

***APPENDIX C***



January 6, 2012

Lisa Loo  
Chair, Rules Committee  
Board of Governors  
State Bar of Arizona

Re: Comments to the proposed Civil Rules of Procedure for Limited Jurisdiction Courts

Dear Lisa:

The Legal Services Committee of the State Bar studies and recommends ways to meet the legal needs of the indigent and working-poor in Arizona. We often comment on procedural rules, both to ensure that legal aid attorneys have sufficient procedural tools at their disposal to adequately represent clients, and to ensure that the unrepresented indigent receive due process in court. Our members also participate in other court- and bar-sponsored access to justice forums, including the Committee on Civil Rules of Procedure for Limited Jurisdiction Courts ("LJC Committee").

The LJC Committee has endeavored to produce uniform procedural rules to guide courts and litigants, and to provide sufficient notice and the opportunity to be heard as part of the procedural due process that all courts must provide. We have reviewed those rules and believe that they do a great deal, but not enough, for low-income Arizona consumers. Based on our experience and the anecdotal evidence that supports the background section below,<sup>1</sup> we still have concerns, particularly with respect to a large piece of the civil filings: debt collection actions. We ask that the Board of Governors, through the Rules Committee, file comments to the proposed Rules in order to protect Arizona consumers' due process rights. A factual background and our request are set forth below.

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<sup>1</sup>E.g., NEIGHBORHOOD ECONOMIC DEVELOPMENT ADVOCACY PROJECT, DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS (May 2010), available at [http://www.nedap.org/pressroom/documents/DEBT\\_DECEPTION\\_FINAL\\_WEB.pdf](http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf).

## Background

A large percentage of civil lawsuits filed in justice court are consumer debt collection cases filed against low-income Arizona consumers, many of whom may qualify for legal services. There are numerous due process concerns which arise in these cases because of the debt collection litigation model and the inundation of the justice courts with these cases.

It is an emergent trend that many of the consumer debt collection cases are now filed by debt buyers who have purchased the debt after it has gone into default. In fact, some of these debts are sold numerous times before a lawsuit is filed. Debt buyers generally purchase these debts for pennies on the dollar. Because of this low cost, debt buyers receive little if any evidentiary documentation of the debt. Often, debt buyers receive nothing more than a spreadsheet summarizing the hundreds or thousands of accounts they have purchased from a creditor or a debt buyer, and thus may have no fair mechanism to establish the debt by a preponderance of the evidence at trial.

As a result of the debt buyer's lack of evidence, debt buyers may sue the wrong consumer (for example, the named defendant may have the same name as the true debtor) or even a consumer who has paid the account in full. Some consumers are sued twice for the same debt by different debt buyers.<sup>2</sup> Moreover, it is not unusual for a debt buyer to sue a consumer beyond the statute of limitations for the alleged debt. As a debt is sold from debt buyer to debt buyer, the likelihood of a mistake is increased as it is possible the alleged debt will be sold to two different debt buyers or the debt buyers will transfer even less documentation at the time of sale.

The standard collection complaint filed by debt buyers in Arizona justice court is a form pleading that does not: 1) identify the original creditor, 2) attach the contract from which the consumer's alleged liability arises, 3) attach proof of ownership of debt, 4) state the date of default or 5) break down the amount claimed as currently owed by principal due at the time of default, interest, fees, and other charges. Moreover, prior to judgment debt buyers often file employee affidavits averring as to the information contained in the debt buyer's own files, rather than in the business records of the original creditor. These affidavits are analogous to the robo-signers in the foreclosure context, where the employee often has not reviewed the creditor's records (because the debt buyer doesn't have them), and has instead reviewed only the spreadsheets described above. Debt buyers shy away from large-value cases, which would require them to file in superior court. Instead, debt buyers rely on overburdened justice courts.<sup>3</sup>

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<sup>2</sup> See *Chase Bank, USA, N.A. v. Cardello*, 896 N.Y.S.2d 856 (N.Y. Ct. 2010).

<sup>3</sup> Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt-Collection After FDCPA*, 79 S. CAL. L. REV. 711, 729, 743-44 (2006), available at <http://lawweb.usc.edu/why/students/orgs/lawreview/L.GoldbergDealinginDebt.cfm> ("The minimal procedural formalities... and less onerous pleading requirements of small-claims courts

Consumers who receive these bare-boned pleadings do not recognize the debt buyer -- because their contract was instead with the underlying merchant or provider of credit -- and may ignore the pleading. They also have no ability to determine whether they have a defense such as statute of limitations because the date of default is not provided. They cannot calculate whether they are being sued for the right amount in the absence of the contract, as the contract will contain information regarding agreed upon interest rates and late charges. They cannot even determine the law of which state applies because the majority of credit card contracts contain a choice of law provision other than Arizona. Those state laws may contain, for example, greater substantive defenses than those provided under Arizona law.

