No. 17-3244

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Beth Lavallee,

Plaintiff-Appellee,

v.

Med-1 Solutions, LLC,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Indiana

Hon. Debra McVicker Lynch

Case No. 1:15-cv-01922-DML-WTL

Brief of Amicus Curiae Bureau of Consumer Financial Protection in Support of Plaintiff-Appellee

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QUESTION PRESENTED

The Fair Debt Collection Practices Act requires a debt collector, in certain situations, to "send the consumer a written notice containing" information about the debt and the consumer's rights. 15 U.S.C. § 1692g(a). The question addressed in this amicus brief is: Whether the requirements of the Electronic Signatures in Global and National Commerce Act (E-SIGN Act), 15 U.S.C. § 7001-7006, apply when a debt collector wants to use an email to satisfy the written-notice requirement of § 1692g(a).

INTEREST OF AMICUS CURIAE

The Bureau of Consumer Financial Protection (Bureau), an agency of the United States, files this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.

This case presents a question concerning electronic delivery of so-called "validation notices" under the Fair Debt Collection Practices Act (FDCPA or the Act), 15 U.S.C. § 1692-1692p. The Bureau is charged by Congress with "regulat[ing] the offering and provision of consumer financial products and services under the Federal consumer financial laws," 12 U.S.C. § 5491(a), which include the FDCPA, *id.* §§ 5481(12)(H), 5481(14). Pursuant to its statutory authorities, the Bureau has issued an advance notice of proposed rulemaking to

consider rules governing electronic delivery of validation notices. *See* 78 Fed. Reg. 67848, 67859 (Nov. 12, 2013). Given the Bureau's work in this area, the Bureau has a substantial interest in this Court's resolution of the question presented. The Bureau respectfully submits this amicus brief to assist the Court in its examination of that question.

STATEMENT

A. Statutory Background

1. The Fair Debt Collection Practices Act

Congress enacted the FDCPA in 1977. Pub. L. No. 95-109, 91 Stat. 874. Congress did so based on its finding that "[a]busive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce." 15 U.S.C. § 1692(d). By enacting the FDCPA, Congress hoped to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." *Id.* § 1692(e); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010).

To achieve those ends, the FDCPA imposes several prohibitions and requirements on "debt collector[s]." *See* 15 U.S.C. § 1692a(6)

(defining "debt collector"). Among other things, the FDCPA bans debt collectors from employing harassing, oppressive, or abusive practices; making misleading or deceptive representations; and using unfair or unconscionable means to collect debts. *See id.* §§ 1692d-1692f.

As relevant here, the FDCPA also imposes a disclosure requirement on debt collectors. Under 15 U.S.C. § 1692g(a), a debt collector generally must provide a consumer with information about the debt and the consumer's rights either in the initial communication with the consumer or through a written notice shortly after that first communication. Section 1692g(a) states:

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—[the information specified in 15 U.S.C. § 1692g(a)(1)-(5)[1]].

[1] The following information must be provided to the consumer: (1) the amount of the debt; (2) the name of the creditor to whom the debt is owed; (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and (5) a statement that, upon the consumer's written

The legislative history explains that the purpose of these "validation notices" (as they have come to be called) is to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid." S. Rep. No. 95-382, at 4 (1977).

2. The E-SIGN Act

In 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act (E-SIGN Act), 15 U.S.C. §§ 7001-7006. The E-SIGN Act is designed "to promote electronic commerce by providing a consistent national framework for electronic signatures and transactions." S. Rep. No. 106-131, at 1 (1999); *see also* H.R. Rep. No. 106-341, pt. 1, at 5 (1999) ("The bill adds greater legal certainty and predictability to electronic commerce by according the same legal effect, validity, and enforceability to electronic signatures and records as are accorded written signatures and records.").

