In the

# Court of Appeals of Maryland

September Term, 2020

No. COA-REG-0030-2020

Larry S. Chavis, et al.

*Petitioners*

v.

Blibaum and Associates, P.A. et al.

*Respondents*

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Bryione K. Moore, et al.

*Petitioners*

v.

Peak Management, LLC

*Respondent*

On Writ of Certiorari to
the Court of Special Appeals

## Amicus Curiae Brief of The Maryland State Bar Association in Support of Respondents (Filed With All Parties' Consent)

Steven M. Klepper
CPF #0112120030
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
sklepper@kg-law.com
(410) 752-6030

J. Bradford McCullough
CPF No. 8312010314
LERCH EARLY & BREWER, CHTD.
7600 Wisconsin Avenue, Suite 700
Bethesda, Maryland 20814
jbmccullough@lerchearly.com
(301) 657-0734

*Counsel for Amicus Curiae The Maryland State Bar Association*

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## Statement of Interest

For more than a century, the Maryland State Bar Association (MSBA) has been the voice of lawyers across the state, from nearly every practice area, career stage, and demographic. This representation extends to the public policy arena. Although most of the MSBA's policy advocacy is legislative, on rare occasion the MSBA will file an amicus curiae brief. The MSBA has an interest in Question 1—whether the respondent law firm violated the Maryland Consumer Debt Collection Act (MCDCA) when it sought, on behalf of a client, to collect post-judgment interest at a rate of ten percent instead of six percent.[1]

The MSBA does not file this brief to take sides generally on creditor-debtor matters. Its members include attorneys for both creditors and debtors. Its interest in Question 1 goes to the heart of the attorney-client relationship generally.

Reversal on Question 1 would interfere with and undermine the attorney-client relationship by imposing liability on attorneys for good-faith advocacy on behalf of their clients regarding unsettled legal issues and thereby create an unwarranted conflict of interest. A "claim, attempt, or threat to enforce a right" is actionable under the MCDCA only if made "with knowledge that the right does not exist." Md. Code, Com. Law § 14-202(8). Even assuming

[1] The MSBA takes no position on Question 2, regarding class certification.

that the MCDCA allows a debtor to challenge the *amount* of interest sought by a creditor—as opposed to that creditor's right to seek any interest—the law on the proper rate of interest was sufficiently unsettled that a federal court certified the question to this Court. This uncertainty in the law negates any notion that the law firm asserted a right it knew did not exist. If advocacy for a client on such an unsettled legal question were to create liability for the attorney, an untenable conflict would arise between an attorney's professional obligation to advocate zealously on behalf of the attorney's client and the attorney's fear of potential liability under the MCDCA.

## Argument

### This Court should reject a reading of the MCDCA that conflicts with the Maryland Attorneys' Rules of Professional Conduct.

Under the Maryland Attorneys' Rules of Professional Conduct, an attorney-advocate "zealously asserts the client's position under the rules of the adversary system" and has an "obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law." Md. Rule 19-300.1, *Preamble [2] & [9]*. In balancing the attorney's "duty to use legal procedure for the fullest benefit of the client's cause" against the "duty not to abuse legal procedure," the Court has recognized that "the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." Md. Rule 19-303.1, *Comment [1]*.

This case involves advocacy in the face of uncertainty in the law. In their collection efforts against Petitioners, Respondents interpreted § 11-107 of the Courts Article to provide for a 10% post-judgment rate of interest on judgments arising out of breach of contract actions involving residential lease agreements. *Ben-Davies v. Blibaum & Assocs., P.A.*, 457 Md. 228, 232–33 (2018). Petitioners sued, asserting that the applicable rate under subsection (b) of that statute was 6%. *Id.* The parties jointly moved for certification of that legal question to this Court, which accepted the question. *Id.* at 243. The certification statute authorizes the Court to answer such a certified question only where "there is no controlling appellate decision, constitutional provision, or statute of this State." Md. Code, Cts. & Jud. Proc. § 12-603. Certification is thus for "questions of Maryland law that are unsettled, uncertain, or otherwise controversial." *Proctor v. WMATA*, 412 Md. 691, 705 (2010).

Ultimately, the Court agreed with Petitioners on this unsettled question. Following a lengthy discussion of the statute's legislative history and Maryland case law interpreting the word "rent" in various contexts, this Court held that the 6% rate applied. *Ben-Davies*, 457 Md. at 247–65. No one claims that Respondents' arguments, although unsuccessful, fell outside the bounds of ethical advocacy or were subject to sanction under Rule 1-341.

Although Petitioners recognize the issue was sufficiently novel to warrant certification to this Court, they contend that Blibaum violated the

MCDCA because it "collected 10% post-judgment interest when Maryland law limited post-judgment interest to 6%." (Petitioners' Br. 1.) They seek to impose liability solely for Blibaum's collection activities occurring before this Court settled the question in *Ben-Davies*, not for any post-*Ben-Davies* collection activities.

