Small Claims Courts: An Overview and Recommendation

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SMALL CLAIMS COURTS: AN OVERVIEW AND RECOMMENDATION

A ... problem is to make adequate provision for petty litigation, to provide for disposing quickly, inexpensively, and justly of the litigation of the poor, for the collection of debts in a shifting population, and for the great volume of small controversies which a busy, crowded population, diversified in race and language, necessarily engenders. It is here that the administration of justice touches immediately the greatest number of people.

Roscoe Pound

Small claims courts have been in operation in the United States for over sixty years. They were established to function as inexpensive, efficient, and convenient forums for resolving claims which could not be brought economically in ordinary civil courts because of the costs and delays accompanying ordinary civil court proceedings.

Small claims courts also reduce administrative delays by resolving a large volume of claims. For example, the District of Columbia small claims court processed 30,000 claims in 1973. Despite the amount of litigation handled by small claims courts, commentators have expressed much dissatisfaction with their operation and practice. Some commentators urge abandonment of small claims courts and development of alternative means of redress, especially for consumer disputes. While

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1 Pound, The Administration of Justice in the Modern City, 26 Harv. L. Rev. 302, 315 (1913).
2 Note, The California Small Claims Court, 52 Calif. L. Rev. 876, 877 (1964) [hereinafter cited as California Small Claims].
much of the criticism leveled at small claims courts is justified, abandon-
dment of these courts as a mechanism for the redress of small claims
would be undesirable. This note will discuss ways in which small claims
courts can be reformed to become more effective mechanisms for the
resolution of small disputes. A model small claims court statute incor-
porating the suggested changes will be presented.

I. BACKGROUND CONSIDERATIONS

A. History of Small Claims Courts

The impetus for establishment of small claims courts in the United
States came from reformers in the early twentieth century who perceived
that the American judicial system, although in theory providing all with
equal rights, failed to afford a practical remedy to most people because of
the costs and delay of litigation.\textsuperscript{7} The reformers advocated creation of
courts to hear exclusively small claims in a summary manner to remedy
these administrative defects in the law.\textsuperscript{8}

The states soon acted by creating forums for deciding small claims.
The first small claims court was judicially established by the Cleveland
Municipal Court in 1913.\textsuperscript{9} Two months later, the first statutory small
debtors' court began operation in Kansas.\textsuperscript{10} As the small claims idea at-
tracted attention, other statewide statutory systems developed. Massachu-
netts pioneered with such a system in 1920;\textsuperscript{11} California and South Dakota
followed a year later.\textsuperscript{12} Currently, small claims courts exist in every state,\textsuperscript{13}

\textsuperscript{7}See, e.g., Pound, supra note 1, at 316.
\textsuperscript{8}R. SMITH, JUSTICE AND THE POOR 15 (2d ed. 1919); Scott, Small Causes and Poor
\textsuperscript{9}California Small Claims, supra note 2, at 877.
\textsuperscript{10}R. SMITH, supra note 8, at 48.
\textsuperscript{11}MASS. STAT. ch. 553, § 1 (1920), now MASS. GEN. LAWS ANN. ch. 218, § 21
\textsuperscript{12}Smith, Small Claims Procedure Is Succeeding, 8 J. AM. JUD. SOC'y 247 (June
1924). See INSTITUTE OF JUDICIAL ADMINISTRATION, SMALL CLAIMS COURT (1954,
Supp. 1959) (comprehensive account of the small claims movement from 1913 to
1940); Northrop, Small Claims Courts and Conciliation Tribunals: A Bibliography,
33 LAW LIB. J. 39 (1940) (pre-1940 bibliography of statutes and articles relating to
small claims courts).
\textsuperscript{13}See Buyer v. Seller in Small Claims Court, 36 CONSUMER REP. 624, 629-31
(1971) for a compilation of small claims courts in the United States. The author's
compilation indicates that three states, Colorado, Indiana, and Nebraska, had no
small claims courts at that time. Small claims courts in Colorado have since been
established by local court rule. NICJ STAFF STUDIES, supra note 4, at 286 n.137. In-
diana and Nebraska have recently established statutory small claims courts. IND. ANN.
STAT. § 33-11.6-1-1 et seq. (Burns Supp. 1975); NEB. REV. STAT. § 24-521 et seq.
but only thirty-two states have comprehensive statutory small claims court systems.\textsuperscript{14} In the remainder of the states, local court rules provide for establishment of small claims courts. In spite of the proliferation of small claims courts, an estimated 41 million people, largely in rural areas, have no ready access to this type of judicial forum.\textsuperscript{15}


Florida once had a statutory system of small claims courts (ch. 26920, § 1 et seq., [1951] Fla. Laws 1108) but in a recent court reorganization the Small Claims Act was repealed. Ch. 72-404, § 30, [1972] Fla. Laws 1395. Section 9 of ch. 72-404, [1972] Fla. Laws 1402 amended Fla. Stat. Ann. § 34.01 (Supp. 1975) to give county courts the jurisdiction previously exercised by the small claims courts. There are no longer any specific statutory provisions governing small claims; small claims procedure is now determined by local court rule.

Maryland's only statutory provision relating to small claims provides that in civil actions in the district court, where the amount in controversy is $1,000 or less, no formal pleadings are required. \textit{Md. Ann. Code CJ} § 6-403 (1974).

Georgia has created a number of small claims courts by local laws passed through the legislature but not included as part of the legislative compilation. \textit{See} the note in \textit{Ga. Code Ann. tit. 24, pt. IV} (1971, Supp. 1975) for a list of local small claims court acts and a reference to their enactment in the Georgia Session Laws.


