2013 WL 7089313 (Md.) (Appellate Brief)
Maryland Court of Appeals.

James TOWNSEND, Appellant,
v.
MIDLAND FUNDING, LLC, Appellee.

No. 76.
September Term, 2013.
September 30, 2013.

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

Brief Amici Curiae of Aarp, the University of Mary land 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 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 ***2** 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 ***3** 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 ***4** 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.

*5 **The National Consumer Law Center** ("NCLC") is a national re search 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 office, 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 *6 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 litigtion 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 - maybe 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 hearsayrul. *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 *7 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 perpetratedby 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 leve of documentation to enable themto determine whether a *8 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 legalrepresentation and do not appear in court to defend such lawsuits.[3] Report, at 7; *see also* FTC Debt Buying Report, at ii-iv. ***9** 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 ***10** 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 ofproceedings 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]

***11 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 - ***12** 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 /issue /177_62/bofa-credit-cards-debt-collections-delinquent-robosigning-047991.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* JeffHorwitz,*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-1045606-1.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* ***13** 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: ***14** (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 Horwitzand 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-c le an-up-c ard-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 ***15** California's courts with specious lawsuits against consumers." Press Release, CA Attorney 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/attomey-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.consumer finance.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 Practice*s (Sept. 19, 2013), *available at* http:// www.consumerfinance.gov/pressreleases/cfpb-orders-chase-and-jpmorgan-chase-to-pay-309- ***16** 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.").

***17** 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/SB10001424052702304510704575562212919179 (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 ***18** "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 ***19** 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.

***20 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 ofjustice in this country. It has been statedthat 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 ***21** 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 Rule's 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 ***22** 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 explainedby 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 ***23** 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."); ***24** *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, Al (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.").

***25** 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.

***26 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 asto why [plaintiffs] 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.

***27** 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 nece ssary 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 ***28** 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 ***29** 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) ofthe 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 ***30** 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 ofthe 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 ***31** 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.

***32** *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.

*33 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.

Footnotes

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.

2 Pursuant to Rule 8-511(b), amicicuriae 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

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 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.

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 require s an affiant who is competent, who has personal knowledge of the matters asserted, and who is offering via affidavit “admissible evidence”).

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 intellectualproperty in relation to this credit card program. These fees are used for the general purposes of AARP.

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).

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

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

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

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