



CFPB Files Amicus Brief in Support of Debtor in FDCPA Case

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On April 25, 2018, the Consumer Financial Protection Bureau filed its first *amicus* brief under Acting Director Mulvaney in the case of *Lavallee v. Med-1 Solutions, LLC*, 2017 U.S. Dist. LEXIS 162508 (S.D. Ind. September 29, 2017). The case, which is before the U.S. Court of Appeals for the Seventh Circuit, involves a debtor’s claim that a debt collector failed to send her the debt validation notice required by the Fair Debt Collection Practices Act.

Specifically, the debtor claimed that the debt collector attempted to provide her the debt validation notice by email, but that she never actually viewed the notice because she had to click through the debt collector’s email to a secure website to access and download the notice. If the debtor had viewed the notice, the debt collector would have automatically received a notification. On cross motions for summary judgment, the district court found in favor of the debtor. The district court held as a matter of law that providing the debt validation notice in this manner – requiring the debtor to click through to a secured website, where she then had to download a PDF copy of the notice – was not sufficient to “send” the notice for purposes of the FDCPA. The court drew a distinction between a notice sent by mail, where there is a presumption of receipt three days after mailing, and a notice that requires a consumer to take several steps to view the notice, and reasoned that because the debt collector never received notification that the debtor viewed the electronic notice, the debt collector knew, or should have known that the debtor never actually accessed or viewed the notice. As a result, the court held that the debt collector never “sent” the notice. The district court granted the debtor’s motion, denied the debt collector’s motion, and awarded statutory damages to the debtor. The debt collector appealed.

The case is currently pending before the Seventh Circuit, to which the Bureau submitted an *amicus* brief supporting the debtor. Instead of focusing on the issue of whether the debt collector properly “sent” the debt validation notice, the Bureau’s brief seeks to bring to the attention of the appellate court an issue that the lower court did not address: whether the debt collector had the appropriate consent under the E-SIGN Act to provide the debt validation notice electronically in the first place. In keeping with its new mandate not to “push the envelope,” the Bureau goes out of its way to explain its express statutory authority to interpret both the FDCPA and E-SIGN, including its authority to interpret whether E-SIGN applies to notices required by the FDCPA. Citing to both its Advanced Notice of Proposed Rulemaking from 2013 and its Outline of Proposals for its SBREFA Panel from 2016 as evidence of its ongoing role in interpreting the FDCPA and the applicability of E-SIGN to the FDCPA’s debt validation notice, the Bureau argues that E-SIGN requires a debt collector to get the debtor’s consent to receive notices electronically before it can provide a debtor with an electronic debt validation notice. Because there were no facts

in the case to indicate that either the debt collector or the original creditor obtained the debtor's E-SIGN consent to receive disclosures electronically, the Bureau argues that the debt collector could not provide the debt validation notice by email, regardless of whether it properly "sent" the notice under the FDCPA.

Notably, the Bureau signaled in its brief that some type of debt collection rulemaking process is underway, or at least under consideration: "The next step in the rulemaking [after the 2013 ANPR and 2016 Outline of Proposals for the SBREFA Panel] – issuance of a notice of proposed rulemaking – is currently being considered within the Bureau." The Bureau also highlighted a popular talking point for Acting Director Mulvaney – that debt collection complaints (in particular, complaints that the debtor does not owe the debt being collected) make up a high volume of complaints received by the Bureau. While the Bureau's enforcement priorities have certainly shifted under Acting Director Mulvaney, debt collection seems to remain on the Bureau's radar.

The brief is available at: <https://www.consumerfinance.gov/policy-compliance/amicus/briefs/lavallee-v-med-1-solutions-llc/>

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