\textsuperscript{15} \textit{Sen. Comm. on Commerce, The Consumer Controversies Resolution Act, S. Rep. No. 1164, 93d Cong., 2d Sess. 4} (1974). In order to make small claims courts and other consumer redress mechanisms available and accessible to every person, Senators Moss, Magnuson, and Tunney introduced S. 2928 before the 93d Cong., 2d Sess. (1974). Upon failure of this bill to pass in the 93d Congress the same Senators reintroduced it in substantially the same form as S. 2069 in the 94th Cong.,
B. Purposes of Small Claims Courts

Since the signing of the Magna Carta in 1215, the English and American systems of jurisprudence have sought to make justice available to all, regardless of financial means.\(^1\) To this end, small claims courts attempt to provide legal redress for meritorious claimants with small claims who are likely to be discouraged by the delay, expense, and procedural technicalities of full trial proceedings.\(^2\) These courts seek to render justice that is speedy, simple, fair, and inexpensive\(^3\) by streamlining procedures and conducting hearings informally at a minimal cost to the litigants.\(^4\)

Small claims courts have often been conceived of as forums to benefit primarily the poor by reducing their sense of alienation from society and restoring their confidence in the courts.\(^5\) Yet, the purpose of these courts need not be so limited.\(^6\) Since the costs associated with civil litigation pre-

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\(^1\) Willging, supra note 3, at 255. Willging quotes the Magna Carta, ch. 40 (1215): "To no one will we sell, to no one will we deny, or delay, right or justice." \(\text{Id.}\)

\(^2\) \(\text{Id.}\) at 259.

\(^3\) NICJ STAFF STUDIES, supra note 4, at 13. The court in Sanderson v. Niemann, 17 Cal. 2d 573, 110 P.2d 1025 (1941) discussed the nature and function of the small claims court:

It is apparent that such a court was established in order to offer a means of obtaining speedy settlement of claims of small amounts. The theory behind its organization is that only by escaping from the complexity and delay of the normal course of litigation could anything be gained in a legal proceeding which may involve a small sum. Consequently, the small claims court functions informally and expeditiously. The chief characteristics of its proceedings are that there are no attorneys, no pleadings, and no legal rules of evidence; there are no juries, and no formal findings are made on the issues presented. At the hearings the presentation of evidence may be sharply curtailed, and the proceedings are often terminated in a short space of time. The awards—although made in accordance with substantive law—are often based on the application of common sense; and the spirit of compromise and conciliation attends the proceedings.

\(^4\) 17 Cal. 2d at 273, 110 P.2d at 1030.


\(^7\) See Small Claims Court: Reform Revisited, supra note 19, at 48.
vent people of all means from asserting small claims in civil courts, small claims courts constitute effective forums for all persons in need of such redress.

C. The Nature of the Proceedings

Small claims court procedure represents a major shift away from the Anglo-American adversarial system of justice. The adversary model presupposes a triangle of forces: two opposing advocates appealing for their clients to a disinterested third party. This system functions adequately only where both parties to the dispute are represented by able counsel. However, in small claims courts frequently either one or both litigants is not represented by counsel because the parties cannot afford legal services, because the amount of the claim does not justify the expense of an attorney, or because attorneys are prohibited by statute from appearing. The adversarial model, therefore, is frequently inapplicable to small claims court procedure.

The direction of present small claims court legislation has been towards implicitly sanctioning an inquisitorial process. When lawyers are not involved in the proceedings, the judge must assume the roles of impartial arbiter and advocate for both plaintiff and defendant. The burden thus placed on the judicial decisionmaker often results in either an uninformed judgment if the judge remains passive, or a biased decision if the judge assumes an inquisitorial posture. It is questionable, therefore, whether inquisitorial proceedings can adequately assure justice to the participants.

To prevent small claims adjudication from degenerating into an inquisitorial process, adversary safeguards may need to be implemented. Yet the cost of representation by counsel, and the potential for unfairness if only one party to the proceedings is represented by an attorney, suggest that the traditional adversary model is impractical for small claims

22 Regarding consumer disputes, one commentator has noted that the cost of suit in a civil court is usually greater than the recovery sought. Leff, Injury, Ignorance, and Spite—The Dynamics of Coercive Collection, 80 YALE L.J. 1, 21 (1970). Leff states: "It is usually economically rational for [the consumer] just to abandon his claim." Id. at 22.


26 Adams, supra note 24, at 602.

27 Id. at 608.

28 Id. at 596.

29 Id. at 602-03. See Adams, supra note 24, for an extensive discussion of the adversarial and inquisitorial models as applied to the small claims court. Adams concentrates on the theoretical underpinnings of the adjudicatory process with only limited consideration of how small claims courts should actually be designed. Adams notes that designing a small claims court that does not operate as an inquisitorial process may not be worth the cost. Id. at 605.

30 See note 112 and accompanying text infra.
A small claims court, with the judge assuming an important role but with some adversarial features, may be the best way to produce the efficient and inexpensive justice which the advocates of small claims courts envision.\textsuperscript{32}

\section*{II. Towards A Model Small Claims Court System}

Small claims courts have by no means been universally successful as forums for simple, inexpensive, and speedy adjudication of small claims. Critics charge that the courts have failed to provide large-scale redress for small grievances and instead, have become collection agencies for commercial creditors.\textsuperscript{33} Nevertheless, the experience of some successful small claims courts suggests that with procedural reforms and continued experimentation small claims courts can be improved to meet the needs for which they were designed.

\subsection*{A. Subject Matter Jurisdiction}

\textit{1. Amount in Controversy}—Because small claims court proceedings are informal, all small claims court statutes set jurisdictional limits. These limits range from $150 in Texas\textsuperscript{34} to $2,000 in New Mexico.\textsuperscript{35} Probably the primary factor in setting the jurisdictional limit is the weighing of the minor nature of the claim and the informality of the small claims proceedings against the constitutional safeguards which should prevail where major disputes are to be resolved.\textsuperscript{36} However, because constitutional protection for cases heard in small claims court can be provided by allowing a trial \textit{de novo} on appeal,\textsuperscript{37} this consideration need not be determinative of the jurisdictional limit. Moreover, the dollar amount of a claim, which is often thought of as an indication of the claim's complexity and is used to set the small claims court limit,\textsuperscript{38} can be

\textsuperscript{31}See the discussion of representation by attorneys at notes 89-94 and accompanying text \textit{infra}.

\textsuperscript{32}See the discussion of the role of the judge at notes 106-16 and accompanying text \textit{infra} and the discussion of the use of legal paraprofessionals at notes 95-97 and 102-05 and accompanying text \textit{infra}.

