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Policy Brief

Small Claims Court Reform

THE PROBLEM

Small claims courts were developed in the United States in the early part of this century to increase citizen access to justice for small monetary claims. Recently, however, small claims courts have been severely criticized for their inaccessibility to ordinary citizens and their ineffectiveness in providing justice to small claims litigants:

- Inconvenient court hours, excessive delays between case filing and trial, and the high cost of pursuing a claim discourage potential plaintiffs from filing legitimate claims.
- *Pro se* litigants, especially defendants, are given inadequate assistance in preparing for trial.
- Disproportionate use of small claims procedures by businesses, creditors, and landlords tarnishes the public image of the courts.
- The time pressure created by crowded dockets, the difficulty of dealing with *pro se* litigants, and the belief that small claims are of little consequence cause many judges to process cases in hurried, assembly-line fashion.
- Permitting attorneys to participate actively during trial puts *pro se* litigants at a distinct disadvantage and defeats the purpose of the small claims court — to provide an informal, speedy, and inexpensive forum for the resolution of minor claims.
- Uncollected judgments are a serious problem: studies show that between one- to three-fourths of judgment creditors are never paid.

While the deficiencies of the nation's small claims courts are numerous, most critics have not recommended their abolition, but instead have argued for major reform. A revitalization of these courts can be accomplished.

CONTENTS OF THIS BRIEF

This brief reviews the major criticisms that have been leveled against small claims courts and assesses whether there is evidence to substantiate them. It lists the many reforms that have been offered to answer those criticisms, taking note of any practical or legal restrictions that might limit their implementation. Finally, this brief lists sources for further information on small claims court reform, including model legislation, key journal articles and monographs, and experts on small claims courts.

- Section I describes the objectives of small claims courts and the criticisms that have been leveled against them.
- Section II reviews the reforms that have been suggested to improve the accessibility and effectiveness of the courts.
- Section III describes the need for state legislative action to reform the courts.
- Section IV lists sources of further information and assistance.

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I. INTRODUCTION: A Forum for Minor Disputes

Development of Small Claims Courts

Until the early part of this century, the nation's Justice of the Peace Courts were the principal forum for the resolution of minor civil disputes. While these courts were in many ways well-suited to the needs of an agrarian society, they were inadequate to cope with the demands of a society that was increasingly urban, industrialized, and mobile (23). The regular civil courts, because of their higher costs, the complexity of their procedures, and crowded dockets, were also an inadequate forum for minor disputes (28, 42). In response, small claims courts were established in the early 1900's in several urban jurisdictions and eventually on a statewide basis in many states.

Small claims courts are typically a special part or division of a lower or district court and usually have concurrent jurisdiction with that court over small claims disputes. In a few states, however, such cases are still handled by Justices of the Peace. In most states, small claims courts hear only actions involving monetary relief.[1] The size of the jurisdictional claim limit varies widely across the states,[2] but most have upper limits between $750 and $1,000. The subject matter is restricted to tort, contract, and personal property damage suits, with libel and slander generally excluded.

Small claims courts are designed to be used by all citizens, regardless of their economic circumstances, cultural background, or legal sophistication. To this end, the courts typically differ from regular civil courts in the following ways:

- A suit can be initiated by filling out a simple form that requires only a brief description of the basis for the claim.
- Court costs are reduced through substantially lower filing fees.
- Defendants typically are not required to file an answer before appearing at trial.
- Trials are relatively informal, with relaxed rules of evidence.
- Jury trials are usually not permitted in small claims courts. In some states, a defendant can secure a jury trial by transferring the case to the court's regular civil division. In others, the right to jury trial is guaranteed through *de novo* appeal.
- While a majority of the states permits parties to have attorney representation, it is not required. The courts are expressly designed to encourage litigants to represent themselves.

In addition, depending on their abilities and their preferences, small claims judges may play a more active role during trial by directly eliciting information from the parties and encouraging compromise settlements between them.

[1] A handful of states do permit small claims courts to hear cases involving equitable relief. For example, Nebraska allows the courts to rescind contracts for the sale of goods and services, NEB. REV. STAT. sec. 24-522(2).

[2] For example, the limit for small claims in the State Court of Fulton County in Atlanta, Georgia, is $300, but the small claims limit in Alaska is now $2,000. Occasionally, an exemption to the limit is statutorily required. For example, in Massachusetts, the jurisdictional claim limit does not apply to motor vehicle claims, MASS. GEN. LAWS ANN. ch. 218, sec. 21.

Criticisms Leveled Against Small Claims Courts

Over the years, the small claims courts became an institutionalized, but often neglected, part of the court system. These courts received increased attention (and increased criticism) with the advent of the consumer protection movement in the 1960's. Ironically, small claims courts, which were designed to avoid the deficiencies of the regular court system, are now cited by critics for those same deficiencies — excessive delays, high costs to litigants, cumbersome procedures, and inaccessibility to ordinary citizens. There are other problems with the nation's small claims courts. Default rates in some courts run a staggering 40 to 60 percent (24, 32, 42). Once a judgment has been awarded, there is no guarantee that the judgment debtor will pay the claim. In fact, in many courts, 25 to 75 percent of the judgments are never paid (7, 31, 33, 36, 42). Some critics have decried the heavy use of the courts by businesses, creditors, and landlords against nonbusiness defendants, claiming that the transformation of the courts into "collection agencies" may discourage the filing of consumer complaints (21, 28).

An additional problem with small claims courts appears to be the attitude of the judiciary. Many judges do not look forward to small claims duty (5, 20, 24, 30). The cases involve small amounts of money, and few are legally complex. Judges must cross-examine the parties and their witnesses, examine physical evidence, and help *pro se* litigants develop their cases; at the same time, judges must remain impartial and issue judgments that are consistent with substantive law. Crowded dockets prevent careful deliberation and necessitate quick decisions. As a result of these factors, many small claims judges process cases with excessive dispatch. Litigants may not be given sufficient opportunity to explain their side of the case. Critical aspects of the case may not be explored. Many judges do not explain or even announce their decision at the end of trial. The unfortunate result is that *pro se* litigants often find small claims court to be confusing, hurried, and impersonal.

Finally, many cases that come before small claims courts are not well-suited to the adversarial process. First, as noted before, only monetary remedies are available in most small claims courts. Yet, for many disputes, including consumer cases, the best solution may be some form of equitable relief (e.g., order or agreement to repair, replace, refund, reform, or rescind). Second, many complaints represent the culmination of a long history of problems between the parties. But the courts must focus on the specific complaint at hand and cannot fully address the underlying problems that are at the root of such controversies. Cases involving a personal conflict between the parties are especially dreaded by many small claims judges. Third, many cases require a compromise solution. The courts cannot always deal effectively with such cases, not only because of their inability to provide equitable relief, but also because of their "winner-take-all" orientation.

Prior to trial, some judges will actively help the parties fashion a compromise settlement to their dispute. Others will suspend execution of a monetary judgment in order to give the parties an opportunity to effect an equitable settlement. Thus, in some courts, judges have devised their own ways of circumventing these limitations of the small claims forum. But some judges find the informal rules of procedure typically used in small claims courts to be extremely discomforting and are therefore unwilling to deviate very much from their normal judicial role (24, 33). Furthermore, judges vary tremendously in their ability to mediate compromise settlements. And some feel that the heavy small claims caseload in their court prohibits them from taking the time to mediate cases. As described below, because many cases are not well-suited to the adversarial process, some courts have established experimental programs to test the use of mediation or arbitration for resolving small claims disputes.

In Section II of this brief, these criticisms of small claims courts and the recommendations that have been made to address them are examined in detail.

