IN THE COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2013

No. 76

James Townsend,
Appellant,
v.
Midland Funding, LLC,
Appellee.

Circuit Court for Baltimore City
24-C-13-001033
(Honorable Pamela J. White)

Brief Amici Curiae of AARP, The University of Maryland Law School Consumer Protection Clinic, Civil Justice Inc., Maryland Legal Aid Bureau, Inc., The National Association of Consumer Advocates, The National Consumer Law Center, and The Public Justice Center, In Support of Appellant

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[1] The views expressed in this brief are those of the Consumer Protection Clinic only. They do not expressly or impliedly represent the views of the University of Maryland Francis King Carey School of Law, or of its Clinic in general. The authors acknowledge the assistance on this Brief: of the following Consumer Protection Clinic students: Andrew J. Ahye, Daniel G. Borman, Thomas J. Bolek and David R. Seaton.

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ISSUE PRESENTED

Did the trial court err by allowing a debt buyer to prove its case against a debtor by submitting unauthenticated documents and an affidavit of an individual not employed by the original creditor given that Rule 3-306 provides that a debt buyer must prove its case with evidence that would pass muster under the business records exception to the hearsay rule?

INTEREST OF AMICI CURIAE

Amici[2] are national and local consumer advocacy organizations, each having extensive experience representing the interests of low income consumers in state and federal courts to protect them from the injustice of erroneous judgments entered against them in debt buyer lawsuits. Although the amount in controversy is typically small, averaging about $3,000, the consequences of an erroneous judgment can be devastating.

Amici have an interest in protecting people from abusive debt collection based on inherently inaccurate and unverified information. Several have

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[2] Pursuant to Rule 8-511(b), amici curiae certifies that the statements expressed in this brief represent the considered opinion of the amici in its capacity as advocates of low-income and older people. Amici have authored this brief in its entirety and have no interest in the outcome of the particular litigation between Appellants and Appellees except the institutional interests described within. No persons or entities have made any monetary or other contribution to the preparation or submission of this brief other than amici, their members, and counsel.

participated as amici curiae in cases involving challenges to abusive debt collections in federal and state courts. Amici have also advocated for improved court procedures—including in Maryland—and regulatory oversight of the debt buyer industry. Amici are engaged in the public policy debate over the standards of proof and rules of evidence and the due process rights which arise in the context of debt buyer litigation. Specifically, amici seek to combat errors and injustice in the context of debt collection—especially debt buyer—lawsuits. Amici raise issues which might otherwise escape the Court's attention, and amici's participation in this case will assist this Court in understanding and evaluating the issues raised on appeal.

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. As the leading organization representing the interests of people aged fifty and older, AARP is greatly concerned about abusive practices being used to collect stale and invalid debt, to which older people are especially vulnerable. Many older debtors believe they will go to jail if summoned to court. Older people are more easily upset by the threat of a court judgment against them, and many believe that they will lose their homes, pensions, or bank

accounts, or even go to jail if they receive a court summons. As a result, older people may feel coerced into paying debts they had already paid in full or never owed in the first place, such as debts of a deceased loved one.

The University of Maryland Law School Consumer Protection Clinic provides *pro bono* representation to Maryland consumers who are being sued by debt buyers. In addition to representing individual clients, the Clinic is also tasked with public outreach and education. In these capacities, the Clinic seeks to identify and propose solutions to systemic problems which impede access to justice for Maryland's residents, particularly its self represented litigants. In partnership with the Maryland Pro Bono Resource Center's Consumer Protection Project, the Clinic also provides consultation and support to pro bono lawyers who are part of PBRC's Consumer Protection Project.

Civil Justice, Inc. ("CJ") is a non-profit, public interest organization founded in 1998 for the purpose of increasing the delivery of legal services to individuals of low and moderate income while supporting a statewide network of solo, small firm and community based lawyers who share a commitment to increasing access to justice. CJ has represented hundreds of Maryland consumers individually, and thousands in public interest litigation who have been victimized by predatory creditors and their affiliates. CJ and its members routinely advise and often represent Maryland consumers who are facing debt collection actions in state

courts, many of whom are *pro se*, and clarifying the rules of procedure and proof required will have a significant impact in these cases.

Maryland Legal Aid Bureau, Inc. provides direct legal services to low-income consumers in support of its mission to safeguard the economic stability of the State's poorest residents by ensuring that only valid debts are being lawfully collected in the courts of this State. Over the past ten years, that stability has been threatened by the massive increase in lawsuits filed by debt buyers. Because so many more people seek Legal Aid's help each year than it can possibly represent, many eligible individuals are turned away. The Legal Aid Bureau must usually provide only brief advice and close cases involving consumers sued for old credit card debts on the District Court's small claim docket.

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Enforcement and compliance with consumer protection laws has been a continuing concern of NACA since its inception.

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a non-profit corporation in 1969 at Boston College School of Law, NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support. NCLC is recognized nationally as an expert in debt collection issues, including the Fair Debt Collection Act, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 40 years. NCLC is, among other roles and accomplishments, author of a widely praised twenty-volume series of treatises on consumer law, including *Fair Debt Collection* (7th ed. 2011 and Supp.) and *Collection Actions* (2d ed. 2011 and Supp.). The Supreme Court of the United States has relied upon *Fair Debt Collection* as supporting authority. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573, 591 n.12 (2010).

The Public Justice Center ("PJC") a not-for-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding

commitment to protecting and advancing consumers' rights. The PJC has participated in a number of Maryland cases guarding the rights of consumers, including in the contexts of creditors' requests for attorneys' fees, arbitration agreements, and access to justice. The PJC participated directly in and contributed significantly to the deliberations of the Rules Committee on the recent amendments to Rule 3-306 and has an interest in this case because it addresses the critical issues of due process in an area of civil litigation that has a substantial impact on the lives of poor people.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents the question of whether documents created by third party predecessors in interest—usually a bank—may be admitted into evidence when a debt buyer plaintiff does not demonstrate personal knowledge regarding any of the foundational elements which would be required to admit the documents under the business records exception to the hearsay rule. Amici urge this Court to overturn the lower court, and hold that a debt buyer's documents may not be admitted into evidence without the debt buyer first laying the proper foundation for the business records exception to the hearsay rule. *See* Rules 5-101 and 5-803(b)(6) (demanding the indicia of reliability which ensures the judgments Maryland courts render are fundamentally fair); *see also Bernadyn v. State*, 390 Md. 1, 19, 887 A.2d 602, 613 (2005) (in order for a business record to be admitted into evidence, "testimony

must be given by a witness who possesses the necessary knowledge to establish" . . . "the requirements of Rule 5-803(b)(6) and to establish its authentication or identification") (quotation omitted). Additionally, a debt buyer may not avoid the rule against hearsay by claiming it has the records of another entity in its possession. *See Bernadyn v. State*, 390 Md. at 20-1, 887 A.2d at 613-14 ("[an] outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have." (citing 2 McCormick on Evidence § 292, at 277)); *CACH, LLC v. Askew*, 358 S.W. 3d 58, 63 (Mo. 2012) (en banc) (excluding records generated by bank because debt buyer is not competent to testify as to business records of bank).