\textsuperscript{33}Eovaldi & Gestrin, \textit{supra} note 5, at 321; Willging, \textit{supra} note 3, at 259.

\textsuperscript{34}TEX. REV. CIV. STAT. ANN. art. 2460a (1971). The jurisdictional limit is $150 for the recovery of money and $200 for recovery of wages or salary earned, or labor performed under a contract of employment.

\textsuperscript{35}N.M. STAT. ANN. § 16-5-1 (1953). Most other states have jurisdictional limits of $1,000 or less. See, e.g., CONN. GEN. STAT. ANN. § 51-15 (Supp. 1976) ($750); IDAHO CODE § 1-2301 (Supp. 1974) ($300); NEB. REV. STAT. § 24-522(1) (Cum. Supp. 1974) ($500); N.Y. UNIFORM DIST. CT. ACT § 1801 (Supp. 1975) ($1,000).

\textsuperscript{36}NICJ STAFF STUDIES, \textit{supra} note 4, at 40; Rosenberg & Schubin, \textit{Trial by Lawyer—Compulsory Arbitration of Small Claims in Pennsylvania}, 74 HARV. L. REV. 448, 468 (1961).

\textsuperscript{37}See notes 98-101 and accompanying text \textit{infra}.

\textsuperscript{38}Small Claims Court: Reform Revisited, \textit{supra} note 19, at 63. The complexity rationale is used in ALASKA STAT. § 22.15.040 (1975), which states that an action shall not be heard as a small claim if important or unusual points of law are involved.
reduced in importance by enacting express statutory provisions stating that complex cases falling within the jurisdictional limit may be removed to the civil court with concurrent jurisdiction.\(^{39}\)

The jurisdictional limit should be based on an assessment of how large a claim must be before it becomes economically feasible for a litigant to hire a lawyer and bring suit in civil court.\(^{40}\) It has been suggested that a limit between $500 and $1,000 would make redress possible for most consumer disputes.\(^{41}\) The limit should not be set higher because of the pressure from litigants for greater formality in the proceedings where the amount in controversy is greater. The jurisdictional limit should be periodically re-examined so that the effective jurisdiction of the court can keep pace with price level fluctuations.\(^{42}\)

2. Types of Controversies and Remedies Available—Most states limit small claims court remedies to the recovery of money\(^{43}\) on the ground that equitable remedies should not be granted after informal, speedy hearings.\(^{44}\) Under such limitations, a small claims court will not grant equitable relief to a plaintiff who has an equitable action within its jurisdictional limit.\(^{45}\) This limitation of remedies is inappropriate in light of studies showing that repairs, rescission, replacement, and reformation are often sought in consumer disputes.\(^{46}\) Since one important function of small

\(^{39}\) See note 145 and accompanying text infra.

\(^{40}\) REDRESS OF CONSUMER GRIEVANCES, supra note 15, at 18. Delays also inhibit the bringing of a suit in civil court.

\(^{41}\) NICJ Staff Studies, supra note 4, at 42. The proposed Consumer Controversies Resolution Act provides that small claims courts should set the jurisdictional limit high enough to permit most consumer controversies to be heard. S. 2069, 94th Cong., 1st Sess. § 8(c)(2) (1975). The proposed parameters should meet this goal.

\(^{42}\) Note, Small Claims in Indiana, 3 Ind. L.F. 517, 529 (1970). Setting the monetary limit on an automatic sliding scale geared to economic indicators would negate the need for constantly changing the statute or court rule. NICJ Staff Studies, supra note 4, at 42. The difficulty of using such a procedure lies not in finding appropriate economic indicators but in writing a reasonably understandable statute to change periodically the jurisdictional limit with price level fluctuations.

\(^{43}\) See, e.g., HAWAI'I REV. STAT. § 633-27 (Supp. 1974); NEV. REV. STAT. § 73.010 (1973); N.Y. UNIFORM DIST. CT. ACT § 1801 (1963); WASH. REV. CODE ANN. § 12.40.010 (Supp. 1974).

\(^{44}\) NICJ Staff Studies, supra note 4, at 34.

\(^{45}\) In Menkis v. Whitestone Savings & Loan Ass'n, 17 Misc. 2d 329, 356 N.Y.S.2d 485 (Dist. Ct. 1974), a mortgagor was denied reformatory relief in seeking to collect interest on funds held in escrow in connection with a mortgage because the court found the action to be one in equity not cognizable within the jurisdiction.

\(^{46}\) A detailed study of one consumer fraud bureau of the Illinois Attorney General's Division of Consumer Fraud and Protection showed that 50 percent of the complainants wanted restitution in the form of partial refund, repair, or replacement; 23 percent wanted the transaction performed or completed; 14 percent wanted the transaction canceled and their money returned. Steele, Fraud, Dispute and the Consumer: Responding to Consumer Complaints, 123 U. Pa. L. Rev. 1107, 1138 (1975). A study of consumer cases in the small claims division of the Philadelphia Municipal Court showed that 22 percent of the complainants wanted home improvements and repairs; 13 percent complained of unsatisfactory products; 8 percent complained of faulty car repairs; and 5 percent sought appliance repairs and service. Steadman & Rosenstein, "Small Claims" Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study, 121 U. Pa. L. Rev. 1309, 1327 (1973).
claims courts is to settle consumer disputes, these courts should be equipped to give the kinds of remedies consumers demand.

While small claims courts must have the authority to order some equitable remedies if they are to constitute effective forums, they should be precluded from issuing injunctions and temporary restraining orders. These remedies may affect broad practices extending far beyond the specific controversy at issue. Because of the potentially far-reaching impact of injunctions and temporary restraining orders, these remedies should be granted only after formal procedures not available in small claims courts.

Small claims court jurisdiction should extend to all contract and tort claims below the monetary ceiling. Most states exclude libel and slander actions from small claims jurisdiction because legislators have concluded that these actions are too difficult to be handled by small claims courts. However, libel and slander actions are inherently no more complex than other tort and contract cases which may arise, and small claims jurisdiction should include them.