The section of the E-SIGN Act that is particularly relevant to this case is § 101(c), which governs the "use of an electronic record" to satisfy a legal requirement that consumer disclosures be made "in

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request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

writing." 15 U.S.C. § 7001(c). Under § 101(c), "if a statute, regulation, or other rule of law 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, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if" various conditions are met. *Id.* Those conditions include the consumer's "affirmative[] consent[] to such use"; the provision to the consumer of a "clear and conspicuous statement" informing her of her right to withdraw consent and to receive the disclosure "on paper or in nonelectronic form"; and a disclosure of the "hardware and software requirements for access to and retention of the electronic records," along with the consumer's electronic consent (or confirmation of consent) "in a manner that reasonably demonstrates that the consumer can access information in the electronic form." *Id.* § 7001(c).

An electronic record is broadly defined to include "a contract or other record created, generated, sent, communicated, received, or stored by electronic means." *Id.* § 7006(4); *see also id.* § 7006(2) (defining "electronic"). An email, for example, would be an electronic record. *Cf. Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546,

556 (1st Cir. 2005) (holding that an "e-mail agreement to arbitrate" is governed by § 101(a) of the E-SIGN Act). And a "transaction" is defined to mean "an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons." 15 U.S.C. § 7006(13).

The E-SIGN Act grants federal regulatory agencies a role to play in implementing the statute. In particular, § 104(b) provides that federal agencies with rulemaking authority "under any other statute may interpret [§ 101 of the E-SIGN Act]" through regulations and other authorized guidance, so long as the standards set forth in §§ 104(b)(2) and (c) are satisfied. 15 U.S.C. § 7004(b). Section 104(d) further authorizes federal regulatory agencies to "exempt without condition a specified category or type of record from the requirements relating to consent in [§ 101(c)] if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers." *Id.* § 7004(d).

B. The Bureau's Advance Notice of Proposed Rulemaking on Debt Collection

Between 1977 and 2011, the Federal Trade Commission (FTC) was the Federal agency primarily responsible for enforcing the FDCPA. But the FTC generally lacked the authority to promulgate rules to

implement the FDCPA's provisions. *See* 15 U.S.C. § 1692*l* (2006). In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376. The Dodd-Frank Act established the Bureau, 12 U.S.C. § 5491(a), granted the Bureau concurrent authority to enforce compliance with the FDCPA, 15 U.S.C. § 1692*l*(b)(6), and generally authorized the Bureau to "prescribe rules with respect to the collection of debts by debt collectors, as defined in the [FDCPA]." *Id.* § 1692*l*(d).

Debt collection has been one of the most complained about consumer financial products or services in the Bureau's complaint system.[2] Indeed, in 2017, the Bureau received approximately 84,500 debt collection complaints, and 39 percent of those concerned complaints about attempts by debt collectors to collect debts that consumers claimed they did not owe. *CFPB 2018 Report* at 14-15.

In November 2013, the Bureau published an advance notice of proposed rulemaking (ANPRM) in the *Federal Register* to begin the process for considering rules to regulate debt-collection practices. *See*

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[2] *Consumer Financial Protection Bureau, Fair Debt Collection Practices Act – CFPB Annual Report 2018* (CFPB 2018 Report), at 14 (available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/ cfpb_fdcpa_annual-report-congress_03-2018.pdf).

78 Fed. Reg. 67848 (Nov. 12, 2013). Among the topics addressed in the ANPRM was "Electronic Delivery of Validation Notices." *Id.* at 67859. In particular, the ANPRM noted that the E-SIGN Act "requires affirmative consent from consumers to receiving disclosures electronically." *Id*. The ANPRM requested information about collectors' current practices and their experience with the "consent regime under the E-Sign Act . . . for electronic delivery of validation notices." *Id.* The next step in the rulemaking – issuance of a notice of proposed rulemaking – is currently being considered within the Bureau.[3]

C. Facts

The following facts are taken from the district court's opinion, from the record before the district court, and from the evidence cited in the opening brief of Appellant Med-1 Solutions (Med-1 Br.).

Med-1 Solutions (Med-1) is a debt collector as that term is defined in the FDCPA. Dist. Ct. Op. 2 (A-2).[4] Appellee Beth Lavallee (Lavallee)

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[3] On July 28, 2016, the Bureau published an Outline of Proposals Under Consideration (Outline of Proposals), http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf.

