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Email Notice Lessons From 7th Circ. Debt Collection Ruling

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Consumers increasingly expect to have access to information and the ability to conduct business at the time and place of their choosing, whether shopping for goods and services or managing their finances. Often, that means they expect service providers to communicate with them by email, text or other electronic means.[1]

These expectations are changing the business of debt collection, as a growing number of debtors look for alternative channels of communication rather than the traditional mail and telephone exchanges the industry has relied on for decades. As the industry looks to keep pace with changing consumer preferences, it faces legal questions that don't always have clear answers.

In August, the U.S. Court of Appeals for the Seventh Circuit, in Lavallee v. Med-1 Solutions LLC,[2] addressed the question of whether an email sent by a debt collector constitutes a communication triggering a debt validation notice required by Section 1692g of the Fair Debt Collection Practices Act. The court further addressed whether the collector had in fact provided a valid FDCPA debt validation notice within the email it sent. Given the facts at issue in the case, the court said no to both questions.

Several commentators have suggested Lavallee may have significant implications for debt collectors' email communications and for the Consumer Financial Protection Bureau's proposed debt collection rule.

This article discusses the Lavallee case and, where the collector appears to have gone wrong, the implications of Lavallee on email communications in general, and how this might affect implementation of the CFPB's proposed debt collection rule. While there are a number of lessons debt collectors can learn from Lavallee, its broader implications for email communications appears to be limited.

Lavallee v. Med-1 — An Overview

The Facts

Med-1, a debt collector, sent Beth Lavallee two emails in early 2015 regarding two separate hospital debts she had incurred. Med-1 referred in the emails to a secure message with a hyperlink to what it called a SecurePackage — a series of pages where Lavallee could ultimately view a debt validation notice from Med-1. Med-1 received no notice that the emails had not been received by Lavallee, but Lavallee did not recall receiving them or seeing them in her inbox.

Whether Lavallee received the emails or not, Med-1 tracks whether a debt validation notice has been downloaded. Its records showed that Lavallee never clicked the hyperlink and, as a result, did not access the debt validation notice. Lavallee spoke by telephone with Med-1 for the first time in November 2015 — an event that qualified as an initial communication triggering the FDCPA's debt validation notice requirement. Med-1, however, presumably

believed that the initial emails from early 2015 included compliant debt validation notices and did not send another notice after the November discussion.

The Outcome

In affirming the lower court's summary judgment for Lavallee, the Seventh Circuit first focused on whether the Med-1 emails were a communication under the FDCPA, which defines a communication as "the conveying of information regarding a debt directly or indirectly ... through any medium."[3] The text of the emails from Med-1 did not mention, or in any way reference, that the communication related to the hospital debts Med-1 was seeking to collect; it simply informed Lavallee of a secure message that could be viewed by clicking on a hyperlink.

The court concluded that the emails themselves were not communications under the FDCPA. Further, because Lavallee never accessed the secure messages, the debt validation notices themselves did not constitute an initial communication.

The court then turned to the telephone calls that occurred in November 2015, and agreed with the lower court that such calls were, in fact, the initial communications between Med-1 and Lavallee. Because Med-1 acknowledged it had not sent a debt validation notice within five days of those calls, the Seventh Circuit upheld the lower court's granting of summary judgment.

The Use of Email in Debt Collection

Lavallee should not be read to mean that debt collectors can never provide a debt validation notice through email; such a position is contrary to existing law and positions currently staked out by regulators. Neither does it appear likely to have significant implications for the CFPB's proposed debt collection rule. Lavallee does, however, make clear that care must be taken when using email in the collection of debts.[4]

The Federal Trade Commission has indicated that debt collectors are permitted to contact consumers via a variety of media, including email and text, but in doing so are required to comply with the FDCPA.[5] Likewise, any number of cases throughout the U.S. acknowledge the ability of debt collectors to collect via email, again requiring compliance with the FDCPA when doing so.

The CFPB's recent proposed debt collection rule expressly contemplates that debt collectors may use email as part of their overall collection efforts. The proposed rule, while not placing limits on the number of email or text communications that a debt collector may send to a debtor, does contain important caveats regarding the use of email. Among other things, the debt collector must maintain reasonable procedures to confirm and document that:

- The debtor recently used the email address to contact the debt collector and the email address is not a work email account, subject to certain limitations.

