IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

September Term 2014
No. 0530

CLIFFORD CAIN, JR.

Appellant
v.

MIDLAND FUNDING LLC,

Appellee

On Appeal from Circuit Court for Baltimore City, Maryland
(The Honorable Pamela J. White)

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INTRODUCTION

Midland Funding, LLC ("Midland") filed over a thousand debt collection actions in Maryland state courts between October 1, 2007 and January 14, 2010. (E. 21 ¶23.) Many of these cases proceeded through judgment, including the contract action that Midland filed against plaintiff and putative class representative Clifford Cain, Jr. ("Mr. Cain or Appellant") on March 30, 2009 in the District Court of Maryland for Baltimore City ("District Court Judgment"). (E. 1271-1279.) The judgment against Mr. Cain totaled $4,520.54, which Midland obtained, along with costs and post judgment interest, by garnishing Mr. Cain's wages. (E. 24 ¶¶33, 36.)

Midland's District Court Judgment against Mr. Cain, and the thousand or more other judgments it obtained during this period, are void as a matter of Maryland law, as announced last year by this Court in *Finch v. LVNV Funding, LLC*, 212 Md. App. 748 (2013). This is because Midland commenced all of these contract collection actions, and obtained all of these judgments, without the required license from the State Collection Agency Licensing Board. Md. Code Ann., Bus. Reg. § 7-301(a). In fact, by "knowingly and willfully" doing business as a collection agency without a license, Midland committed a series of misdemeanors punishable by fine or imprisonment. *Id.* § 7-401.[1]

[1] Midland previously entered into a settlement agreement with the State of Maryland (E. 212-223) concerning its unlicensed collection activities in Maryland courts.

By pursuing these judgments in Maryland state courts without the authority under state license to do so, Midland also "claim[ed], attempt[ed] or threaten[ed] to enforce a right with knowledge that the right did not exist" in violation of the Maryland Consumer Debt Collection Act and the Maryland Consumer Protection Act. Md. Code Ann., Com. Law §§ 13-301(14)(iii), 14-202(8). *See also* State of Maryland-Midland Settlement Agreement at ¶ 10 (E. 216.)

In short, Midland has been an active, even hyperactive, litigant in Maryland courts for years. But in the wake of this Court's *Finch* decision, and facing a class action[2] asserted by Mr. Cain that seeks disgorgement of the judgments and associated costs and interest that Midland has illegally obtained, it is now in search of a friendlier forum—i.e., a private arbitration forum. Thus, within days after the Maryland Court of Appeals denied certiorari in *Finch*, Midland decided to move to compel arbitration of Mr. Cain's claims. This was the first time Midland sought to invoke arbitration in this case or at any time since it first asserted a contractual right against Mr. Cain in March of 2009 upon which it obtained the District Court Judgment. Not once before the Court of Appeals declined to review this Court's holding in *Finch* did Midland ever attempt to arbitrate with Mr. Cain.

Midland's delay of over four years from the time it could have first invoked arbitration against Mr. Cain until it actually did so is a textbook example of conduct that waives a party's contractual right to arbitrate. *Abramson v. Wildman*, 184 Md. App. 189, 202 (2009) (finding a delay of

[2] Mr. Cain moved for class certification in the Circuit Court (E. 436) but that motion was never ruled upon (E. 9.)

four months to be sufficient to establish waiver). Moreover, the timing of the motion to compel arbitration below, close on the heels of an adverse court ruling that Midland believed would "impact [this] case," (E. 39), smacks of the sort of "tactical" delay that this Court has found consistent with waiver. *Commonwealth Equity Services v. Messick*, 152 Md. App. 381, 403 (2003).

Finally, the notion that the judgment Midland previously obtained against Mr. Cain is not closely related enough to this action for the principles of waiver to attach defies logic; it is that very judgment, and others like it, that this action attacks. Indeed, the arbitration agreement Midland seeks to enforce has merged into the 2009 judgment it voluntarily obtained, *Accubid Excavation, Inc. v. Kennedy Contractors, Inc.*, 188 Md. App. 214, 233 (2009), which is a separate reason that Midland cannot now rely on the language of that contract to compel arbitration against Mr. Cain.

STATEMENT OF THE CASE

On July 30, 2013, Appellant initiated this action and filed a five-count complaint against Midland in Baltimore City Circuit Court. (E. 14-37.) The putative class action complaint sought disgorgement of the principal value of all judgments Midland had obtained on debt collection actions in Maryland state courts between October 1, 2007 and January 14, 2010, when it was operating in the state without the required collection agency license. The complaint also sought disgorgement of the interest, costs and attorneys' fees Midland recovered in connection with those judgments. Finally, the complaint included a claim for unjust enrichment, based on the premise that Midland knew it had no legal right to the judgments when it

secured them, and a claim for damages under the Maryland Consumer Protection Act and Maryland Consumer Debt Collection Act.

On September 9, Midland filed a consent motion to stay all proceedings in this case "pending final appellate resolution of *Finch v. LVNV Funding, LLC*," and the circuit court granted the stay. (E. 38-46.) The Maryland Court of Appeals denied certiorari in *Finch* on October 8, 2013, *LVNV Funding v. Finch & Dorsey*, 435 Md. 266 (2013). Midland moved to lift the stay on October 15 and requested additional time to respond to the complaint. (E. 50-54.) Then, on October 24, it filed a motion to compel arbitration of Mr. Cain's claims based on an arbitration agreement he purportedly entered into when he received a credit card from Citibank in 2003, the same credit card agreement upon which Midland sued him in 2009 and on which it obtained the judgment now being challenged in this lawsuit.

Following several rounds of motions practice and multiple attempts by Midland to proffer arbitration clauses that might have governed Mr. Cain's credit card transactions eleven years earlier, (E. 55-127, 255-354),[3] the circuit court ordered on February 20, 2014 that it would hold a trial "to determine if the arbitration agreement exists pursuant to Md. Code Ann., Cts. & Jud. Proc. 3-207(b)." (E. 355-356.) Because Midland did not have any arbitration agreement it could prove governed its predecessor in interest and Mr. Cain, and it conceded that it was its burden to prove the existence of any bona fide arbitration agreement governing the contract on

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[3] Midland initially sought to compel arbitration based upon the purported arbitration agreement governing the credit card of the legal partner of one of its counsel in this case. (E. 55, 726-727.)

which it claimed to be the successor in interest (E. 726), it requested leave of the Court to conduct discovery to find the applicable arbitration agreement. (E. 729.) After the discovery period sought by Midland, the trial was held on April 16, 2014. (E. 814-986.)

In conjunction with the trial, Appellant submitted memoranda and argument discussing, among other issues, the fact that Midland had waived its right to arbitrate. (E. 369-407, 418-422, 945-948.)[4] Appellant argued that Midland waived its right to seek arbitration by initiating a collection action against Mr. Cain which resulted in a judgment and by litigating a nationwide class action for over five years in federal court in Ohio, the settlement of which might have encompassed Mr. Cain's and the putative class's claims in this case had he not filed a conditional objection and obtained a stipulation that the claims were not covered. (E. 377.) Appellant also argued below that the credit card contract Midland was trying to use to enforce its right to arbitrate had merged into the judgment it obtained in 2009 and thus no longer had any independent validity. (E. 377-378, 947.)

