No. 17-3244

In the United States Court of Appeals for the Seventh Circuit

BETH LAVALEE,

Plaintiff-Appellee,

v.

MED-1 SOLUTIONS, LLC,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division, No. 1:15-cv-01922-DML-WTL.
The Honorable **Debra McVicker Lynch**, Judge Presiding.

BRIEF OF ACA INTERNATIONAL AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

Brian Melendez,
Counsel of Record
BARNES & THORNBURG LLP
Suite 2800
225 South Sixth Street
Minneapolis, MN 55402-4662
Ph. 612.367.8734
brian.melendez@btlaw.com

Attorney for Amicus Curiae
ACA International

COUNSEL PRESS · (866) 703-9373

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Address: Barnes & Thornburg LLP, Suite 2800, 225 South Sixth Street, Minneapolis, MN 55402-4662

Phone Number: 612.367.8734 Fax Number: 612.333.6798

E-Mail Address: brian.melendez@btlaw.com

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Statement of Identity, Interest, and Source of Authority to File

Pursuant to Fed. R. App. P. 29(a)(4)(D), Amicus Curiae ACA International states:

ACA International, the Association of Credit and Collection Professionals, is a not-for-profit corporation based in Minneapolis, Minnesota.

Founded in 1939, ACA represents nearly 3,700 members, including credit grantors, collection agencies, attorneys, asset buyers, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers.

ACA company members range in size from small businesses with a few employees to large, publicly held corporations. These members include the very smallest of businesses that operate within a limited geographic range of a single town, city, or state, and the very largest of national corporations doing business in every state. But most ACA company members are small businesses, collecting rightfully owed debts on behalf of other small and local businesses. Approximately 75% of ACA's company members maintain fewer than twenty-five employees.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA

members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars — dollars that are returned to and reinvested by businesses, and that would otherwise constitute losses on those businesses' financial statements. Without an effective collection process, the economic viability of these businesses — and, by extension, the American economy in general — is threatened. Recovering rightfully owed consumer debt lets organizations survive; helps prevent job losses; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls.

All the Parties have not consented to ACA filing this brief, so ACA is filing a motion for leave to file this brief under Rule 29(a)(3).

Statement Under Rule 29(a)(4)(E)

No Party's counsel authored this brief in whole or in part. No Party or Party's counsel contributed money that was intended to fund preparing or submitting this brief. No person — other than Amicus Curiae ACA International, its members, and its counsel — contributed money that was intended to fund preparing or submitting this brief.

Argument

I. The national credit economy depends on the credit-and-collection industry's efficient operation.

As part of the process of attempting to recover outstanding payments, debt collectors and debt buyers are an extension of every community's businesses. Debt collectors and debt buyers work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. Their efforts have resulted in the annual recovery of billions of dollars — dollars that are returned to and reinvested by businesses, and that would otherwise constitute losses on those businesses' financial statements. Recovering rightfully owed consumer debt helps prevent job losses; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls. Without effective collections, consumers would be forced to pay higher prices and higher taxes to compensate for uncollected debts.

In 2017, ACA commissioned a study to measure the various impacts of third-party debt collection on the national and state economies. The study found that, in calendar year 2016:

- Third-party debt collectors recovered about $78.5 billion from consumers on behalf of creditor and government clients, to whom nearly $67.6 billion was returned.[1]
- The third-party collection of consumer debt returned an average savings of $579 per household by keeping the cost of goods and services lower.[2]
- Health-care-related debt was the leading category of debt, accounting for nearly 47% of all debt collected by the credit-and-collection industry.[3]

The credit-and-collection industry keeps bad debt from being a total loss for the original creditor. A creditor loans out money with the expectation of being repaid according to the loan's terms, and its resources and operations are geared toward that expectation. But sometimes the expectation is disappointed and, in those cases, a debt collector is often a more attractive option for a creditor than continued collection activity by the creditor itself. Without debt collectors, the creditor would simply charge off the loan, which would be a total loss — and would drive up the interest that the creditor

[1] Ernst & Young, *The Impact of Third-Party Debt Collection on the US National and State Economies in 2016* at 2 (2017), *online at* https://www.acainternational.org/assets/ernst-young/ey-2017-aca-state-of-the-industry-report-final-5.pdf (accessed Jan. 30, 2018).

[2] *Id.*

[3] *Id.* at 6.

must charge in order to recoup that loss. The national credit economy depends on the credit-and-collection industry, which maximizes recovery from debt and thereby keeps costs, interest rates, and taxes down.

II. Email has become a key way in which debt collectors seek to operate more efficiently.

The more efficiently the credit-and-collection industry can operate, the more it can recover for unpaid creditors and governmental clients, and the lower those creditors and governments can keep costs, interest rates, and taxes. The national credit economy — including consumers, who ultimately bear the cost of unpaid debt — benefits from the credit-and-collection industry's efficient operation.