II. KEY RECOMMENDATIONS: Small Claims Court Reform

Small Claims Court Jurisdiction

In recent years, legislatures in several states have acted to increase the jurisdictional claim limit for small claims courts. Those states that have not should do so. Adjustments in the claim limit are necessitated by a rate of inflation that has nearly tripled the Consumer Price Index since 1967. If the limit is too low, litigants are effectively denied a judicial remedy for claims involving expensive consumer items such as appliances (2, 20, 24). A low limit may also cause complainants to truncate their claims in order to avoid the higher costs and inconvenience of the regular civil court, but in doing so, they may be quitting legitimate claims (21).

It should be noted, however, that there are potential problems if the jurisdictional claim limit is raised too high. Both judges and litigants are increasingly uncomfortable with the informality of small claims procedures as the limit is raised. Some judges may want to tighten the rules of evidence or follow more formal court procedures (2). Litigants may be more likely to secure attorney representation (14, 20). More plaintiffs may choose to file their complaint in the regular civil court. Where the option can be exercised, more defendants may seek to have their case transferred. The number of appeals may be greater (24).

With these considerations in mind, several commentators on small claims procedures have urged that state legislatures adopt a small claims limit of $1,000 (1, 6, 24). Adjustments for inflation should be made every three to five years. When consumer plaintiffs are entitled to file for double or treble damages, and the total amount claimed exceeds the jurisdictional claim limit, such claims could still be heard in the small claims court.

Accessibility and Convenience of the Court

Public Awareness. The need to publicize small claims courts more actively is widely recognized. One study found that only 26 percent of small claims court users had already known of the court's availability before the case in question arose. While most learned of the court from family, friends, co-workers, or attorneys, only 12 percent had seen a public notice in the mass media (33). Proposals for increasing public awareness of the courts vary tremendously in scope and cost. These include:

- making greater use of public service advertising (39);
- producing mailing inserts or circulars to enclose with other government correspondence (21);
- requiring certain businesses to include a notification of the court's availability on warranties or bills of sale (20);
- listing the small claims court in the telephone directory under "services and frequently called numbers" (31, 39); and

- establishing an advisory panel of court personnel, business representatives, and citizens to promote the court's use and to serve as a liaison between the court and the community (1).

Some members of the judiciary oppose such efforts, especially the more costly ones, on the grounds that it is improper for the courts to "drum up" business (19). However, because the courts have been so severely criticized for their domination by business (see p. 9) they should make their availability better known to the public.

Hours of Operation. The prospect of making several trips to the courthouse during working hours effectively discourages many complainants from pursuing their claim in court and exacerbates the problem of defendants not appearing for trial.[3] A recent study in Massachusetts showed, for example, that 63 percent of plaintiffs and 57 percent of defendants had to miss work for their court appearance (32). Thus, nearly every critic of small claims procedures has recommended that the courts schedule evening or weekend sessions (6, 9, 12, 21, 25, 29, 33). Judges should authorize a survey of small claims litigants to see if there is demand for such sessions, for in some jurisdictions they prove to be unpopular.[4] Others have recommended that filing by mail be permitted (15) or that the court clerk's hours also be expanded so that complainants can file more easily (32). Both of these recommendations warrant consideration.

Trial Schedule. Potential litigants may also be discouraged by the prospect of long court delays. One nationwide survey of small claims courts revealed that the average time between case filing and trial is eight weeks, but that some courts experience delays of up to 20 or more weeks (18). Moreover, litigants can often expect delays on the day of trial itself. In some courts, all cases are scheduled for the same time. Parties must be present for the calendar call and then wait, sometimes for several hours, for their cases to be called. Moreover, default cases or those involving attorneys are frequently given precedence.

Several good suggestions have been made to remedy these scheduling problems. Delays between filing and trial can be minimized by requiring that a hearing be held within a specified time (e.g., 30 or 40 days) of the defendant's receipt of summons. Of course, there should also be a minimum time period between the service of process and trial so that the defendant has adequate time to prepare a defense.[5] In addition, to minimize inconvenience to litigants, continuances at or before trial should be granted sparingly and only for good cause (e.g., the defendant raises a counterclaim at trial for which the plaintiff is unprepared) (20, 39). When a continuance is granted, the case should be rescheduled with the same judge whenever possible (33).

[3]Venue should be the defendant's place of residence or business or where the transaction in dispute actually took place (20, 29). By statute, the judge should be allowed to transfer a trial to a more convenient court, either on motion of one of the parties or on his own initiative (14).

[4]Weekend and evening hours are typically unpopular with the court staff, especially if they must work overtime. A recent study of the Massachusetts courts showed, for example, that many court clerks were not telling litigants that they had the option of scheduling their trial for a Saturday hearing (32). Court staff should be given compensatory time off for working weekends and evenings (39).

[5]For example, California requires that trial be held not less than 10 days or more than 40 days after the defendant's receipt of summons for defendants who reside in the county of the court, and not less than 30 days or more than 70 days for defendants who reside outside the county; CAL. CIV. PROC. CODE sec. 116.4.

Other suggestions include:

- initiating special dockets for certain types of cases — defaults, collection cases involving business plaintiffs, cases requiring expert testimony such as dry cleaning or automobile repairs (24, 33);
- for the convenience of litigants, scheduling cases for specific and staggered times, rather than all at once (4, 39); and
- having several judges hear cases at the same time (i.e., multiple trial parts) (39).

It should be noted that, in fairness to all litigants, scheduling preference should not be given to default cases or to those involving attorneys (40). Of course, in the latter case, such preference is normally given to minimize litigants' legal costs; but this goal can be accomplished instead by using staggered schedules.

Bilingual Services. For some Americans, an inadequate facility with English is a barrier to their use of small claims courts. In jurisdictions with large non-English-speaking populations, the court should develop bilingual complaint forms and brochures (20, 29). Other critics of small claims courts have pointed to the need for bilingual intake services and for court interpreters (9, 23, 29, 33).

Financial Costs. A final barrier to the public's use of small claims courts is the financial cost of pursuing a claim. Fees must be paid to file the claim and to execute service of process. More significantly, as already noted, litigants must often take time off from work to attend their hearing and may lose a full day's wages as a result.[6] In addition, many small claims litigants, unwilling to take the risk of representing themselves, pay substantial lawyers' fees. In many cases, potential litigants tally up these costs and decide that their grievance is simply not worth pursuing.

There are several possible ways of reducing these costs. As noted before, litigants should be given the option of having their hearing scheduled for a time outside of regular working hours. The issue of whether attorneys should be permitted in small claims court is a complex one (see p. 10). So long as they are not banned, there will be parties who want and can afford attorney representation. What the courts must do, then, is to undertake reforms that will make litigants feel more at ease about proceeding *pro se* (see next section). Finally, if fees for filing or service of process are beyond the means of any litigant, such fees should be waived upon the complainant's signature to a sworn statement of indigency (2, 14, 15).

[6]These lost wages typically amount to nearly a third of the amount of the disputed claim for both plaintiffs and defendants (33). A recent study in Florida showed that 22 percent of the surveyed litigants lost wages as a result of pursuing or defending against a small claim (7).

Assistance for Pro Se Litigants

The small claims court is often a person's first and only contact with the court system. Thus, litigants are often ignorant of judicial procedures and have little idea of what to expect at trial. Several critics assert that the courts do not do enough to help disputants prepare for trial (27, 28, 31). In many jurisdictions, brochures have been developed to help litigants prepare, but they often use technical language or are insufficiently detailed. Intake clerks in some courts have been criticized for their unhelpful attitude toward *pro se* litigants and their preferential treatment toward attorneys (17, 24).