On May 1, 2014, the circuit court entered an order granting Midland's motion to compel, finding credible the Citibank employee who had testified that a particular arbitration agreement applied to the credit card Mr. Cain obtained in 2003. (E. 423-430.) The order also denied Appellant's waiver and merger arguments. (E. 430-434.) Specifically, the court held that "[w]hile the present action is related to certain aspects" of the debt collection action Midland filed in district court in 2009, "Plaintiff seeks

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[4] Even before the trial, Appellant had previously asserted his waiver argument. (E. 344, 735-736.)

additional relief well beyond the scope of voiding judgment entered in the district court action." (E. 433.) This appeal followed. (E. 70.)

QUESTIONS PRESENTED

1. Did Midland waive its right to invoke arbitration under any valid agreement that may have existed between Mr. Cain and Citibank by (i) filing suit against Mr. Cain in 2009 and obtaining a judgment against him in the District Court of Maryland, and (ii) litigating a nationwide class action in federal court for five years that included Mr. Cain as a class member, without ever once invoking that arbitration provision?
2. Is a finding of prejudice required under Maryland law to establish that Midland waived its right to arbitrate, and if so, were Mr. Cain and the proposed class prejudiced by Midland's actions?
3. Did any and all rights Midland had as assignee under the purported 2003 credit card contract between Mr. Cain and Citibank merge into the 2009 judgment that Midland obtained based on that credit card agreement?

FACTUAL AND STATUTORY BACKGROUND

A. The Maryland Collection Agency licensing Act, and the Legislative History of Its 2007 Amendment

The Maryland Collection Agency Licensing Act ("MCALA"), Md. Code Ann., Bus. Reg. § 7-501, mandates that "a person must have a license [obtained from the State Collection Agency Licensing Board] whenever the person does business as a collection agency in the State." *Id.* § 7-301(a). To "knowingly and willfully" do business as a collection agency in Maryland

without the required license is a misdemeanor punishable by six months' imprisonment and/or a $1,000 fine. *Id.* § 7-401.

In 2007, the Maryland legislature amended the MCALA to add to the definition of the term "collection agency." Following the amendment, the definition of "collection agency" now includes "a person who is engaged directly or indirectly in the business of . . . collecting a consumer claim the person owns, if the claim was in default when the person acquired it." *Id.* § 7-101(c)(1)(iii).

The legislative history of the 2007 amendment, which was introduced by House Bill 1324, makes clear that it was intended to bring debt buyers like Midland within the purview of Maryland's licensing regime:

> House Bill 1324 extends the purview of the State Collection Agency Licensing Board to include persons who collect consumer claims acquired when claims were in default. These persons are known as "debt purchasers" since they purchase delinquent consumer debt resulting from credit card transactions and other bills; these persons then own the debt and seek to collect from consumers like other collection agencies who act on behalf of original creditors.

Bradshaw v. Hilco Receivables, LLC, 765 F. Supp.2d 719, 726 (D. Md. 2011) (quoting H.B. 1324, 2007 Leg. Sess., S. Fin. Comm. (Md. 2007)). Moreover, the amendment's supporters believed it was necessary to bring Maryland's treatment of Midland and other debt purchasers into accord with federal law:

> [T]he evolution of the debt collection industry has created a "loophole" used by some entities as a means to circumvent current State collection agency laws. Entities such as "debt purchasers" who enter into purchase agreements to collect delinquent consumer debt rather than acting as an agent for the

> original creditor, currently collect consumer debt in the State without complying with any licensing or bonding requirement. The federal government has recognized and defined debt purchasers as collection agencies, and requires that these entities fully comply with the Federal Fair Debt Collection Practices Act. This legislation would include debt purchasers within the definition of a "collection agency," and require them to be licensed by the Board before they may collect consumer claims in this State.

Bradshaw, 765 F. Supp.2d at 726 (quoting testimony in support of HB 1324 by Charles W. Turnbaugh, Comm'r Fin. Reg.).

B. Regulatory and Legal Developments Involving Unlicensed Debt Buyers After the 2007 Amendment

The Maryland Department of Labor, Licensing and Regulation ("DLLR") set forth its official position on HB 1324 in DLLR Advisory Notice 07-06, which stated: "effective October 1, 2007 any person engaged in the collection of a consumer claim the person owns, if the claim was in default when the person acquired it, is required to be licensed as a collection agency pursuant to HB 1324." (E. 22, ¶25.) However, Midland did not obtain its license as a collection agency until January 15, 2010. (E. 21, ¶22.) According to public records, Midland filed over one thousand collection lawsuits in Maryland state courts between October 1, 2007 and January 14, 2010 without the license required by the MCALA. (E. 21, ¶23.) In fact, Midland filed so many such lawsuits that the DLLR issued a "cease and desist" order against it on September 16, 2009. (E. 22, ¶26.) That agency action led to a memorialized settlement on December 17, 2009, which stated in part:

> The position of the Agency is that, unless otherwise exempt, a person who brings actions in Maryland State courts to collect consumer claims which were acquired when the claims were in

> default is knowingly and willfully doing business as a "collection agency" in the State under [Bus. Reg.] § 7-101(c). This includes, but is not limited to, the named Plaintiffs in such judicial actions, which will normally be the owners of the consumer debt. Thus the Agency's position is that a Plaintiff in a Maryland State court action brought to collect a consumer claim which was acquired when the claim was in default is required to be licensed as a collection agency under MCALA, and is subject to the regulatory authority of the Agency in the conduct of that litigation.

(E. 213.)

In September of 2009, Wayne Bradshaw filed a class action complaint against another unlicensed debt buyer, Hilco Receivables, in Frederick County Circuit Court, alleging that its collection activities, including initiation of debt collection lawsuits in Maryland state courts, in violation of the MCALA constituted violations of the federal Fair Debt Collection Practices Act, the Maryland Consumer Protection Act and the Maryland Consumer Debt Collection Act ("MCDCA"). *Bradshaw*, 765 F. Supp.2d at 722-23. The case was removed to federal court, and on February 23, 2011, the federal Maryland district court granted the plaintiff's motion for summary judgment on liability, finding that the unlicensed debt buyer's collection activities constituted violations of all three statutes. *Id.* at 728-733.

Specifically, with respect to the MCDCA, the *Bradshaw* court held that attempting to collect debts without a license violated the provision of the MCDCA that makes it unlawful to "[c] laim, attempt, or threaten to enforce a right with knowledge that the right does not exist." *Id.* at 732 (citing Md. Code Ann., Com. Law § 14-202(8)). Because a violation of the MCDCA is a per se violation of the Maryland Consumer Protection Act, Md.

Code Ann., Com. Law § 13-301(14)(iii), the court granted summary judgment to the plaintiff on that claim as well. 765 F. Supp. At 733.

This Court's decision in *Finch v. LVNV Funding LLC*, 212 Md. App. 748 (2013) built upon the holdings in the earlier *Bradshaw* decision. The *Finch* court held that Maryland state court judgments obtained by unlicensed collection agencies, just like judgments obtained by nonlawyers purporting to practice law without a license, are void. 212 Md. App. At 759-761. A void judgment is "a mere nullity, which [is] disregarded entirely." *Id.* at 761 (citations and internal quotation marks omitted) (alterations in original). Such void judgments, this Court concluded, may be collaterally attacked in another court, in an action other than the one in which the judgment was rendered, because "[a]ll proceedings founded upon the void judgment are themselves considered invalid and ineffective for any purpose." *Id.* at 768-69 (quoting *Cook v. Alexandria Nat'l Bank*, 263 Md. 147, 151-152 (1971)).

