

SUPREME COURT OF FLORIDA

CASE NOS. SC18-2142 & SC18-2143

EUGENE HAM, III, and
LAURA FOXHALL, Petitioners,

vs.

PORTFOLIO RECOVERY ASSOCIATES, LLC, Respondent.

On Appeal from the First District Court of Appeal

**AMICUS CURIAE BRIEF OF THE
NATIONAL ASSOCIATION OF CONSUMER
ADVOCATES IN SUPPORT OF PETITIONERS**

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PREFACE

Petitioners, EUGENE HAM, III and LAURA FOXHALL, are referred to as "Petitioners."

Respondent, PORTFOLIO RECOVERY ASSOCIATES, LLC, is referred to as "Respondent" or "PORTFOLIO" or its proper name.

Amicus Curiae, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, is referred to as "NACA" or its proper name.

The following abbreviation is used: (R. # - Record on Appeal)

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CONCISE STATEMENT OF AMICUS CURIAE

Amicus Curiae, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, is a nonprofit association of more than 1,500 attorneys and consumer advocates committed to representing consumers' interests. Members are private and public-sector attorneys, legal services attorneys, law professors, and law students whose primary focus is the protection and representation of consumers. They have represented hundreds of thousands of consumers victimized by fraudulent, abusive, and predatory business practices. NACA also has a charitable and educational fund incorporated under §501(c)(3). No publicly held corporation owns 10 percent or more of any stake or stock in NATIONAL ASSOCIATION OF CONSUMER ADVOCATES.

INTEREST OF AMICUS CURIAE

Amicus Curiae, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, is a national organization fully committed to promoting justice for consumers and a fair and open marketplace that protects the rights of consumers, particularly those of modest means. Section 57.105(7), Florida Statutes (2017) was enacted to "level the playing field between parties of unequal bargaining power and sophistication," and to ensure that parties without ample resources have equal access to the courts." *Port-A-Weld Inc. v. Padula & Wadsworth Construction, Inc.*, 984 So.2d 564, 570 (Fla. 4th DCA 2008) (citations omitted). The provision has been called the "compelled mutuality provision."

Florida Medical Center, Inc., v. McCoy, 657 So. 2d 1248 (Fla. 4th DCA 1995).

The Florida Supreme Court already recognized that Section 57.105 is an example of where "[t]he legislature of this state has not hesitated to enact statutes providing authority to the courts to award attorney fees." *Florida Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1148 (Fla. 1985), holding modified by *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990). The *Rowe* Court articulated many of the important policy concerns that animate statutes like Section 57.105:

The assessment of attorney fees against an unsuccessful litigant imposes no more of a penalty than other costs of proceedings which are more commonly assessed. In certain causes of action, attorney fees historically have been considered part of litigation costs and the award of these costs is intended not only to discourage meritless claims, but also to make the prevailing plaintiff or defendant whole. It can be argued that, rather than deterring plaintiffs from litigating, the statute could actually encourage plaintiffs to proceed with well-founded ... claims that would otherwise be ignored because they are not economically feasible ... The statute may encourage an initiating party to consider carefully the likelihood of success before bringing an action, and similarly encourage a defendant to evaluate the same factor in determining how to proceed once an action is filed.

Rowe, 472 So. 2d at 1149 (Fla. 1985). These exact policy concerns - making defendants in non-meritorious debt collection actions whole, discouraging non-meritorious debt collection claims from being filed and encouraging defendants in debt collection actions to consider carefully the likelihood of success when assessing whether to mount a vigorous defense

to a debt collection action - are all furthered by the interpretation of Section 57.105(7) advanced by Respondents.

The members of the NATIONAL ASSOCIATION OF CONSUMER ADVOCATES defend consumers in millions of debt collection lawsuits in the State of Florida, but are severely limited by the clients' means in addition to the inconsistent application of Section 57.105(7). Many attorneys are unable to defend consumers in debt defense cases because consumers are usually without means and attorneys cannot consistently defend lawsuits brought by billion-dollar companies with merely the hope for payment of reasonable fees and costs upon prevailing.

