Can Email Be Effectively Used in Collections?

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CAN EMAIL BE EFFECTIVELY USED IN COLLECTIONS?

Email can be effectively used in collections Nothing prevents a law firm or a collection agency to contact consumers or businesses by email. However, when email is used, the content must still comply with the law.

Retail Collections

Currently, email can be used to contact consumers. The content of the email is still regulated by the Fair Debt Collection Practices Act and The Unfair Deceptive Practices Act. Emails should be treated like phone calls or letters. First, the Firm should be careful when sending an email to a consumer, if it is a work address. The Act prohibits communications with third parties. 15 U.S.C.A. Section 1692c(b A work email may not be private and an employer could view the email causing a violation. Most employers have policies that email is not confidential. The Firm also has a problem identifying work addresses. Clearly, llaing@straussfactor.com is a work address but it is not so clear if the address is llaing07@gmail.com Also not all email addresses to a home computer are private. They may be shared by other members of the family. The Act bars indirect communication with third parties. 15 U.S.C.A. Section 1692b(4-5). The best practice is to have the consumer consent to communication by email. This consent should be in writing.

In May 2019, the CFPB published its notice of proposed rulemaking under the FDCPA. In the proposed rules, collectors have to include opt-out instructions in every email, text message, and other electronic communication to consumers.

This Rule states that the consumer should not pay a fee to opt-out or have to provide any other information except their email address, cell phone number to unsubscribe. A collector can only reply once to that address to confirm the opt-out. Furthermore, the Proposed Rule prohibits emails to the consumer's work email address unless the collector has received prior consent from the consumer to do so or an email from that email address.

Second, the Act limits a debt collector's communications with consumers. 15 U.S.C.A. Section 1692c(a). No oral communication can be made:

> at any unusual time or place or at a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector should assume that the convenient time for communicating with a consumer is after 8:00 a.m. and before 9:00 p.m.

The Federal Trade Commission (FTC) interprets the Act to prohibit Sunday contracts. The FTC considers Sunday to be an unusual time to collect debts.

However, the Act allows under certain circumstances to allow such communication if approved by the court or consent of the debtor. §1692c. Email should not be sent before 8:00 am or after 9:00 pm. Email should not be sent to an employee's address if the sender should know if receiving email might be inconvenient to the consumer. Once more the best advice is to have the consumer consent to the email communication in writing.

Once more the new Proposed Rules address this communication. The Proposed Rule states that calls to cell phones, text messages, and email are subject to the FDCPA's prohibition on communicating at unusual and inconvenient times and places.

If a consumer asks you to cease communication or emailing them, all communication including emails should cease. The FDPCA requires a collector to cease all communication if the debtor notifies the collector that he wishes the collector to do so. After receiving this notice, a collector may take legal action to collect this debt. See Heintz v. Jenkins, 115 S.Ct. 1489 (1995).

A recent case. *Lavallee v. Med-1 Solutions, LLC*, interpreted whether email to a consumer with a hyperlink to the validation notice required under 1692g(a) complied with the Act. In this case, the consumer received two emails from Med-1, one for each debt. In the email, there was a hyperlink to a Med-1 Vendor's web server. Once there, the consumer had to click through multiple screens to access and download a document containing the 1692 disclosure. Lavalle never opened these emails. The consumer called Med-1 concerning the bills and no 1692g(a) disclosure was made after that call. The Seventh Circuit held that Med-1 violated the FDCPA by failing to give the 1692 disclosure. The Court found that the emails conveyed three pieces of information: the sender's name, its email address, and the fact that it "has sent…a secure message." Further, the Court did not approve the hyperlink method to gain access to the required mandated disclosures under 1692. As a

result, Med-1 failed to give proper 1692 disclosures to the Lavalle.

In this case, The Bureau of Consumer Financial Protection filed an amicus brief. The Bureau argued that the E-Sign Act 15 U.S.C. 7001 et seq. That Act states that when a statute or regulation "requires that information….be provided or made available to a consumer in writing," the E-Sign Act imposes conditions on the use of an electronic record to satisfy that disclosure requirement. Section 7001(c) (1). The Bureau argued that the emails sent by Med-1 failed to comply with this Act. The Court did not address this issue but this Act should be reviewed by a collector to make certain your firm is in compliance. The New Proposed Rules set forth an alternative to the E- Sign Act for sending three disclosures electronically: the validation, notice, original-creditor disclosure, and validation-information disclosure. Please review the Proposed Rule for the specifics.

Commercial Collections

Emails can be sent to a business concerning commercial collections. A collector may find this method of communication useful pre-suit in hopes to resolve the debt before litigation. A series of letters could be generated. For example, you could make a demand by email and place a follow-up call to your client's contact. Some studies find that the response rate can be as high as 2 to 4 times what the baseline of 2 emails will be. If no payment, you could send an email threatening a lawsuit

could be filed. However, if the debtor is avoiding you, your emails may go unread. That is why phone calls are still important.

After litigation, emails can be effective to try to resolve the lawsuit. Consider using email at key litigation triggers such as filing the lawsuit, at service of the complaint, and at judgment. Once more the business could ignore your email, but the triggers I suggested are at times when the constable has been at the business with court papers. Email is also effective to set up a paper trail. If the debtor claims not to have received an invoice, ask for the email address of the party you speaking with and email the invoice. This email speeds up the process of collecting and takes out the snail mail. If the debtor is contesting the debt, ask the debtor to email his complaint to you and you can email the client. The client can quickly respond and you can update the debtor. Once more this speeds up the process. The debtor may be more willing to read the email to see what solutions could be offered to resolve the debt. Once you have gotten the debtor's attention, email is an easy way to discuss options to settle or repay. You may want to get creative and try to establish a program that allows the debtor to contact you and negotiate a settlement. Some banks have already done so and found that their customers can work out the debt online, rather than through phone calls.

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