C. **Facts Regarding Midland's Judgment Against Mr. Cain**

Midland obtained one of these judgments that can be declared void against Mr. Cain in an action it brought against him on March 30, 2009, when it did not have a license with the State Collection Agency Licensing Board. (E. 23 ¶¶29-30.) The action was filed in Baltimore City District Court under the name Midland Funding LLC. v. Clifford Cain Jr., Case No. 01010003932009. (E., 23 ¶29.) The debt collection action arose out of the same credit card contract that Midland used as the basis for its motion to compel arbitration in this action, but Midland never sought to arbitrate with Mr. Cain under that agreement before seeking judgment against him in 2009. (E. 373.)

Based upon an affidavit of Indebtedness and Ownership of Account submitted by Midland, the Baltimore district court entered judgment against Mr. Cain in the amount of $4,520.54. (E. 24 ¶¶32-33; E. 1271-1279.) Midland also sought and obtained a writ of garnishment against Mr. Cain's wages in order to collect the judgment. (E, 24 ¶36.)

D. **Facts Related to the Vassalle Class action**

Midland has also been engaged in litigation in federal court in the Northern District of Ohio for over five years in a putative class action, *Vassalle v. Midland Funding LLC.* (E. 387-389.) *Vassalle* involves thousands of consumers, including Mr. Cain, as putative class members. (E. 373.)

After Mr. Cain filed this action and after Midland moved to compel arbitration against him, Midland sought to enter into a settlement in the *Vassalle* action. (E. 386-407.) (An earlier proposed settlement was rejected by the Sixth Circuit as unfair in that it did not adequately protect the interests of absent class members. *Vassalle v. Midland Funding* LLC, 708 F.3d 747, 755-756 (6th Cir. 2013).) Mr. Cain filed a conditional objection and motion to intervene in *Vassalle* to protect his rights to pursue the claims in this lawsuit. (E. 373, fn. 2.) Midland never sought to arbitrate with Mr. Cain or any of the plaintiffs or proposed class members in the *Vassalle* action. (E. 373.)

E. **The Maryland Uniform Arbitration Act and the Federal Arbitration Act**

The Maryland Uniform Arbitration Act (MUAA"), codified at sections 3-201 through 3-234 of the Courts and Judicial Proceedings Article of the Maryland Code, has been called the "state analog" of the Federal

Arbitration Act ("FAA") and was modeled closely on its federal counterpart. *Walther v. Sovereign Bank*, 386 Md. 412, 423-424 (2005). In nearly identical language to section 2 of the FAA, the MUAA provides that a "written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy arising between the parties in the future is valid and enforceable, and is irrevocable, <u>except</u> upon grounds that exist at law or in equity for the revocation of a contract." Md. Code Ann., § 3-206(a)(emphasis added). If one party to a dispute moves to compel arbitration and the other party denies that an arbitration agreement exists, as happened in this case, "the court shall proceed expeditiously to determine if the agreement exists." *Id.* § 3-207(b).

Both the MUAA and the FAA were adopted to achieve the same goals, and both reflect similar legislative policies favoring arbitration. *Thompson v. Witherspoon*, 197 Md. App. 69, 80 (2011). As a result, when construing the MUAA, Maryland courts look to federal cases interpreting the FAA. *Id.*

<u>**STANDARD OF REVIEW**</u>

The trial court's determination as to whether a particular dispute is subject to arbitration is a conclusion of law subject to de novo review. *Questar Homes of Avalon LLC v. Pillar Const., Inc.*, 388 Md. 675, 684 (2005). This Court has held that the question of whether a party has waived its contractual right to arbitration is generally a question of fact reviewed for clear error. *The Redemptorists v. Coulthard Servs. Inc.*, 145 Md. App. 116, 137 (2002). However, many other courts have analyzed the waiver issue as one of law reviewed de novo where the underlying facts regarding

the waiving party's prior involvement in judicial proceedings are not in dispute. *See, e.g.*, *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291, 294 n.2 (1st Cir. 1986) ("we opt to review the waiver claim de novo as a legal conclusion that follows from the undisputed facts of defendants' pretrial participation in the litigation"); *Fisher v. A.G. Becker Paribis Inc.*, 791 F.2d 691, 693 (9th Cir. 1986) ("Where . . . the concern is whether the undisputed facts of defendant's pretrial participation in the litigation satisfy the standard for waiver, the question of waiver of arbitration is one of law which we review de novo.") (citing *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985)). Because there are no factual disputes regarding Midland's litigation conduct in either the action leading to the District Court Judgment against Mr. Cain or the *Vassalle* class action, this Court should apply a de novo standard of review to the waiver issue here.

This is particularly true where the fact pattern here – a corporation goes to court and sues to collect a debt, and then turns around and wants consumer claims relating to abusive debt collection to be forced into arbitration – is one that quite a few courts, including state high courts, have addressed, and is a recurring problem. To treat this systemic issue with straightforward and undisputed facts, that comes up again and again and has been dealt with by a number of courts (overwhelmingly in a way that is favorable to Mr. Cain here) as if it turned upon discrete factual issues would encourage different results in different cases depending upon which judge parties draw. The Circuit Court's ruling on waiver turns on no issue where some party's demeanor or credibility is controlling, where a trial court ought to be given great deference, but instead turns on dry and undisputed

facts about Midland's legal actions in courts that are readily drawn from pleadings and court filings.

The question of whether an arbitration agreement contained in a contract has merged into the judgment obtained on that contract, and has thus become unenforceable in its own right, is also an issue of law reviewed de novo. *Allstate Ins. Co. v. Stinebaugh*, 374 Md. 631, 645-646 (2003).

ARGUMENT

A. Midland Waived Its Right to Arbitration Through Its Extensive Use of the Judicial System.

1. Filing a Lawsuit and Pursuing It Through Judgment, and Engaging in Complex Class Action Litigation Over a Period of Years, Is Inconsistent with Asserting the Right to Arbitrate.

Because arbitration is a matter of contract, it is possible for a party to waive that right, in which case there is no longer an agreement to arbitrate. *Charles J. Frank, Inc. v. Associated Jewish Charities of Baltimore, Inc.*, 294 Md. 443, 448 (1982). "A waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right" by being "inconsistent with an intention of enforcing" the right. *Id.* at 448-49 (quoting *Bargale Indus., Inc. v. Robert Realty Co.*, 275 Md. 638, 643 (1975)).

The paradigmatic example of conduct inconsistent with the intention of enforcing the right to arbitrate is filing a lawsuit instead. "A party asserting a claim who sues instead of seeking arbitration is in essence refusing to arbitrate and is itself in default of the arbitration agreement." *Gold Coast Mall, Inc. v. Larmar Corp.*, 298 Md. 96, 113-114 (1983). Or put

another way, "[u]pon the premise, which is more or less universally held, that a resort to litigation is inconsistent with an intent to arbitrate, . . . one who litigates an issue that otherwise would be subject to arbitration waives his right subsequently to arbitrate that issue." *Stauffer Constr. Co., Inc. v. Bd. Of Educ. Of Montgomery Cty.*, 54 Md. App. 658, 667 (1983).