Effective as of January 1, 2012, the Court of Appeals adopted comprehensive amendments to the Maryland Rules for obtaining judgments on affidavits in uncontested debt buyer cases in District Court to counter documented litigation abuses perpetrated by debt buyers. *See* Standing Committee on Rules of Practice and Procedure, 171st Report, 31-47 (2011) ("Report"); *see also* Rules Order, Court of Appeals (Sept. 8, 2011) (adopting the report). The major thrust of the rules amendments is to require submission of specific information to obtain a judgment on affidavit, "enhance transparency," and ensure that judges have available a reliable level of documentation to enable them to determine whether a

debt buyer has proved both liability and damages. *See* Report, at 8 (stating that in order to promote transparency in the judicial process, courts need to require additional information in judgment-by-affidavit cases); *see also*, Rule 3-306.

As recognized by comments received by the the Rules Committee, the debt buying industry is structured in such a way that in most cases, a debt buyer does not have access to basic contract and account level information necessary to avoid collection abuses, including collection against the wrong person or in the wrong amount. *See* FTC, The Structure and Practices of the Debt Buying Industry, ii-iv (Jan. 3, 2013) ("FTC Debt Buying Report") (finding debt buyers rarely receive any documents related to the debts, such as account statements or the terms and conditions of credit, and their ability to obtain same, if such documents even existed, was limited). Despite the fact that "the plaintiff often has insufficient reliable documentation" to prove a debt is owed by a particular person in a particular amount, millions of default judgments are entered every year because alleged debtors usually do not have legal representation and do not appear in court to defend such lawsuits.[3] Report, at 7; *see also* FTC Debt Buying Report, at ii-iv.

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[3] The Rules Committee recognized that in the vast majority of debt buyer cases, the court grants the debt buyer a default judgment because the consumer has failed to appear for trial. Report, at 7. In many of these instances, debtors simply do not know they have been sued due to improper service. *See Debt Weight: The Consumer Credit Crisis In New York And Its Impact On The Working Poor,* Urban

Because most judgments are entered by default, debt buyers have enjoyed the absence of adversarial proceedings and rigorous judicial scrutiny that would normally prevent entry of judgments on invalid or insufficient claims.

The lack of judicial scrutiny has emboldened the debt buying industry to take legal shortcuts, resulting in an explosion of collection suits filed in Maryland as well as nationwide. Lacking adequate proof, and in many cases contrary to debt portfolio purchase agreements that sell the debt "as is" and explicitly disclaim warranties as to accuracy, debt buyers create the misleading perception that they are seeking to collect a valid, timely debt from the right person and for the right amount. *See* Report, at 8; Rick Jurgens & Robert J. Hobbs, *The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts*, Nat'l Consumer Law Ctr., 11 (2010) ("NCLC Debt Machine").

As a matter of basic due process, and to ensure that the purpose of the Rules amendments is realized and efforts to ensure fairness are not thwarted, this Court

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Justice Center, 7, 20 (2007), *available at* http://www.urbanjustice.org/pdf/publications/http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf. Debt buyers often send notices to addresses listed in the underlying credit card accounts, however, these accounts are frequently several years old and contain outdated contact information. In addition, many process servers simply fail to serve papers but nonetheless sign false affidavits of service with the court. *See Debt Deception: How Debt Buyers Abuse The System To Prey On Lower-Income New Yorkers*, Neighborhood Econ. Dev. Advocacy Project 1 (2010), *available at* httpwww.nedap.org/pressroom/pressroom/documents/debt_deception_final_web.pdf.

should hold that the Circuit Court erred in admitting third party hearsay documents proffered by a debt buyer affidavit. Order, E. 112. Rule 3-306 does not apply in a trial on the merits, and certainly does not automatically make documents admissible. Additionally, the informal nature of proceedings in small claims court do not make such documents automatically admissible, as Appellants argue in their brief in *Bartlett v. Portfolio Recovery Associates., LLC*, No. 24-C-13-001323 (Cir. Ct.), *cert. granted*, No. 64 (Md. Jul. 3, 2013), at 20. This Court should protect citizens and the integrity of Maryland courts by enforcing the full arsenal of professional, procedural, and substantive rules applicable to debt buyers.

This Court should reverse the Circuit Court because the documents at issue were not admissible without foundational testimony from a competent witness.[4]

[4] In this case, the documents were actually admitted even though no witness for the Plaintiff even attempted to lay the foundation for their admission. By admitting documents at a merits trial without any foundational testimony whatsoever, the lower court created a standard which is even lower than that required for an affidavit judgment under Rule 3-306 (which requires an affiant who is competent, who has personal knowledge of the matters asserted, and who is offering via affidavit "admissible evidence").

ARGUMENT

I. THIS COURT AMENDED ITS RULES TO ENSURE THAT JUDGMENT WOULD BE ENTERED IN DEBT BUYER CASES ONLY IF RELIABLE EVIDENCE PROVED BOTH LIABILITY AND DAMAGES.

The recommendations of the Rules Committee adopted by this Court were designed to ensure that debt buyers prove with competent, admissible evidence that they own the debt they seek to collect, that they are suing the right person for the right amount, and that they have a legal right to a judgment. Amici adopt by reference the detailed account of the background and history of the rules amendment argued by the Brief for Legal Aid Bureau, Inc., as Amicus Curiae Supporting Appellant, *Bartlett v. Portfolio Recovery Associates., LLC*, at 7-11. The amendments were deemed essential to protect alleged debtors and the courts because of the flood of often questionable and abusive debt collection lawsuits.

Strict scrutiny over the records of debt buyers and third party banks that sell debt portfolios is further warranted because banks are also implicated in the debt collection litigation abuses that the Rules Committee sought to combat. Increasingly widespread reports have surfaced that banks and debt buyers sell and resell clearly invalid debt—that which resulted from identity theft, was disputed, settled, discharged, paid in full, or is otherwise invalid. *See* Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, Am. Banker (Mar. 29, 2012, 6:31 pm. ET), http://www.americanbanker.com/issues/177_62/bofa-

credit-cards-collections-debts-faulty-records-1047992-1.html ("Horwitz Mar. 2012") ("Bank of America's caution that its card records may be incomplete or inaccurate suggests that documentation and accuracy problems may originate at the debt's source."). "[E]ach year, buyers sought to collect about one million debts consumers did not owe," and this may understate the problem. FTC Debt Buying Report, at iv. One Maryland consumer paid her debt in full, but even proof of payment would not deter debt buyers to whom her account was sold. Her three year nightmare ended only after she filed her own lawsuit. Maria Aspan, *Borrower Beware: B of A Customer Repaid Her Bill Yet Faced a Collections Nightmare*, Am. Banker, (Mar. 29, 2012, 5:47 pm ET) http://www.Americanbanker.com /issues/177_62/bofa-credit-cards-debt-collections-delinquent-robosigning-047991-1.html.