[4] The district court's opinion is attached as an appendix to Med-1's opening brief at A-1 to A-12.

incurred two debts for medical services provided by a hospital. *Id.* In the course of obtaining such services, Lavallee provided the hospital with her email address. *Id.* at 4 (A-4). The hospital referred Lavallee's two debts to Med-1 for collection. *See* Def's Br. in Supp. of Mot. for Summ. J. (Dist. Ct. ECF 27), at 2.

In March and April 2015, Med-1 sent an email — one in each month for each of two debts that Lavallee purportedly owed — to the email address that Lavallee had provided to the hospital. *Id.* at 3. Med-1 argues that these were its initial communications with Lavallee. Med-1 Br. 4.[5] The emails listed the sender as "Info@med1solutions.com" and the subject line as "Med-1 Solutions has sent you a secure package." Dist. Ct. Op. 2 (A-2). Med-1's opening brief (at 5-8) describes the steps a recipient must then take to retrieve the "secure package." Briefly, the recipient must click (or copy and paste into her web browser) a link provided in the email, which would send the recipient to a "Delivery Acceptance" webpage. On that webpage, the recipient must click a box to accept delivery of the "secure package" and then click a button to "Open SecurePackage." The recipient is then

[5] The district court did not make any finding as to whether these emails were the "initial communications" for purposes of FDCPA § 809(a).

taken to another webpage, from which the recipient can click an "Attachments" tab and then a "Download" button to open the "secure package" or save it to her computer. Had Lavallee taken these steps, she presumably would have received the "secure package." The "secure package," which was an electronic Portable Document Format (PDF) file, would have informed her about the debt and provided her with the validation notices required by 15 U.S.C. § 1692g(a). Med-1 Br. 9.

Lavallee, however, did not take these steps. The email address used by Med-1 appears to have belonged to Lavallee, although she does not recall receiving the emails from Med-1. Dist. Ct. Op. 4 (A-4). But regardless of what happened with the emails, the evidence is undisputed that Lavallee never "viewed or accessed" either of the secure packages containing the validation notices for her two medical debts. *Id*.

D. Proceedings Below

Lavallee filed suit against Med-1 in the United States District Court for the Southern District of Indiana alleging a violation of 15 U.S.C. § 1692g(a). By the time the parties filed cross-motions for summary judgment, the pertinent legal issue in the case was whether Med-1's emails to Lavallee satisfied § 1692g(a)'s requirement that

Med-1 "send [Lavallee] a written notice containing" the information required under the FDCPA. Dist. Ct. Op. 5 (A-5).

In September 2017, the district court issued an opinion granting Lavallee's motion for summary judgment and denying the motion for summary judgment filed by Med-1. The court held that Med-1 had not complied with § 1692g(a) because it had not "sent" validation notices to Lavallee. 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.'" Dist. Ct. Op. 8 (A-8).

The court further found that Med-1's method of transmitting validation notices to consumers "is one that's not even likely to accomplish receipt of the validation notice." Dist. Ct. Op. 9 (A-9). That is because "for Ms. Lavallee even to have had an opportunity to receive the validation notice, she was required to open an email and then click through over the internet to an unknown web browser inviting her to then open a 'Secure Package.'" *Id.* at 10 (A-10). As the court observed, consumers are "regularly warned and know to beware of email invitations to click on web-based attachments," which "can be sources of viruses." *Id.* at 11 (A-11). The district court found "no evidence" that

Lavallee gave her email address to Med-1 or anticipated that Med-1 would have it, or that she knew who Med-1 was at the time Med-1 emailed her. *Id.* at 10 n.6 (A-10). Accordingly, the court concluded that, based on these facts, Med-1 "did not 'send' to Ms. Lavallee the validation notice as required by 15 U.S.C. § 1692g(a)." *Id*. at 11 (A-11).

The court awarded Lavallee $1000 in statutory damages, as well as costs and a reasonable attorney's fee.

SUMMARY OF ARGUMENT

As it comes to this Court, this case concerns whether Med-1 complied with the FDCPA's requirement that a debt collector "send the consumer a written notice containing" statutorily required information about the debt. 15 U.S.C. § 1692g(a). The district court understood this case to raise only that question, and so does Med-1. *See* Dist. Ct. Op. 5 (A-5) ("The sole question presented by this case is whether . . . Med-1 Solutions sent to Ms. Lavallee a debt notification letter in compliance with the FDCPA."); Med-1 Br. 16 ("[T]he sole issue presented on this appeal is whether Med-1 has sent *a written notice containing* the mandatory disclosures . . . via secure email attachment." (emphasis in original)).