Since most consumer disputes can be classified as small claims, consumer dispute resolution, in particular, is one of the most important functions of small claims courts. Although studies show that consumers bring only a

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47 Cf. IND. ANN. STAT. § 33-11.6-4-4 (Burns Supp. 1975); N.M. STAT. ANN. § 16-5-1(1) (1953).
48 NICJ STAFF STUDIES, supra note 4, at 36.
49 Cf. IND. ANN. STAT. § 33-11.6-4-2 (Burns Supp. 1975).
50 See, e.g., MASS. GEN. LAWS ANN. ch. 218, § 21 (1974); MICH. COMP. LAWS ANN. § 600.8424 (Supp. 1974); VT. STAT. ANN. tit. 12, § 5531 (1952). Libel and slander jurisdictional limitations may be attributed to a policy against encouragement of defamation suits or to the difficulty of proof involved in the actions. Comment, Small Claims Courts, 34 COLUM. L. REV. 932, 934 n.15 (1934).
51 NICJ STAFF STUDIES, supra note 4, at 33.
52 One writer has observed:
At a time when there is increased attention focused on the problems of consumers, tenants, and the urban poor, the role of the small claims court should receive increased importance. If molded to meet these needs of the community, this court can serve as a freely accessible institution for the rational settlement of disputes.


At the mid-year meeting of the ABA in Philadelphia in 1976, Justin Stanley, the president-elect of the ABA, stated that he would work towards developing small claims courts as forums for the resolution of consumer disputes and that an ABA committee was being formed to develop plans for the idea. Chicago Tribune, Feb. 17, 1976, at 6, col. 3 (Midwest Ed.).

Consumer Reports magazine and the Association of the Bar of the City of New York have called for the development of small claims courts designed solely to handle consumer disputes. Buyer v. Seller in Small Claims Court, supra note 13, at 628; NICJ STAFF STUDIES, supra note 4, at 28-29. These proposals are based on the assumption that if the courts do not become known as consumer courts, consumers will never use them. Id. at 29.

However, imposing such a limitation on small claims courts would create a significant practical problem of what to do with the other cases now heard in small claims court as well as a jurisdictional problem of determining what truly is a consumer case. REDRESS OF CONSUMER GRIEVANCES, supra note 15, at 16.
small number of the cases heard in small claims courts, infrequent consumer use of the courts reflects a lack of consumer knowledge about small claims proceedings rather than their unsuitability as forums for resolution of consumer grievances.  

3. Concurrent Jurisdiction with Civil Courts—Most statutes governing small claims courts provide for concurrent jurisdiction with the regular civil court. Such provisions are desirable since, if small claims courts were exclusive forums for claims under the jurisdictional limit, litigants would be less tolerant of the informal and experimental nature of small claims procedures.

B. Claimants

The relative ease and efficiency of obtaining a judgment in small claims court has led commercial interests to use these courts extensively for debt collection. Commentators have concluded that, in the absence of restrictions, commercial interests will continue to be heavy users of small claims courts. Although most states impose no limitations on suits by commercial parties in small claims courts, a few legislatures have barred or curtailed the activities of this class of parties by statute. These states

53 All NICJ studies showed that the number of consumer cases is small taken either as an absolute figure or as a proportion of the total cases brought in small claims courts. NICJ STAFF STUDIES, supra note 4, at 29. In a study of the Roxbury, Massachusetts small claims court, 173 consumer actions were brought out of a total of 1,431 small claims actions in the period from July 1, 1970 to December 23, 1971. Id., App. A, at 375-76. In a study of the Philadelphia Municipal Court during four months in 1971, 614 cases were brought by consumers. This represented only a small fraction of the court's workload. Id., App. C, at 469. In a study of the Los Angeles small claims court, consumer cases represented 14.1 percent of the 4,435 cases brought in the 2 1/2 months studied. Id., App. E, at 610 n.1 and accompanying text.

54 Haemmel, supra note 5, at 508.


56 NICJ STAFF STUDIES, supra note 4, at 44.

57 Haemmel, supra note 5, at 507; Note Small Claims Courts as Collection Agencies, 4 STAN. L. REV. 237 (1952).

58 NICJ STAFF STUDIES, supra note 4, at 48; Small Claims Court: Reform Revisited, supra note 19, at 61.


have barred commercial parties in response to their use of "sewer service," the practice by some commercial creditors whereby a process server swears that service has been performed when it has not,61 and in response to creditor dominance in courts originally designed for use by individual litigants.62 Frequent resort by commercial creditors to small claims procedures has been further criticized because these parties develop an expertise and familiarity with the proceedings, thereby obtaining an unfair advantage over individual litigants.63

While exclusion of commercial creditors from small claims court may discourage some questionable credit transactions,64 it seems likely that such a restriction would only deflect the collection process to other civil courts.65 In addition, the greater delay and inconvenience of the civil courts could lead businesses to resort to heavyhanded collection practices instead of using the courts for enforcement purposes.66 Furthermore, if businesses were forced to bring all suits in civil courts, the consumer defendant would be exposed to more formal, complex, and expensive proceedings.67

It is unfair to exclude an entire class of parties from a useful adjudication process because a few have abused the process.68 The better approach is

61 See note 125 and accompanying text infra.
62 Ohio Small Claims, supra note 52, at 469-70.
63 See notes 92-93 and accompanying text infra.
64 The Persecution and Intimidation of the Low-Income Litigant, supra note 4, at 1674.
65 Buyer v. Seller in Small Claims Court, supra note 13, at 628. See also D. Caplovitz, Consumers in Trouble—A Study of Debtors in Default (1974). In Matter of Vigilante Protective Systems, 333 F. Supp. 1029 (S.D.N.Y. 1971), an injunction was sought to bar the vacation of thousands of default judgments obtained by one company on contracts allegedly obtained by fraud. Most of the judgments had been obtained in the regular civil court, since New York City bars corporations from using its small claims courts.
66 NICJ STAFF STUDIES, supra note 4, at 50; The Persecution and Intimidation of the Low-Income Litigant, supra note 4, at 1674-75.
67 NICJ STAFF STUDIES, supra note 4, at 51. In Hearings on S. 2928, supra note 4, at 88-89, Senator Tunney noted that prohibiting corporations from appearing in small claims courts as plaintiffs merely means that small claims cases end up in the next highest court, where it is even harder for the consumer to get formal legal representation and adequate redress.

