORS 646.607 is amended to read:

646.607. A person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person:

(1) Employs any unconscionable tactic in connection with sale, rental or other disposition of real estate, goods or services, or collection or enforcement of an obligation; *[or]*

(2) Violates section 3 of this 2003 Act; or

[(2)] **(3)** Fails to deliver all or any portion of real estate, goods or services as promised, and upon request of the customer, fails to refund any money *[which]* **that** has been received from the customer *[which]* **that** was for the purchase of the undelivered real estate, goods or services and *[which]* **that** is not retained by the seller pursuant to any right, claim or defense asserted in good faith. This subsection does not create a warranty obligation and *[shall]* **does** not apply to a dispute over the quality of real estate, goods or services delivered to a customer.

SECTION 10. ORS 646.607, as amended by section 9 of this 2003 Act, is amended to read:

646.607. A person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person:

(1) Employs any unconscionable tactic in connection with sale, rental or other disposition of real estate, goods or services, or collection or enforcement of an obligation; **or**

[(2) Violates section 3 of this 2003 Act; or]

[(3)] **(2)** Fails to deliver all or any portion of real estate, goods or services as promised, and upon request of the customer, fails to refund any money that has been received from the customer that was for the purchase of the undelivered real estate, goods or services and that is not retained by the seller pursuant to any right, claim or defense asserted in good faith. This subsection does not create a warranty obligation and does not apply to a dispute over the quality of real estate, goods or services delivered to a customer.

SECTION 11. (1) Section 3 of this 2003 Act applies to transmissions of electronic mail messages occurring on or after March 1, 2004.

(2) Sections 5 and 6 of this 2003 Act and the amendments to ORS 646.607 by section 9 of this 2003 Act apply to violations occurring on or after March 1, 2004.

SECTION 12. The amendments to ORS 646.607 by section 10 of this 2003 Act become operative on January 2, 2006.

SECTION 13. Sections 1 to 8 and 11 of this 2003 Act are repealed on January 2, 2006.

Passed by Senate July 16, 2003

Repassed by Senate August 22, 2003

.....
Secretary of Senate

.....
President of Senate

Passed by House August 22, 2003

.....
Speaker of House

Received by Governor:

.....M,....., 2003

Approved:

.....M,....., 2003

.....
Governor

Filed in Office of Secretary of State:

.....M,....., 2003

.....
Secretary of State