It is difficult for consumers to obtain representation in these cases because (1) they cannot afford an attorney, or (2) they cannot find an attorney who will take their case. Absent a counterclaim, attorneys rarely take these cases on contingency because it is unlikely that they will recover their attorney's fees if they successfully defend the case.<sup>4</sup> Typically these cases have a high default rate.

Rather than a true adversary system, the debt buyer litigation model is characterized by a sophisticated business represented by a skilled lawyer suing an unsophisticated, unrepresented consumer. Judgments are often wrongly entered against unrepresented consumers, despite lack of sufficient proof as to liability, standing, or damages. In 2010, the Federal Trade Commission, based on "extensive analysis", concluded that:

neither litigation nor arbitration currently provides adequate protection for consumers. The system for resolving disputes about consumer debts is broken...because consumers are not adequately protected in either debt collection litigation or arbitration.<sup>5</sup>

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offer collection lawyers a swift sword of judgment against debtors and give lawyers leeway to file cases that would not survive in general civil court.")

<sup>4</sup> Although A.R.S. § 12-341.01 gives the Court discretion to award fees in matters arising out of contract, it is not mandatory or even common for these fees to be awarded in debt collection cases.

<sup>5</sup> FTC, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION (2010), p. i, available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>.

## The Legal Services Committee's Request

We commend the members of the LJC Committee for their efforts. For example, the proposed Rules require that the complaint identify the original creditor. Furthermore, the Rules require that at the disclosure stage, a debt buyer must produce evidence of assignment and, if available, the original agreement, a billing statement, and the date of default. Although we believe that these proposed rules are beneficial, we do not believe that they are sufficient. We believe that the Rules should require the following additional procedural protections:

1. The Rules should require a heightened pleading requirement in debt collection cases.

At a minimum, as to debt collection cases, the documentation required at the disclosure stage should be required at an earlier stage, the complaint stage, in order to protect the rights of low-income consumers in Arizona.<sup>6</sup> We also believe that the complaint should identify the date of default, the complete chain of assignment, and break down the amount due by principal at time of default, interest, and late charges. Without this information, low-income consumers simply do not have a chance at determining whether they have a defense or the amount they truly owe.

The trend throughout the country is to provide these types of protections to consumers in collection cases. The courts and/or legislatures of Delaware, Massachusetts, Virginia, Michigan, Connecticut, Delaware, California, Florida, North Carolina, Michigan, and New Mexico all require certain documents be attached to, or information provided in, debt collection complaints.

Similar safeguards were provided by the recent Landlord Tenant Rules adopted by the Supreme Court. For example, a landlord must attach as an exhibit to the complaint a notice to vacate that was served on the tenant. Rule 5(b)(7) of the Landlord Tenant Rules. There are also specific and heightened pleading requirements with respect to the complaint. Rules 5(b), (c)

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<sup>6</sup>We understand that the LJC Committee discussed and agreed to a special rule for discovery in a debt collection action that requires the production of, at a minimum, documents evidencing the assignment of the debt and also, where available, requires the production of the underlying contract and billing statements. (Proposed Petition, at 6 n. 3; proposed Rule 121(a)(3).) Although we might quibble with the concept that a plaintiff suing on a debt might not have the underlying contract "available" to it, we nonetheless believe this LJC Committee discovery agreement should be afforded deference, as it was agreed to by representatives of the affected stakeholders. This agreement, however, did not address the pleading requirement itself, and we strongly recommend a heightened requirement. Moreover, heightened pleading requirements generally yield less boilerplate and jargon and therefore support the readability of legal documents (a concern here, where a microsoft word readability assessment reflects that these rules are written at a high school comprehension level).

and (d). The attorney filing a complaint must “verify that the attorney believes the assertions in the complaint to be true on the basis of a reasonably diligent inquiry.” Rule 5(b)(8). The complaint must state the specific reason for the eviction and if for reasons other than nonpayment, the complaint must “state the reason for the termination of the tenancy with specific facts, including the date, place and circumstances of the reason for termination, so the tenant has an opportunity to prepare a defense.” Rule 5(b)(7), 5(d)(2). Although there are obvious and important reasons for providing these safeguards when an individual’s home is at stake, there are not nearly the same number of mistakes made in the landlord tenant context, primarily because of the absence of the debt buying industry. Moreover, erroneous judgments in the debt collection context lead to erroneous garnishments, which unjustly take away earned wages from the working poor. Thus, it is appropriate to provide similar safeguards in the debt collection context.