Here, Midland first availed itself of the judicial system with respect to Mr. Cain in March of 2009, when it filed a debt collection action against him in Baltimore city District Court and pursued that action through judgment. During the two-year-and-three-month period covered by this proposed class action, while Midland was doing business as a collection agency in Maryland without the required license, it filed over a thousand similar debt collections in the state courts against other consumers. (E. 21 ¶¶ 22-23.) Midland continued to use the judicial system to collect upon its void judgments through garnishment proceedings. (E. 24 ¶ 36.) Midland's use of the judicial system continued with its involvement in the multi-year *Vassalle* litigation in federal court in Ohio, where it has negotiated and sought court approval for two class settlements, the first of which would have encompassed over 1.4 million consumers, including Mr. Cain. *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 753 (6th Cir. 2013); (E. 373, 386-407.) At no point during any of this litigation did Midland once attempt to invoke arbitration against Mr. Cain or, to his knowledge, against any other putative members of this class or the *Vassalle* class.

Midland's pattern of litigation-related activity is far more extensive than conduct that this Court has found to constitute waiver of the right to arbitrate. For example, in *Abramson v. Wildman*, a breach of contract dispute between an attorney and his former client, this Court found that the

attorney waived his arbitration rights when he delayed for four months in moving for arbitration after the former client filed a counterclaim. 184 Md. App. 189, 202 (2009).

Similarly, in *Commonwealth Equity Services v. Messick*, this Court held that waiver had occurred where two defendants waited for thirteen months and six months, respectively, after being served with the complaint and engaged in some written discovery before moving to compel arbitration. 152 Md. App. 381, 398-399 (2003). The knowing relinquishment of rights by Midland here dwarfs the conduct found by this Court to constitute such a relinquishment in either *Abramson* or *Messick*. Here, by contrast, Midland litigated its debt collection action against Mr. Cain all the way through judgment five years ago, and pursued a huge class action also involving Mr. Cain over multiple years and through two proposed class settlements.[5] Midland has fully immersed itself in the judicial waters, and it is too late for it to seek an arbitral life raft now.

2. Midland Cannot Change Course After Years of Litigation and Opt for Arbitration in Response to an Increasingly Hostile Judicial Climate in Maryland.

Even when this action was filed in July of 2013, Midland did not seek arbitration right away. Instead, it requested a stay until the appellate review of *Finch v. LVNV Funding* reached a conclusion, no doubt hoping that the tide of adverse court rulings against it and other unlicensed debt buyers in

[5] Moreover, in the instant case Midland asked for (E. 729), and received (E. 356), the right to conduct discovery in the court below in order to come up with a purported arbitration agreement governing Mr. Cain's claims.

Maryland that had begun with the 2011 decision in *Bradshaw v. Hilco Receivables* was about to turn. When that did not occur, and the denial of certiorari by the Maryland Court of Appeals made this Court's decision in *Finch* final, 435 Md. 266 (2013), then and only then did Midland move to compel arbitration—but it abandoned the initial purported arbitration agreements it presented to the circuit court after it utilized discovery to obtain the purported contractual documents between it, as the successor in interest to Citibank, and Mr. Cain.

This Court should not permit Midland to engage in such blatant procedural gamesmanship. "[A]rbitration may not be used as a strategy to manipulate the legal process." *Nat'l Found. For Cancer Research v. A.G. Edwards & Sons*, 821 F.2d 772, 775 (D.C. Cir. 1987). *See also Menorah Ins. Co., Ltd. V. INX Reinsurance Corp.*, 72 F.3d 218, 222 (1st Cir. 1995) ("Arbitration clauses were not meant to be another weapon in the arsenal for imposing delay and costs in the dispute resolution process."). Judge Posner made the same point in his typical pithy way in *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.* in affirming the district court's finding of waiver:

> The presumption that an election to proceed judicially constitutes a waiver of the right to arbitrate has not been rebutted. There is no plausible interpretation of the reason for the delay except that Kraftmaid initially decided to litigate its dispute with Cabinetree in the federal district court, and that later, for reasons unknown and with no shadow of justification, Kraftmaid changed its mind and decided it would be better off in arbitration. Neither in its briefs nor at oral argument did Kraftmaid give any reason for its delay in filing the stay besides needing time "to weigh its options." That is the worst possible reason for delay. It amounts to saying that Kraftmaid wanted to see how the case was going in federal district court before

> deciding whether it would be better off there or in arbitration. It wanted to play heads I win, tails you lose.

50 F.3d 388, 391 (7th Cir. 1995).

This Court has been similarly skeptical of tactical delays in asserting arbitration like the one employed by Midland in this case. In *Abramson*, the court observed that the attorney who delayed for four months after being served with a counterclaim before moving for arbitration "has given no reason for persisting in the litigation" and that as a result his "belated insistence on arbitration has all the markings of a simple strategic decision to deny appellee a judicial forum and a jury trial." 184 Md. App. At 202. The issue of using arbitration as an escape from a hostile judicial climate, as Midland appears to be doing here, was presented even more directly in *Messick*, where this Court noted that the appellant could have invoked arbitration at the outset of the litigation but "chose not to do so for presumably tactical reasons" until after an adverse ruling in a related case, and that this course of conduct supported a finding of waiver. 152 Md. App. At 402-03. Just as this Court rejected the forum shopping attempted in *Abramson* and *Messick*, it should reject Midland's attempt at forum shopping here.

3. The Claims Midland Previously Litigated Are Sufficiently Related to the Claims in This Action for Waiver to Apply.

This Court's decision in *Commonwealth Equity Services v.* Messick is instructive in another respect as well: it points out that a party's litigation behavior in other cases can be relevant to the determination of whether that party has waived its right to invoke arbitration, so long as those other cases are related to the case at hand. 152 Md. App. at 395-397. This is significant

in light of the circuit court's conclusion in this case that the instant putative class action is "distinct from" the earlier debt collection action that Midland filed against Mr. Cain, and thus that Midland's pursuit of that earlier action through judgment did not result in a waiver of its arbitration rights. (E. 433.) The trial court appeared to be operating under the assumption that the claims and requested relief in the earlier District Court Judgment had to overlap completely with the claims and requested relief in this case in order for the earlier action to constitute waiver. That position is not correct.

Filing and litigating a claim in court waives arbitration not only for that claim but for closely related claims as well. *See, e.g.*, *Midwest Window Systems, Inc. v. Amcor Indus., Inc.*, 630 F.2d 536, 537 (7th Cir. 1980) (party who filed and litigated a collection action waived its right to arbitrate related contract claims); *Gutor Int'l AG v. Raymond Packer Co.*, 493 F.2d 938, 945-46 (1st Cir. 1974) ("[a]ll related matters" must be litigated in court when the party seeking to compel arbitration initiated the lawsuit), abrogated on other grounds by *Travenol Labs., Inc. v. Zotal, Ltd.*, 474 N.E.2d 1070 (Mass. 1985); *Owens & Minor Med., Inc. v. Innovative Mktg. & Distrib. Servs., Inc.*, 711 So. 2d 176, 177 (Fla. Dist. Ct. App. 1998) (waiver extends to other claims when there is a "close relationship between the claims of the parties"). Mr. Cain's claims easily satisfy this standard: They challenge the very legality of the judgment and associated costs and interest that Midland obtained against him in the earlier proceeding.

