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## CFPB Files Amicus Brief In Seventh Circuit FDCPA Case

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The CFPB (referring to itself as the Bureau of Consumer Financial Protection) has filed what appears to be its first amicus brief since former Director Cordray's departure.

The [amicus brief](#) was filed in *Lavallee v. Med-1 Solutions, LLC*, an appeal to the U.S. Court of Appeals for the Seventh Circuit in which the issue before the court is whether the defendant sent the plaintiff a written validation notice containing the disclosures required by the FDCPA in 15 U.S.C. Section 1692g(a). The defendant claimed that it satisfied the FDCPA requirement when it sent the plaintiff two emails relating to two medical debts that each included a link to a webpage on which the plaintiff could open a "secure package" that would then take the plaintiff to another webpage on which she could open (or save to her computer) the validation notice which was in electronic Portable Document Format (PDF). There was undisputed evidence that the plaintiff never viewed or accessed either of the two secure packages containing the validation notices for her two medical debts.

The district court granted summary judgment to the plaintiff, finding that the defendant had violated Section 1692g(a) because it had not "sent" validation notices to the plaintiff. The court stated that if a notice "is not sent in a manner in which receipt should be presumed as a matter of logic and common experience, then it cannot be considered to have been 'sent.'" The district court also questioned whether in light of the frequent warnings consumers receive that email attachments can contain viruses, the use of a click-through attachment was a method likely to accomplish a consumer's receipt of a validation notice. In addition, it found no evidence that that plaintiff had given her email address to the defendant or anticipated it would have her address.

In its amicus brief, which was filed in support of the plaintiff/appellee, the Bureau argues that if the Seventh Circuit reaches the question of whether the validation notices purportedly sent to the plaintiff complied with the "written notice" requirement of Section 1692g(a), the court's analysis should address the applicability of the E-SIGN Act. The E-SIGN Act applies to any statute that "requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing." It allows "the use of an electronic record" to satisfy a written notice requirement if the consumer has given prior, informed consent to receiving electronic notices in lieu of paper, and if the Act's other conditions are satisfied.

The Bureau argues that, for purposes of the E-SIGN Act, a debt collector's actions in collecting consumer debt involves a "transaction" and the FDCPA's validation notice requirement is a requirement for information to be provided "in writing." Thus, according to the Bureau, because the E-SIGN Act's requirements serve "as an overlay on other laws," the Seventh Circuit cannot assess the defendant's argument that it provided a written notice under Section 1692g(a) without determining whether such requirements were satisfied. The Bureau observes that the summary judgment record before the district court contained no evidence that the E-SIGN Act's requirements were satisfied and suggested that the defendant had not complied with the Act.

In its amicus brief, the Bureau notes that the topics addressed in the advance notice of proposed rulemaking regarding debt collection that it published in November 2013 included the electronic delivery of validation notices and requested information about collectors' current practices and experience with the "consent regime under the E-Sign Act...for electronic delivery of validation notices." The Bureau states that "the next step in the rulemaking—issuance of a proposed rulemaking—is currently being considered by the Bureau." It also notes the authority

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that the E-SIGN Act grants to federal regulatory agencies to “exempt without condition a specified category or type of record from the requirements relating to consent” and comments that “any policy concerns related to the application of the E-SIGN Act to validation notices are more appropriately addressed through the exercise of that statutory authority.”

ACA International submitted [an amicus brief](#) in support of the defendant/appellant in which it urges the Seventh Circuit to reverse the district court and thereby provide guidance “which would establish that email can be ‘written notice’ within [Section 1692g(a)’s] meaning, and that the [FDCPA] applies to email in the same way that it applies to postal mail.” ACA also observes in its brief that if the Seventh Circuit affirms the district court, the district court’s approach “raises several questions about which guidance from this Court would be very helpful to the credit and collection industry” and lists such questions.

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