The inability of businesses to use small claims court procedure may also increase the cost of credit. NICJ STAFF STUDIES, supra note 4, at 50. David Van Knapp, counsel for the District of Columbia Project on Consumer Legal Assistance, in Hearings on S. 2928, supra note 4, at 87, suggests that the credit structure of New York City businesses should be examined to determine the effect of disallowing appearances by corporations in the small claims court.

68 Small Claims in Indiana, supra note 42, at 535. This recommendation not to exclude suits by commercial parties in small claims courts is consistent with most state statutes (see note 59 and accompanying text supra), and with the position of the board of directors of the National Institute of Consumer Justice (REDRESS OF CONSUMER GRIEVANCES, supra note 15, at 15-16). The imposition of no limitations on use by commercial parties is contrary to the limitations placed on commercial parties by several state statutes (see note 60 and accompanying text supra), and the denial of the small claims forum for use by corporate plaintiffs sought by a minority of the board of directors of the National Institute of Consumer Justice (REDRESS OF CONSUMER GRIEVANCES, supra note 15, at 52-54 (separate statement of Blair Shick and William Clendenen)).
to let commercial parties use the courts subject to rules for venue and mass filing which will curb their domination of the courts. Although most small claims courts have no limitation on mass filings, a restriction on the number of claims that may be filed, like Ohio's statutory provision allowing a party to file no more than six claims within any month, may be desirable. A limitation on mass filing could also prevent a commercial party from developing an expertise in small claims procedures that could place an individual defendant, facing an experienced party, at an undue disadvantage. Such a limitation would not mean that small claims courts will look unfavorably on commercial parties, resulting in their complete abandonment of use of the small claims procedure. Ohio's restriction has not led sellers to abandon the small claims courts. As a further safeguard, commentators suggest that claimants who abuse the courts' procedures should be excluded from them. Under such a rule, the judge would determine the existence of abuse, which could be defined to include the obtaining of default judgments based on fraudulent or unfair trade practices, circumventing court rules, or filing colorless claims.

The use of small claims courts by creditors does not prevent individual litigants from using these courts as effectively as creditors now do. The results of studies showing that plaintiffs overwhelmingly win their cases in

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69 See notes 117-23 and accompanying text infra.
70 NICJ Staff Studies, supra note 4, at 54.
71 The states that have a limit on mass filing are Kansas, Nebraska, and Ohio. KAN. STAT. ANN. § 61-2704 (Supp. 1975) (no more than five claims in any one calendar year); NEB. REV. STAT. § 24-523(6) (Cum. Supp. 1974) (no more than ten claims in any calendar year); OHIO REV. CODE ANN. § 1925.08 (Supp. 1975) (no more than six claims per thirty day period).
73 See notes 94-95 and accompanying text infra.
74 Ohio Small Claims, supra note 52, at 509. The authors conducted an empirical study between June 1, 1971 and May 31, 1972 in an urban county, Hamilton (including Cincinnati), and a rural county, Clermont (including Batavia). Id. at 477. The study showed that in Clermont County, 48 percent of the suits were brought by proprietorships and 41 percent by corporations. In Hamilton County, 36 percent of the suits were brought by proprietorships and over 37 percent by corporations. Id. at 509. These findings show that businesses and corporations continue to take advantage of the small claims courts even where restrictions are placed on mass filings.
75 NICJ Staff Studies, supra note 4, at 55; Small Claims Courts as Collection Agencies, supra note 57, at 242.
76 NICJ Staff Studies, supra note 4, at 55. An example of the abuse of the small claims process occurred in Menon v. Weil, 66 Misc. 2d 114, 320 N.Y.S.2d 405 (Civ. Ct. 1971). The United States through the United States Attorney sought dismissal of twenty small claims actions brought by the estranged wife of a United Nations field worker stationed in South Korea for support and maintenance against United Nations officials as agents of her absent husband. The actions were dismissed because of international treaties and the diplomatic immunity of the officials. In accordance with New York statute (N.Y.C. Civ. Ct. Act § 1810 (1963)) an order was granted restraining Mrs. Menon from prosecuting further suits against United Nations officials in the small claims court.
small claims courts imply that it is more appropriate to view the small claims courts as plaintiffs' courts presently dominated by creditor-plaintiffs than as collection agencies for creditors.\textsuperscript{77} Such a distinction suggests that use of small claims courts by creditors does not preclude individuals from utilizing these courts nor does it justify excluding creditors from using small claims procedures.\textsuperscript{78} Instead, access to the small claims court should be available to any individual or organization.

**C. Court Use and Court Hours**

Studies indicate that the infrequent use of small claims courts by non-commercial plaintiffs results in part from a lack of knowledge of the courts' existence or of how it functions.\textsuperscript{79} When small claims courts are publicized, individual plaintiffs sue more frequently.\textsuperscript{80} Public relations efforts\textsuperscript{81} and small claims court handbooks for the public\textsuperscript{82} will increase the courts' visibility and use.

The location of small claims courts in downtown areas may restrict some potential plaintiffs' use of the courts. Neighborhood small claims courts have been suggested for the sake of convenience and have been implemented on an experimental basis in New York City.\textsuperscript{83} While lack of experience with neighborhood forums precludes any conclusion as to their effectiveness,\textsuperscript{84} further experimentation seems desirable.

Those who use the courts frequently complain that the hours during which the courts are open for filing and trial are short and inconvenient.\textsuperscript{85} Since so many users complain about inconvenient hours, it seems likely

\textsuperscript{77} In a study of the Oakland, Piedmont, and Emeryville, California small claims courts, plaintiffs were found to receive judgment in 90 percent of the claims decided. California Small Claims, supra note 2, at 886. In a study of the Los Angeles small claims court, plaintiffs were found to receive judgment in 85.7 percent of the claims heard. NICJ STAFF STUDIES, supra note 4, App. E, at 587.