Midwest Window provides an illustration of this "closely related" principle in a factual setting very similar to this case. There, the Seventh Circuit Court of Appeals held that filing a collection action and litigating that action to judgment waived the filing party's right to arbitrate a related

claim brought by the other party in a separate proceeding. *Midwest Window*, 630 F.2d at 536-37. A dispute arose between Amcor and Midwest under a contract containing an arbitration clause. *Id.* at 536. Like Midland here, Amcor filed a collection action under the contract and pursued its collection claim against Midwest to judgment. *Id.* Later, Midwest filed its own claim against Amcor in a second proceeding in a different court, and Amcor (again like Midland here) moved to compel Midwest's claim to arbitration. *Id.*

Given these facts, the Seventh Circuit held that Amcor had waived arbitration and that Amcor's waiver encompassed Midwest's claim. *Id.* at 537. The Seventh Circuit explained that "it was Amcor which initially avoided arbitration . . . by resorting to legal action" and that Amcor's conduct was sufficient to waive arbitration. *Id.* Because Amcor's debt-collection claim and Midwest's later claim were related—they both grew out of the parties' "unsatisfactory business relationship"—Amcor's waiver encompassed Midwest's claim. *Id.*

Many courts around the country have joined the Seventh Circuit in applying the rule that filing a claim in court waives arbitration for related claims as well. For example, in another case involving debt collection activities, the Ohio Court of Appeals held that by initiating foreclosure proceedings, Citifinancial waived its right to invoke arbitration under an agreement signed concurrently with the mortgage in a subsequent action filed by the mortgagor's estate for fraud, civil conspiracy, and violation of Ohio predatory lending laws. *Blackburn v. Citifinancial, Inc.*, No. 05AP-7, 2007 WL 927222, at *4-*5 (Ohio Ct. App. March 29, 2007). The complaint in *Blackburn* alleged that a man working closely with Citifinancial

convinced the decedent, who was in ill health and could not read more than simple words, to sign four separate promissory notes and mortgages, each with increasing loan amounts, and hid the transactions from her family by placing his address on all loan-related documents. *Id.* at *1. The court held that Citifinancial's prior litigation conduct in seeking foreclosure and judgment on the promissory note, even though it later dismissed the action without obtaining a judgment, constituted a waiver of its right to arbitrate the fraud, conspiracy and statutory claims in the complaint. *Id.* at *1, *4-*5. *See also Gutor Int'l*, 493 F.2d at 945-46 (party who filed suit seeking payment on contract waived right to arbitrate counterclaim related to the same contract); *PPG Indus., Inc. v. Webster Auto Parts Inc.*, 128 F.3d 103, 108-109 (2d Cir. 1997) (filing motions and engaging in discovery in another action waived right to arbitrate related claims, including claim that waiving party breached state unfair trade practices act); *Owens & Minor*, 711 So. 2d at 177 (party who brought breach of contract claim waived right to arbitrate counterclaim that the contract was fraudulently induced because the counterclaim was "intertwined" with waiving party's claim); *G.T. Leach Builders, L.L.C. v. TCMS, Inc.*, No. 13-11-310-CV, 2012 WL 506568, at *4-*5 (Tex. Ct. App. Feb. 16, 2012) (party who had sued under contract waived right to arbitrate different claims brought in a second suit based on same contract); *Checksmart v. Morgan*, No. 80856, 2003 WL 125130, at *4 (Ohio Ct. App. Jan. 16, 2003) (payday lender's suit to recover on dishonored check waived its right to arbitrate counterclaim brought by consumer under Ohio's Payday Loan Act).

Moreover, filing and litigating a claim in one case waives arbitration for related claims even if the later, related claims are filed in a separate proceeding. In *PPG Industries*, for example, the Second Circuit described it

as "irrelevant" that the claims for which arbitration had been waived arose in a separate action. 128 F.3d at 109; *see also Samuel J. Marranca Gen'l Contracting Co. v. Amerimar Cherry Hill Assocs.*, 610 A.2d 499, 501 (Pa. Super. Ct. 1992) (party waived right to arbitrate by substantially participating in litigation, including initiating earlier lawsuits over same contract); *G.T. Leach Builders*, 2012 WL 506568, at *4-*5 (defendant had substantially invoked the judicial process by initiating earlier suit against the plaintiff over related contract dispute even though earlier suit was dismissed for lack of jurisdiction); *Blackburn*, 2007 WL 927222, at *4-*5 (Citifinancial's initiation of foreclosure proceedings waived its right to arbitrate in later proceeding challenging the conduct that led to the mortgage).

The rule that filing and litigating one claim waives arbitration for related claims— whether or not in the same action—serves the same purposes as the waiver doctrine generally: It ensures fairness because it guarantees that all aspects of a dispute will be heard in the same type of forum, subject to the same rules and procedures. *See Midwest Window*, 630 F.2d at 537 (finding waiver prevented Amcor from complicating the matter by "partially changing the arena and the rules"); *Gutor Int'l*, 493 F.2d at 945 ("Fairness to [the non-waiving party] dictates that both questions . . . be litigated in the same forum."). And it prevents the gamesmanship that can arise when parties are moving between different fora, asking different decision-makers to rule on related questions. By contrast, limiting the scope of a party's waiver to a single court action or to perfectly identical claims, as the court below seemed to suggest (E. 433), would erect a hyper-technical requirement that would undermine the precise concern that waiver seeks to address: ensuring that the parties "play

fair" in their choice of forum. Midland's previous collection action resulting in judgment against Mr. Cain and Mr. Cain's current action on behalf of a class challenging that judgment and others like it are closely related along the lines of *Midwest Window*, and the circuit court erred in denying Mr. Cain's waiver argument.[6]

B. A Showing of Prejudice Is Not Required Under Maryland Law, but in Any Event Mr. Cain Was Prejudiced by Midland's Conduct.

Some federal courts, including the Court of Appeals for the Fourth Circuit, have included a prejudice element in their waiver analysis, requiring that the party opposing arbitration show that it has suffered actual prejudice because of the waiving party's conduct. *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987). However, "[t]he law in Maryland is not as clear as that in the federal courts on the question of whether delay in seeking to compel arbitration may alone constitute a waiver, or whether prejudice resulting from the delay must also be shown." *Messick*, 152 Md. App. at 397. The Maryland Court of

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[6] By Midland's logic an arbitrator has the authority to review judgments entered by Maryland state courts. Such a result sought by Midland is simply not permitted under Maryland law. First, the Md. Const. DECL OF RIGHTS, art. VIII preserves the principle of separation of powers between the three branches of government. The "judicial power" of the State of Maryland, including power to enter judgments, is vested in the state courts. Md. Const. art. IV, § 1. It seems problematic to consider the notion, from both a constitutional and public policy perspective, that a private arbitrator would have the power to review and declare state court judgments void when a federal court and the other branches of Maryland's government could not do so.

Appeals has held that "an inappropriate delay acts as a relinquishment of the contractual right to compel such a proceeding." *Allstate Ins. Co. v. Stinebaugh*, 374 Md. at 646. But most cases where Maryland courts have found waiver also involved significant litigation activities by the waiving party in addition to delay, at least insofar as filing an answer. *Messick*, 152 Md. App. at 398 (citing *The Redemptorists v. Coulthard Servs., Inc.*, 145 Md. App. at 141).