Of particular relevance to the case at bar are widespread allegations that J.P. Morgan Chase, the original owner of the debt alleged in the case at bar, sells debts that it knows to be invalid. *See* Jeff Horwitz, *JPM Chase Quietly Halts Suits Over Consumer Debts*, Am. Banker (Jan. 10, 2012, 5:55 pm ET) http://www. americanbanker.com/issues/177_7/jpmorgan-chase-consumer-debt-collection-1045 606-1.html. The Office of the Comptroller of the Currency instituted enforcement actions against Chase for such practices. *See* JPMorgan Chase Bank, N.A., No. 2013-138 (Dep't of Treas. Sept. 18, 2013) (Consent Order), *available at*

http://www.occ.gov/static/enforcement-actions/ea2013-138.pdf (imposing $60 million penalties and ordering correction of deficiencies). According to the Consent Order, "The Comptroller finds, and the Bank neither admits nor denies" that in its "sworn document and Collections Litigation," Chase:

a) Filed affidavits which falsely represented that they were based on personal knowledge;

b) Filed inaccurate sworn documents that resulted in "judgments with financial errors in favor of the Bank";

c) Filed "numerous affidavits that were not properly notarized";

d) Failed to have proper procedures in place to ensure compliance with the Servicemembers Civil Relief Act;

e) Failed to devote sufficient resources to properly administer its collections litigation processes;

f) Failed to devote adequate controls, policies and training to its collection litigation processes;

g) Failed to sufficiently oversee outside counsel and other third party providers handling collection litigation services.

Id., Article I, Paragraph 2.

According to the Consent order, additional data integrity problems exist specifically in relation to the sale of charged off accounts by Chase to debt buyers. Chase must submit to the OCC "Revised policies and procedures to ensure that the Bank's sales of charged-off consumer Accounts are consistent with the OCC's expectations regarding the Bank's debt sales activities" including:

(i) Processes, systems, and controls to ensure the accuracy and integrity of all information provided to any third party in connection with the sale of charged-off debt;

* * *

(vi) Processes to ensure that the information provided to debt buyers is sufficient and appropriate for debt collection activities in compliance with federal and state laws and regulations….

Id., Article IV, paragraph (1)(p).

The revelations about debt collection litigation abuses and the inaccuracy and lack of integrity in debt portfolio sales by Chase also prompted the Office of the Comptroller of the Currency to issue guidance to all the banks they supervise to halt such practices. *See Shining a Light on the Consumer Debt Industry: Hearing Before the Subcomm. on Fin. Inst. and Consumer Prot. S. Comm. on Banking, Hous., and Urban Affairs*, (2013) (statement of Thomas Curry, Comptroller of the Currency) (discussing problems of banks selling debt without adequate controls); *see also* Jeff Horwitz and Maria Aspan, *OCC Pressures Banks to Clean Up Card Debt Sales*, Am. Banker (Jul. 2, 2013, 1:24 pm ET), http://www.americanbanker.com/issues/178_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html; Maria Aspan, *Wells Fargo Halts Card Debt Sales as Scrutiny Mounts*, Am. Banker (Jul. 29, 2013, 10:00 pm ET), http://www.americanbanker.com/issues/178_144/wells-fargo-halts-card-debt-sales-as-scrutiny-mounts-1060922-1.html. Additionally, the California Attorney General recently sued "to hold Chase accountable for systematically using illegal tactics to flood

California's courts with specious lawsuits against consumers." Press Release, CA Att'y Gen., *Attorney General Kamala D. Harris Announces Suit Against JPMorgan Chase for Fraudulent and Unlawful Debt-Collection Practices* (May 9, 2013), *available at* http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-suit-against-jpmorgan-chase ("Chase employed unlawful practices as shortcuts to obtain judgments against California consumers with speed and ease that could not have been possible if Chase had adhered to the minimum substantive and procedural protections required by law.").

In addition, Chase has also been ordered by the Consumer Financial Protection Bureau ("CFPB") to pay a $20 million penalty and refund $309 million to more than 2.1 million customers for illegal credit card billing practices.[5] JPMorgan Chase Bank, N.A., No. 2013-CFPB-0007 (Consumer Fin. Prot. Bureau Sept. 18, 2013) (Consent Order), *available at* http://www.consumerfinance.gov/f/201309_cfpb_jpmc_consent-order.pdf; *see also* Press Release, CFPB, *CFPB Orders Chase and JPMorgan Chase to Pay $309 Million Refund for Illegal Credit Card Practices* (Sept. 19, 2013), *available at* http://www.consumerfinance.gov/pressreleases/cfpb-orders-chase-and-jpmorgan-chase-to-pay-309-

[5] Chase issues the AARP-branded Visa Cards available to qualifying AARP members. Chase pays a royalty fee to AARP for the use of its intellectual property in relation to this credit card program. These fees are used for the general purposes of AARP.

million-refund-for-illegal-credit-card-practices/. The billing practices by Chase at issue in the CFPB enforcement action occurred from 2005-2012, suggesting that at least some of the debts Chase sold to debt buyers include such illegally charged amounts. *Id.*

A. The Rule Amendments Set Forth And Explained The Heightened Gatekeeping Obligations Of Maryland Courts In Debt Buyer Litigation

Through the rules amendments, this Court set forth and explained the heightened gatekeeping obligations of Maryland courts in debt buyer litigation in the face of the improvident practices of debt buyers. Report, at 8. Courts in other states have come to similar conclusions—that "weak legal arguments compel the Court to stop [debt buyers] at the gate." *Commonwealth Fin. Sys., Inc., v. Smith*, 15 A.3d 492, 500 (Pa. Super. Ct. 2011) (citing *In re Foreclosure Cases*, Nos. 1:07CV2282 et seq., 2007 WL 3232430, at *2 (N.D. Ohio Oct. 31 2007) ("Neither the fluidity of the secondary [debt] market, nor monetary or economic considerations of the parties, nor the convenience of the litigants supersede[s] those obligations."); *MBNA Am. Bank, N.A. v. Nelson*, 15 Misc. 3d 1148(A), 841 N.Y.S.2d 826, *1 (Civ. Ct. 2007) ("The judiciary continues to provide an important role in safeguarding consumer rights and in overseeing the fairness of the debt collection process.").

Debt buyers assert claims even where the evidence necessary to prove the claim is unavailable—and what little information is available is known to be inaccurate or is subject to explicit disclaimers as to accuracy—because they know few debtors will be able to defend against even spurious claims. *See* Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom – In Lawsuits*, Wall St. J. (Nov. 28, 2010), http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html (reporting that by industry estimates ninety-four percent of collections end in default and that "[t]he majority of borrowers don't have a lawyer, some don't know they are even being sued, and others don't appear in court, say judges."). Debtors who receive notice of a lawsuit—although many do not because of faulty service—usually appear without legal representation if they appear at all.[6] Often they either cannot afford an attorney or cannot find an attorney who will take their case. *See* Brief for Legal Aid Bureau, Inc., as Amicus Curiae Supporting Appellant, *Bartlett v. Portfolio Recovery Associates., LLC*, at 3; Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 Mo. L. Rev 707, 721-26 (2008) (arguing that the typical consumer debtor's

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[6] In New York, for example, only 1% of defendants sued by creditors were represented by an attorney. *Debt Deception* at 1 (noting that ninety-five percent of 457,322 lawsuits filed by twenty-six debt buyers against people residing in low- or moderate-income neighborhoods ended in default judgments, and not a single person in the study was represented by counsel).