This problem of inadequate assistance is especially critical for *pro se* defendants. Unlike plaintiffs, defendants usually have no direct contact with the small claims clerk prior to trial. Complaint forms often fail to explain what the defendant must do to defend against the claim or to list sources of help. Furthermore, many individual defendants are sued by businesses, creditors, or landlords who can afford to hire an attorney. Even where attorneys are banned from small claims court, such plaintiffs have learned through experience how to handle their claims and still hold a distinct advantage over individual defendants. Finally, recently enacted consumer protection laws provide defendants with a variety of legal defense options, but defendants are largely ignorant of them. Unfortunately, judges and clerks usually fail to suggest these defenses to *pro se* litigants, often because they, too, are unfamiliar with those provisions (28, 29, 33).[7]

Several steps can be taken to provide better assistance to *pro se* litigants.

Complaint Forms. Recommended modifications of complaint forms focus on the need to inform defendants of their rights (9, 20, 39).[8] Suggested contents for revised forms include:

- a clear description of the complaint and an explanation of what the defendant must do to defend against it;
- a listing of options available to the defendant, including the right to seek a continuance, a change in the trial date, or development of an installment payment plan; and
- an explanation of what help is available to the defendant, either through the court clerk or elsewhere, plus a list of phone numbers for the court clerk, legal service agencies, and consumer groups.

The complaint form should also announce the availability of a brochure that describes the small claims court and trial procedures.

Brochures. Small claims courts should provide both plaintiffs and defendants with a brochure that lists the types of cases handled by the court; outlines the processing of small claims cases, including a detailed description of a typical trial day; offers advice on how to prepare for trial; and lists the names and telephone numbers of court personnel who can be contacted for further information. Step-by-step instructions should be presented on filing, identifying the proper defendant, arranging for service of process, obtaining legal assistance, and filing an appeal.

[7]One suggestion for increasing judges' awareness of consumer defenses is to assemble a benchbook that includes a checklist of relevant statutes (39).

[8]See Wolfe (40) for a sample complaint/summons form.

The brochure should also explain the court's collection process, including detailed instructions on how to initiate execution of a wage garnishment, property attachment, or other remedies. Other desirable features include: an exhortation to litigants to settle their dispute out of court; a checklist to help litigants keep track of what they need to do; and separate brochures for plaintiffs and defendants.[9] Defendants should receive a brochure with the complaint. As noted before, bilingual brochures should be developed in jurisdictions with a large non-English-speaking population.

Clerk Assistance. Filing clerks at most small claims courts routinely offer advice to plaintiffs (e.g., evidence and witnesses needed to prove a claim; how to obtain further legal advice; how to find a business's corporate name)[10] and provide assistance in filling out the complaint form (40). One author has recommended that court clerks be allowed to screen cases and to reject those that seem frivolous or have no valid cause of action, provided that a complainant can appeal to a judge for permission to file (20). Obviously, few courts will want to give this kind of discretionary power to their filing clerks. While clerks might be allowed to advise plaintiffs that they lack a valid claim, they should do so cautiously, and no party should be barred by the clerks from filing (40).

In some courts, clerks are confused about how far they can go in giving advice, fearing that they may be charged with the unauthorized practice of law (7, 8). This confusion can be minimized if the court develops a manual for the clerks that clearly spells out what advice they are permitted to give (20, 31, 40). The manual should describe required procedures, how to help plaintiffs fill out the complaint form, and how to respond to specific requests for help or information. A one-page checklist should also be developed to remind clerks of these guidelines.

Clerks also need to be trained in consumer law (4, 39). They should be able to inform plaintiffs of double or treble damages to which they might be entitled in certain cases. And they should be familiar with possible legal defenses that defendants can raise against claims filed by businesses or creditors.

As noted before, defendants usually do not have any direct contact before the trial with the small claims clerk. Thus, while plaintiffs can benefit from the clerk's advice and help, defendants typically do not. Practically, all that can be done to remedy this problem is to proclaim the clerk's availability on the complaint form and in the brochure. To give defendants the same degree of access enjoyed by plaintiffs, clerks should be permitted to give defendants advice over the telephone (33).

Finally, when the judicial budget permits it, clerks and other court staff should be assigned exclusively to the small claims division (15, 20). When staff must also handle filings for the regular civil court, small claims litigants are too often given short shrift. Similarly, if possible, the small claims filing desk should be physically separate from the main filing desk and clearly identified.

[9]Sample handbooks for both plaintiffs and defendants appear in Wolfe (40). To supplement its brochure, the Hennepin County Conciliation Court (Minnesota) developed a slide-tape presentation to introduce first-time litigants to the small claims process. According to Judge James D. Rogers, production costs for that tape were less than $300; the court's projector cost an additional $300.

[10]It has been urged that litigants be permitted to sue businesses under their commonly used name, not just their legal corporate name (23, 31, 39).

Legal Advisors. To reduce the advantages enjoyed by parties who have an attorney, numerous commentators recommend that legal advisors be made available to all litigants, either to help in case preparation or to assist in the actual presentation of the case before the judge (6, 9, 27, 29). Beyond that suggestion, the Model Small Claims Court Act stipulates that the administrative judge of the small claims court appoint an "ombudsman" whose duties would include reminding litigants of hearing dates, helping them prepare for trial, giving legal advice, and representing certain *pro se* litigants at trial. At the request of the court, the ombudsman could serve as a mediator or help a winning plaintiff with collection of the judgment. In addition, the ombudsman could be responsible for meeting with community groups, publicizing the court, and responding to complaints (1, 32).

Unfortunately, few courts can afford to hire such personnel. Litigants' need for assistance can be partially met by specifying for clerks what advice they are permitted to give, as already noted. In addition, more extensive assistance can be provided by law students or paraprofessional volunteers, if they are properly supervised by the judicial and clerical staff (20, 40). When a *pro se* litigant's opponent is represented by an attorney, a volunteer should be allowed to speak for that litigant as a surrogate. If the other party is not represented, the volunteer's role should be limited to giving advice to the litigant prior to trial.

Restriction of Transfers to the Regular Civil Court

If a defendant can transfer a case to the regular civil court, and thereby increase the plaintiff's litigation costs, the purpose of small claims court is defeated. In many courts, transfer of the case occurs when the defendant files a counterclaim that exceeds the court's jurisdictional claim limit. A defendant can abuse this provision, filing a counterclaim for the sole purpose of moving the case to a more expensive forum and discouraging the plaintiff from pursuing the claim. To prevent this, it has been recommended that counterclaims exceeding the claim limit not be allowed and that defendants having legitimate counterclaims which exceed that limit be required to file a separate suit in the regular civil court (12, 14, 20). Another alternative is to allow the case to be transferred, but to have it tried by the same informal rules of procedure and evidence used in the small claims division (33). Defendants should be allowed to raise counterclaims at trial, since many will not learn that they have a legitimate claim prior to trial. If a plaintiff is unprepared to defend against the counterclaim, a continuance should be granted.

In many states, defendants are given the option of having their case transferred in order to exercise their right to a jury trial or their right to attorney representation. Because of the potential for abuse of that procedure, those rights should instead be protected by allowing defendants to file an appeal for a trial *de novo*. The California Supreme Court ruled in 1946 that this provision was satisfactory for guaranteeing the right to counsel, declaring that due process is not denied "so long as the right to appear by counsel is guaranteed in a real sense somewhere in the proceedings."[11] A similar ruling was recently made by Montana's Supreme Court concerning

[11] *Prudential Insurance Co. v. Small Claims Court*, 76 Cal. App. 2d 379, 173 P.2d 38 (1946). See also *Foster v. Walus*, 81 Idaho 452, 347 P.2d 120 (1959) and *North Central Services, Inc. v. Hafdahl*, Mont. 625 P.2d 56 (1981).

the right to jury trial.[12] By requesting trial *de novo* on appeal, defendants can still thwart plaintiffs by removing their case to the regular civil division, but this is probably less likely to occur than when transfer is allowed prior to trial in the small claims court.