2. The Rules should require due diligence in all cases.

As to all civil filings, we recommend a due diligence requirement. Limited jurisdiction courts should not permit limited compliance with a party’s good faith obligations. In particular, we recommend that the Rules contain an analogous rule to the due diligence requirement in Rule 4(a) of the Landlord Tenant Rules:

**a. Due Diligence.** Each party and attorney filing or appearing in an action or defense shall exercise due diligence to ensure that the action has a good faith basis, and that the relief sought is consistent with the applicable agreement and applicable law. Attorneys must exercise reasonable care to ensure that their pleadings are accurate and well-grounded in fact and law.

3. The Rules should require heightened default standards in debt collection cases.

As to debt collection cases, the default requirements should be standardized to require the presentation of sufficient extrinsic documents, or other reliable evidence, to a reviewing court prior to the entry of a default judgment, and a review of the evidence by the court, in order to protect against some of the special problems present in debt buyer collection cases. For example, the debt buyers should have to submit the contract, evidence of the date of default, and a calculation of the amount due in connection with a motion for default judgment. This heightened default requirement, analogous to the heightened default requirement in Rule 13(a) of the Landlord Tenant Rules, will protect against both robo-filing on the part of debt buyers, and robo-signing on the part of limited jurisdiction judges who are completely dependent in the default setting on the representations of the party seeking default.

Conclusion

The above are our general observations with respect to the proposed Rules, with a focus on the emergent issues and due process concerns arising out of the aggregation of debts by debt buyers who were not a party to the original transactions. We seek the opportunity to continue a dialogue with the Rules Committee, and we are available to appear at your meetings, to research any specific issues in which you are interested, or to propose more specific language for these rules.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Restaino", written over a horizontal line.

Gary Restaino

Chair

Legal Services Committee



February 1, 2012

Lisa Loo  
Chair, Rules Committee  
Board of Governors  
State Bar of Arizona

Re: Suggested Changes to the Proposed Civil Rules of Procedure for Limited Jurisdiction Courts

Dear Ms. Loo:

Previously, on January 6, the Legal Services Committee of the State Bar submitted a letter to the Rules Committee explaining some of our substantive concerns about the proposed Civil Rules of Procedure for Limited Jurisdiction. Subsequently, the Chair of the Legal Services Committee, Gary Restaino, made a presentation to the Rules Committee. The Rules Committee was interested in our concerns and requested that we submit more specific language. In this letter we will provide specific language on the substantive matters and also present some additional observations about the rules package that we hope will serve as guidance in the next phase of this process.

**Proposed Language:**

We identified three main substantive concerns: (1) the need for a heightened pleading requirement in debt collection cases; (2) the need for heightened default standards in debt collections cases; and (3) the need for due diligence in all cases.

**1. Heightened Pleading Requirement In Debt Collection Cases:**

Rule 110 (b) concerns the contents of a complaint. We propose the wording in subsection 2 be modified to read:

2. In a lawsuit to recover on a consumer debt, the following information must be included:

- a. The name of the original creditor and the current assignee in the caption; and
- b. In the complaint, the identity of the original owner of the debt, a redacted original account number, the date of the last payment, the date of default, the amount owed to the original creditor at the time

of default, the governing state law, the name of the current owner of the debt, information on the full chain of the assignment of the debt from the original creditor to the current plaintiff, and a breakdown of the amount claimed to be currently owed broken down by principal, interest, fees and other specified charges.

Also, we propose adding the following paragraph 6 to Rule 110:

6. In a lawsuit to recover on a consumer debt, the following documents shall be attached as exhibits to the complaint:

- a. A copy of the original contract or other documentary evidence of the original debt, showing proof of the original debt and the terms of the debt; and
- b. A copy of the assignment or other documentary evidence establishing that the plaintiff/creditor is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain at least the last four digits of the original account number of the debt purchased and must clearly show the debtor's name associated with that account.

Rule 109 concerns signatures on documents filed with the court. Section (c) pertains to verification of a pleading. We propose adding the following words to that section:

A Verification by Attorney. This means that the attorney signing the complaint shall verify that the attorney believes the assertions in the complaint to be true on the basis of a reasonable diligent inquiry.

