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ALERT

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August 9, 2019

SEVENTH CIRCUIT AVOIDS RULING ON IMPORTANT ELECRONIC COMMUNICATION ISSUES IN COLLECTION NOTICE CASE

In a much-anticipated ruling, the U.S. Court of Appeals for the Seventh Circuit concluded that a debt collector violated the federal Fair Debt Collection Practices Act's ("FDCPA") validation of debt notice ("VDN") requirement when it sent a debtor emails containing hyperlinks to a third-party website where the debtor could obtain her VDNs. *Lavallee* v. *Med-1 Solutions*, *LLC*, No. 17-3244 (7th Cir. Aug. 8, 2019). The Seventh Circuit concluded that the emails did not constitute "communications" under the FDCPA because the emails said nothing about a debt and did not imply the existence of a debt. The Seventh Circuit also found that the emails did not "contain" the mandatory validation of debt disclosures. The emails merely provided a digital pathway to access the required information.

This case turned on the electronic delivery method used by a collector, not to the content of the required notice. In March and April, the collector sent the debtor two separate emails related to medical debts to the email address provided by the debtor to the hospital-creditor. The emails indicated that "Med-1 has sent you a secure message." The emails said nothing about and did not even imply an existing debt. The emails prompted the debtor to click on a hyperlink to navigate to a third-party website, where the debtor had to click buttons and select tabs to receive a PDF of her VDN.

The emails were not returned to the collector as undelivered. The debtor did not recall seeing the emails in her inbox. However, the software used by the collector to send "secure" VDNs tracked if anyone tried to access the VDNs on the third-party website. The debtor never tired to access the notices. In November, the debtor called the hospital to discuss another debt and learned about the prior debts associated with the March and April emails from the collector. The debtor called the collector to discuss the prior debts. The collector did not send a VDN after this conversation. The Seventh Circuit concluded that the initial March and April emails with hyperlinks to the VDNs were not "communications" under the FDCPA; and therefore, the November call was the "initial communication" under the FDPCA that triggered the VDN requirement.

The district court had found that the collector violated the VDN requirement but on different grounds — the collector did not "send" the VDNs because (i) the debtor did not download the notices and (ii) the electronic delivery method used (*i.e.*, embedding a hyperlink in an email from an unknown sender) made receipt of the notices unlikely.

To add to the mix of issues before the Seventh Circuit, the Consumer Financial Protection Bureau ("CFPB") filed an amicus brief with the Seventh Circuit for the sole purpose of making the court aware that the collector did not provide a "written" VDN under the FDCPA because the collector failed to satisfy the conditions of the E-SIGN Act before sending the VDNs to the debtor electronically. The parties failed to raise the E-SIGN issue to the district court. At oral argument, the CFPB asked the court to consider the CFPB's pending debt collection rulemaking efforts if the court chose to decide the case on the basis of E-SIGN non-compliance.

As summarized by the CFPB, to find that the collector complied with the VDN requirement, the Seventh Circuit would need to find that (i) the collector "sent" the notice through an email with a hyperlink to a third-party website, (ii) the email "contained" the required disclosures and (iii) the email and PDF VDN constituted "written" notice in accordance with the E-SIGN Act. These questions are fundamental to electronic communications.

Reviewing the case *de novo,* the Seventh Circuit avoided addressing certain electronic communication questions and interrupting the CFPB's debt collection rulemaking process by deciding this case strictly on the basis that the emails did not "contain" the required disclosures and on the statutory basis that the March and April emails did not qualify as "communications" under the FDCPA. The Seventh Circuit's decision is cautionary on the use of hyperlinks. The district court's *Lavallee* decision is cited in the commentary to the CFPB's proposed debt collection rule. This litigation might have influenced the electronic delivery provisions in the CFPB's proposed debt collection rule.

Effective electronic communication with customers is challenging for all e-commerce businesses, not just the financial services industry. Stay tuned as regulators, legislatures and courts mold regulations and standards around effective electronic communications. ❑

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PERFORMANCE METRICS SUPPORT USE OF ALTERNATIVE CREDIT DATA

The Consumer Financial Protection Bureau has issued an update on its first (and only) No-Action Letter recipient (the fintech Upstart, Inc.). https://www.consumerfinance.gov/about-us/blog/update-credit-access-and-no-action-letter/ (8/6/19).

As a condition of receiving a No-Action Letter, Upstart agreed to a model risk management and compliance plan that required Upstart to (i) analyze and appropriately address risks to consumers, (ii) assess the real-world impact of alternative data and machine learning, and (iii) share information with the CFPB comparing outcomes from Upstart's underwriting and pricing model (tested model) against outcomes from a hypothetical model that uses traditional application and credit file variables and does not employ machine learning (traditional model). The traditional model was independently validated through fair lending testing to ensure that the model did not violate applicable antidiscrimination laws.

Upstart was asked to answer several questions, including:

(1) Whether the tested model's use of alternative data and machine learning expands access to credit, including lower-priced credit, overall and for various applicant segments, compared to the traditional model; and

(2) Whether the tested model's underwriting or pricing outcomes result in greater disparities than the traditional model with respect to race, ethnicity, sex, or age, and if so, whether applicants in different protected class groups with similar model-predicted default risk actually default at the same rate.

According to the CFPB, the results of the analysis showed that the tested model approved 27% more applicants than the traditional model, and yielded 16% lower average APRs for approved loans, in Upstart's applicant pool. The expansion of credit generally held across all tested race, ethnicity, and sex segments:

- "Near prime" consumers with FICO scores from 620 to 660 were approved approximately twice as frequently;
- Applicants under 25 years of age were 32% more likely to be approved; and
- Consumers with incomes under $50,000 were 13% more likely to be approved.

No significant fair lending disparities meriting further analysis were identified.

This is an important development as Congress and state and federal regulators wrestle with issues surrounding the "fair" use of alternative data, machine learning and artificial intelligence in determining whether and how such tools should be regulated to avoid potentially undesirable outcomes.

This assessment also comes as the CFPB is reviewing comments on proposed revisions to the CFPB's No-Action Letter, Trial Disclosure, and Product Sandbox policies. 83 Fed. Reg. 64036 (Dec. 13, 2018). ❑

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