- When using a nonwork email address that the creditor or a prior debt collector obtained, that the consumer did not request the creditor or prior collector cease using that address.

- When communicating with a consumer at an email address that the creditor or prior debt collector obtained, the collector has taken additional steps to prevent

communications to an address the collector knows has previously led to prohibited third-party disclosures.

- All email communications include a clear and conspicuous statement of the consumer's right to opt out of further electronic communications and the means by which the consumer may do so. The collector cannot require payment of a fee or provision of additional information to allow the consumer to opt out.

Further, for a debt validation notice sent after the initial communication, the CFPB's proposed debt collection rule requires debt collectors to: (1) obtain consent pursuant to Section 101(c) of the ESIGN Act directly from the consumer or qualify for a specific exception; (2) identify the communication's purpose by including, in the subject line of an email or in the first line of a text message transmitting the disclosure, the current creditor's name, and one additional piece of information identifying the debt (other than the amount); (3) permit receipt of notifications of undeliverability, monitor for any such notifications, and react appropriately to any such notifications; and (4) provide the disclosure in a format reasonably expected to be accessible on any commercially available screen size (including mobile) and via commercially available screen readers.[6] (Debt validation notices provided with the initial communication would not be subject to the E-Sign Act and therefore are addressed separately under the proposed rule.)

Under the CFPB's proposed debt collection rule, the collector is not required to obtain a consent under ESIGN if (1) the disclosure is being sent to an email address or telephone number subject to a preexisting ESIGN consent obtained by the creditor or a prior debt collector, and (2) the collector either (a) includes the disclosures directly in the body of an email or (b) provides a clear and conspicuous hyperlink to such disclosures that are accessible on the website for a reasonable period of time, and can be saved or printed; the consumer receives notice and an opportunity to opt out of hyperlinked delivery; and the consumer has not opted out.[7]

Lessons Learned

Some observers have suggested that Lavallee will make the implementation of the CFPB's proposed debt collection rule more difficult, given the court's position regarding the use of hyperlinks. While the decision certainly makes clear that debt collectors will have to properly provide consumers with a communication to trigger the debt validation notice requirement, it is important to remember that the court was not required to — and could not — give any type of deference to a rule (such as the CFPB's proposed rule) that did not exist when the court decided the case.

Further, while the CFPB's proposed rule contemplates hyperlinked delivery of disclosures in some circumstances, it requires communication of contextual information not present in the emails at issue in Lavallee and procedural safeguards necessarily not considered in the Lavallee decision.

Debt collectors (and creditors) can still learn some lessons from Lavallee, despite the questions about its reach and influence.

- Be aware of relevant ESIGN and Uniform Electronic Transactions Act requirements for delivery of electronic disclosures to consumers.

- When possible, consider obtaining express consent to use an email address for collection. The risks that may arise from the use of hyperlinks, and in particular the risk of third-party disclosures, should be mitigated to the extent possible so that disclosure content is in the body of the email itself.

- If consent is not obtained and hyperlinks are used, consider including information in the body of the email that alerts the consumer to the fact that the email relates to an account or a collection matter. Inclusion of the mini-Miranda disclosure may be sufficient.

- When using hyperlinks, consider monitoring accounts to determine whether the consumer has accessed materials at which the hyperlink points. If not, consider alternative delivery methods, whether within the body of an email or more traditional delivery methods.

- If the email content does not indicate in some way that it relates to a collection matter, and a later communication is initiated, consider sending a new debt validation notice that complies with the FDCPA.

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[1] See, e.g., Consumer Financial Protection Bureau, Study of Third-Party Debt Collection Operations, at pp. 28–29 (July 2016).

[2] Lavallee v. Med-1 Solutions, LLC, 932 F.3d 1049 (7th Cir. 2019).

[3] 15 USC 1692a(2).

[4] Though beyond the scope of this article, debt collectors should be aware of and take into account potential ESIGN and UETA requirements that may apply to providing required disclosures to debtors by email.

[5] See, e.g., Federal Trade Commission, Collecting Consumer Debts, The Challenges of Change, A Workshop Report (February 2009).

[6] Proposed 12 C.F.R. §1006.42(b), 84 Fed. Reg. 23274, 23406 (May 21, 2019).

[7] Proposed 12 C.F.R. §1006.42(c), 84 Fed. Reg. at 23406.