"choice" to appear *pro se* and defend is involuntary). Notwithstanding having viable counterclaims and lacking any knowledge of their legal rights, alleged debtors must resort to appearing *pro se* and stumble through complex procedural and substantive law that even some trained attorneys do not fully understand.

Debt buyers exploit unrepresented consumers through judicial collections: the threat of litigation is sufficient to force payment even if a debtor has a valid defense. An alleged debtor faced with a court summons may believe that a collector would not be allowed to bring a case that could not be proven in court and that he has no choice but to make payments to avoid a judgment. *See Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) (reasoning that unsophisticated "consumers would unwittingly acquiesce" to a time-barred lawsuit instead of defending against it). Moreover, the *Kimber* court noted that,

> even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense; this is particularly true in light of the costs of attorneys today.

Id. As explained by one commentator, "a civil filing serves as a credible threat to inflict harm on the defendant['s credit rating and thus] may induce the defendant to pay." Richard Hynes, *Broke But Not Bankrupt: Consumer Debt Collection In State Courts*, 60 Fla. L. Rev. 1, 20 (2008). The CFPB has asserted supervisory authority

over debt buyers, recognizing that the coercive power of judicial debt collection creates a major consumer protection concern:

> Whether or not consumers owe and are liable for the debts collectors are attempting to recover, unlawful collection practices can cause significant reputational damage, invade personal privacy, [ ] inflict emotional distress[,] interfere[] with a consumer's employment relationships . . . [and] impair the consumer's ability to repay debts.

Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65775-01, 65777 (Oct. 31, 2012) (to be codified at 12 C.F.R. pt. 1090). Indeed, the price debt buyers pay for a particular debt portfolio is based upon the likelihood that a debtor will succumb to the pressure exerted by the threat or entry of a judgment rather than the legitimacy of the debt. *See* FTC, Collecting Consumer Debts: The Challenges of Change - A Workshop Report, 20 (2009) (debt buyers use mathematical scoring models based on likelihood of collection to determine whether to purchase a portfolio and how much to pay).[7]

In the face of such challenges, and consistent with the intent of the Rules Committee in recommending the amendments, this Court should strictly uphold the legal standard that all litigants—including debt buyers in small claims actions—must satisfy in order to establish a business records exception to the rule against the admissibility of hearsay.

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[7] *Available at* http://www.ftc.gov/bcp/workshop/debtcollection/dcwr.pdf.

B. The Rules Were Revised To Prevent Entry Of Judgments On Affidavit Without Reliable Information To Prove Liability And Damages, Not To Supplant The Rules That Ensure Fairness In A Trial On The Merits

In all debt buyer cases, the amendments to Rule 3-306 establish the minimum reliable information necessary to support a valid judgment based on an affidavit when the defendant does not file a Notice of Intention to Defend. Rule 3-306 is "procedural only." Committee Note, Rule 3-306(d)(2). Rule 3-306 and the relaxation of certain evidentiary requirements in small claims court pursuant to Rule 5-101 do not obviate requirements for fairness and due process. *See* Standing Committee on Rules of Practice and Procedure, 125th Report, 6 (July 7, 1992) (amending Rule 5-101, clarifying "courts cannot allow persons who are legally incompetent as witnesses to testify even if the rules of evidence generally are inapplicable"). The 1992 Rules Committee note explicitly provides:

> Rule 5-101 is not intended to preclude a court from relying on the rules to advance fairness in a proceeding that is not formally bound by the Rules. . . . Nor, of course, does Rule 5-101 override constitutional guarantees, such as due process or confrontation.

Id.; *see also Ridgeway Shopping Ctr., Inc. v. Seidman*, 243 Md. 358, 364, 221 A.2d 393, 396 (1966) ("Of course, cross-examination plays a most important part in the administration of justice in this country. It has been stated that it is one of the most efficacious tests for the discovery of the truth."). The reason that the rules of evidence relating to the competency of witnesses always apply in all cases in

Maryland is to prevent the admission of unreliable evidence—the exact error that occurred in this case. *See* Rule 5-101(b)(4). Having relaxed rules of evidence (or even no rules of evidence) does not mean that documents are automatically admissible, regardless of how incompetent (or nonexistent) the sponsoring witness is.

Similarly, there is nothing to suggest that the Rules Committee or this Court ever intended to create a lower burden at trial for debt buyers than would exist for any other litigant. Even in small claims court, the absence of a competent witness to testify to such documentation or other reliable form of proof of both liability and damages should prevent a judgment from being entered.

Neither the rules amendments nor a relaxation of the hearsay rules implicate the substantive burdens of proof necessary to obtain a judgment in small claims court. For example, the debt buyer must prove ownership of the debt—a burden of production imposed by substantive law, not the rules of evidence. *See* 6 Am. Jur. 2 Assignments §148 (2013) ("The assignee's burden of proving the existence of the assignment is met by evidence that is satisfactory in character to protect the defendant from another action by the alleged assignor, and which shows that there was a full and complete assignment of the claim from an assignor who was the real party in interest with respect to the claim."). This is not merely a technicality, but rather, implicates due process: if judgment is entered and the debtor pays on the

debt, he may be forced to pay a second time to the rightful owner of the debt. "It has long been recognized in this State that when a maker of a note pays the debt to someone who does not have possession of the note, such payment is no defense to an action by the holder of the note." *Jackson v. 2109 Brandywine LLC*, 180 Md. App. 535, 561, 952 A.2d 304, 320 (2008).

Similarly, pursuant to substantive law, a debt buyer is not competent to testify as to the business records of another business in order to prove the amount of an alleged debt. As explained by the Missouri Supreme Court in *CACH, LLC v. Askew*, "[a]ll of the requirements of [the business record rule] must be satisfied for a record to be admitted as competent evidence." 358 S.W.3d at 63. The court explained:

> To satisfy [all the] requirements [of the business records rule], the records 'custodian' or 'other qualified witness' has to testify to the record's identity, mode of preparation, and that it was made in the regular course of business, at or near the time of the event that it records. For that reason, a document that is prepared by one business cannot qualify for the business records exception merely based on another business's records custodian testifying that it appears in the files of the business that did not create the record.[8]

Id. Maryland courts follow this rule also. In *Davis v. Goodman*, the court found "[i]nformation from a person who is not a part of the business and has no duty to

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[8] Maryland requires that the documents be "made and kept" in the normal course of business. Rule 5-803(b)(6).

report will not be admissible simply because it is included in a business record." 117 Md. App. 378, 419, 700 A.2d 798, 817-18 (1997).