The parties have assumed that § 1692g(a) of the FDCPA was the only statute relevant to the question whether Med-1 has sent Lavallee a "written notice" that complies with § 1692g(a). But it is not. Section 101(c) of the E-SIGN Act applies to statutes like the FDCPA that "require[] 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." 15 U.S.C. § 7001(c). Where a written validation notice is required because the required information is not included in the initial communication and the debt is not paid within five days of the initial communication, the E-SIGN Act establishes the conditions that must be met if the debt collector wants to use email (or any "electronic record," for that matter) to satisfy that requirement. Thus, Med-1's argument that its "email communications satisfy the written notice requirement of § 1692g(a)," Med-1 Br. 18-23 (formatting altered), must take account of the E-SIGN Act's requirements as well.

Under the E-SIGN Act, an email from a debt collector (such as Med-1) would satisfy the "writing" requirement in § 1692g(a) if the consumer (such as Lavallee) had given prior, informed consent to receiving electronic notices in lieu of paper, and if E-SIGN's other

requirements had been met. But there is no evidence in the record that this occurred; rather, the limited record evidence that bears on the question of E-SIGN Act compliance suggests that it did not. And in the absence of such compliance, Med-1 could not use email to comply with any § 1692g(a) written-notice obligation it may have had.

Amicus ACA International suggests that there is a "need for guidance from this Court" on a debt collector's use of email to provide validation notices. ACA Br. 13. As noted above, the Bureau has begun the process of considering rules to regulate the use of electronic delivery of validation notices. Absent a regulatory exemption, however, the E-SIGN Act applies of its own force to written-notice requirements set forth in federal laws such as the FDCPA. Therefore, if this Court reaches the question of whether the validation notices that Med-1 purportedly sent to Lavallee complied with the "written notice" requirement in § 1692g(a), the Court's analysis should take account of the E-SIGN Act as well.

ARGUMENT

MED-1 COULD NOT USE AN EMAIL TO COMPLY WITH THE FDCPA'S WRITTEN VALIDATION-NOTICE REQUIREMENT UNLESS THE REQUIREMENTS OF THE E-SIGN ACT WERE SATISFIED

The FDCPA provides two ways in which a debt collector may provide consumers with statutorily required disclosures about the debt that the collector is seeking to collect. First, a debt collector's "initial communication" with the consumer may "contain[]" the required information. 15 U.S.C. § 1692g(a). Second, if the debt has not been paid and if the disclosures are not contained in the initial communication, the debt collector must "send the consumer a written notice containing" the information within five days of its initial communication with the consumer. *Id.* As it comes to this Court, this

case concerns whether Med-1 has satisfied the second method of complying with § 1692g(a). *See*, *supra*, p.13.[6]

Med-1 argues that it complied with § 1692g(a) because it (1) sent validation notices to Lavallee by email (Br. 30-38); (2) the emails "contained" the information required by § 1692g(a) (*id.* at 23-27); and (3) its emails were "written notice[s]," *id.* at 18-23. Med-1 must prevail on all three points to obtain reversal of the district court's judgment and an entry of judgment in its favor. *See* Med-1 Br. 38.[7] With respect to the "written notice" question, however, Med-1 fails to address the E-SIGN Act. The E-SIGN Act is relevant because it sets the requirements that must be met when an email is used to provide information that, like validation notices, is required by law to be provided to a consumer

[6] Med-1 argues here, and it argued below, that its liability turns on whether it satisfied § 1692g(a)'s written-notice requirement. *See* Med-1 Br. 16 ("[T]he sole issue presented on this appeal is whether Med-1 has *sent a written notice containing* the mandatory disclosures. . .."); Def's Br. In Supp. Of Mot. for Summ. J. (ECF 27), at 7 ("Defendant fulfilled the FDCPA requirement that a debt collector '*send the consumer a written notice*' containing certain disclosures when Defendant sent its initial communication to Plaintiff on March 20, 2015, regarding the first of Plaintiff's debts.") (emphasis added). This amicus brief, therefore, focuses only on the written-notice requirement as well.