\textsuperscript{78} NICJ STAFF STUDIES, supra note 4, at 11.

\textsuperscript{79} Eovaldi & Gestrin, supra note 5, at 321; Haemmel, supra note 5, at 503.

\textsuperscript{80} NICJ STAFF STUDIES, supra note 4, at 258-59. When a radio station in Columbus, Ohio started making announcements about the small claims court in 1971, the case-load of the Columbus court increased significantly. Small claims courts in Boston and Detroit had similar success when the court was publicized by radio and newspaper. Id.

\textsuperscript{81} S. 2069, 94th Cong., 1st Sess. § 8(a)(2) (1975); REDRESS OF CONSUMER GRIEVANCES, supra note 15, at 24; Eovaldi & Gestrin, supra note 5, at 321.

\textsuperscript{82} Every jurisdiction with a small claims court should make a guide to small claims courts available to the public. The guide should include copies of all necessary forms. For an example of such a guide, see J. Baidner, THE NEW YORK HANDBOOK ON SMALL CLAIMS COURTS: AN ESSENTIAL GUIDE TO FIGHTING YOUR CASE (1975).

\textsuperscript{83} The Harlem small claims court is a community court. NICJ STAFF STUDIES, supra note 4, App. H, at 690. The NICJ Staff Study recommends local small claims courts that would be part of the regular court system. Id. at 25. Neighborhood small claims courts could be particularly appropriate in urban areas. REDRESS OF CONSUMER GRIEVANCES, supra note 15, at 18.

\textsuperscript{84} See the extensive discussion in NICJ STAFF STUDIES, supra note 4, at 21-28.

\textsuperscript{85} S. REP. NO. 1164, supra note 15, at 11; NICJ STAFF STUDIES, supra note 4, at 62-63; Ohio Small Claims, supra note 52, at 489-90.
that limited hours deter potential plaintiffs from using small claims courts.\textsuperscript{86} Although limited court hours also deter the use of other civil courts, the problem is more significant with respect to small claims courts, since the low monetary value of the claims makes potential plaintiffs less willing to take time off from work and to lose pay, to present their claims. This problem could be solved by scheduling some small claims court sessions during non-working hours. Evening sessions, like those presently held in New York City, and additional court hours on Saturdays, would make the courts more accessible.\textsuperscript{87} As small claims courts become better known and more accessible, demand for their use by individual litigants is likely to increase.\textsuperscript{88}

D. Court Personnel

1. Attorney Representation—Most small claims courts allow attorneys to appear in the proceedings.\textsuperscript{89} However, it has been suggested that the litigant represented by an attorney has an unfair advantage over the pro se litigant.\textsuperscript{90} The presence of attorneys complicates the proceedings to the practical and psychological detriment of the individual litigant. Also, the presence of attorneys has been found to undermine the small claims court ideal of speedy, inexpensive, informal, and understandable proceedings.\textsuperscript{91}

Some states, motivated by these factors and by concern over possible inequities when a commercial litigant represented by an attorney sues an individual litigant appearing pro se, have barred attorneys

\textsuperscript{86} See The Persecution and Intimidation of the Low-Income Litigant, supra note 4, at 1671, where it is stated:
If court sessions were made convenient for the working man, defaults might decrease significantly, witnesses would be more available, and the pressures that stem from squeezing the small claims calendar into a crowded court docket might be alleviated. See also Steadman & Rosenstein, supra note 46, at 1337.

\textsuperscript{87} S. 2069, 94th Cong., 1st Sess. § 8(b)(3) (1975); Redress of Consumer Grievances, supra note 15, at 18. The District of Columbia Code has a requirement that the small claims court operate on Saturdays and on one evening a week (D.C. Code Ann. § 11-1302 (1973)), but this is not done in practice. Murphy, D.C. Small Claims—The Forgotten Court, 34 D.C.B.J. 14, 20 (Feb. 1967).

\textsuperscript{88} NICJ Staff Studies, supra note 4, at 66.


\textsuperscript{90} A study of small claims cases in which parties appearing pro se were opposed by attorneys revealed:
When an attorney opposes a litigant acting on his own behalf, the interaction is again affected by the deference that the lawyer's professional status commands. The lay litigant may feel constrained from challenging or strongly opposing the lawyer or even from presenting his own view of the case. If he feels ill-at-ease in the courtroom, the sensation may be increased by the contrast between his own demeanor and that of the lawyer, who is accustomed to appearing in court, adept at argumentation, and perhaps, on familiar terms with the judge.

NICJ Staff Studies, supra note 4, App. A, at 404. Banning attorneys from small claims courts would prevent this situation from arising.

\textsuperscript{91} Id. at 215, 218. Attorneys interject legal technicalities and formality into the trial, defeating any hope for a simple procedure where grievances can be informally resolved. See also R. Smith, supra note 8, at 53.
from the small claims courts altogether. Since the cost of hiring an attorney and the necessity of counsel for successful litigation are major deterrents to access to the courts, prohibiting attorneys is a desirable way to encourage use of small claims courts by those lacking the means to employ attorneys for small claims, and to hold down the cost of resolving minor disputes.

Even without attorney representation, agents of business plaintiffs which frequently resort to small claims courts are likely to become familiar with the procedures of the court and the law relevant to the types of cases that the agents handle. These agents gain familiarity and credibility with the court and obtain a distinct advantage over individual defendants. The use of paraprofessionals to assist individual litigants may counter the strength of business litigants.

Although disallowing attorneys altogether in small claims court proceedings may create constitutional due process problems, the right to an appeal with a trial de novo in the ordinary civil court satisfies the due process right to be heard by counsel and the constitutional right to a jury trial. This principle was established in Capital Traction Co. v. Hoff, where the Supreme Court held that a trial by a judge in the justice of the peace court with trial by jury only on appeal satisfied the seventh amendment.