Indeed, in the case at bar, the affiant, an employee of Midland Credit Management, E. 46, does not even "have an identity of interest with" the plaintiff-respondent, Midland Funding, LLC. *Davis v. Goodman*, 117 Md. App. at 419, 700 A.2d at 818. The affidavit is artfully drafted to give the appearance that the records are admissible when in fact they are not: it purports to establish only personal knowledge of Midland Credit Management's record keeping practices—not personal knowledge of Midland Funding's or Chase's record keeping procedures, and not of the debtor or the debt itself. Thus, "there is no circumstantial guarantee of sincerity" to permit admission of the documents into evidence. *Id.*

It is even questionable whether an affiant of a debt buyer, including Midland Funding, is competent to testify to its own business records in light of widespread evidence of robo-signing. *See* NCLC Debt Machine, at 22. The term "robo-signing," so familiar in the foreclosure context has already been used to describe Midland's practice of executing false affidavits which were used in litigation nationwide. *See Midland Funding, LLC v. Brent*, 644 F. Supp. 2d 961, 966 (N.D. Ohio 2009) (debt buyer employee admitting to robo-signing affidavits pursuant to standard company procedure and noting the "percentage of [affidavits] that are checked for accuracy is 'very few and far between.'"); *Vassalle v. Midland*

Funding, 708 F.3d 747 (6th Cir. 2013), *reh'g denied* Nos. 11-3814/3961/4016/4019/4021, 2013 U.S. App. LEXIS 7988 (6th Cir. Apr. 19, 2013) (reversing approval of inadequate nationwide class action settlement of FDCPA claims asserting collector routinely obtained state court judgments using false affidavits because, *inter alia*, it did not enjoin such practices); David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. Times, A1 (Nov. 1, 2010), http://www.nytimes.com/2010/11/01/business/01debt.html (noting robo-signing is a common and long-entrenched practice in the collections industry, although it has garnered far less public attention than in the foreclosure context). An employee of one debt buyer said he was required to sign hundreds of affidavits a day, while an employee of another debt buyer said that she signed, on average, an affidavit every 13 seconds. *Id.* Researchers in a New York study found that over the course of a year, an affiant for one debt buyer identified himself as the custodian of records in 47,503 lawsuits. *Debt Deception*, at 14; *see also*, Jeff Horwitz, *State AGs Probing Sales of Credit Card Debt*, Am. Banker (Sept. 17, 2012, 1:22 pm ET)) http://www.americanbanker.com/issues/177_180/state-attorneys-general-probing-sales-of-credit-card-debt-1052724-1.html (reporting "managers of a credit card processing facility in San Antonio ordered its employees to robo-sign affidavits attesting to the accuracy of debts owed by Chase customers.").

Contrary to the holding of the Circuit Court and the rule urged by Respondent Midland Funding, Rule 3-306 was never intended to reduce the substantive standards, burdens of proof, or due process protections that ensure trials are fair. The amendments established the floor for the minimum reliable information required to obtain a judgment on affidavit in debt buyer cases when no Notice of Intention to Defend has been filed by the defendant. Rule 3-306 was amended to provide an additional backstop to prevent unjustified judgments from being entered when the defendant is completely absent from the proceeding.

Judges should not admit documents into evidence when there is no witness for the Plaintiff to vouch for or be subject to cross examination on the issues of authenticity, relevance and reliability of documents which are proffered by a debt buyer's attorney. Doing so would reverse the burden of proof: it would require an alleged debtor to disprove liability and damages rather than for a debt buyer to prove it is entitled to judgment. By admitting documents that are recognized by the Rules Committee to be inherently unreliable based on overwhelming nationwide evidence of industry practice, some trial courts have created a de facto *small claims debt buyer exception* to the rules of evidence (Rule 5-101) and procedure (Rule 3-306) which should not be permitted.

II. MARYLAND COURTS MUST PRESERVE DUE PROCESS AND PROTECT THE FAIRNESS OF JUDICIAL PROCEEDINGS.

Procedural safeguards are required to avoid the risk of erroneous judgments especially where, as here, defendants do not currently have a recognized right to counsel and rarely have access to counsel. *See e.g.*, *Turner v. Rogers,* 131 S. Ct. 2507, 2520 (2011) (noting "the Due Process Clause … does not require the provision of counsel … [if] the State provides alternative procedural safeguards."). Further, the court has the inherent authority, and indeed, the obligation, to ensure the fairness of the proceedings. Maryland courts have found consistently that due process demands, at the very least, a finding that hearsay evidence is reliable. *See* Appellant's Br., *Bartlett v. Portfolio Recovery Associates, LLC,* Md. No 64, at 22-23. Moreover, in admitting the documents into evidence without any witness, the Circuit Court deprived the Appellant of a fundamental and constitutionally mandated due process protection: the right to cross examine the witness. In *Fine v. Kolodny,* 263 Md. 647, 652, 284 A.2d 409, 412 (1971), this Court explained:

> there is yet a more significant reason as to why [plaintiff's] statements should not be equated with testimony, namely, because these statements were not subject to cross-examination by the defendants' counsel or subject to impeachment. Indeed, the defendants did not even have the opportunity to question her capacity to testify, were they so disposed. Wigmore on Evidence, Vol. II, s 477, 3rd ed. This in our opinion would constitute a violation of the 'due process' clause of the Constitution of the United States (Article XIV, Section 1) and Article 23 of the Declaration of Rights of the Constitution of Maryland.

The Rules Committee sought to ensure that even if an alleged debtor does not appear to defend a debt buyer lawsuit, the judge has the information necessary to decide whether the debt buyer is entitled to judgment on affidavit. In the rare case when an alleged debtor does seek to defend a claim, due process requires that she be permitted to cross examine the Plaintiff's witnesses.

A. The Court's Obligation To Ensure A Fair Trial For *Pro Se* Litigants Is Not Contrary To Rule 3-306 Or A Relaxation Of The Rules Of Evidence In Small Claims Court.

With the full knowledge that many litigants are forced by circumstances to proceed in litigation without a lawyer, the Maryland Code of Judicial Conduct encourages judges to make "reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard." Maryland Code of Judicial Conduct 2.2 ("CJCR"). Entering judgment against an unrepresented litigant when no competent witness testifies is neither accommodating nor fair to the *pro se* litigant.

CJCR 2.6 also discusses the importance of ensuring that *pro se* litigants receive a fair trial. Specifically, CJCR 2.6, comment 2, explains that self-represented litigants often lack knowledge of the law, and judicial procedures "may inhibit their ability to be heard effectively" given that lack of legal training makes it is difficult for *pro se* litigants to defend themselves. Courts are not required to go to great lengths to help *pro se* litigants who must frequently defend

claims of debt buyers in small claims court, but courts may not tip the scales so far in the debt collector's direction. The Rules Committee made it clear that the purpose of the rules amendments was to "ensure fairness to *all* parties." Report, at 41 (emphasis added). Courts should, at the very least, observe the fundamental procedural protections that they follow in every other small claims case, such as requiring that evidence be admitted only through testimony from competent witnesses, and barring unreliable documents from admission into evidence.