Application of §57.105(7) to account stated actions varies not only from county to county, but also from judge to judge. The inconsistent application of Section 57.105(7) has prevented its purpose to "level the playing field between parties of unequal bargaining power and sophistication" from being effectuated, resulting in an absolute lack of protection for the vast majority of consumers who have been served with a debt collection lawsuit. A law that is not uniformly applied is effectively no law at all. NATIONAL ASSOCIATION OF CONSUMER ADVOCATES seeks to restore the protection of Section 57.105(7) to the consumer.

SUMMARY OF ARGUMENT

Florida Statute § 57.105(7) should be construed to apply to "account stated" debt collection lawsuits when based upon contractual credit card debt. Doing so effectuates many of the concerns of the Florida Supreme Court when it created the Florida Commission on Access to Civil Justice in Administrative Order Number AOSC14-65, as corrected. In this Administrative Order, the Court tasked the Commission to study the "remaining unmet civil legal needs of disadvantaged, low income, and moderate-income Floridians." In the Administrative Order's Preamble, the Court states:

WHEREAS, the American and Florida judicial systems are founded upon the fundamental principle that justice should be accessible to all persons, the advancement of which is of profound interest to the Supreme Court of Florida; and

WHEREAS, access to civil justice for lower income and disadvantaged persons is a critical challenge for the legal system, especially in difficult economic times; AOSC14-65, page 1.

Construing the statute to include litigation based upon credit card debt, which includes prevailing party fee language, ensures that consumers have an opportunity for reasonable access to legal representation, representation that levels the uneven playing field between well-heeled debt collectors and cash-strapped consumers. Failing to construe the statute to apply to "account stated" cases as described above would defeat the purpose of the "fundamental principle that justice should be accessible to all persons," including lower income and

disadvantaged persons.

ARGUMENT

Some media reports have popularized the notion that ordinary people can easily win debt buyer lawsuits on their own simply by appearing in Court and uttering a simple set of "magic words," essentially, "show me the evidence." Jake Halpern, "Magic Words," *This American Life*,

August 15, 2014, <https://www.thisamericanlife.org/radio-archives/episode/532/magic-words>. Yet the reality is much more akin to Senator Elizabeth Warren's description:

We're watching a fight between two players, one a skilled repeat gladiator, and one who's thrown into the ring for the first time and gets clubbed over the head before they even get a sense of what the rules are.

Michael Rezendes & Francie Latour, *No Mercy for Consumers*, BOSTON GLOBE, July 30, 2006, http://www.boston.com/news/specials/debt/part1_main/.

While defendants with competent legal representation often fare quite well in debt buyer cases, there is no easy path to victory for unrepresented litigants. Viable defenses to debt buyer lawsuits can be quite difficult for a layperson to articulate and deploy effectively in front of a skeptical judge. Unrepresented defendants often come to court with virtually no understanding of the law, their rights, or of what a debt buyer should have to prove in court in order to prevail against them. Debt buyers, on the other hand, tend to be represented by top-tier collections law firms or experienced in-house counsel, while defendants in

consumer debt collection actions lack the financial resources to obtain legal representation. Without statutory fee shifting provisions like Florida Statute §57.105(7), consumer defendants in debt collection actions have no reasonable access to legal representation.

I. APPLICATION OF § 57.105(7) TO "ACCOUNT STATED" DEBT COLLECTION CASES EFFECTUATES THE GOAL OF PROVIDING JUSTICE TO ALL, EVEN THE LOWER INCOME AND DISADVANTAGED

One of the Florida Legislature's main purposes in enacting Florida Statute §57.105 was an effort to deter frivolous litigation and move toward ensuring access to the courts for all, especially in small-dollar cases, providing courts with the ability to award reasonable attorney's fees in appropriate cases. Appropriate cases include those where there is a systematic use by institutions of a one-sided attorney fee provisions. When one side in a particular type of litigation regularly has the advantage of superior resources, the prospect of reimbursement of fees can improve the position and stiffen the resolve of the relatively weaker side. *See* Aronson, Attorney-Client Fee Arrangements: Regulation and Review, 68 A.B.A. T. 284,287 (1982) (including, among factors usable to identify situations suitable for fee shifting, whether defendants in a class of cases are usually institutional). Such is the case with Section 57.105(7), which transforms any unilateral contractual attorney's provision into a reciprocal obligation whereby the prevailing party is entitled to recover reasonable fees and costs. The statute serves to "right the scales"

in cases where there is a systemic imbalance in the equities.