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92 Small Claims Court: Reform Revisited, supra note 19, at 65. The author of the above-cited comment suggests having the state provide counsel for indigents, but the cost of such representation may be prohibitive. His proposal would not provide counsel to those who could not economically justify hiring an attorney because of the small amount involved and the expense of attorneys. See note 22 and accompanying text supra.

93 Willging, supra note 3, at 304. Willging discusses financial barriers to access to the courts by the poor.

94 Eovaldi & Gestrin, supra note 5, at 295. CAL. CIV. PRO. CODE § 117g (Deering Supp. 1976) states "No attorney at law or other person than the plaintiff and defendant should take any part in filing or prosecution or defense of such litigation." See also the similar provisions of IDAHO CODE § 1-2308 (Supp. 1974); KAN. STAT. ANN. § 61-2707(a) (Supp. 1974) (no party represented by an attorney prior to judgment); MICH. COMP. LAWS ANN. § 600.8408 (Supp. 1975); MINN. STAT. ANN. § 491.02 (1971); NEB. REV. STAT. § 24-523(2) (Cum. Supp. 1974). The board of directors of the National Institute of Consumer Justice also recommends that lawyers should not be allowed to appear except to sue on their own behalf. REDRESS OF CONSUMER GRIEVANCES, supra note 15, at 23. There was a dissenting view to this recommendation. Id. at 48 (separate statement of Philip Elman). Attorneys may continue to give advice to parties appearing in the small claims court, but they may not represent the parties in the small claims forum.

95 The Persecution and Intimidation of the Low-Income Litigant, supra note 4, at 1662.

96 Id. at 1663; Comment, The Nature and Operation of the New York Small Claims Court, 38 ALBANY L. REV. 196, 204 (1974) [hereinafter cited as New York Small Claims Court].

97 See notes 102-05 and accompanying text infra.

98 The Supreme Court has held:

If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of . . . hearing, and therefore, . . . due process in the constitutional sense.


99 174 U.S. 1 (1899).
ment jury trial guarantee. Similarly, the right to a jury trial and the right be be represented by counsel must be available on appeal from a small claims court judgment.

The California statutory provision barring attorneys from appearing in small claims courts was challenged on due process grounds in *Prudential Insurance Co. v. Small Claims Court.* Following *Hoff*, the court held that due process is not denied "as long as the right to appear by counsel is guaranteed in a real sense somewhere in the proceedings." Since California's statute allowed the defendant a new trial on appeal with representation by counsel, due process requirements were found to be satisfied.

To protect pro se litigants from the complications of confrontation with an attorney, and to preserve the informality and speed of the small claims proceedings, attorneys should be disallowed from appearing in small claims courts. Such a limitation will be free from constitutional defects if provision is made for representation by counsel on appeal in a trial *de novo*.

2. Clerks and Legal Paraprofessionals—If attorneys are barred from small claims courts, litigants may need assistance in preparing their claims and defenses. It has been suggested that clerks and legal paraprofessionals be made available to assist the parties and to familiarize them with court proceedings.102

Clerks should give the parties technical and clerical assistance in such matters as scheduling the trial and mailing out the summons. They should also provide information, answering questions about the court and referring the parties to legal paraprofessionals for any necessary assistance in preparing their cases. Since clerks are not trained to give advice regarding legal questions, legal paraprofessionals rather than clerks should guide parties in their preparation for litigation.103 In the Harlem small claims court, paralegals help litigants prepare cases, tell them what to bring to trial, answer questions about the court, and sit in on proceedings to offer support to fearful and shy litigants.104 While unauthorized practice restrictions prevent paraprofessionals from representing litigants in the proceedings, paralegals serve a valuable function in preparing and supporting parties presenting or defending small claims.105 They may also help to

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101 Id. at 382, 173 P.2d at 40.
102 Pound, *supra* note 1, at 319; Steadman & Rosenstein, *supra* note 46, at 1318. Some statutes specifically provide that the clerk should assist individuals, upon request, in filling out their claims. See, e.g., *CAL. CIV. PRO. CODE* § 117c (Deering Supp. 1976); *MICH. COMP. LAWS ANN.* § 600.8403 (Supp. 1975). Both the proposed Consumer Controversies Resolution Act (S. 2069, 94th Cong., 1st Sess. § 8(b)(2) (1975)) and the report of the board of directors of the National Institute of Consumer Justice ( *REDRESS OF CONSUMER GRIEVANCES, supra* note 15, at 19) recommended that court personnel should assist parties in the small claims court.
103 NICJ STAFF STUDIES, *supra* note 4, at 235.
105 Id. at 244. For a discussion of the role of legal paraprofessionals see generally *Comment, Legal Paraprofessionals and Unauthorized Practice, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 104 (1973); Brickman, Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism, 71 COLUM. L. REV. 1153 (1971).*
counter the strength of business litigants who send experienced agents to small claims courts, thereby increasing chances for fair determination of claims.

3. Judges—In the interest of speed, economy, and informality, most small claims court legislation disallows trial by jury.\textsuperscript{108} Rather, trial is by the court, leaving the judge with liberal powers to conduct the hearing and render judgment.\textsuperscript{107} The informality of the process and the absence of professional advocates to assist in developing the case further increase judicial discretion.\textsuperscript{108}

Where there are no attorneys to present and focus facts and issues, the judge must play an active role in the proceedings.\textsuperscript{109} He must expedite the hearing and bring out the essential evidence upon which a decision can be reached.\textsuperscript{110} By so acting, he can guard against abuses and preserve a fair trial for both parties.\textsuperscript{111} However, an inherent problem with the judge assuming such an active role is the possible compromise of the judge’s impartiality.\textsuperscript{112}

