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Emails and the Mailbox Rule: 21st Century Application of a 19th Century Doctrine

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The evidentiary presumption under federal common law that a letter that was properly addressed and mailed will be received by its intended recipient, also known as the "mailbox rule," dates back to the U.S. Supreme Court's 1884 decision in *Rosenthal v. Walker*. 111 U.S. 185, 193 (1884). In *Rosenthal*, the court held that the presumption is "a mere inference of fact, founded on the probability that the officers of the government will do their duty and the usual course of business" in delivering the mail to its intended recipient. Id. at 193. The presumption is rebuttable, however: If the intended recipient contends that he never received the letter, then the factfinder must decide the resulting issue of fact.

The mailbox rule often arises where notice is a determinative issue. For example, under the Family and Medical Leave Act (FMLA), an employer is required to notify a covered employee if a leave of absence falls under FMLA. 29 C.F.R. §825.300. In related litigation, the employer can prove mailing and invoke the mailbox rule to establish that the employee received the notice. See, e.g., *Lupyan v. Corinthian Colleges*, 761 F.3d 314 (3d Cir. 2014). Similarly, under the Employee Retirement Income Security Act (ERISA), an employee may be required to file documents in a timely manner to receive plan benefits. Where the plan administrator denies receipt of the requisite documents, the mailbox presumption may come into play upon proof of mailing. See *Schikore v. BankAmerica Supplemental Ret. Plan*, 269 F.3d 956 (9th Cir. 2001).

> With the typical office worker receiving more than 90 emails every day on average, it is certain that disputes will continue to arise concerning whether such emails constitute actual and constructive notice.

Email Does Not Ensure Delivery

Email may seem inherently more reliable than "snail mail" given that electronic transmission is facilitated entirely by computers and eliminates the mail carrier and other humans capable of errors and omissions. However, several issues unique to email can prevent messages from being sent or received. For example, an email may fail to transmit when an attachment contains too much data. Similarly, an email may never be received, as a

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practical matter, if the recipient's "spam filter" catches the email, or if the recipient intentionally blocks or filters emails from a specific email address or domain. Even more unpredictably, server, network, and local computer problems may interfere with the receipt of emails.

Delivery receipts and read receipts provide some assurances but can present their own issues. A delivery receipt may confirm that the email was delivered, even though a spam filter caught the message or it was otherwise not readily retrievable and thus remained unread. "Read receipts" also do not provide complete protection: The recipient may decline to send a read receipt even after reading the email, or may not read a word of the email but send a read receipt anyway. These considerations add nuance and complexity to the application of the mailbox rule to emails, and courts will need to grapple with these issues as they arise.

Applying Mailbox Rule to Emails

The authors' experience has been that most trial courts treat emails as presumptively authenticated documents, though obviously subject to established evidentiary rules. Consistent with that common sense observation, most courts that have considered the issue have applied the mailbox rule to email communications, although without a clear consensus concerning application.

In 2005, the U.S. Court of Appeals for the Eighth Circuit held in *American Boat Company v. Unknown Sunken Barge* that a rebuttable presumption of delivery applies to emails. 418 F.3d 910 (8th Cir. 2005); see also *Kennell v. Gates*, 215 F.3d 825, 829 (8th Cir. 2000) (applying the presumption of receipt to "an in-house computer message system"). In *American Boat*, the plaintiffs' attorneys contended that they did not receive email notice of an order until four months after the order was filed, long after the 21-day window to appeal the order had expired.[1] The district court denied the plaintiffs' motion to enlarge the time to file an appeal, reasoning that the presumption of delivery applies to emails, but that the plaintiffs "failed to overcome the presumption that the docket accurately reflected delivery of the … email notification." *American Boat*, 418 F.3d at 914. The plaintiffs then appealed that decision.

> Until these issues are resolved, the best practice for sending important documents is to send them via certified or registered mail, return receipt requested, or via courier. If email is the only option, the email should be sent with a read receipt or a responsive email should be requested.