In those cases where the issue has arisen, the waiving party's litigation-related activity was so substantial that it would have supported a finding of actual prejudice; thus, Maryland courts have not yet had to decide whether such a finding is actually required in this state or whether a party can still waive its arbitration rights in the absence of prejudice to its litigation adversary. *See Messick*, 152 Md. App. at 398 ("We need not decide . . . whether delay, without a showing of prejudice to the opposing party, may support a finding of waiver" because the lower court had found that the appellees were prejudiced); *RTKL Associates, Inc. V. Four villages Ltd. P'Ship*, 95 Md. App. 135, 144 (1993) ("We need not reach the issue with respect to whether prejudice must be occasioned before a waiver may be found because the trial judge found that FVLP was prejudiced").

Here too, Midland's conduct has prejudiced Mr. Cain and the proposed class. Thus, while Appellant does not concede that a showing of prejudice is required to establish waiver under Maryland law,[7] he would

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[7] To the contrary, the notion that prejudice is always necessary to establish waiver makes little sense given that the purpose of the waiver doctrine is to determine whether the waiving party has "relinquish[ed] [] a known right," *Bargale Indus., Inc. v. Robert Realty Co.*, 275 Md. 638, 643

easily be able to make such a showing. Federal courts assessing prejudice look to the length of delay and the extent of the previous trial-oriented activity of the party now seeking arbitration. *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001). Employing this test in a case with strikingly similar facts to this one, the Maryland federal district court found that a collection agency waived its right to arbitrate, and that the plaintiff had suffered actual prejudice, when it filed suit in 2009 in Montgomery County District Court to collect a debt on a car loan, and after voluntarily dismissing that suit, filed a motion to dismiss and engaged in discovery in a proceeding brought against it three years later under the Maryland Consumer Debt Collection act. *Barbagallo v. Niagara Credit Solutions, Inc.*, No. DKC 12-1885, 2012 WL 6478956, at *2-*4 (D. Md. Dec. 4, 2012). The court found that "the suit that [the collection agency] brought in state court supports a finding of prejudice, because it was based on essentially the same legal and factual issues currently disputed: it sought to recover the underlying debt on the contract." *Id.* at *3.

This previous collection activity supported a finding of prejudice even though, unlike Midland's previous district court collection action here, it did not result in a judgment against the plaintiff. Thus, Mr. Cain's showing of prejudice is even stronger than that of the Barbagallo plaintiff, because

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(1975), a question that logically must be answered by looking at that party's own conduct and that has nothing to do with whether any other party was injured as a result. *See Best Place, Inc. v. Penn Am. Ins. Co.*, 920 P.2d 334, 353 (Haw. 1996) ("Waiver is essentially unilateral in character, focusing only upon the acts and conduct of the [waiving party]."); *Farm Bureau Mut. Auto. Ins. Co. v. Houle*, 102 A.2d 326, 330 (Vt. 1954) ("A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position.").

many courts have found that an adverse judgment establishes prejudice per se. *See, e.g.*, *Midwest Window*, 630 F.2d at 537 (judgment is "prejudice enough" to establish waiver); *Schonfeldt v. Blue Cross of Cal.*, No. B142085, 2002 WL 4771, at *4 (Cal. Ct. App. Jan. 2, 2002) ("Prejudice is presumed . . . where the party seeking arbitration has filed a lawsuit and prosecuted it to final judgment.") (citing *Groom v. Health Net*, 98 Cal. Rptr. 2d 836, 840 (Cal. Ct. App. 2000)); *O'Donnell v. Hovnanian Enters., Inc.*, 29 A.3d 1183, 1189-90 (Pa. Super. Ct. 2011) (court ruling in favor of the waiving party constituted prejudice); *Otis Housing Ass'n v. Ha*, 201 P.2d 309, 312 (Wash. 2009) (finding that a party waived arbitration when it prosecuted an unlawful detainer action to judgment before seeking to arbitrate).

Here, where Midland not only prosecuted an action against Mr. Cain and pursued it to judgment but also litigated a federal class action involving Cain for five years, through two proposed settlements, and needed discovery in this action to even identify the purported arbitration agreement it presented at trial, prejudice has certainly occurred. Further evidence of prejudice comes from the fact that although Appellant filed this putative class action in July of 2013 and has filed a motion for class certification, (E. 436), no ruling has yet been made on that motion or on the merits of any of his claims. Instead, the litigation was first stayed at Midland's request awaiting final resolution of *Finch v. LVNV Funding*, (E. 38-46), and it has been hijacked ever since by the dispute over Midland's repetitive requests and purported agreements for arbitration, now including this appeal.

After availing itself of the Maryland courts' resources for years by filing thousands of debt collection actions and pursuing judgments there, Midland has now spent over a year of Mr. Cain's, the Baltimore City Circuit Court's, and now this Court's, time and resources arguing that this dispute should be in arbitration instead. This eleventh-hour change in position is prejudicial not just to Mr. Cain and the proposed class but to the entire Maryland judicial system. It should not be countenanced.

C. Midland Can No Longer Enforce an Arbitration Clause Contained in Mr. Cain's 2003 Credit Card Agreement with Citibank, Because This Agreement Has Merged into Midland's 2009 Judgment.

Alternatively, if the Court does not find that Midland waived its right to compel arbitration for the reasons stated above, the judgment below should still be reversed because the contract between Mr. Cain and Citibank, including its arbitration provisions and other substantive rights merged into the District Court judgment Midland obtained against Mr. Cain in 2009 and ceased to exist at that time.

> Maryland's appellate courts have recognized that, under the rule of merger, "a simple contract is merged in a judgment or decree rendered upon it, and that all its powers to sustain rights and enforce liabilities terminated in the judgment or decree…." *Jackson v. Wilson*, 76 Md. 567, 571 (1893) (citation omitted). *See also United Book Press v. Md. Composition Co.*, 141 Md. App. 460, 474 (2001) (citing Restatement (Second) of Judgments § 18, cmt. a (1982) for the proposition that "a claim merges into a judgment obtained with respect to that claim" and holding that, while a cause of action on a contract between the appellant and a third party merged into the judgment against the third party, a separate cause of action between the appellant and another party, based on a separate contract, did not merge into the judgment).

Accubid Excavation, Inc. v. Kennedy Contractors, Inc., 188 Md. App. 214, 232-33 (2009)(footnote omitted). *See also SunTrust Bank v. Goldman*, 201 Md. App. 390, 403 (2011) ("after all appeal rights are exhausted and the judgment in this case becomes final, appellant's contractual right to attorneys' fees will be extinguished because the agreement will have merged into that judgment"); *Monarch Constr., Inc. v. Aris Corp.*, 188 Md. App. 377, 394-95 (2009 (same).

Here, Midland sued Mr. Cain in the District Court based upon an alleged contract debt and obtained a judgment against him. (E. 1271-1279.) Now, five years later, Midland's request to demand arbitration, a right it claims was part of the same contract it previously sued Cain upon, is not permitted under the Rule of Merger because the right "terminated in the judgment" Midland obtained against Cain previously.