## **2. Heightened Default Standard in Debt Collection Cases:**

We propose the following be added to Rule 140 which concerns default judgments as a new subsection (h):

In each consumer debt collection case, the court shall:

1. Determine whether the service of the summons and complaint was proper and timely, and whether the complaint included all the factual information and documentation required under Rule 110.
2. Determine whether a proper foundation was provided for the factual claims and the documentary evidence and that all affidavits or declarations are based on personal knowledge (or whether any affiant or declarant provided sufficient foundation to establish the business records exception to Rule 803 of the Rules of Evidence but only for records of the company for which the affiant or declarant is employed).
3. Determine whether the facts alleged, if proven, would be sufficient to determine that plaintiff is entitled to the amounts requested under the agreement and applicable law.

**3. Due Diligence Requirement:**

We propose the following due diligence provision as a new section (e) to Rule 109 for all cases:

- e. **Due Diligence.** Each party and attorney filing or appearing in an action or defense shall exercise due diligence to ensure that the action has a good faith basis, and that the relief sought is consistent with the applicable agreement and applicable law. Attorneys must exercise reasonable care to ensure that their pleadings are accurate and well-grounded in fact and law.

**Universal Concerns/Suggestions:**

The Legal Services Committee reviewed the rules package with an eye toward how these rules would impact unrepresented litigants who are the majority of litigants in justice court. We have also consulted with the Civil Practice and Procedure Committee, through the chair of its Subcommittee on Rules for the Justice Courts, and we thus incorporate some of the concerns raised by the chair of that subcommittee. On remand, we request that the Committee on Civil Rules of Procedure for Limited Jurisdiction Courts address the following.

**1. Readability and Understanding of the Rules:**

Our initial comment also noted our concerns about the readability of the rules package. The Supreme Court gave the committee the responsibility to craft rules that would “simplify” the court processes and make the rules more “comprehensible to everyone.” Our initial observation is that the rules are written at a tenth grade reading level. An effort should be made to reduce the readability level. We think some of this can be accomplished by looking at word choice and using different words. As examples, the word “give” could replace the word “provide” or the word “ends” could replace the word “concludes.” In other places, the number of words in a sentence should be reduced as some sentences have 50 plus words. Some of the sentences could be broken up by using numbers to separate out the different clauses. We understand that as lawyers we often think a certain word must be used and we are comfortable using it. Additional definitions may be helpful to unrepresented persons. We will look for materials that may help the committee.

**2. Notices:**

We liked the idea of the notice to the defendant, contained as part of the summons and as required by Rule 112(d), and the notice language required in discovery requests. These instructions are perfectly appropriate for a Court to issue to parties, and we anticipate that the instructions will be helpful and informative to unrepresented litigants. We suggest other notices be considered such as for a pretrial conference, motion for summary judgment and at trial, in order to increase the opportunity for unrepresented litigants to fully understand the expectations of a party to a lawsuit.

**3. Time Periods:**

We question whether any time periods of less than 10 days should be used in the rules for action required by a party. *See, e.g.*, Rule 128 (e), five days for a reply to a motion to be filed; Rule 139 (c) and (d), five days to object to a proposed judgment and to court costs, respectively. Unrepresented persons cannot respond as quickly as attorneys and short time frames may prevent litigants from seeking limited scope advice and from complying with required time frames.

**4. The Order and Numbering of the Rules:**

We suggest that the committee review the order of the rules. As an example, the change of judge rule is in Rule 133(d) which is the general rule on trials. This provision should be in the front part of the rules.

Lisa Loo  
February 1, 2012  
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The committee did not follow the numbering system used in the Arizona or federal Rules of Civil Procedure. At the end of the rules, there are two tables. The first table lists the Arizona Rules of Civil Procedure incorporated into the Justice Court rules. Table 2 is a cross reference to the Arizona Civil Rules of Procedure that may have slight or significant differences on the subject matter of the Justice Court rules. We are concerned that the system used by the committee does not simplify the process and make the rules more comprehensible to everyone. We suggest that the committee review its numbering system with simplification and comprehensibility in mind, especially for unrepresented litigants.

Thank you for considering our proposal and suggestions. Please let me know if you have any questions. My telephone number is (602) 252-3432.

Sincerely,

/s/ Ellen Sue Katz

Chair, Access Subcommittee

State Bar Legal Services Committee

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