Consumer debt collection is the very best example of a systemic imbalance in the equities. Consumer lenders include a contractual right to attorney fees within their contracts. When the debt goes bad, it is charged off and sold to debt buyers who file suit. The vast majority of defendants in debt buyer lawsuits do not have legal representation, most often because they cannot afford it. Without representation, consumers cannot defend themselves against what are often unmeritorious claims. A substantial percentage of those suits are improper, brought against the wrong person, including improper interest, charges and fees, but the meritorious defenses will rarely be raised due to the inherent imbalance of resources between the parties. As a result, the impact of the systemic imbalance in the equities is most strongly felt in consumer debt collection cases, where debt collectors almost always win not necessarily because the merits favor them, but because consumers have no means to defend themselves in court.

Section 57.105(7) helps to match adversaries in debt collection cases more evenly, by adopting a basic rule of fairness that effectively says "what is good for the goose is good for the gander." The statute helps in at least some small way to prevent the disproportionate advantage in access to and use of the legal process held by debt collectors from becoming a *de facto* denial of due process. The interpretation of the statute urged by Petitioners advances the important policy considerations of providing consumers with access to legal

representation. Given the central role an attorney plays in leveling the adversarial playing field and in safeguarding consumer defendants' legal rights, this Court should uphold the goals also set out in the Preamble to AOSC14-65, page 1 *supra* by giving Florida consumers an opportunity to fight against non-meritorious debt collection actions brought under an "account stated" legal theory with the effective assistance of counsel. Reciprocity is the only way to insure pleadings are properly vetted before the Court based upon sound principles of law, not *pro se* efforts to maneuver the legal system (or worse, spout internet law).

A. Debt Buyers Flood the Courts with Debt Collection Cases but Do Not Play by the Rules.

The issue of affording Florida consumers with a reasonable access to legal representation where there are meritorious defenses has become critical as consumer debt collection has exploded in ubiquity. Debt buyers represent "[t]he most significant change in the debt collection business in recent years." Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change*, February 2009, page 13 ("FTC 2009 Report"). Debt buyers purchase charged-off debt from creditors "for pennies-on-the-dollar." Stifler & Parish, *Debt Collection and Debt Buying: The State of Lending in America & its Impact on U.S. Households*, Center for Responsible Lending, April 2014, page 2. Credit-card debt is most common, but professional buyers also acquire student loans, medical debt, utility and phone bills, tax liens, car loans, and mortgage and

auto deficiency debt. *Id.* at 3. Debts "are typically bundled into portfolios" to be sold. FTC, *The Structure and Practices of the Debt Buying Industry*, January 2013, page 17 ("FTC 2013 Report").

Mass consumer debt buyers price bundles of consumer debt based in part on their age and timeliness. *See* FTC 2013 Report at 21. As a debt ages, its value drops precipitously: whereas debt less than 3 years old generally costs 7.9 cents per dollar of debt, a 3 to 6-year-old debt costs only 3.1 cents and a 6 to 15-year-old debt 2.2 cents; debts older than 15 years cost "effectively nothing." *Id.* at 23-24. As their pennies-on-the-dollar prices reflect, these debts are extremely difficult to collect. However, the pennies-on-the-dollar price of acquiring this debt creates the possibility for windfall-sized returns for debt buyers, if any of this debt is collected.