While transfers to the regular civil court should be discouraged, small claims judges must still be able to exercise their discretion in transferring cases for good cause — for example, if a plaintiff appears to have waived too much of the claim in order to meet the court's jurisdictional claim limit; if the case involves important, unusual, or complex points of law and requires full development by attorneys; if there are multiple parties involved; or if the required evidence is difficult to produce (14, 24, 39).[13]

No Restriction on Business Use of the Court

With the recent rise of the consumer protection movement, small claims courts have been severely criticized for their heavy use by businesses, creditors, and landlords against individual, often lower income, defendants. In some courts, a handful of business plaintiffs are responsible for an enormous share of the caseload.[14] In contrast, filings for consumer complaints against businesses are relatively infrequent. One nationwide study of small claims courts showed, in fact, that consumer complaints typically range between 1 and 29 percent of a court's caseload (7, 20, 32, 33). Because the courts have a pro-business image, critics assert, consumers are being discouraged from filing their claims. One frequently offered solution is to ban business interests from small claims court (18, 29).[15] Should corporations, collection agencies, and creditors be barred from filing in small claims court?

Several objections to this policy can be raised. First, it must be remembered that the primary purpose of small claims court is to handle certain types of claims efficiently and inexpensively, not to protect a certain class of litigants or to serve a consumer protection role. Second, if businesses are denied access to the court, they will file in the regular civil court, where court costs are higher and defendants will need to hire an attorney to represent them (33). Third, a ban on businesses may deny court access to small businessmen who cannot afford to pursue a case in the regular civil court. Fourth, it is unfair to deny access to all business litigants simply because the courts may have been abused by a few. If it is found that the simple and inexpensive procedures of the small claims court are being routinely used for purposes of harassment or to enforce claims based on unfair or fraudulent trade practices, the court can order that the offending party be barred from filing in the small claims court (14, 23).

[12] *North Central Services, Inc. v. Hafdahl*. The Montana Supreme Court found a basis for its ruling in *Capital Traction Co. v. Hoff*, 174 U.S. 1, 19 S. Ct. 580, 43 L.Ed. 873 (1898), where the Supreme Court held that a trial by a judge in a Justice of the Peace Court with trial by jury only on appeal was constitutional.

[13] Upon the motion of the defendant, a case filed in the regular civil court which could have been brought originally in the small claims division should be transferred to that division (2).

[14] In a Rhode Island small claims court, for example, three business plaintiffs were responsible for approximately 25 percent of the cases filed. Use of the courts by these businesses was so heavy that the court had rubber stamps made to affix their names to court documents (35).

[15] One author recommends that large businesses and collection agencies be barred, but that sole proprietors and tradesmen be allowed to file in small claims court (23). Definitional problems make this unworkable.

Finally, a recent study by Ruhnka and his colleagues shows that there is no basic incompatibility between business and non-business use of the small claims court. For that investigation, the total filings by individuals in each of 15 courts were converted to rates per 1,000 population of the respective jurisdictions. Heavy use of the courts by businesses and collection agencies led to larger caseloads overall, but did not decrease the rate of individual use (33). Thus, there is no evidence that individual plaintiffs are being discouraged from using small claims courts because they are used heavily by business interests.

Other restrictions have been proposed to curb alleged abuses of the small claims forum by businesses, creditors, and collection agencies, including:

- placing a limit on the number of claims that a party can file during a specified time period (2, 20, 24, 29);
- requiring heavy users of the court to pay a filing fee surcharge (9);
- increasing the filing fee for a user by a specified amount with each successive claim (2, 24); and
- limiting the number of cases that will be heard for the same plaintiff on a single day (23).

The arguments raised against an outright ban of businesses from small claims courts can be raised against these proposals as well. If businesses have legitimate and provable claims against non-business defendants, denying them equal access to small claims court is simply unfair and unwarranted.

Rather than trying to discourage business use of small claims courts, reform efforts should focus on encouraging individual citizens to use them. As already noted, small claims courts need to be better publicized. In the previous section, several reforms that could make the small claims court a more accessible, convenient, and attractive forum for individual litigants were discussed.

An additional reform that may increase the attractiveness of the courts to individual litigants is to create a separate docket for debt collection cases (15, 32). Such a docket would also be more convenient for businesses which have filed several claims. More specialized courts are another possibility to consider. In Illinois, the Cook County *Pro Se* Court allows only individual, non-business litigants to file. Whether that degree of specialization is necessary or useful is disputed. Kosmin, for example, opposes separate consumer courts, claiming that there is no evidence to show that the low number of consumer cases is due to a lack of court specialization (24). The financial cost of a separate court for non-business plaintiffs is another argument against their establishment.

Restriction on the Role of Attorneys

Small claims courts have also been criticized for allowing parties to be represented by attorneys. Gould claims that this practice defeats the very purpose of the small claims court – to provide an informal, speedy, and inexpensive forum for small monetary disputes (20). The objections raised to attorney participation in small claims trials include the following:

- having one or both parties represented by an attorney increases the formality and, therefore, the duration of the hearing (17, 24);

- attorneys are more likely to request a continuance (17, 24);
- an unrepresented defendant is at a disadvantage, especially when the case is technically or legally complex (17, 18, 42);
- having a *pro se* litigant opposed by a party with attorney representation is awkward for the judge and makes even-handed conduct of the trial more difficult (17, 20, 33);
- a *pro se* complainant, learning that the defendant will have counsel, may be discouraged from filing or appearing for trial (17, 24, 34);
- a plaintiff can use the threat of attorney representation to press a *pro se* defendant into settling out of court, even when the defendant may have a legitimate defense (34); and
- attorneys' fees add considerably to the cost of pursuing or defending against a claim.

Those critics who have been concerned about heavy use of small claims courts by business interests have noted that business plaintiffs are more frequently represented by counsel than are individual defendants. In many courts, a single attorney is on retainer with a large number of corporations (22, 33).[16] For example, an examination of case records for a Massachusetts court revealed that 45 percent of the claims for one month were filed by one attorney who represented several companies (32).

To discourage attorneys from taking small claims cases, some states have imposed restrictions on the fees that they can earn from such cases.[17] Oklahoma, for uncontested cases, limits the lawyer's fees to 10 percent of the amount in dispute.[18] Nevada, on the other hand, does not allow winning parties to recover attorneys' fees.[19] Other jurisdictions have applied different restrictions. For example, in Montana attorneys can appear at trial only if both parties are represented.[20] Some critics have called for attorneys to be barred from small claims courts (2, 4, 6), and a few states have recently taken that step.[21]

It should be noted that a ban on attorneys has implications for other small claims court reforms that might be considered. First, with this ban, in order to guarantee the right to counsel and the right to a jury trial, litigants must be able to appeal for a trial *de novo* in the regular civil court where they would be represented by counsel.[22]

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[16]In some jurisdictions, all corporations are required to have attorney representation (e.g., D.C. Code Encyclopedia Ct. Rules, Rules for Small Claims and Conciliation, Rule 9b), a practice that is unfair to small businessmen (20, 33).

[17]WISC. STAT. ANN. sec. 799.25 (10)(a).