The Eighth Circuit agreed that the mailbox rule was applicable to emails but nonetheless reversed, holding that the plaintiffs "made a sufficient showing to at least be entitled to an evidentiary hearing on the issue of whether they have adequately rebutted the presumption." Id.; see also *Dempster v. Dempster*, 404 F. Supp. 2d 445, 449 (E.D.N.Y. 2005) (reaching the same conclusion).[2] The appellate court noted three factors in making this determination: (1) the electronic notification system was only operational for a few weeks, and therefore may have had glitches; (2) none of the attorneys who were supposed to receive notice by postal mail received such notice; and, perhaps most convincing, (3) the government's co-counsel did not receive an email notification, despite the fact that she had elected to. *American Boat* provides an indication that appellate courts are willing to apply the mailbox rule to emails, and that like the traditional mailbox rule, the intended recipient may rebut the presumption of receipt. The Seventh Circuit also applied the mailbox rule in 2013, although without analysis or elaboration, in *Ball v. Kotter*, 723 F.3d 813 (7th Cir. 2013). See also *United States v. Cary*, No. 15-3858, 2017 WL 903524 (7th Cir. March 6, 2017),

cert. denied, No. 16-8619, 2017 WL 1301437 (U.S. May 15, 2017) (citing *Ball* and applying the presumption of delivery to a text message).

Several U.S. District Courts and state courts have also similarly held that a rebuttable presumption of delivery applies to emails. See, e.g., *Couch v. AT&T Servs.,* No. 13-CV-2004 (DRH)(GRB), 2014 WL 7424093, at *6-8 (E.D.N.Y. Dec. 31, 2014); *Hackers v. Palmer*, 79 Pa. D. & C.4th 485, 495 (Com. Pl. 2006) (acknowledging that the presumption applies to emails but declining to apply it at the summary judgment stage).

In 2014, however, the U.S. District Court for the Eastern District of Michigan in *Gardner v. Detroit Entertainment* implicitly cautioned against using email to send important documents when notice is required. No. 12-14870, 2014 WL 5286734 (E.D. Mich. Oct. 15, 2014). The *Gardner* court did not explicitly refer to the mailbox rule, but held in dicta that evidence that an email was sent does not prove actual notice. Id. In *Gardner*, an employee took intermittent FMLA medical leave over a period of years. After an extended period, the employer's third-party FMLA administrator emailed the employee and requested that she recertify her basis for leave by a certain date. The employee did not respond, certain of her absences lost FMLA protection, and the employer terminated her. The employee sued, alleging that she did not receive sufficient notice. The court denied the employer's motion for summary judgment because there was a genuine issue of material fact as to whether the employee consented to notice by email only. In its opinion, the court noted that "[t]he transmitting of an email, in the absence of any proof that the email had been opened and actually received, can only amount to proof of constructive notice." Id. at *7

Conclusion

Email and other forms of electronic communication have been commonplace for years, and people will likely increasingly rely on email for the transmission of statutory and contractual notices as well as other documents that affect legal rights. With the typical office worker receiving more than 90 emails every day on average,[3] it is certain that disputes will continue to arise concerning whether such emails constitute actual and constructive notice.

Courts and legislatures will be called upon to consider and confront the issues of whether and how the mailbox rule and other evidentiary rules should apply to emails. Until these issues are resolved, the best practice for sending important documents is to send them via certified or registered mail, return receipt requested, or via courier. If email is the only option, the email should be sent with a read receipt or a responsive email should be requested. Contractual notice provisions should be reviewed and drafted to reflect the reality of email communications. The law will no doubt continue to catch up.

1. There was ample evidence that a glitch prevented the notice from being sent to its intended recipients: (1) none of the plaintiffs' three attorneys who were supposed to receive notice by mail received notice; (2) neither the plaintiffs' local counsel nor his secretary, both of whom elected to receive notice by email, received notice; and (3) the secretary's inbox showed 13 other notifications from the district court, but not the notice at issue.

2. In *American Boat*, the district court later held, and the Eighth Circuit affirmed, that the plaintiffs failed to rebut the presumption of delivery. No. 1:01CV00021RWS, 2008 WL 1821500, at *11 (E.D. Mo. April 22, 2008), aff'd, 567 F.3d 348 (8th Cir. 2009).

3. Email Statistics Report, 2015-2019, The Radicati Group.