To satisfy the requirement that Blibaum had "knowledge that the right does not exist" under section 14-202(8), Petitioners argue that Respondents "had actual knowledge of all laws affecting the validity of their collection efforts." (Petitioners' Br. 18.) Contending that respondents committed a "knowing violation," even if they "were mistaken about [the meaning of] these laws," *id.*, petitioners cite Judge Young's statement in an MCDCA case that "ignorance of the law will not excuse its violation." *Spencer v. Hendersen-Webb, Inc.*, 81 F. Supp. 2d 582, 594 (D. Md. 1999). But Respondents are not claiming they were unaware of § 11-107(b) of the Courts Article. Instead, they interpreted § 11-107 differently from Petitioners at a time when there was no controlling authority to the contrary, and thus did not assert a right they knew did not exist. *See, e.g.*, *Chow v. State*, 393 Md. 431, 471 (2006) (holding that use of the words "knowingly" and "knowing" in firearm statute required "that a defendant 'knows' that the sale, rental, transfer, purchase, possession, or receipt of a regulated firearm of which they are a participant in is in a manner that is illegal and not a legal sale.").

Petitioners' contention, if accepted by this Court, would run contrary to well-established Maryland jurisprudence recognizing that zealous advocacy is essential to the continuing development of law. *Christian v. Maternal Fetal Medicine Associates of Md., LLC*, 459 Md. 1, 19–20 (2018). It also would interfere with the attorney-client relationship and restrict clients' access to courts in a manner that this Court, in other contexts, has recognized is untenable. *See, e.g.*, *Key v. Chrysler Credit Corp.*, 303 Md. 397, 404 (1985) (interpreting the judicial privilege to defamatory statements broadly to foster the "free and unfettered administration of justice"); *N. Point Constr. Co. v. Sagner*, 185 Md. 200, 208 (1945) (in malicious use of process case, observing, that "[i]f attorneys cannot act and advise freely, and without constant fear of being harassed by suits and actions at law, parties could not obtain their legal rights"); *United States v. Hurt*, 543 F.2d 162, 166 (D.C. Cir. 1976) (libel suit against lawyer for representing client creates a "conflict" that "corrupts the relationship when counsel's duty to his client calls for a course of action which concern for himself suggests that he avoid").

Acceptance of Petitioners' contention would run contrary to this Court's recent pronouncement that "it is both possible, and indeed a requirement of the law, for a lawyer to zealously represent his client's interests and to also comply with the minimum standards established by the debt collection requirements of … the MCDCA." *Andrews & Lawrence Prof'l Servs., LLC v.*

*Mills*, 467 Md. 126, 160 (2020). That pronouncement makes little sense if good-faith legal advocacy in an unsettled area of the law, upon rejection by the courts, were to become retroactive "knowledge that the right [did] not exist" under section 14-202(8).

Reversal on Question 1 also could interfere with the judicial function in debt-collection cases, if judges knew that a ruling against the creditor might subject the creditor's counsel to personal liability for good-faith advocacy. For an analogous example, the Supreme Court has held that prosecutorial immunity protects criminal defendants, not just prosecutors. When a criminal defendant moves for sanctions or post-conviction relief, a judge's "focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976). Judges should be free to decide novel questions of debt-collection law without worrying whether their decisions might create MCDCA liability for the creditors' counsel.

This Court should reject an interpretation of the MCDCA that would chill legitimate legal advocacy and interfere with the attorney-client relationship. Advocacy can be legitimate even when unsuccessful, and even when "the attorney believes that the client's position ultimately will not prevail." Md. Rule 19-303.1, *Comment [2]*. Advocacy crosses the line only when

"the attorney is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." *Id.*; *see URS Corp. v. Fort Myer Constr. Corp.*, 452 Md. 48, 72–73 (2017) ("fairly debatable" legal position not subject to sanction under Rule 1-341). A holding that the respondent law firm had actionable "knowledge" under the MCDCA would dangerously undermine core principles of the attorney-client relationship in Maryland.

## Conclusion

The MSBA urges the Court to affirm the judgment of the Court of Special Appeals on Question 1.

Respectfully submitted:


s/*Steven M. Klepper*
Steven M. Klepper
CPF #0112120030
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
sklepper@kg-law.com
(410) 752-6030

s/*J. Bradford McCullough*
J. Bradford McCullough
CPF No. 8312010314
LERCH EARLY & BREWER, CHTD.
7600 Wisconsin Avenue, Suite 700
Bethesda, Maryland 20814
jbmccullough@lerchearly.com
(301) 657-0734

*Counsel for Amicus Curiae The Maryland State Bar Association*

**Certification of Word Count and Compliance with Rule 8-112**

1. This brief contains 1,886 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112. It was prepared using Century Schoolbook font, 13 point.

s/*Steven M. Klepper*
Steven M. Klepper, CPF #0112120030

**Certificate of Service**

I hereby certify that, within one business day of the electronic filing of this brief on January 8, 2021, two paper copies of the foregoing brief will be sent by first-class mail, postage prepaid, to:

E. David Hoskins
THE LAW OFFICES OF E. DAVID HOSKINS, LLC
16 East Lombard Street, Suite 400
Baltimore, Maryland 21202
*Counsel for Petitioner*

James E. Dickerman
ECCLESTON AND WOLF, PC
7240 Parkway Drive, 4th Floor
Hanover, Maryland 21076
*Counsel for Respondent*

s/*Steven M. Klepper*
Steven M. Klepper, CPF #0112120030