Debt buyers have increasingly used litigation as a debt collection strategy in recent years. *See* Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom - in Lawsuits*, Wall Street Journal (Nov. 28, 2010) ("The big explosions in lawsuit is coming not from lenders but from firms who buy debt."). Large debt buyers like Respondent Portfolio will file tens of thousands of debt collection suits in one year, and sometimes more than 100 in a single day. For example, one of Respondent Portfolio's peers, Encore Capital, filed 245,000 suits in one year, and filed 110 lawsuits on one day in a single state court (Bronx County Civil Court). *Id.*

Debt buyers generally "rely on overburdened 'small claims courts,' where the state court formal rules of evidence typically do not apply." Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. Bus. & Tech. L. 259, 261 (2011) ("Debt buyers shy away from large-value cases, which would require formal proof that complies with the forum state's rules of evidence.") They often prevail on even meritless claims because debtors default. FTC 2013 Report at 45 (90% or more of consumers sued do not appear in court to defend"); Holland, *supra*, at 263 (debt buyers have won "billions of dollars in default judgments"); FTC, *Repairing A Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*, July 2010, page 7, n. 18 (60% to 95% of defendants default, with 90% being the average).

Things have gotten so bad that there is a widespread belief that small claims courts have become an extension of the debt collection industry:

There are anecdotal reports that more than 95% of all collection cases end in a judgment in favor of the collector. At least one judge who handles debt buyer and collections cases reports that in over 90% of all such collection cases filed, the creditor lacks the requisite proof to prevail. Instead of proof, arguably creditors rely on a de facto system of "default judgment justice" wherein the creditors know that very few defendants will ever challenge the lawsuit, and overwhelmed courts and judges will simply enter default judgments in order to keep the flood of paperwork from bringing the workflow to a halt.

See Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits*

Filed by Debt Buyers, Loyola Consumer Law Review, 26:2, page 179, 184.

In addition to turning small claims courts into virtual extensions of the debt collection industry, debt buyers like Portfolio often do not "play by the rules." Some of the conduct engaged in by debt buyers and debt collectors that "breaks the rules" include lack of data integrity, lack of proof, inadequate documentation, robo-signing and other unfair and deceptive acts and practices. FTC 2010 Report, page ii. The federal government has taken notice of these practices and has reacted with strong enforcement measures. In its 2016 annual report, the Consumer Financial Protection Bureau (CFPB) reported the following enforcement actions against debt collectors, including Respondent Portfolio, to protect consumers from these harmful practices:

The Bureau finds three of its recent cases to be particularly noteworthy. In its case with JP Morgan Chase, the Bureau took action against the bank for selling credit card debts which, in some cases, overstated the amount owed or misidentified the individual owing the debt. In its cases with Encore and Portfolio Recovery Associates, the nation's two largest debt buyers, the Bureau took action against those entities for demanding payments and filing lawsuits on debts that they knew very little about and without reviewing the appropriate documentation to make sure they were collecting the right amount from the right consumer. These matters put over \$110 million back in consumers' pockets, penalized the companies \$48 million, and also brought debt relief with a face value of several billion dollars to hundreds of thousands of consumers.

Fair Debt Collection Practices Act, CFPB Annual Report 2016, page 3.

Many other reports and studies articulate the abusive practices of the debt

collection industry, all demonstrating a critical need to provide Florida consumers with the means to defend themselves against what are often meritless and abusive debt collection lawsuits.

B. Most Florida defendants in debt buyer lawsuits cannot afford an attorney.

While attorneys play a central role in leveling the adversarial playing field and in safeguarding consumer defendants' legal rights, the vast majority of defendants in debt buyer lawsuits do not have legal representation, often because they cannot afford it. One study published in 2014 examined a sample of 4,400 debt buyer lawsuits in Maryland and found that less than 2 percent of defendants had legal representation. *See Holland, Junk Justice, supra* at page 187. Not surprisingly, Respondent Portfolio was included in the debt buyers surveyed in the Maryland study, due to the large number of cases it filed there. *Id.* at 186.