[18]OK. STAT. ANN. tit. 12, sec. 1751(b).

[19]NEV. REV. STAT. sec. 73.040.

[20]MONT. CODE ANN. 25-35-505(2).

[21]E.g., California: "No attorney at law or other person than the plaintiff and the defendant shall take part in the filing or the prosecution or defense of such litigation in small claims court, unless appearing to prosecute or defend an action by or against himself, or by or against a partnership in which he is a general partner and in which all the partners are attorneys, or by or against a professional corporation of which he is an officer or director and of which all other officers and directors are attorneys at law," CAL. CIV. PROC. CODE sec. 117.4. If this ban is implemented, one exception should be allowed: if one party in a case is an attorney, then the other party should be permitted to be represented (41).

[22]See Notes 11 and 12 above.

Second, banning attorneys may force some inexperienced litigants to proceed *pro se* against opponents who are much more familiar with the adversarial process (11, 24, 32).[23] Thus, if this ban is implemented, it should be coupled with improved efforts to provide legal assistance and greater judicial activism during trial. Moreover, if attorneys are barred, this is an additional reason for requiring that all small claims judges be attorneys (2).

Third, in jurisdictions which adopt a sizeable claim limit, litigants who are pursuing or defending against a large claim and cannot be represented by an attorney will be uncomfortable with the informality of the small claims court. Whether it is fair to require litigants to represent themselves *pro se* for cases involving substantial amounts of money can be questioned.

Fourth, if attorneys are banned, there should be concern over giving small claims judges the power to issue equitable judgments which can be enforced through contempt of court proceedings (39).

While allowing attorney representation in small claims cases has been widely criticized, several arguments can be made for continuing the practice. First, as just noted, the value of other desirable court reforms would be undermined if attorneys were banned. Second, small claims judges are sometimes criticized for giving judgments that are based more on common sense than on substantive law (8). This problem is partly due to the simplified procedures and fast pace in small claims courts. Importantly, attorneys can help a judge focus on the substantive issues involved in a particular case (20, 24). Third, court clerks and small claims judges are often ignorant of consumer defenses that can be raised in debt collection cases. Attorneys are more likely than *pro se* defendants to bring these defenses to the court's attention (20, 32, 39). Fourth, attorneys can act as a check on incompetent or biased judges (32). Finally, attorneys can help explain the judicial process to their clients, can temper their clients' expectations, and can explain to them their appeal rights. They can also help screen out unfounded or unwarranted claims (7, 20, 33).

Considering these several arguments, the best course is to allow those small claims litigants who want and can afford an attorney to have one. Most of the objections to permitting attorneys can be addressed by having the courts more tightly control the nature of their participation. Weller and Ruhnka urge that attorneys not be allowed to raise objections or otherwise interrupt an opponent's testimony. The judge should direct all questioning. In essence, attorneys should only be allowed to advise their clients during the trial (39). As a result, the disadvantage suffered by unrepresented parties can be minimized.

Protection of Defendants' Rights in Default Cases

Several critics of small claims courts see the high number of cases in which defendants do not appear for trial as an indicator of serious problems with the courts (21, 37). As noted before, in some small claims courts, the default rate is as high as 60 percent. Default rates are especially high when claims are brought by business plaintiffs, whether the defendants are individuals or businesses (3, 7).

[23]This point has sometimes been used to argue that attorneys should not be banned. While there are other reasons for rejecting a ban, this particular argument is not compelling: "Cases brought by litigants who are so totally frightened or inarticulate as to be unable to bring their case *pro se* will be too infrequent to justify the added expense, delay, and technicality that would result from allowing them to be represented by lawyers" (2, p. 771).

Several sources of this problem have been identified. First, as already noted, the time and location of the hearing is inconvenient for many defendants. Second, the complaint form used in most jurisdictions fails to inform defendants of their rights (33). Third, improper service of process can keep defendants from learning of a suit until after the judgment has been entered (37, 42). Fourth, judges do not always examine the plaintiff's evidence carefully before issuing a default judgment (24). Finally, defendants in debt collection cases sometimes believe that goods or services they receive are faulty, and they refuse to respond to the summons, not realizing the consequences of that refusal (16, 20, 33).[24]

To correct these problems, the courts must take greater steps to safeguard defendants' rights. Modifications that can be made in the complaint form which will help defendants more clearly understand both their rights and what is required of them have already been discussed. Both the complaint form and the brochure should spell out the consequences to defendants of not appearing for trial (2).

In addition, there must be verification that the defendant has received the summons to appear. Every method of service of process has its disadvantages. Personal service provides the best proof of service, but it is expensive; there is also the risk that a process server will fraudulently file proof of service without actually serving the summons (so-called "sewer service"). Service by certified mail is much less expensive. But defendants may refuse to sign the return receipt. And, in some cases, the post office will accept the signature of a person other than the addressee who resides in the household. Weller and Ruhnka advise that service by certified mail be used in the first instance, with personal service used when the certified letter is undeliverable, the party refuses to sign the return receipt, or someone other than the addressee signs the receipt (39). A default judgment should not be issued until the judge is totally convinced that the defendant received the summons.

The judge should also explore the plaintiff's earlier efforts to settle the dispute with the defendant before issuing a default judgment (14, 20).[25] Most important, the judge should require the plaintiff to represent a *prima facie* case before issuing the default judgment. The amount of damages claimed should be examined to make sure that it has not been inflated or merely estimated and does not include collection expenses or interest charges that were not previously agreed to by the two parties. Establishing a *prima facie* case requires a probe of all the facts, including whether any "unconscionable practices" attended the plaintiff's conduct in the matter (1, 15, 20, 33). Finally, defendants must be made aware that they have the right to request that a default judgment be vacated for good cause (1, 24).

If it is the plaintiff who fails to appear for trial, most courts dismiss the case without prejudice, thus giving the plaintiff an opportunity to refile. Instead, that failure to appear should be regarded as a failure to establish a *prima facie* case, and a judgment in the defendant's favor

[24]Caplovitz (10) reports that 35% of interviewed defaulters cited reasons for their nonappearance that concerned the creditor's actions.

[25]In Yellowstone County, Montana, a plaintiff must present to the clerk a copy of a certified letter to the defendant which offers settlement terms, plus the signed return receipt, before being allowed to file (41). Similarly, the Model Small Claims Court Act of the U.S. Chamber of Commerce stipulates that plaintiffs be required to sign a sworn affidavit that they made a good faith effort to resolve the dispute on their own before turning to the small claims court (1). Such requirements are not imposed on litigants in the regular civil court and are unwarranted.

should be issued. If evidence establishing a *prima facie* case was submitted upon filing, the defendant should be given the opportunity to defend against the claim. Plaintiffs should be allowed to refile upon showing good cause for their failure to appear (39).

Improvement of the Court's Collection Procedures

As noted before, uncollected judgments are a major problem for the nation's small claims courts. This problem is especially severe for default cases.[26] Despite the severity of this problem, relatively few courts are involved in the collection process, a deficiency for which they have been severely criticized (24, 32, 33, 37). In most jurisdictions, it is up to the winning party to keep track of any payments made, to notify the court when the judgment has been satisfied, to request a hearing for an examination of the defendant's assets when payment is not made, and to initiate a garnishment of wages or property attachment. Many judgment creditors turn to an attorney for help in negotiating the maze of rules and procedures they are required to follow. Of course, such demands are also made on a winning party by the regular civil court. But the high percentage of unpaid small claims judgments argues for special procedures to be adopted. No other problem with the small claims courts has inspired such a variety of recommendations for reform.