The Maryland Access to Justice Commission has also explained the importance of affording *pro se* litigants the opportunity for a fair trial. The commission was established in 2008 by then Chief Judge Robert M. Bell to expand access to Maryland's civil justice system. *Interim Report & Recommendations*, Maryland Access to Justice Commission 1 (Fall 2009).[9] The commission emphasized the importance of "ensur[ing] that individuals can obtain legal representation when they need it." *Id.* at 2. At the same time, the commission recognized that there is a "critical shortage" of funding for legal services. *Id.* In recognition of the goals of the Maryland Access to Justice Commission and the inability of consumer debtors to obtain legal counsel, courts should not make it

[9] *Available at* http://www.mdcourts.gov/mdatjc/pdfs/interimreport111009.pdf.

more difficult for *pro se* litigants to contest the claims that are being made against them.

B. This Court Should Protect Due Process, Fairness, And The Integrity Of Maryland Courts By Enforcing Rules That Prevent Debt Buyers From Making Claims Without Regard To Accuracy.

In light of the abundant evidence of widespread false and inaccurate information contained in debt buyer lawsuits, lawyers, as well as judges, should be on heightened alert to prevent the exploitation of unrepresented defendants in litigation. Rule 3.3(a) of the Maryland Lawyers' Rules of Professional Conduct (MRPC) prohibits attorneys from "knowingly . . . mak[ing] a false statement of fact . . . to a tribunal or fail[ing] to correct a false statement of material fact . . . previously made to the tribunal." Md. R. Cts. J. And Attys. 16-812, MRPC 3.3(a). Additionally, Rule 8.4(c) of the MRPC states that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Md. R. Cts. J. And Attys. 16-812, MRPC 8.4(c). While Rule 3.3(a) only prohibits attorneys from knowingly making false statements of fact, this Court has stated that Rule 8.4(c) can be violated either intentionally or negligently. *Atty. Griev. Comm'n of Md. v. Nwadike*, 416 Md. 180, 193, 6 A.3d 287, 295 (2010).

When judges permit attorneys for debt buyers to simply offer documents into evidence with no competent supporting testimony, they are opening the door

to potential abuse. Admitting such documents into evidence permits attorneys representing debt buyers potentially to make knowing or negligent misrepresentations of fact in violation of MRPC Rules 3.3(a) and 8.4(c) without providing consumer debtors with a means to challenge the veracity of such representations. In fact, lawyers in Maryland for some debt buyers file cases in such volume, and with such a high rate of factual error, that it is hard to imagine that the lawyer adequately and competently reviews the complaint and attachments in each lawsuit in a manner which is consistent with Rule 1-311.

The even bigger problem is that lawyers for debt buyers fail to and refuse to disclose the terms and conditions of the Purchase and Sale Agreements between the bank and the debt buyer. Such contracts often list extremely broad disclaimers of warranty as to the accuracy or completeness of the bank's records regarding the debtor or the debt. *See e.g.*, "Bill of Sale." App. 67 (stating "[t]his Bill of Sale is executed without recourse except as stated in the Credit Card Account Purchase Agreement to which this is an Exhibit. No other representation of or warranty of title or enforceability is expressed or implied."); Horwitz Mar. 2012 (explaining debt is sold in contracts which typically disclaim ""any representations, warranties, promises, covenants, agreements, or guaranties of any kind or character whatsoever' about the accuracy or completeness of the debts' records," and reveal that "some of the claims it sold might already have been extinguished in

bankruptcy court," some balances are "approximate," ... or some "consumers have already paid back in full.").

Courts should not tolerate debt buyers who mislead the tribunal through omissions of material fact as to the accuracy of the claims made in light of the contrary contractual disclaimers. *See Erin Servs. Co., LLC. v. Bohnet*, 26 Misc.3d 1230(A), 907 N.Y.S.2d 100, at *1 (Dist. Ct. Feb. 23, 2010) (finding eighteen ethical violations, warning "'[h]igh volume' debt collection law practices are subject to the same ethical rules as apply to lawyers handling any other civil litigation matter."); *Miller v. Upton, Cohen & Slamowitz*, 687 F. Supp. 2d 86, 101 (E.D.N.Y. 2009) (finding "[a]s in the analogous Rule 11 context, an attorney responsible for issuing and executing a legal document 'must make a reasonable inquiry *personally*.'" (quoting *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1280 (3d Cir. 1994) (emphasis added)). In *Miller*, the court criticized an attorney's reliance on the evaluation of governing law made by previous collectors and the failure to undertake any independent review as being "a naked attempt to substitute their judgment for his own in derogation of his professional duties and his obligations under the FDCPA." *Miller*, 687 F. Supp. 2d at 101. *Miller* concluded:

> in cases such as here, where an attorney commences suit in so uninformed a manner that he is ignorant even as to what law governs his suit, it cannot be said that he has undertaken a level of review sufficient to satisfy even the most general requirements applicable to attorney conduct, let alone the more focused review requirements established by the FDCPA.

Id. at 98.

Debt buyers who seek judgments based on unverified and unverifiable information are going to court with unclean hands. In *Adams v. Manown*, this Court stated that the unclean hands doctrine "is not applied for the protection of the parties nor as a punishment to the wrongdoer; rather, the doctrine is *intended to protect the courts from having to endorse or reward inequitable conduct.*" 328 Md. 463, 474-75 (1992) (emphasis added). Asserting the right to a judgment based on unverified and unverifiable evidence is precisely the type of inequitable conduct envisioned by *Adams*. As held in *Atty. Griev. Comm'n of Md. v. Dore*,

> Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.

2013 Md. LEXIS 570, 44-45 (Md. Aug. 20, 2013);

In order to protect the usually unrepresented alleged debtor, and to ensure the integrity of Maryland courts, this Court should strictly uphold the requirement that judgments must be based on competent, reliable evidence, and bring the full arsenal of the court's tools to bear to prevent erroneous judgments from being entered in debt buyer cases.

III. CONCLUSION

Amici urge this Court to reverse the Circuit Court and hold that even in small claims, a bank's records are not admissible merely because a debt buyer subjectively considers them to be integrated into the debt buyer's own records.

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Respectfully Submitted,

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TEXT OF PERTINENT STATUTORY AUTHORITY

RULE 1-311. SIGNING OF PLEADINGS AND OTHER PAPERS

(a) Requirement. Every pleading and paper of a party represented by an attorney shall be signed by at least one attorney who has been admitted to practice law in this State and who complies with Rule 1-312. Every pleading and paper of a party who is not represented by an attorney shall be signed by the party. Every pleading or paper filed shall contain the signer's address, telephone number, facsimile number, if any, and e-mail address, if any.

Committee note: The requirement that a pleading contain a facsimile number, if any, and e-mail address, if any, does not alter the filing or service rules or time periods triggered by the entry of a judgment. See Blundon v. Taylor, 364 Md. 1 (2001).

(b) Effect of Signature. The signature of an attorney on a pleading or paper constitutes a certification that the attorney has read the pleading or paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for improper purpose or delay.

(c) Sanctions. If a pleading or paper is not signed as required (except inadvertent omission to sign, if promptly corrected) or is signed with intent to defeat the purpose of this Rule, it may be stricken and the action may proceed as though the pleading or paper had not been filed. For a wilful violation of this Rule, an attorney is subject to appropriate disciplinary action.