A 2010 study found that less than one percent of people sued by debt buyers in New York City were represented by an attorney. *See Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower Income New Yorkers*, http://www.neweconomynyc.org/wp-content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf, page 1. In 2016, the New York state court system and the organization Human Rights Watch compiled a randomized sample of 500 lawsuits debt

buyers filed in courts across New York State in 2013. Two hundred forty-seven of those cases had resulted in a judgment by the time the data was sampled and the defendants had legal representation in only three of those cases. As one Arkansas woman put it to Human Rights Watch, "I called several lawyers and they wanted \$200 just to talk to them. I said, 'Well, if I had that kind of money I could just pay the bill.'" "Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor," <https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor>, January 20, 2016, note 183.

While there is no comparable study for the state of Florida, The United Way's Asset Limited, Income Constrained, Employed" ("ALICE") survey for Florida lays

out in stark terms how almost half of Florida's 7.5 million household are struggling financially, with 14.5 percent living in poverty in 2016, and another 32 percent qualifying as "ALICE." Combined 46.5 percent of Florida Households live below the ALICE threshold

<https://www.uwof.org/sites/uwof.org/files/2018%20FL%20ALICE%20REPORT%20AND%20CO%20PAGES.pdf>. The Florida ALICE report found

these frightening statistics about "who is struggling in Florida:"

Florida families saw the following changes from 2010 to 2016:

Below the ALICE Threshold:
13

Of all Florida families with children, there were 827,926, or 46 percent, with income below the ALICE Threshold in 2016, an increase of 5 percent since 2010. Of these families, 40 percent were in married-parent families, 48 percent were in single-female-headed families, and 12 percent were in single-male-headed families.

Married-parent families: The number of married-parent families with children fell by 1 percent from 2010 to 2016, while the number below the ALICE Threshold increased by 6 percent (Figure 5). In 2016, 29 percent of married-parent households lived below the ALICE Threshold.

Single-female-headed families: The number of single-female-headed families with children decreased by 2 percent, but the number below the ALICE Threshold increased slightly, by 1 percent. In 2016, 80 percent of single-female-headed families lived below the ALICE Threshold.

Single-male-headed families: This smallest share of family types increased by 12 percent; the number with income below the ALICE Threshold increased by 13 percent. In 2016, 63 percent of single-male headed households lived below the ALICE Threshold.

Id. at 13.

Studies show that the vast majority of debt collection lawsuits are filed against poor and struggling households. For example, in the 2010 New York study cited *supra*, it was found that "[v]irtually all (95%) of people with default judgments entered against them by debt buyers resided in low or moderate-income neighborhoods." *See Debt Deception, supra*, at 1. While there is no comparable study for Florida, common sense dictates that the same is true in

Florida and that a disproportionate number of debt collection lawsuits are filed against poor and struggling households. For the 3.5 million Florida households in poverty or ALICE status, households who cannot even afford the basic needs it takes to survive, paying out of pocket for legal representation is a virtual impossibility. This demonstrates the acute need for the kind of fee shifting that Section 57.105(7) provides. Without such a provision, Florida defendants in the vast majority of debt collection lawsuits would have no reasonable opportunity for access to legal representation.

C. Defense of Consumer Debt Collection Cases Results in Just Outcomes.

There is no question that adequate defense of consumer debt collection cases results in just outcomes. In the Maryland study cited *supra*, the study found that of the 2 percent of those defendants in debt collection actions who were able to find legal representation, "debt buyers obtained an affidavit, consent, or default judgment only 15% of the time, and recovered only 21% of the principal amount." Loyola Consumer Law Review, 26:2 at 211. The Holland-Maryland study further cited a 2013 unpublished study of the Maryland's Pro Bono Resource Committee's Consumer Protection Project, a study that found that of 80 cases in which pro bono attorneys represented defendants in collection suits by debt buyers, debt buyers obtained final money judgments in only 12 cases

(15%). "Overwhelmingly, defendants with an attorney succeeded in having the case dismissed." *Id.* As Professor Holland puts it, this 2013 unpublished study "confirms what is widely believed: lawyers make a difference." *Id.* at 211.