At the time of filing, plaintiffs need to be made aware of the difficulties of collection. They also need to be given detailed instructions on what procedures to follow, either through the court's brochure or an information sheet distributed by the filing clerk or at the end of trial (12, 33, 39).

Various "carrot and stick" approaches to inducing defendants to pay the judgment have been suggested:

- if the defendant pays within two weeks of receiving the judgment notice, the clerk should expunge the record so that the credit rating is unaffected (20);
- if the defendant pays immediately after the trial, the judge could persuade the plaintiff to waive court costs;[27]
- large interest penalties could be attached to unpaid judgments (18);
- if a judgment debtor has a record of unsatisfied judgments, the judgment creditor could be authorized to commence action for triple the amount of the unpaid judgment (13); and
- the court could notify licensing boards of any business which has not paid a judgment against it (23).

Other suggestions have focused on steps that could be taken to increase the helpfulness of court personnel in the collection process. The court clerk should at least help the judgment creditor fill out any forms that are required — e.g., request for hearing to examine the defendant's assets; request for show cause hearing; request for execution of the judgment by means of a

[26] A recent survey showed that collection rates for default cases are only one-half to two-thirds of those for contested cases (38).

[27] This procedure is followed in the Cook County *Pro Se* Court (17). This inducement does violate the premise that successful litigants should be able to recover their court costs (20), but the trade-off may be worth it to plaintiffs.

wage garnishment or property attachment. After the judgment creditor's initial collection effort fails, the clerk could call or write the defendant on the judgment creditor's behalf, requesting that the payment be made and explaining the consequences of nonpayment (20, 40). Others have suggested that clerks should be trained to execute a wage or bank account garnishment (but not a property attachment) (4, 39). If a court provides litigants with legal advisors, either through paid staff or volunteers, they should also help judgment creditors with collection. Enforcement personnel should be salaried, rather than compensated by a fee, so that they will more actively pursue unpaid small claims judgments (23).

In addition, efforts should be made to make the collection process less costly to judgment creditors. Because of the attendant risks, judgment creditors in some jurisdictions must post bond in order to have a marshal execute a property attachment (33). This requirement should be waived when it creates undue hardship. Similarly, collection fees, which are sometimes substantial, should be waived for indigent plaintiffs. Moreover, if the legal machinery fails to secure payment of the judgment, the judgment creditor should receive a partial refund of the collection fee (20). Alternatively, judgment creditors might not be required to pay a fee until collection is successfully made.

All of these recommendations may help decrease the rate of uncollected judgments, but they are fragmentary, and their impact is likely to be limited. As a result, many critics of small claims courts have called for the judiciary to take a much more active role in helping judgment creditors to get paid.

As a first step, judges must announce their decisions at the end of trial. Judges who fail to do this usually cite the time pressures created by a crowded docket or potential protests from losing parties (33). But these arguments are unpersuasive:

- if judges do not explain their reasoning, litigants have no evidence that their arguments were taken into account;
- untutored litigants may be more likely in the future to file unfounded claims; and
- judges can always withhold announcement of a particular decision when they need to take the case under advisement or they believe the losing party will react with hostility (39).

A policy of announcing and explaining decisions is an easily accomplished, but important reform of small claims procedures. If a case must be taken under advisement or declaration of the judgment must otherwise be delayed, a written notice of judgment should be sent within five days (32).

Losing defendants should then be encouraged to pay the judgment creditor immediately if they can. If they cannot pay at that time, there are two policy options for the courts to consider. First, the defendants could be asked immediately, while still under oath, to identify their assets and place of employment and to explain how they propose to pay the judgment (4, 18, 20, 24). The judge could then set up an installment payment plan and make it part of the judgment order (15, 17, 32, 39).[28] Weller and Ruhnka believe that it is unfair for defendants who plan to appeal or who fully intend to pay the judgment to be required to reveal their finances at the end of trial. This procedure also fails to reach defendants who default (39).

[28] A recent study of the Massachusetts small claims courts showed that, when the judge sets up a payment plan, the judgment creditor is twice as likely to be paid (32).

As an alternative, an order could be attached to the mailed notice of judgment commanding both parties to appear in court 30 days hence for an examination of the defendant's assets if the judgment is not paid by that time. At the conclusion of that hearing, the judge could order a payment plan. There is merit to this suggestion. Its major drawback, however, is its requirement that the winning plaintiff return to court a second time in the event of nonpayment.

In deciding between these two alternatives, the cost of forcing those defendants who plan to appeal or to pay the judgment in full to reveal their assets must be weighed against the inconvenience to the plaintiffs and to the court of scheduling and holding a second hearing. On balance, requiring defendants to reveal their assets at the end of trial appears to be the better policy.

Standards proposed for Massachusetts's small claims courts incorporate that policy (15). They stipulate that, at the end of a contested trial, judges would examine the defendant's assets, devise a payment plan, and issue an order to pay. If the defendant were to default or if the judge were to take the case under advisement, an order to pay within 30 days would be attached to the notice of judgment. In these cases, if the defendant could not immediately pay the judgment, an appointment would be made at the clerk's office for the defendant to fill out a financial statement and request additional time to pay. The judge would then review that statement, devise a payment schedule, and issue an order to pay.[29] Revelation of the defendant's assets would permit a judgment creditor, in the event of the defendant's nonpayment, to proceed with a wage or bank account garnishment or a property attachment.

By these standards, contempt proceedings could also be initiated against the defendant for failure to comply with the court-ordered payment schedule. After a 10-day appeal period had elapsed, if the judgment creditor informed the clerk's office that the defendant was delinquent in making payments, a notice to show cause could be sent to the defendant by certified mail. If the notice to show cause were properly served, and the defendant defaulted, a civil arrest warrant could be issued against the defendant.[30] Contempt charges would be dismissed if the defendant were to pay the judgment in full or to make up the missed payments.

Improvement of Recording of Judgment Satisfaction

In most jurisdictions, the small claims judgment creditor is responsible for notifying the court that the judgment has been paid. Very often, judgment creditors fail to do this, and the clerk's office does not have the manpower to follow up on those cases. Various proposals have been made to improve the courts' recording of judgment satisfaction. One suggestion is to issue cards to the judgment creditors to send in when they have *not* been paid within a certain time period, rather than when they have been paid (20, 31). Such a procedure would be especially helpful in minimizing the paperwork that could otherwise result from installment payments. Going beyond this modest suggestion, others have suggested that defendants could be required to pay the court, which in turn would issue a check to the judgment creditor once the defendant's check has cleared and the court has recorded the satisfaction of judgment (4, 39).[31] This procedure, of course, would also put increased pressure on the defendants to pay the judgment.

[29]When a decision is not rendered at trial, a financial statement could be attached to the notice of judgment for the defendant to fill out and mail in if the judgment cannot immediately be paid in full. Another alternative is for the judge to obtain a list of the defendant's assets at the end of trial so that a payment plan can be ordered and then mailed with the judgment (32).

[30]In the Cook County *Pro Se* Court, contempt proceedings are initiated against a defendant who fails to pay the judgment and then defaults a hearing for assets discovery. This procedure has resulted in collection rates of approximately 95% for trial judgments and 50% for default judgments, according to Judge Emanuel A. Rissman.

The Right of Appeal

Small claims courts are lauded for the informality of their procedures and rules of evidence. Yet, because of this informality, and because small claims judges sometimes take a common sense approach and do not strictly adhere to substantive law, litigants must be able to appeal their case to the regular civil division of the court. It should be noted that, in some states, the plaintiff waives the right to appeal by the act of filing the claim in small claims court. However, the right to appeal should be equally available to both plaintiffs and defendants (8, 18, 39). If an appeal is heard, it should be handled by the same procedures that were applied in the small claims court; litigants should not be allowed to use the appeals process to drag an opponent into a formal trial that requires attorney representation.