As the party seeking to compel Mr. Cain's claims to arbitration, Midland had the burden of demonstrating to the Circuit Court that its purported right to arbitration did not merge into the judgment it obtained against Mr. Cain or that an exception to the Rule on Merger existed. *Messersmith v. Barclay Townhouse Assocs.*, 313 Md. 652, 664 (1988) (the proponents of the arbitration agreement bear the burden of establishing the existence of a valid arbitration agreement by a preponderance of the evidence). Instead, Midland never responded to the merger argument below. (E. 954-959.) And the Circuit Court failed to address it whatsoever. (E. 423-434.)

Maryland law does recognize that merger of the right to compel arbitration could have been avoided if the parties "clearly state their intent in the contract that the [substantive right] shall not merge into the

judgment." *SunTrust Bank*, 201 Md. App. at 404-405. This Court in *Suntrust* provided guidance on what such a clear statement of intent would require, and explained why the contractual language in that case was not sufficient to avoid merger:

> There is no express language stating that the parties intend that the fee provision shall not merge into a judgment on the agreement. Moreover, assuming that language can be sufficiently definite to avoid merger without using a form of the word "merger," the agreement in this case simply employs general collection language, frequently used, especially in loan documents. If we were to hold that the language is sufficiently clear to constitute an exception to the merger bar, the exception would consume the rule, without a clear expression of intent.

Id. at 406.

Like the contract in *Suntrust*, the purported contract advanced at trial by Midland and accepted by the Circuit Court did not contain language clear enough to avoid the Rule on Merger either. The closest the contract comes is the survival clause, which provides that the arbitration agreement will survive "termination or changes in the Agreement, the account, or the relationship between you and us concerning the account." (E. 548.) But, as in *SunTrust*, this language is essentially general, referring to standard alterations or terminations of the contract in the normal course. If the parties had intended for their arbitration agreement to survive the finality of a court judgment, the Maryland cases make it clear that the clause's language needed to be far more explicit.

The Maryland Court of Appeals considered the interplay between the merger doctrine and arbitration in *Allstate Ins. Co. v. Stinebaugh*, 374 Md. 631 (2003). The parties in *Allstate* had agreed to a prior arbitration

agreement that purportedly required "all disputes" to be subject to arbitration. *Id.* at 637. However, in subsequent litigation the parties had entered into a "Consent Order" in the Circuit Court for Worchester County, which did not preserve the previous contractual right to have "all disputes" determined by an arbitrator. *Id.* at 649-50 ("the Consent Order clearly superseded the arbitration agreement and discharged any right Allstate may have had to arbitrate" the dispute). In holding that the right to arbitration was not preserved for subsequent disputes after entry of the Consent Order, the court further noted

> that the Consent Order could be viewed as modifying the prior arbitration agreement.
>
> Allstate and Nationwide entered into an executory arbitration agreement in which they agreed to arbitrate "certain disputes on claims in which two or more signatory companies are involved." They were subsequently bound by a Consent Order in which claims were settled by each of the insurance companies paying one half of a settlement amount. That Consent Order did not contain any provision regarding arbitration of the liability issue.

Id. at 650.

Here, Midland obtained a judgment against Mr. Cain. (E. 1271-1279.). Midland could have requested that its other "rights" under the contract be preserved post judgment, but apparently it did not do so since there is no such reference on the judgment entered in its favor by the District Court. *Id.* Therefore, under the Rule of Merger, the contractual rights that once may have existed between the parties, including the purported right to bring disputes to arbitration, ceased to exist upon entry of the judgment Midland obtained.

For these additional reasons, the Circuit Court erred in ordering Mr. Cain to pursue arbitration of his dispute since his contract with Citibank ceased to exist by virtue of its merger into the District Court Judgment entered in 2009 that was voluntarily sought by Midland and which did not preserve any of its purported contractual rights.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the circuit court's order granting Midland's motion to compel arbitration so that Mr. Cain and the proposed class may pursue their claims against Midland in the Maryland state courts, where Midland obtained the judgments that are at the center of this case.

Respectfully submitted,

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APPENDIX OF STATUTES, ORDINANCES, RULES AND REGULATIONS

MD Code, Business Regulation, § 7-101

§ 7-101. Definitions

(a) In this title the following words have the meanings indicated.

(b) "Board" means the State Collection Agency Licensing Board.

(c) "Collection agency" means a person who engages directly or indirectly in the business of:

(1) (i) collecting for, or soliciting from another, a consumer claim; or

(ii) collecting a consumer claim the person owns, if the claim was in default when the person acquired it;

(2) collecting a consumer claim the person owns, using a name or other artifice that indicates that another party is attempting to collect the consumer claim;

(3) giving, selling, attempting to give or sell to another, or using, for collection of a consumer claim, a series or system of forms or letters that indicates directly or indirectly that a person other than the owner is asserting the consumer claim; or

(4) employing the services of an individual or business to solicit or sell a collection system to be used for collection of a consumer claim.

(d) "Commissioner" means the Commissioner of Financial Regulation.

(e) "Consumer claim" means a claim that:

(1) is for money owed or said to be owed by a resident of the State; and

(2) arises from a transaction in which, for a family, household, or personal purpose, the resident sought or got credit, money, personal property, real property, or services.

(f) “License” means a license issued by the Board to do business as a collection agency.

(g) “Licensed collection agency” means a person who is licensed by the Board to do business as a collection agency.

§ 7-301. License required

(a) Except as otherwise provided in this title, a person must have a license whenever the person does business as a collection agency in the State.

(b) This section does not apply to:

(1) a regular employee of a creditor while the employee is acting under the general direction and control of the creditor to collect a consumer claim that the creditor owns; or

(2) a regular employee of a licensed collection agency while the employee is acting within the scope of employment.

§ 7-401. Prohibited acts

(a) Except as otherwise provided in this title, a person may not knowingly and willfully do business as a collection agency in the State unless the person has a license.

(b) A person who violates this section is guilty of a misdemeanor, and on conviction, is subject to a fine not exceeding $1,000 or imprisonment not exceeding 6 months or both.

§ 7-501. Short title

This title is the Maryland Collection Agency Licensing Act.

MD Code, Commercial Law, § 13-301

§ 13-301. Unfair or deceptive trade practices defined

<Section effective through June 30, 2016. See, also, section effective July 1, 2016.>

Unfair or deceptive trade practices include any:

(1) False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;

(2) Representation that:

(i) Consumer goods, consumer realty, or consumer services have a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which they do not have;

(ii) A merchant has a sponsorship, approval, status, affiliation, or connection which he does not have;

(iii) Deteriorated, altered, reconditioned, reclaimed, or secondhand consumer goods are original or new; or

(iv) Consumer goods, consumer realty, or consumer services are of a particular standard, quality, grade, style, or model which they are not;

(3) Failure to state a material fact if the failure deceives or tends to deceive;

(4) Disparagement of the goods, realty, services, or business of another by a false or misleading representation of a material fact;

(5) Advertisement or offer of consumer goods, consumer realty, or consumer services:

(i) Without intent to sell, lease, or rent them as advertised or offered; or

(ii) With intent not to supply reasonably expected public demand, unless the advertisement or offer discloses a limitation of quantity or other qualifying condition;

(6) False or misleading representation of fact which concerns:

(i) The reason for or the existence or amount of a price reduction; or

(ii) A price in comparison to a price of a competitor or to one's own price at a past or future time;