The Human Rights Watch report cited above makes the point that having legal representation in debt collection actions results in just outcomes:

The limited available evidence seems to indicate that defendants with legal representation often fare reasonably well against debt buyers in court. Legal aid and consumer rights attorneys across several states told Human Rights Watch that they win the overwhelming majority of the cases they defend against debt buyers. Some attorneys reported that if they advanced a vigorous defense, debt buyers often simply dropped the case. This might reflect plaintiffs' uncertainty about their ability to prevail at trial, or a simple calculation about the time and resources they are willing to invest litigating a relatively small debt.

When Human Rights Watch asked a legal aid attorney in Pontiac, Michigan whether her office had ever lost a trial in a debt buyer case, she replied, "I can't remember any. We find the junk debt buyers often do not have any appropriate proof, they come to trial with no witnesses or documentation so they just give up when they get to the end."

In some cases, judges may simply be more inclined to take a defendant seriously if they are represented by an attorney. Steven McMurray, chief judge of the justice courts in Maricopa County, Arizona told Human Rights Watch, "If the person shows up with a competent attorney, this case is not getting resolved in five minutes," he said. "That person [the attorney] is here for a reason. Justices of the Peace are used to processing cases fast and efficiently but if an attorney shows up we pull it off that greased

rail process." Unfortunately, the vast majority of defendants in debt buyer cases do not have legal representation and, in many courts, are stuck on precisely the kind of "greased rail process" Judge McMurray alluded to.

Rubber Stamp Justice, *supra*, beginning at note 180. Notably, Florida legal aid and consumer rights attorneys in the state of Florida were among those interviewed by Human Rights Watch and reported that they win the overwhelming majority of the cases they defend against debt buyers. *Id.* at note 185.

Judges across the country have also observed the efficacy of providing consumers who are sued by debt buyers with access to legal representation. In Michigan, for instance, Judge Charles Goedert of the state's 43rd District Court launched a very simple program in collaboration with the National Legal Aid and Defender Association (NLADA). The court schedules all debt buyer cases on the same morning every week and invites NLADA attorneys to set up a table outside the courtroom to offer advice and in some cases representation to defendants. Judge Goedert had this to say about the program:

We just want to make sure there's a level playing field and that everyone has a fair chance... A lot of times people get good outcomes that they would not have been able to get if they were representing themselves.

Human Rights Watch telephone interview with The Honorable Charles Goedert, 43rd District Court, Hazel Parks, MI, April 29, 2014.

Both statistically and anecdotally, providing a means by which consumers in the state of Florida can have an opportunity for access to legal representation, as Section 57.105(7) does and was intended to do, results in more just outcomes.

D. Application of 57.105(7) in the Consumer Debt Collection Context Has Helped to Level the Playing Field

While there is no study in Florida demonstrating the effectiveness of construing Section 57.105(7) in affording access to legal representation in debt collection actions, the effect can be measured by the number of cases where an attorneys' fee was awarded to counsel for the consumer. In scores of cases just in the past 4 years, Florida trial courts have properly found entitlement to attorney fees where the debt collector brought an account stated claim and a debtor's attorney gained a dismissal of the claim.¹

The high number of cases where attorneys' fees are awarded to Florida consumers demonstrates the meritless nature of many debt collection actions, showing the need for the construction of § 57.105(7) that Petitioners advance.