Weller and Ruhnka urge that appeals be on the record unless the right to trial *de novo* appeal is constitutionally required (39). Unfortunately, in most jurisdictions a record of the original small claims trial is not made unless one of the parties makes arrangements and pays for it in advance, which is rarely done. Without a record of the trial, the reviewing judges rely heavily on the original judge's report on the case, thus minimizing the appellant's chances of having the original judgment overturned. Of course, having a court reporter produce a record of each small claims trial is an expense that few courts can bear. Weller and Ruhnka recommend that small claims courts make tape recordings of the trials using cassette tapes. Once the time allowed for appeal has elapsed, a tape can be reused, making this a relatively inexpensive way of creating case records (39). Use of this innovation deserves consideration.

In most jurisdictions, where the courts cannot routinely produce records of small claims trials, trial *de novo* appeals should be allowed. As discussed previously, trial *de novo* appeals should also be allowed to protect defendants' right to trial by jury and their right to attorney representation (if attorneys are prohibited from the small claims court). Of course, if a state allows such appeals to be exercised, there is no need for appeals on the record as well.

Two disadvantages to *de novo* appeal should be noted, however. First, of course, a trial *de novo* does necessitate that the entire trial be repeated. The trial is usually short, but repeating it represents at least some inconvenience to the litigants. Also, without the implementation of corrective measures, this form of appeal may be abused by those few litigants who want to protract their litigation.

[31]An even more radical suggestion is for the court to pay the judgment creditor and then seek payment from the defendant (24). It is unlikely that any small claims court would be asked to take on that financial and logistical burden.

Objections to the provision of trial *de novo* appeal can be answered to some extent by making appeal a less attractive option. The easiest way to accomplish this is to impose financial costs or risks on the appealing party. Several such proposals have been made:

- require the judgment debtor to post bond in the amount of the judgment upon filing the appeal (29);
- require the appealing party to pay part of the cost of the small claims trial as a non-recoverable filing fee (20);
- when an appeal is unsuccessful, require the appealing party to pay all reasonable attorney's fees incurred by the other party (18);
- allow a successfully appealing party to recover attorney's fees only when the judgment from the regular civil court differs significantly from the original judgment (14).

With any of these measures, a balance must be struck between not discouraging those parties who feel they have suffered a gross injustice and discouraging frivolous, time-wasting appeals. Another possible method for reducing the number of trial *de novo* appeals is to give parties the option prior to trial of both waiving their right to appeal. Unfortunately, such a waiver leaves the parties with no recourse should an error be made in the trial.

Experimentation with Mediation/Arbitration Alternatives

One of several techniques being explored to revitalize small claims courts is the use of mediation or arbitration for small claims cases (13). With mediation, the two disputing parties meet with a hearing officer who helps them reach a mutually acceptable resolution to their conflict. Mediators do not have the power to impose a settlement on the parties. With arbitration, on the other hand, hearing officers do have the power to impose a binding settlement. Whether the arbitration hearing more closely resembles a trial or a mediation hearing depends on the rules set down by the court and the style of the individual arbitrator.

Mediation/arbitration programs are designed to meet two principal goals. First, these programs may help the courts reduce or keep down their backlog of small claims cases. Courts for which this goal is primary usually turn to arbitration, where lawyer-arbitrators serve essentially as surrogate judges. Second, these programs may provide a more appropriate forum for certain types of disputes. With mediation, the parties are given more time than they would be given at trial, and they are able to explore the full extent of their dispute, not just the particular claim at hand. They are guided by a trained hearing officer to negotiate a mutually acceptable agreement. Arbitration can provide these same advantages, especially when arbitrators try to help the parties settle prior to the hearing itself, and when the hearing is conducted in a relatively relaxed, informal manner.

Use of these alternatives may help small claims courts address other criticisms that have been leveled against them. Their availability might result in less delay between case filing and the hearing. Because mediation/arbitration hearings emphasize informality and negotiation, it may be possible to elicit greater cooperation from defendants, thus helping to reduce the problem of defaults. And if litigants feel good about their participation in negotiating a settlement, they may be more likely to pay any amount they owe, thus reducing the problem of uncollected judgments (26).

A court giving consideration to installing a mediation/arbitration program must carefully assess its needs. Not all courts have long delays, large court backlogs, or an understaffed bench. More importantly, a court's need for this type of program depends on the skills and preferences of the particular judges. Some judges are willing to depart from their more traditional role and actively help small claims litigants reach a mutually agreeable settlement. Others are not and would willingly refer suitable cases to the mediation/arbitration program. State statutes should authorize individual courts to establish this type of program.

Other reform options should be considered to increase judicial involvement in fashioning compromise settlements.[32] As noted previously, in most states, small claims judges can provide only monetary relief to parties. To provide judges greater flexibility, it has been suggested that they be able to provide equitable relief as well, limited to orders to repair, replace, refund, reform, or rescind (1, 2, 20, 32). Such orders are typically enforceable through contempt proceedings. With the informality of small claims trials and the large number of *pro se* litigants, legal protections for litigants are weaker than in the regular civil court. Thus, consideration must be given to whether this type of enforcement mechanism is appropriate to small claims court (24, 39). As an alternative, Weller and Ruhnka have suggested that judges be permitted to suspend the execution of monetary judgments in order to give the parties an opportunity to effect an equitable settlement. If the terms of the settlement are carried out, the case can simply be dismissed (39).

III. Agenda for Action

Each state should establish by statute a comprehensive small claims court system. In some states, legislation gives local courts the option of establishing a small claims division. In Montana, for example, legislation was passed in 1975 that gave its District Courts this option. In fact, not one court set up a small claims division. Thus, when legislation was passed in 1977 to establish a small claims division in each of the Justice's Courts, that provision was made mandatory (3). If the legislature determines that citizens need access to an inexpensive, quick, and informal forum for minor disputes, then establishment of a small claims division should be required of the local courts, not merely encouraged.

The enabling legislation that many states have enacted gives the courts broad latitude to experiment with different methods of case processing. In one sense, this is desirable, for it allows individual courts to innovate, and changes can be made without the lengthy process of obtaining specific legislative authorization. On the other hand, statewide uniformity in small claims processing is highly desirable, if not essential. Litigants should not be subject to radically different procedures simply because they reside in different jurisdictions. It is recommended that this tension be resolved in favor of seeking statewide uniformity (2).

Obviously, this statewide uniformity can be brought about through legislation. Another possibility is for the state Supreme Court to establish court rules that spell out for the local courts how small claims will be processed and tried. The legislative process allows for greater public input, and the enacted provisions have the full force of the law. On the other hand,

[32] It has been cautioned that if a pretrial settlement fails, the same judge should not try the case (14). While adherence to this principle would be possible in large courts with multiple trial parts, for most courts, this would be impossible without requiring the parties to come back to court on another day for trial.

court rules can be implemented more quickly. And, in some states, small claims court reform will not be given full attention by the legislature as it deals with other matters. It is recommended that small claims procedures be codified, but if legislative action appears unlikely, the state Supreme Court should proceed with court rules. It should be noted that these rules can always be enacted into law.