A debt collector wants to communicate with the debtor as economically and efficiently as possible. Thus, a debt collector will usually prefer to communicate by telephone call rather than by postal mail, especially since most telephone companies have abandoned distance-sensitive pricing and now offer unlimited long-distance calling. Likewise, a debt collector will usually prefer to communicate by email rather than by telephone, since email is not only inexpensive but does not require a live representative to be available at the precise moment when a consumer is available to communicate.

Debt collectors are regulated by the Fair Debt Collection Practices Act, and must comply with other statutes such as the Telephone Consumer

Protection Act. The Telephone Consumer Protection Act is an example of a legislative response to an emerging technology in a regulated market. The breakup of the Bell System in 1984 led to increased competition between telephone-service providers, which drove down the cost of telephone service, especially long-distance service. The increasing popularity of the telephone for business-to-consumer calls led to a boom in telemarketing: "Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990, a more than four-fold increase since 1984."[4] Congress responded by enacting the Telephone Consumer Protection Act of 1991, in which it found that

> (1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.
> (2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.
> (3) More than 300,000 solicitors call more than 18,000,000 Americans every day.
> . . . .
> (5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.
> (6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.[5]

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[4]Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(4) (not codified in 47 U.S.C.).

[5]*Id.* § 2.

While the Act was aimed at telemarketers, it also applies to debt collectors.[6]

Just as telephone calling had gained ground in the 1980s, email emerged as a popular, inexpensive means of communication, including business-to-consumer communication, in the late 1990s and the 2000s. From 2005 to 2010, "the use of email by professionals . . . increased 78 percent."[7] Debt collectors have taken advantage of email too: while letters and telephone calls remain the most popular methods of communicating with debtors (both at 98 percent), 36 percent of debt collectors used email in their collection operations in 2016.[8] Email has become a key way in which debt collectors seek to operate more efficiently. But while email has emerged as a key way in which debt collectors seek to operate more efficiently, there has been no legislative response to emailed communications in connection with debt collection.

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[6]*See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, ¶ 9, 23 FCC Rcd. 559, 564 (FCC 2008); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, ¶ 141, 30 FCC Rcd. 7961, 8028 (FCC 2015) (citing *id.*).

[7]Om Malik, *Is Email a Curse or a Boon?*, GigaOm (Sep. 22, 2010), *online at* https://web.archive.org/web/20101204012735/http://gigaom.com/collaboration/is-email-a-curse-or-a-boon/ (accessed Jan. 30, 2018).

[8]Ernst & Young, *The Impact of Third-Party Debt Collection on the US National and State Economies in 2016* at 5 (2017), *online at* https://www.acainternational.org/assets/ernst-young/ey-2017-aca-state-of-the-industry-report-final-5.pdf (accessed Jan. 30, 2018).

III. The Fair Debt Collection Practices Act has not kept pace with emerging technology.

When Congress enacted the Fair Debt Collection Practices Act in 1977, it found that "[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors,"[9] but that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers."[10] Congress passed the Fair Debt Collection Practices Act both "to eliminate abusive debt collection practices by debt collectors" and "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[11] The Act mandates or prohibits conduct by debt collectors "in connection with the collection of any debt" in 43 separate paragraphs, each containing one or more specific mandates or prohibitions.[12] Some such provisions apply to methods of communication that are about as familiar today as they were in 1977: for example, one such prohibition applies to "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."[13]

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[9] 15 U.S.C. § 1692(a) (abusive practices).

[10] 15 U.S.C. § 1692(b) (inadequacy of laws).

[11] 15 U.S.C. § 1692(e) (purposes).

[12] *See* 15 U.S.C. § 1692b–92g.

[13] 15 U.S.C. § 1692d(5).

Other provisions apply to methods of communication that are far less common today, such as the "post card."[14]

Email had barely been invented in 1977, and was still two decades away from becoming common. The Congress that enacted the Fair Debt Collection Practices Act, including 15 U.S.C. § 1692g(a), can hardly have envisioned an "initial communication with a consumer in connection with the collection of any debt" being transmitted by electronic mail directly from the debt collector to the consumer. If those legislators had contemplated such electronic communication, then perhaps they would have been clearer about how the debt collector must send the required written notice to the consumer, and could have obviated claims like Ms. Lavallee's.

Congress, though, was working with the technology of 1977 and, at least as far as the written notice under section 1692g(a) is concerned, has not spoken since.[15] The courts can respond to that silence in two ways: they can wait for Congress to speak, and meanwhile pronounce the law only as Congress wrote it; or they can try to fill the silence. The District Court took the latter approach, justifying its summary judgment in part because of its

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[14] 15 U.S.C. § 1692d(7).

[15] The relevant subsection, 15 U.S.C. § 1692g(a), has not been amended since its original enactment in 1977. The section has been amended only once: the Financial Services Regulatory Relief Act of 2006 added two sentences at the end of subsection (b), and added new subsections (d) and (e). Pub. L. No. 109-351, § 802, 120 Stat. 1966, 2006–07 (2006) (amending Fair Debt Collection Practices Act § 809 (15 U.S.C. § 1692g).

view of "modern consumer practices"[16] — a view that finds no purchase in the statutory text.