[7] This brief addresses only the applicability of the E-SIGN Act to § 1692g(a)'s written-notice requirement. The Bureau has not yet issued a regulation or other formal opinion that speaks to the other two issues raised by Med-1. *See* Med-1 Br. 2.

"in writing." The E-SIGN Act requirements include making certain disclosures to a consumer about the use of electronic records and obtaining the consumer's prior consent to such use. Nothing in the record of this case indicates that those requirements were satisfied here. Absent compliance with the E-SIGN Act's procedures (or a regulatory waiver therefrom), Med-1's attempt to use email to provide Lavallee with any required written validation notices could not comply with the FDCPA.

1. The FDCPA provides that a debt collector must "send" consumers a "written notice containing" debt-related information within five days of its initial communication with the consumer, unless the information is "contained in the initial communication" to the consumer or the debt has been paid. 15 U.S.C. 1692g(a). In deciding whether an electronic record (such as the email link to a secure web server used by Med-1) satisfies the "written notice" requirement in § 1692g(a), the FDCPA cannot be interpreted in isolation. Rather, Congress enacted the E-SIGN Act as an overlay on federal (and state) laws that mandate written disclosures to consumers. Amicus ACA International thus wrongly contends that, "at least as far as the written notice under section 1692g(a) is concerned, [Congress] has not spoken

since" the FDCPA was enacted in 1977. ACA Br. 10. Congress spoke in the E-SIGN Act about how written-notice requirements in federal law – including the FDCPA – should be handled in the electronic age. *See* 146 Cong. Rec. 11,158 (S5284) (June 16, 2000) ("The [E-SIGN] Act does not create new requirements for electronic commerce but simply allows disclosures and other items to be delivered electronically instead of on paper.").

The E-SIGN Act's plain text makes it applicable when a debt collector wants to use email to comply with the FDCPA's requirement to send written validation notices. Specifically, 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." 15 U.S.C. § 7001(c)(1). Section 1692g(a) satisfies the "in writing" requirement because it provides that a "debt collector shall . . . send the consumer a written notice." 15 U.S.C. § 1692g(a).[8] A debt collector's actions in collecting consumer debt also involve a "transaction," which is broadly

[8] Although this requirement only applies if the information was not provided in the initial communication and if the debt has not been paid, once those conditions are met, there is no question that the FDCPA imposes a written-notice requirement on debt collectors.

defined to mean "an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons." *Id.* § 7006(13). *Cf.* 146 Cong. Rec. 10,966 (S5229) (June 15, 2000) (statement of Sen. Leahy) (distinguishing "business, consumer, or commercial affairs" from "governmental" affairs, which are not included within the term "transaction"). Finally, debt collection (such as when undertaken over the Internet) satisfies the E-SIGN Act's requirement that the transaction be "in or affecting interstate or foreign commerce," 15 U.S.C. § 7001(c)(1). *See id.* § 1692(d) ("Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce."); *cf. Reno v. ACLU*, 521 U.S. 844, 849 (1977) ("The Internet is an international network of interconnected computers."); *see United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) ("The internet is an instrumentality of interstate commerce.").

2. Because § 101(c)(1) of the E-SIGN Act applies to the written validation-notice requirement, "the use of an electronic record" satisfies the written-notice requirement in § 1692g(a) "if" several conditions are satisfied.

First and foremost, the consumer must affirmatively consent, in advance, to the use of electronic records and must not have withdrawn that consent. 15 U.S.C. § 7001(c)(1)(A). As one of the authors of the conference report that accompanied passage of the E-SIGN Act explained, this requirement is designed to "ensure informed and effective consumer consent to the replacement of paper notices and disclosures with electronic notices and disclosures." 146 Cong. Rec. 10,964 (S5219) (June 15, 2000) (statement of Sen. Leahy); *see also* 145 Cong. Rec. 27,689 (H11164) (Nov. 1, 1999) (statement of Rep. Bliley) (explaining that the amended bill "include[s] a new opt-in provision to prevent consumers from being forced to use or accept electronic records").