RULE 3-306. JUDGMENT ON AFFIDAVIT

(a) Definitions. In this Rule the following definitions apply except as expressly otherwise provided or as necessary implication requires:

(1) *Charge-off*. "Charge-off" means the act of a creditor that treats an account receivable or other debt as a loss or expense because payment is unlikely.

(2) *Charge-off Balance*. "Charge-off balance" means the amount due on the account or debt at the time of charge-off.

(3) *Consumer Debt.* "Consumer debt" means a secured or unsecured debt that is for money owed or alleged to be owed and arises from a consumer transaction.

(4) *Consumer Transaction.* "Consumer transaction" means a transaction involving an individual seeking or acquiring real or personal property, services, future services, money, or credit for personal, family, or household purposes.

(5) *Original Creditor.* "Original creditor" means the lender, provider, or other person to whom a consumer originally was alleged to owe money pursuant to a consumer transaction. "Original creditor" includes the Central Collection Unit, a unit within the State Department of Budget and Management.

(6) *Original Consumer Debt.* "Original consumer debt" means the total of the consumer debt alleged to be owed to the original creditor, consisting of principal, interest, fees, and any other charges.

Committee note: If there has been a charge-off, the amount of the "original consumer debt" is the same as the "charge-off balance."

(7) *Principal.* "Principal" means the unpaid balance of the funds borrowed, the credit utilized, the sales price of goods or services obtained, or the capital sum of any other debt or obligation arising from a consumer transaction, alleged to be owed to the original creditor. It does not include interest, fees, or charges added to the debt or obligation by the original creditor or any subsequent assignees of the consumer debt.

(8) *Future Services.* "Future services" means one or more services that will be delivered at a future time.

(9) *Future Services Contract.* "Future services contract" means an agreement that obligates a consumer to purchase a future service from a provider.

(10) *Provider.* "Provider" means any person who sells a service or future service to a consumer.

(b) Demand for Judgment by Affidavit. In an action for money damages a plaintiff may file a demand for judgment on affidavit at the time of filing the complaint commencing the action. The complaint shall be supported by an affidavit showing that the plaintiff is entitled to judgment as a matter of law in the amount claimed.

(c) Affidavit and Attachments--General Requirements. The affidavit shall:

(1) be made on personal knowledge;

(2) set forth such facts as would be admissible in evidence;

(3) show affirmatively that the affiant is competent to testify to the matters stated in the affidavit; and;

(4) include or be accompanied by:

(A) supporting documents or statements containing sufficient detail as to liability and damages, including the precise amount of the claim and any interest claimed;

(B) if interest is claimed, an interest worksheet substantially in the form prescribed by the Chief Judge of the District Court;

(C) if attorneys' fees are claimed, sufficient proof evidencing that the plaintiff is entitled to an award of attorneys' fees and that the fees are reasonable; and

(D) if the claim is founded upon a note, security agreement, or other instrument, the original or a photocopy of the executed instrument, or a sworn or certified copy, unless the absence thereof is explained in the affidavit.

(d) If Claim Arises from Assigned Consumer Debt. If the claim arises from consumer debt and the plaintiff is not the original creditor, the affidavit also shall include or be accompanied by (i) the items listed in this section, and (ii) an Assigned Consumer Debt Checklist, substantially in the form prescribed by the Chief Judge of the District Court, listing the items and information supplied in or with the affidavit in conformance with this Rule. Each document that accompanies the affidavit shall be clearly numbered as an exhibit and referenced by number in the Checklist.

(1) *Proof of the Existence of the Debt or Account.* Proof of the existence of the debt or account shall be made by a certified or otherwise properly authenticated photocopy or original of at least one of the following:

(A) a document signed by the defendant evidencing the debt or the opening of the account;

(B) a bill or other record reflecting purchases, payments, or other actual use of a credit card or account by the defendant; or

(C) an electronic printout or other documentation from the original creditor establishing the existence of the account and showing purchases, payments, or other actual use of a credit card or account by the defendant.

(2) *Proof of Terms and Conditions.*

(A) Except as provided in subsection (d)(2)(B) of this Rule, if there was a document evidencing the terms and conditions to which the consumer debt was subject, a certified or otherwise properly authenticated photocopy or original of the document actually applicable to the consumer debt at issue shall accompany the affidavit.

(B) Subsection (d)(2)(A) of this Rule does not apply if (i) the consumer debt is an unpaid balance due on a credit card; (ii) the original creditor is or was a financial institution subject to regulation by the Federal Financial Institutions Examination Council or a constituent federal agency of that Council; and (iii) the claim does not include a demand or request for attorneys' fees or interest on the charge-off balance in excess of the Maryland Constitutional rate of six percent per annum.

Committee note: This Rule is procedural only, and subsection (d)(2)(B)(iii) is not intended to address the substantive issue of whether interest in any amount may be charged on a part of the charge-off balance that, under applicable and enforceable Maryland law, may be regarded as interest.

Cross reference: See Federal Financial Institutions Examination Council Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36903--36906 (June 12, 2000).

(3) *Proof of Plaintiff's Ownership.* The affidavit shall contain a statement that the plaintiff owns the consumer debt. It shall include or be accompanied by:

(A) a chronological listing of the names of all prior owners of the debt and the date of each transfer of ownership of the debt, beginning with the name of the original creditor; and

(B) a certified or other properly authenticated copy of the bill of sale or other document that transferred ownership of the debt to each successive owner, including the plaintiff.

Committee note: If a bill of sale or other document transferred debts in addition to the consumer debt upon which the action is based, the documentation required by subsection (d)(3)(B) of this Rule may be in the form of a redacted document that provides the general terms of the bill of sale or other document and the document's specific reference to the debt sued upon.

(4) *Identification and Nature of Debt or Account.* The affidavit shall include the following information:

(A) the name of the original creditor;

(B) the full name of the defendant as it appears on the original account;

(C) the last four digits of the social security number for the defendant appearing on the original account, if known;

(D) the last four digits of the original account number; and

(E) the nature of the consumer transaction, such as utility, credit card, consumer loan, retail installment sales agreement, service, or future services.

(5) *Future Services Contract Information.* If the claim is based on a future services contract, the affidavit shall contain facts evidencing that the plaintiff currently is entitled to an award of damages under that contract.

(6) *Account Charge-off Information.* If there has been a charge-off of the account, the affidavit shall contain the following information:

(A) the date of the charge-off;

(B) the charge-off balance;

(C) an itemization of any fees or charges claimed by the plaintiff in addition to the charge-off balance;

(D) an itemization of all post-charge-off payments received and other credits to which the defendant is entitled; and

(E) the date of the last payment on the consumer debt or of the last transaction giving rise to the consumer debt.

(7) *Information for Debts and Accounts not Charged Off.* If there has been no charge-off, the affidavit shall contain:

(A) an itemization of all money claimed by the plaintiff, (i) including principal, interest, finance charges, service charges, late fees, and any other fees or charges added to the principal by the original creditor and, if applicable, by subsequent assignees of the consumer debt and (ii) accounting for any reduction in the amount of the claim by virtue of any payment made or other credit to which the defendant is entitled;

(B) a statement of the amount and date of the consumer transaction giving rise to the consumer debt, or in instances of multiple transactions, the amount and date of the last transaction; and

(C) a statement of the amount and date of the last payment on the consumer debt.