However small claims court reforms are implemented, careful attention must be paid to their interrelationship. For example, as noted before, if attorneys are banned from small claims trials, other possible reforms, such as allowing small claims judges to provide equitable relief, must be reconsidered. The Montana legislature's failure to examine these kinds of interrelationships resulted in its 1977 small claims statute being declared unconstitutional by the state Supreme Court.[35] In establishing a small claims division in each Justice of the Peace Court, the legislature expressly stated that attorneys were barred from these divisions unless both parties were represented and that there would be no jury trials. At the same time, however, trial *de novo* appeal was disallowed. Thus, litigants were effectively denied their rights to both a jury trial and attorney representation guaranteed in the Montana constitution.[34] When small claims court reforms are considered, all relevant state statutes and constitutional provisions must be reviewed.[35]

Once provisions for a uniform, statewide system of small claims courts have been put in place, the implementation of those provisions by the local courts must be monitored. A study of Montana's small claims courts showed, for example, that some Justice's Courts had failed to create a separate small claims division, even though establishment of such divisions was statutorily required. In some small claims divisions, suits in excess of the jurisdictional claim limit were occasionally allowed, and a defendant was sometimes awarded a judgment without having formally filed a counterclaim (3). A study of small claims courts in Massachusetts showed that judges were uneven in their enforcement of a court rule that limited the extent of attorneys' participation during trial (32). Appeals out of small claims courts are too infrequent for them to serve as an effective corrective mechanism. Thus, each state Supreme Court, through its administrative office, should establish procedures for improving supervision of the small claims courts (1).

[33] *North Central Services v. Hafdahl*, Mont. 625 P.2d 56 (1981).

[34] Unfortunately, in remedying this oversight, the legislature kept the restriction on attorneys and granted defendants the right to have their case transferred out of the small claims division. See MONT. CODE ANN. 25-35-505(2) and 25-35-605.

[35] *Vanderbilt Law Review* (2) provides an excellent example of a blueprint for a statewide system of small claims courts.

IV. Sources of Further Information and Assistance

The following model legislation and written reports, referenced in the text of this brief, can be consulted for more information on small claims court reform.

Model Legislation

Certain provisions of the model small claims statutes listed below differ from the reform recommendations made in this brief, but they are still valuable guides for crafting legislation.

1. Chamber of Commerce of the United States, "Model Small Claims Court Act."
2. "Judicial Reform at the Lowest Level: A Model Statute for Small Claims Courts," *Vanderbilt Law Review* 28 (1975).

Key Journal Articles and Monographs

Many of the ideas presented in this brief came from written reports which describe the need for small claims court reform and list specific recommendations. Inclusion of these reports in the following list does not mean that the authors necessarily endorse all of the recommendations presented in this brief.

3. A.S. Alexander, "Small Claims in Montana: A Statistical Study of Three Years' Operation of a Modern Statewide Small Claims Court." (Bozeman: Montana State University, 1981, unpublished report).
4. "Alternative Legal Services — Part 2: The Role of the Small-Claims Court," *Consumer Reports* (November 1979).
5. R. Beresford, "It Takes a Big Judge to Handle Small Claims," *Judge's Journal* 16 (1977).
6. R. Braucher, "Redress of Consumer Grievances," in *Consumer Complaints: Public Policy Alternatives*, ed. S. Divita and F. McLaughlin (Washington, D.C.: Acropolis, 1975).
7. M.L. Bridenback, E. Purdum, and L. Brock, *A Report on Small Claims Courts in Florida* (Tallahassee: Office of the State Courts Administrator, 1982).
8. M. Budnitz, "Consumer Dispute Resolution Forums," *Trial* 13 (1977).
9. California Department of Consumer Affairs, *The Small Claims Court Experimental Project: A Report to the Legislature on the Court Assistance Experiment* (Sacramento: Department of Consumer Affairs, 1979).
10. D. Caplovitz, *Consumers in Trouble: A Study of Debtors in Default* (New York: Free Press, 1974).
11. M. Cappelletti and B. Garth, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective," *Buffalo Law Review* 27 (1978).
12. S.R. Comenetz, "Report on the Kansas Small Claims Procedure," *Journal of the Kansas Bar Association* 44 (1975).

13. W. DeJong, G.A. Goolkasian, and D. McGillis, *The Use of Mediation and Arbitration in Small Claims Disputes* (Washington, D.C.: U.S. Department of Justice, National Institute of Justice, 1983).

14. A. Domanskis, "Small Claims Courts: An Overview and Recommendation," *University of Michigan Journal of Law Reform* 9 (1976).

15. Draft Standards for the Small Claims Courts, Commonwealth of Massachusetts (Samuel Zoll, Chief Justice of the District Court).

16. T.L. Eovaldi and J.E. Gestrin, "Justice for Consumers: The Mechanics of Redress," *Northwestern University Law Review* 66 (1971).

17. T.L. Eovaldi and P.R. Meyers, "The *Pro Se* Small Claims Court in Chicago: Justice for the 'Little Guy'," *Northwestern University Law Review* 72 (1978).

18. J.G. Frierson, "Let's Abolish Small Claims Courts," *Judge's Journal* 16 (1977).

19. Hon. Kim H. Goldberger, Problem Session on "Public Image of Small Claims Court," National Seminar for Small Claims Court Judges, The National Judicial College, Reno, Nevada, May 28–31, 1980.

20. D. Gould, *Staff Report on the Small Claims Courts* (Boston: National Institute for Consumer Justice, 1972).

21. B.J. Graham and J.R. Snortum, "Small Claims Court: Where the Little Man Has His Day," *Judicature* 60 (1977).

22. J.H. Joseph and B.A. Friedman, "Consumer Redress Through the Small Claims Court: A Proposed Model Consumer Justice Act," *Boston College Industrial and Commercial Law Review* 18 (1977).

23. J.Y. King, "Small Claims Practice in the United States," *St. John's Law Review* 52 (1977).

24. L.G. Kosmin, "The Small Claims Court Dilemma," *Houston Law Review* 13 (1976).

25. C.S. Mack, "Fair Settlement of Just Consumer Claims," in *Consumer Complaints: Public Policy Alternatives*, ed. S. Divita and F. McLaughlin (Washington, D.C.: Acropolis, 1975).

26. C.A. McEwen and R.J. Maiman, "Small Claims Mediation in Maine: An Empirical Assessment," *Maine Law Review* 33 (1981).

27. T. McFadgen, "Dispute-Resolution in the Small Claims Context: Adjudication, Arbitration, or Mediation?" (LL.M. Thesis, Harvard University Law School, 1982).

28. M. Minton and J. Steffenson, "Small Claims Courts: A Survey and Analysis," *Judicature* 55 (1972).

29. B.A. Moulton, "The Persecution and Intimidation of the Low Income Litigant as Performed by the Small Claims Court of California," *Stanford Law Review* 21 (1969).

30. L. Nader, "Disputing Without the Force of Law," *Yale Law Journal* 88 (1977).

31. New York Public Interest Research Group, Inc., *Winning Isn't Everything: A Study of the New York City Small Claims Court System* (Albany: New York Public Interest Research Group, Inc., 1976).

32. Massachusetts Public Interest Research Group, Inc., *The Plight of the "People's Court": An Analysis of Massachusetts Small Claims Courts* (Boston: Massachusetts Public Interest Research Group, Inc., 1982).

33. J.C. Ruhnka, S. Weller, and J.A. Martin, *Small Claims Courts: A National Examination* (Williamsburg, Va.: National Center for State Courts, 1978).

34. A. Sarat, "Alternatives in Dispute Processing: Litigation in a Small Claims Court," *Law and Society Review* 10 (1976).

35. R. Scobey, "The Big Problem of Small Claims: An Empirical Analysis of the Providence Small Claims Court," *Rhode Island Bar Journal* (March 1980).

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