IV. The credit-and-collection industry operates in a nationwide market, so both public policy and due process favor consistent and predictable application of the Fair Debt Collection Practices Act.

Congress recognized the effects upon interstate commerce of debt-collection practices in the Fair Debt Collection Practices Act,[17] and stated explicitly in that statute that one of its purposes was "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[18] Congress has thus evinced an intent not to weave a regulatory web so tangled that it snares legitimate, compliant, law-abiding actors along with the abusive actors at whose unfair and deceptive conduct the statute is aimed.

But for the credit-and-collection industry to comply with the Fair Debt Collection Practices Act, the Act must be consistently and predictably applied — that is, a debt collector must know what the Act prohibits and what it allows: "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden

[16]Order at 10 [A000010].

[17]Fair Debt Collection Practices Act § 802(d), 15 U.S.C. § 1692(d) (Congressional findings and declaration of purpose — interstate commerce).

[18]Fair Debt Collection Practices Act § 802(e), 15 U.S.C. § 1692(e) (purposes).

or required."[19] In a nationwide market, that outcome requires consistent and predictable nationwide direction on which a debt collector can rely.

The Act's regulatory effectiveness disintegrates if a debt collector's present ability to comply with the Act's requirements depends on a future interpretation by a judge in one of the nation's 94 judicial districts. The District Court here invented a requirement that is not evident from the statutory text, and that no other court had ever articulated. That approach raises an issue of constitutional dimension because it deprives debt collectors of fair notice of what the Fair Debt Collection Practices Act requires and what it prohibits:

> A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[20]

The District Court's summary judgment would subject Med-1 to liability for reading and following a statute that doesn't quite contemplate the method of communication that it was using, and certainly doesn't contemplate the new rules around that method of communication that the District Court imposed.

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[19] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

[20] *Id.* at 253 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

Med-1 complied with the statute's terms, directed its communication to Ms. Lavallee at an address that she herself had provided, and "contained" its required notice within its email to her in a way that was intended to securely communicate the information that the law requires. (The District Court's focus on cases about misaddressed communications seems inapt in light of Med-1 using an email address that not only was correct, but had been provided by Ms. Lavallee.) To impose liability under these circumstances would violate due process.

V. The District Court's approach creates a need for guidance from this Court.

The District Court reached its summary judgment by grafting the mailbox rule onto 15 U.S.C. § 1692g(a),[21] so that the requirement that the debt collector must "send the consumer a written notice containing" the statutorily required disclosures now incorporates a requirement that the consumer *receive* the notice sent by email, even if the notice is sent to a correct email address that the consumer provided. That approach creates a need for guidance from this Court.

That guidance should take the form of a reversal, which would establish that email can be "written notice" within 15 U.S.C. § 1692g(a)'s meaning, and that the statute applies to email in the same way that it

[21]Order at 9–11 [A000009–11].

applies to postal mail. The law should not let a debt collector "send the consumer a written notice" at a known bad address but, if the debt collector is using the best address available, then the debt collector should be able to comply with the requirement that it "send the consumer a written notice" by simply sending the consumer a written notice. If more is required, then it should be up to Congress to say so.

But if this Court instead affirms the District Court, then the District Court's approach raises several questions about which guidance from this Court would be very helpful to the credit-and-collection industry:

- Does the "mailbox rule" apply only when the "written notice" under 15 U.S.C. § 1692g(a) is sent by email, or does it apply when the required notice is sent by other methods?
- If the "mailbox rule" applies only when the written notice is sent by email, does it apply to all written notices that are sent by email, or only when the statutory disclosures are contained within a secure attachment?
- If the written notice is sent by email and contained within a secure attachment, and the consumer opens and reads the email but does not open the attachment, has the written notice been "sent" within 15 U.S.C. § 1692g(a)'s meaning?
- If the written notice is sent by email, but the debt collector cannot tell whether the consumer has received or opened the

> email, then how can the debt collector know whether it has complied with the requirement that it "send the consumer a written notice"? And how can a debt collector who has tried in good faith to comply with the requirement, and has done so using email, defend itself against a consumer's (possibly false) denial of having received the email?

Without clear answers to these questions, debt collectors are less likely to use email for their initial communication with a consumer, which will drive up the cost of collection — a cost that will ultimately be borne by the consuming public.

Conclusion

Therefore, Amicus Curiae ACA International respectfully asks that this Court reverse the District Court's order.

February 5, 2018.

BARNES & THORNBURG LLP

s/ Brian Melendez

Brian Melendez
Suite 2800
225 South Sixth Street
Minneapolis, MN 55402-4662
Ph. 612.367.8734
Fax 612.333.6798
brian.melendez@btlaw.com

Attorney for Amicus Curiae
ACA International

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BARNES & THORNBURG LLP

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____

Brian Melendez
Attorney for Amicus Curiae
ACA International

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BARNES & THORNBURG LLP

s/ Brian Melendez

Brian Melendez
Attorney for Amicus Curiae
ACA International