Second, prior to consenting, the consumer must be provided with a clear and conspicuous statement that informs her of several things: (1) any right or option that she has to have the record provided or made available on paper or in nonelectronic form; (2) her right to withdraw her consent and any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal; (3) whether her consent applies only to the particular transaction that gave rise to the obligation to provide the

record; (4) whether her consent applies to identified categories of records that may be provided or made available during the course of the parties' relationship; (5) the procedures she must use to withdraw consent and update the information needed to contact her electronically; and (6) how, if she consents, she may, upon request, obtain a paper copy of an electronic record, and whether any fee will be charged for such copy. 15 U.S.C. § 7001(c)(1)(B); *see also The Prudential Ins. Co. of Am. v. Dukoff*, 674 F. Supp. 2d 401, 412 (E.D.N.Y. 2009) ("Section 7001(c) requires companies to make certain disclosures to consumers before providing important records in electronic, rather than print, form.").

Third, prior to consenting, the consumer also must be "provided with a statement of the hardware and software requirements for access to and retention of the electronic records." 15 U.S.C. § 7001(c)(1)(C)(i).

Fourth, the consumer must consent electronically, or confirm her consent electronically, in a manner that reasonably demonstrates that

she can access information in the electronic form that will be used. *Id.* § 7001(c)(1)(C)(ii).[9]

Because § 101(c) of the E-SIGN Act serves as an overlay on other laws, this Court cannot assess Med-1's argument that it provided Lavallee a "written notice" under § 1692g(a) (*see* Med-1 Br. 18-23) without determining with the foregoing requirements have been satisfied. But although Med-1 requests this Court direct judgment in its favor (Med-1 Br. 38), it does not address the E-SIGN Act in its opening brief.[10] And perhaps because the E-SIGN Act was not raised

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[9] Even after the consumer consents, the E-SIGN Act imposes ongoing obligations on the person providing the electronic record when there are certain types of changes in the hardware or software needed to access or retain electronic records. In such a situation, the consumer must be provided a statement of the revised hardware or software requirements and the right to withdraw consent without the imposition of any fees for such withdrawal or any conditions or consequences not previously disclosed. The consumer must also consent electronically, or confirm her consent electronically, in a manner that reasonably demonstrates that she can access information in the electronic form that will be used thereafter. 15 U.S.C. § 7001(c)(1)(D).

[10] Med-1 cites *Derisme v. Hunt Leibert Jacobson, PC*, No. 3:10-cv-244 (MRK), 2010 U.S. Dist. Lexis 119351, at *18 (D. Conn. Nov. 10, 2010), which states that a validation notice could be sent by email. *See* Med-1 Br. 19. There is no discussion of the E-SIGN Act in that case, and to the extent that the case suggests a debt collector could use email to satisfy the FDCPA's written validation-notice requirement without complying with the E-SIGN Act, the case would be wrongly decided. Further, *Blanchard v. North American Credit Services*, No. 3:15-cv-

by either party below, the summary-judgment record before the district court contains no evidence that these E-SIGN requirements were satisfied. There is, for example, no evidence that Lavallee consented to receive mandatory written notices, such as the validation notices, through electronic records. *See* 15 U.S.C. § 7001(c)(1)(A). There is likewise no showing that, prior to such consent (which she apparently did not give), she was informed, *inter alia*, that she had the right to receive the notice in a paper format, and that she had the right

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1295-DRH, 2016 U.S. Dist. Lexis 48548, at *12-13 (S.D. Ill. Apr. 11, 2016), *see* Med-1 Br. 19, holds that a consumer may use email to notify a debt collector that he disputes a debt. This is irrelevant here because section 101(c) of the E-SIGN Act applies only to notices that must be provided to a consumer, not to notices that a consumer provides to a debt collector. *See* 15 U.S.C. § 7001(c)(1) (referring to "a statute, regulation, or other rule of law" requiring information to "be provided or made available *to a consumer* in writing") (emphasis added). And nothing in *Ghanta v. Immediate Credit Recovery, Inc.*, No. 3:16-cv-00573-O, 2017 U.S. Dist. Lexis 67726 (N.D. Tex. Apr. 18, 2017), *see* Med-1 Br. 20, indicates that the court was aware of the E-SIGN Act, or even suggests that a debt collector could ignore its provisions when complying with the FDCPA's requirement regarding the sending of a written validation notice.