(7) Knowingly false statement that a service, replacement, or repair is needed;

(8) False statement which concerns the reason for offering or supplying consumer goods, consumer realty, or consumer services at sale or discount prices;

(9) Deception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with:

(i) The promotion or sale of any consumer goods, consumer realty, or consumer service;

(ii) A contract or other agreement for the evaluation, perfection, marketing, brokering or promotion of an invention; or

(iii) The subsequent performance of a merchant with respect to an agreement of sale, lease, or rental;

(10) Solicitations of sales or services over the telephone without first clearly, affirmatively, and expressly stating:

(i) The solicitor's name and the trade name of a person represented by the solicitor;

(ii) The purpose of the telephone conversation; and

(iii) The kind of merchandise, real property, intangibles, or service solicited;

(11) Use of any plan or scheme in soliciting sales or services over the telephone that misrepresents the solicitor's true status or mission;

(12) Use of a contract related to a consumer transaction which contains a confessed judgment clause that waives the consumer's right to assert a legal defense to an action;

(13) Use by a seller, who is in the business of selling consumer realty, of a contract related to the sale of single family residential consumer realty, including condominiums and town houses, that contains a clause limiting or precluding the buyer's right to obtain consequential damages as a result of the seller's breach or cancellation of the contract;

(14) Violation of a provision of:

(i) This title;

(ii) An order of the Attorney General or agreement of a party relating to unit pricing under Title 14, Subtitle 1 of this article;

(iii) Title 14, Subtitle 2 of this article, the Maryland Consumer Debt Collection Act;[1]

(iv) Title 14, Subtitle 3 of this article, the Maryland Door-to-Door Sales Act;[2]

(v) Title 14, Subtitle 9 of this article, Kosher Products;

(vi) Title 14, Subtitle 10 of this article, Automotive Repair Facilities;

(vii) Section 14-1302 of this article;

(viii) Title 14, Subtitle 11 of this article, Maryland Layaway Sales Act;[3]

(ix) Section 22-415 of the Transportation Article;

(x) Title 14, Subtitle 20 of this article;

(xi) Title 14, Subtitle 15 of this article, the Automotive Warranty Enforcement Act;[4]

(xii) Title 14, Subtitle 21 of this article;

(xiii) Section 18-107 of the Transportation Article;

(xiv) Title 14, Subtitle 22 of this article, the Maryland Telephone Solicitations Act;[5]

(xv) Title 14, Subtitle 23 of this article, the Automotive Crash Parts Act;[6]

(xvi) Title 10, Subtitle 6 of the Real Property Article;

(xvii) Title 14, Subtitle 25 of this article, the Hearing Aid Sales Act;[7]

(xviii) Title 14, Subtitle 26 of this article, the Maryland Door-to-Door Solicitations Act;[8]

(xix) Title 14, Subtitle 31 of this article, the Maryland Household Goods Movers Act;[9]

(xx) Title 14, Subtitle 32 of this article, the Maryland Telephone Consumer Protection Act;[10]

(xxi) Title 14, Subtitle 34 of this article, the Social Security Number Privacy Act;[11]

(xxii) Title 14, Subtitle 37 of this article, the Online Child Safety Act;

(xxiii) Section 14-1319, § 14-1320, or § 14-1322 of this article;

(xxiv) Section 7-304 of the Criminal Law Article;

(xxv) Title 7, Subtitle 3 of the Real Property Article, the Protection of Homeowners in Foreclosure Act;

(xxvi) Title 6, Subtitle 13 of the Environment Article;

(xxvii) Section 7-405(e)(2)(ii) of the Health Occupations Article;

(xxviii) Title 12, Subtitle 10 of the Financial Institutions Article; or

(xxix) Title 19, Subtitle 7 of the Business Regulation Article; or

(15) Act or omission that relates to a residential building and that is chargeable as a misdemeanor under or otherwise violates a provision of the Energy Conservation Building Standards Act,[12] Title 7, Subtitle 4 of the Public Utilities Article.

MD Code, Commercial Law, § 14-201

§ 14-201. Definitions

(a) In this subtitle the following words have the meanings indicated.

(b) "Collector" means a person collecting or attempting to collect an alleged debt arising out of a consumer transaction.

(c) "Consumer transaction" means any transaction involving a person seeking or acquiring real or personal property, services, money, or credit for personal, family, or household purposes.

(d) "Person" includes an individual, corporation, business trust, statutory trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

§ 14-202. Certain acts prohibited

In collecting or attempting to collect an alleged debt a collector may not:

(1) Use or threaten force or violence;

(2) Threaten criminal prosecution, unless the transaction involved the violation of a criminal statute;

(3) Disclose or threaten to disclose information which affects the debtor's reputation for credit worthiness with knowledge that the information is false;

(4) Except as permitted by statute, contact a person's employer with respect to a delinquent indebtedness before obtaining final judgment against the debtor;

(5) Except as permitted by statute, disclose or threaten to disclose to a person other than the debtor or his spouse or, if the debtor is a minor, his parent, information which affects the debtor's reputation, whether or not for credit worthiness, with knowledge that the other person does not have a legitimate business need for the information;

(6) Communicate with the debtor or a person related to him with the frequency, at the unusual hours, or in any other manner as reasonably can be expected to abuse or harass the debtor;

(7) Use obscene or grossly abusive language in communicating with the debtor or a person related to him;

(8) Claim, attempt, or threaten to enforce a right with knowledge that the right does not exist; or

(9) Use a communication which simulates legal or judicial process or gives the appearance of being authorized, issued, or approved by a government, governmental agency, or lawyer when it is not.

§ 14-203. Liability for damages

A collector who violates any provision of this subtitle is liable for any damages proximately caused by the violation, including damages for

emotional distress or mental anguish suffered with or without accompanying physical injury.

§ 14-204. Short title

This subtitle may be cited as the Maryland Consumer Debt Collection Act.

MD Code, Courts and Judicial Proceedings, § 3-206

§ 3-206. Validity and enforceability of arbitration agreement

In general

(a) Except as otherwise provided in this subtitle, a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy arising between the parties in the future is valid and enforceable, and is irrevocable, except upon grounds that exist at law or in equity for the revocation of a contract.

Application of subtitle

(b) This subtitle does not apply to an arbitration agreement between employers and employees or between their respective representatives unless it is expressly provided in the agreement that this subtitle shall apply.

§ 3-207. Orders for arbitration

Petition to order arbitration

(a) If a party to an arbitration agreement described in § 3-202 of this subtitle refuses to arbitrate, the other party may file a petition with a court to order arbitration.

Denial of arbitration agreement

(b) If the opposing party denies existence of an arbitration agreement, the court shall proceed expeditiously to determine if the agreement exists.

Court determination of agreement

(c) If the court determines that the agreement exists, it shall order arbitration. Otherwise it shall deny the petition.

§ 3-234. Short title

This subtitle may be cited as the Maryland Uniform Arbitration Act.

CERTIFICATE OF SERVICE

I hereby certify and give notice that 2 copies of the foregoing opening brief was served on the Appellee's counsel by depositing same in the U.S. Mail, first class postage prepaid, on December 15, 2014 to the following:

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STATEMENT AS TO FONT

This brief was prepared with 14 pt Georgia.