¹ See *Asset Acceptance, LLC v. Lisa K. English*, 24 Fla. L. Weekly Supp. 353a (Fla. 13th Cir. Ct. 2013); *Cach, LLC v. Kevin Largie*, 24 Fla. L. Weekly Supp. 385a (Fla. Brevard Cty. Ct. 2016); *Cach, LLC v. Taite*

McBean, 24 Fla. L. Weekly Supp. 361a (Fla. Hillsborough Cty. Ct. 2015); Calvary Portfolio Services, LLC. v. Budnik, 18 Fla. L. Weekly Supp. 1035a (Fla. Polk Cty. Ct. 2011); Cunliffe v. Portfolio Recovery Associates, LLC, 20 Fla. L. Weekly Supp. 1125b (Fla. 9th Cir. Ct. 2013); Midland Funding, LLC. v. Alvedene Beaty, 24 Fla. L. Weekly Supp. 571b (Fla. Hillsborough Cty. Ct. 2013); Midland Funding, LLC. v. Jean Cazeau, 24 Fla. L. Weekly Supp. 641a (Fla. Broward Cty. Ct. 2016); Midland Funding, LLC. v. Sandra Chapman, 24 Fla. L. Weekly Supp. 577a (Fla. Hillsborough Cty. Ct. 2016); Midland Funding, LLC. v. Robert Cody, 24 Fla. L. Weekly Supp. 624a (Fla. Hendry Cty. Ct. 2016); Midland Funding, LLC. v. Ronald Faulk, 24 Fla. L. Weekly Supp. 345a (Fla. Sarasota Cty. Ct. 2016); Midland Funding, LLC. v. Reginald Felder, 24 Fla. L. Weekly Supp. 168a (Fla. Hillsborough Cty. Ct. 2016); Midland Funding, LLC. v. Wilfred Gregory, 24 Fla. L. Weekly Supp. 699a (Fla. Orange Cty. Ct. 2016); Midland Funding, LLC. v. Rick King, 24 Fla. L. Weekly Supp. 348b (Fla. Sarasota Cty. Ct. 2016); Midland Funding, LLC. v. Murissa Jack, 25 Fla. L. Weekly Supp. 377a (Fla. Hillsborough Cty. Ct. 2017); Midland Funding, LLC. v. Edith Lopez, 24 Fla. L. Weekly Supp. 351a (Fla. Sarasota Cty. Ct. 2016); Midland Funding, LLC. v. Elizabeth Melendez, 24 Fla. L. Weekly Supp. 573a (Fla. Hillsborough Cty. Ct. 2016); Midland Funding, LLC. v. Erica Nunez, 24 Fla. L. Weekly Supp. 529a (Fla. Leon Cty. Ct. 2016); Midland Funding, LLC. v. Samuel Perry, 24 Fla. L. Weekly Supp. 643a (Fla. Lee Cty. Ct. 2016); Midland Funding, LLC. v. Denise Reed, 24 Fla. L. Weekly Supp. 765a (Fla. Brevard Cty. Ct. 2016); Midland Funding, LLC. v. Elisa Russo, 24 Fla. L. Weekly Supp. 771a (Fla. Broward Cty. Ct. 2016); Midland Funding, LLC. v. James Sasser, 24 Fla. L. Weekly Supp. 624a (Fla. Duval Cty. Ct. 2016); Midland Funding, LLC. v. Jeffrey Smith, 19 Fla. L. Weekly Supp. 889a (Fla. Baker Cty. Ct. 2012); Midland Funding, LLC. v. Brenda Stokes, 24 Fla. L. Weekly Supp. 625a (Fla. Duval Cty. Ct. 2016); Midland Funding, LLC. v. Hernan Villena, 24 Fla. L. Weekly Supp. 772a (Fla. Broward Cty. Ct. 2016); Midland Funding, LLC. v. Terry Yake, 25 Fla. L. Weekly Supp. 357b (Fla. Duval Cty. Ct. 2017); Midland Funding, LLC. v. Angela Williams, 24 Fla. L. Weekly Supp. 295a (Fla. Leon Cty. Ct. 2016); Midland Funding, LLC. v. Diana Wyatt, 24 Fla. L. Weekly Supp. 575a (Fla. Hillsborough Cty. Ct. 2016); Palisades Collection, LLC. v. Robert Grassano, 19 Fla. L. Weekly Supp. 394a (Fla. Polk Cty. Ct. 2011); Portfolio Recovery Associates, LLC. v. Tammy R. York and Morton Smith, II and Tammy Holley Jacobson, 25 Fla. L. Weekly Supp. 4a (Fla. 10th Cir. Ct. 2017); Portfolio Recovery Associates, LLC. v. Wade Blanchard, 24 Fla. L. Weekly Supp. 354a (Fla. Hillsborough Cty. Ct.