Med-1 also relies on *Mahon v. Credit Bureau, Inc.*, 171 F.3d 1197 (9th Cir. 1999), *see* Med-1 Br. 18, which holds that a debt collector complies with the FDCPA's written validation-notice requirement upon sending such a notice, even if the notice is not received. 171 F.3d at 1201-02. But that case, which pre-dates the E-SIGN Act, has no relevance to the situation here because the debt collector in *Mahon* used the mail, not email, to send the validation notice.

to withdraw her consent, or that she was provided with a statement of the hardware and software requirements for access to and retention of the electronic records. 15 U.S.C. §§ 7001(c)(1)(B), (C). And there is no evidence that she consented electronically or confirmed her consent electronically, no less in a manner that reasonably demonstrates that she could access information in the electronic form that Med-1 uses. 15 U.S.C. § 7001(c)(1)(D).

The summary-judgment record does suggest that Med-1 did not comply with the E-SIGN Act itself. In particular, Med-1 stated below that the March 20, 2015, and April 17, 2015, SecurePackages were its "initial communication letters" sent to Lavallee (ECF 6 at 4),[11] suggesting that Med- could not have obtained Lavallee's *prior*, informed consent under the E-SIGN Act. The record does not reveal whether the hospital to which Lavallee purportedly owed her debts complied with the requirements of the E-SIGN Act, and the Bureau takes no position whether, and under what circumstances, a debt collector may invoke an original creditor's compliance with the E-SIGN Act to justify use of an electronic record to satisfy § 1692g(a).

[11] The district court did not make any finding as to whether these emails were the "initial communications" for purposes of FDCPA section 809(a).

The Bureau notes, however, that the district court found "no evidence that Ms. Lavallee . . . ever anticipated that her email would be given to [Med-1]" (Dist. Ct. Opp. 10 n.6 (A-10)), which suggests that Lavallee may not have received E-SIGN Act disclosures from the hospital. *See* 15 U.S.C. § 7001(c)(1)(B)(ii) (requiring disclosure "of whether the consent [to electronic records] applies . . . only to the particular transaction which gave rise to the obligation to provide the record."). And if Lavallee never received E-SIGN Act disclosures nor consented to receive electronic notices in lieu of paper, Med-1 could not use email or other electronic records to satisfy the "written notice" requirement in § 1692g(a).

3. The Bureau recognizes that the five-day window within which a debt collector must provide written validation notices may not afford debt collectors sufficient time to make compliance with the E-SIGN Act a viable option. The Bureau also recognizes that electronic delivery of validation notices may afford consumers certain advantages over traditional paper mailings. These are among the reasons that the Bureau inquired about electronic delivery of validation notices in its debt-collection ANPRM. *See* Outline of Proposals at 3 ("With regard to the FDCPA specifically, the ANPR also sought comment about

interpreting the nearly forty-year old statute to address contemporary debt collection challenges, including questions such as how collectors apply the FDCPA to technology such as cell phones, text messages, and email.").

Such policy considerations, however, do not affect the legal analysis here. At the outset, the E-SIGN Act itself makes clear that it does not "affect[] the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law." 15 U.S.C. § 7001(c)(2)(A). Thus, a short time period for complying with E-SIGN Act requirements does not justify ignoring those requirements altogether.

Moreover, the E-SIGN Act grants federal regulatory agencies the authority to "exempt without condition a specified category or type of record from the requirements relating to consent in section [101(c)] if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers." 15 U.S.C. § 7004(d)(1). 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.

CONCLUSION

For the foregoing reasons, if the Court reaches the question whether Med-1 satisified the "written notice" requirement of 15 U.S.C. § 1692g(a), it should address the applicability of the E-SIGN Act in the manner set forth above.

Respectfully submitted,

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I hereby certify that on April 25, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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