(8) *Licensing Information.* The affidavit shall include a list of all Maryland collection agency licenses that the plaintiff currently holds and provide the following information as to each:

(A) license number,

(B) name appearing on the license, and

(C) date of issue.

(e) Subsequent Proceedings.

(1) *When Notice of Intention to Defend Filed.* If the defendant files a timely notice of intention to defend pursuant to Rule 3-307, the plaintiff shall appear in court on the trial date prepared for a trial on the merits. If the defendant fails to appear in court on the trial date, the court may proceed as if the defendant failed to file a timely notice of intention to defend.

(2) *When No Notice of Intention to Defend Filed.*

(A) If the defendant fails to file a timely notice of intention to defend, the plaintiff need not appear in court on the trial date and the court may determine liability and damages on the basis of the complaint, affidavit, and supporting documents filed pursuant to this Rule. If the defendant fails to appear in court on the trial date and the court determines that the pleading and documentary evidence are sufficient to entitle the plaintiff to judgment, the court shall grant the demand for judgment on affidavit.

(B) If the court determines that the pleading and documentary evidence are insufficient to entitle the plaintiff to judgment on affidavit, the court may deny the demand for judgment on affidavit or may grant a continuance to permit the plaintiff to supplement the documentary evidence filed with the demand. If the defendant appears in court at the time set for trial and it is established to the court's satisfaction that the defendant may have a meritorious defense, the court shall deny the demand for judgment on affidavit. If the demand for judgment on affidavit is denied or the court grants a continuance pursuant to this section, the clerk shall set a new trial date and mail notice of the reassignment to the parties, unless the plaintiff is in court and requests the court to proceed with trial.

Cross reference: Rule 3-509.

(f) Reduction in Amount of Damages. Before entry of judgment, the plaintiff shall inform the court of any reduction in the amount of the claim by virtue of any payment or other credit.

(g) Notice of Judgment on Affidavit. When a demand for judgment on affidavit is granted, the clerk shall mail notice of the judgment promptly after its entry to each party at the latest address stated in the pleadings. The notice shall inform (1) the plaintiff of the right to obtain a lien on real property pursuant to Rule 3-621, and (2) the defendant of the right to file a motion to vacate the judgment within 30 days after its entry pursuant to Rule 3-535 (a). The clerk shall ensure that the docket or file reflects compliance with this section.

RULE 5-101. SCOPE

(a) Generally. Except as otherwise provided by statute or rule, the rules in this Title apply to all actions and proceedings in the courts of this State.

(b) Rules Inapplicable. The rules in this Title other than those relating to the competency of witnesses do not apply to the following proceedings:

* * *

(4) Small claim actions under Rule 3-701 and appeals under Rule 7-112 (d)(2);

* * *

(12) Any other proceeding in which, prior to the adoption of the rules in this Title, the court was traditionally not bound by the common-law rules of evidence.

(c) Discretionary Application. In the following proceedings, the court, in the interest of justice, may decline to require strict application of the rules in this Title other than those relating to the competency of witnesses:

(1) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 5-104 (a);

* * *

(10) Any other proceeding in which, prior to the adoption of the rules in this Title, the court was authorized to decline to apply the common-law rules of evidence.

(d) Privileges. In all actions and proceedings, lawful privileges shall be respected.

Rule 5-803(b)(6)

Rule 5-803. Hearsay exceptions: Unavailability of declarant not required

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(b) Other exceptions

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Cross references: Rule 5-902(b).

RULE 2.2. IMPARTIALITY AND FAIRNESS

A judge shall uphold and apply the law and shall perform all duties of judicial office **impartially** and fairly.

COMMENT

[1] To ensure **impartiality** and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.

Cross reference: See Rule 2.6 Comment [2].

*** * ***

RULE 2.6. ENSURING THE RIGHT TO BE HEARD

(a) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

(b) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

COMMENT

[1] The right to be heard is an essential component of a fair and **impartial** system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] Increasingly, judges have before them self-represented litigants whose lack of **knowledge** about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively. A judge's obligation under Rule 2.2 to remain fair and **impartial** does not preclude the judge from making reasonable accommodations to protect a self-represented litigant's right to be heard, so long as those accommodations do not give the self-represented litigant an unfair advantage. This Rule does not require a judge to make any particular accommodation.

[3] Settlement conferences and referrals to alternative dispute resolution may play an important role in the administration of justice. The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are (a) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (b) whether the parties and their counsel are relatively sophisticated in legal matters, (c) whether the case will be tried by the judge or a jury, (d) whether the parties participate with their counsel in settlement discussions, (e) whether any parties are self-represented, and (f) the nature of the proceeding.

[4] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and **impartiality**, but also on the appearance of their objectivity and **impartiality**. A judge should keep in mind the effect that the judge's participation in settlement discussions may have on both the judge's own views of the case and the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11 (a)(1).

*** * ***

Rule 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) Notwithstanding paragraphs (a) through (d), a lawyer for an accused in a criminal case need not disclose that the accused intends to testify falsely or has testified falsely if the lawyer reasonably believes that the disclosure would jeopardize any constitutional right of the accused.

COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(o) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(4) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The

obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

[5] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

[6] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[7] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

[8] Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

[9] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

[10] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

[11] The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

[12] If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the

advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

[13] The general rule--that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client--applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. Paragraph (e) is intended to protect from discipline the lawyer who does not make disclosures mandated by paragraphs (a) through (d) only when the lawyer acts in the "reasonable belief" that disclosure would jeopardize a constitutional right of the client. For a definition of "reasonable belief," see Rule 1.0(k).

Duration of Obligation

[14] A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. After that point, however, the lawyer may be permitted to take certain actions pursuant to Rule 1.6(b)(3).

Refusing to Offer Proof Believed to Be False

[15] Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

[16] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

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RULE 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Maryland Lawyers' Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this paragraph;

(f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Maryland Lawyers' Rules of Professional Conduct or other law; or

(g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Maryland Lawyers' Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Sexual misconduct or sexual harassment involving colleagues, clients, or co-workers may violate paragraph (d) or (e). This could occur, for example, where coercion or undue influence is used to obtain sexual favor in exploitation of these relationships. *See Attorney Grievance Commission v. Goldsborough*, 330 Md. 342 (1993). See also Rule 1.7.

[4] Paragraph (e) reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in paragraph (e) and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A judge, however, must

require lawyers to refrain from the conduct described in paragraph (e). See Md. Rule 16-813, Maryland Code of Judicial Conduct, Rule 2.3.

[5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[6] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23th day of September, 2013, the requisite copies of this brief were served on the following counsel of record via first class mail, postage prepaid:

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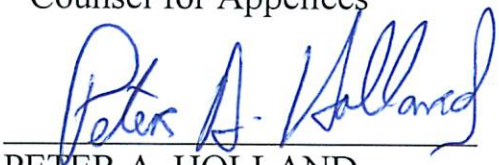

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