2016); Portfolio Recovery Associates, LLC. v. Jenna Cole, 24 Fla. L. Weekly Supp. 323b (Fla. 13th Cir. Ct. 2015); Portfolio Recovery Associates, LLC. v. Jeraldine Edwards, 24 Fla. L. Weekly Supp. 575a (Fla. Hillsborough Cty. Ct. 2016); Portfolio Recovery Associates, LLC. v. Jose Lara, 24 Fla. L. Weekly Supp. 362b (Fla. Hillsborough Cty. Ct. 2016); Portfolio Recovery Associates, LLC v. Makeda Benjamin, (Fla. 9th Cir. Ct. 2016); Portfolio Recovery Associates, LLC. v. Berenice Ramirez, 24 Fla. L. Weekly Supp. 360a (Fla. Hillsborough Cty. Ct. 2016); Portfolio Recovery Associates, LLC. v. Patricia Suttle, 24 Fla. L. Weekly Supp. 359a (Fla. Hillsborough Cty. Ct. 2016); and Target National Bank v. Kelly L. Crunk, 22 Fla. L. Weekly Supp. 726a (Fla. St. Johns Cty. Ct. 2014).

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E. Debt Collectors File Account Stated Claims to Evade Liability for Fees in Cases Based upon a Written Contract

Section 57.105(7) must be construed to apply in "account stated" cases based upon contractual credit card debt. Wily debt buyers like Respondent Portfolio are using "account stated" claims in an effort to evade reciprocity and to choke off the handful of consumers who are able to find representation because of the prospect of earning fees. The debt collectors forego traditional breach of contract claims available as a result of the underlying credit agreement. *See* Emanwel J. Turnbull, *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection*, 38 Vt. L. Rev. 339,340 (2013). They instead characterize the claim as one for "account stated" and thereby attempt to thwart the requirement of actually producing the underlying agreement on which the suit is based. *See id* at 343-44. This tactic also permits them to avoid the need for the individual charges and payment history. *Id.*; *see also In re: Portfolio Recovery Assoc., LLC*, 2015-CFPB-0023, Doc. 1 at 7-8 (US CFPB Sept. 9, 2015) (describing debt buyers and collection practices in Portfolio's order issued from the U.S. Consumer Financial Protection Bureau), *available at* R.31-90, R.37-38. This tactic has afforded debt collectors the ability to argue that Section 57.105(7) does not apply, attempting to deny the debtor any prospect of defense as in the case below. *See Turnbull, Account Stated Resurrected*, 38 Vt. L. Rev. at 362.

This Court should not allow debt buyers to make an end run around the legislature's intent in this way. To do so would make a mockery of the important policy considerations laid out above - reasonable opportunity for access to legal representation and a level playing field. Construing the statute to give consumers an opportunity to retain counsel does not tilt the table in favor of consumers or give consumers an automatic win. Rather, it simply ensures that "account stated" debt collection actions are adjudicated on the merits.

CONCLUSION

NACA urges this Court to clarify the conflict in District Courts in question in favor of the Respondent's position raised in its briefs before this Court.

Respectfully submitted this 10th day of January, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 10, 2020, I electronically filed the foregoing document with the Clerk of Court using the E-portal Filing System. I also certify that the foregoing document is being served this day on all counsel of record by electronic mail, pursuant to Florida Rules of Judicial Administration 2.516 on all counsel of record.

/s/ Janet R. Varnell
Janet R. Varnell

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CERTIFICATE OF COMPLIANCE

I certify that this computer-generated Brief is prepared in Times New Roman, size 14 font and complies with the font requirements of Rule 9.210 (a)(2), Florida Rules of Appellate Procedure.

/s/Janet R. Varnell

Janet R. Varnell

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