Because of the nature of the proceedings and the discretion given to the court, small claims courts cannot operate effectively without extremely capable judges.\textsuperscript{113} Small claims court judges often serve as part of a rotation through the court system.\textsuperscript{114} Although the rotation process assures that small claims judges will be legally trained, the danger exists that small claims judges will fail to take their role seriously.\textsuperscript{115} Screening of judges would help to ensure that only those judges sincerely interested in working in small claims courts serve there. The difficult function, that the small claims judge has to perform, calls for a sympathetic and serious judge.\textsuperscript{116}

\begin{footnotes}
\item[106] See, e.g., NEB. REV. STAT. § 24-525 (Cum. Supp. 1974); N.D. CENT. CODE § 27-08.1-03 (Supp. 1975). The claimant is said to waive any right to a jury by bringing the claim in small claims court. See note 177 and accompanying text infra. Defendants seeking a jury trial are often given a right of removal to the regular civil court. See note 143 and accompanying text infra.
\item[107] Some statutes have specifically invested wide discretionary powers in the judge. See, e.g., S.D. COMPIL. LAWS ANN. § 15-39-35 (1967) (duty of the judge to conduct hearings so as to discover facts and to determine the justice of cases); TEX REV. CIV. STAT. ANN. art. 2460a(9) (1971) (duty of the judge to develop all facts and to exercise discretion so as to effectuate a correct judgment and to speedily dispose of cases).
\item[108] NICJ STAFF STUDIES, supra note 4, at 219.
\item[109] New York Small Claims Court, supra note 96, at 212.
\item[110] Adams, supra note 24, at 607.
\item[111] The Persecution and Intimidation of the Low-Income Litigant, supra note 4, at 1665.
\item[112] Adams, supra note 24, at 602-03, 608.
\item[113] R. Smith, supra note 8, at 47-48.
\item[114] See, e.g., MICH. COMP. LAWS ANN. § 600.8401 (Supp. 1975); N.J. STAT. ANN. § 2A:6-42 (Supp. 1975); ORE. REV. STAT. § 46.415 (1975). In New Mexico and Indiana judges are elected to serve solely as small claims judges. IND. ANN. STAT. § 33-11.6-3-2 (Burns Supp. 1975); N.M. STAT. ANN. § 16-5-3 (1953).
\item[115] Some civil court judges view small claims duty as K.P. duty. These judges dislike presiding over cases involving legally untrained pro se litigants and sums they regard as trivial. NICJ STAFF STUDIES, supra note 4, at 222.
\item[116] Id. at 225.
\end{footnotes}
E. Pretrial Procedures

1. Venue—Although the problem of proper venue rarely arises in small claims tort actions, since venue is in the county where the injury took place or where the defendant resides, the problem may be complex in contract actions, especially when mail-order and door-to-door sales companies are involved.\(^{117}\) One empirical study in California determined that 20 percent of all claims brought were against out-of-county defendants, and 50 percent of the claims brought by corporations were against out-of-county defendants.\(^{118}\)

Despite the widespread existence of this problem, small claims courts rarely grant transfer of venue.\(^{119}\) Enactment of statutory provisions permitting discretionary transfer of cases to a more convenient forum may alleviate this problem.\(^{120}\) Venue requirements should be flexible,\(^{121}\) but guidelines are needed for determining venue when the action is filed. Venue should lie where the action arises or where the defendant resides or does business.\(^{122}\) Actions brought in the wrong venue may be dismissed unless the defendant appears and waives his right to challenge venue.\(^{123}\)

2. Pleadings—Since a statement of the claim may be difficult for lay parties to draft and to understand, most small claims courts require no formal pleading except for a simplified statement of claim and notice.\(^{124}\) Notice requirements should be limited to informing the defendant of the nature of the dispute, the amount of money involved, and the hearing date.\(^{125}\)

3. Service of Process—Small claims courts have been plagued with high default judgment rates. Studies suggest that one reason for this problem is the

\(^{117}\) Id. at 74; Small Claims in Indiana, supra note 42, at 531.

\(^{118}\) California Small Claims, supra note 2, at 887.

\(^{119}\) This was the finding of studies based on the Oakland, Piedmont, and Emeryville, California small claims courts. Discretionary change of venue is rarely granted, unless an express statutory provision provides for it. Id. at 879 n.35.

\(^{120}\) Id. at 889; Comment, Small Claims Courts and the Poor, 42 S. CAL. L. REV. 493, 500 (1969).

\(^{121}\) NICJ STAFF STUDIES, supra note 4, at 83. Although flexibility of approach provides no ready answer to a particular venue question, it is recognized that the test for venue varies depending upon the particular circumstances. The need for flexibility in venue is stated well by Carrington & Martin, Substantive Interests and the Jurisdiction of State Courts, 66 MICH. L. REV. 227, 230 (1967):

It is the thesis of this article that the requisite minimum quantum of "contact" between the defendant and the forum does and should vary with the measure of the values affected and the costs inflicted by the attempted exercise of power. In other words, the test, however phrased, must be adapted to the needs of each of the environments in which it must operate.

\(^{122}\) Cf. MICH. COMP. LAWS ANN. § 600.8415 (Supp. 1975).

\(^{123}\) Cf. WIS. STAT. ANN. § 299.11(5) (Supp. 1975).

\(^{124}\) See, e.g., CAL. CIV. PRO. CODE § 1171 (Deering Supp. 1976); ILL. REV. STAT. ch. 110A, § 282 (1968); UTAH CODE ANN. § 78-6-8 (Supp. 1975).

\(^{125}\) Small Claims Court: Reform Revisited, supra note 19, at 50. For examples of simplified notice appropriate for use in small claims court, see CAL. CIV. PRO. CODE § 117h (Deering Supp. 1976); ILL. REV. STAT. ch. 110A, § 282 (1968).
failure of defendants to receive notice. In New York City, personal service has often resulted in "sewer service." Most states follow the more effective and less expensive procedure of service by registered or certified mail requiring the defendant's signature on the return receipt to validate service. These states allow personal service if service cannot be effected by mail, or if personal service would be more effective under the circumstances.

4. Fees—Fees are levied on filing, service of process, and use of collection remedies by most small claims courts. Minimal costs will ensure that the court will be accessible to all who desire to use it, and costs should be waivable for indigents.

5. Arbitration and Conciliation Alternatives—Resort to small claims court usually takes place only after informal attempts at settlement have failed. For this reason, some cases may be more amenable to settlement by mediation than by adjudication. Since a trial often leaves one or both of the parties dissatisfied with the legal process, an agreement worked out through arbitration may have a positive psychological effect on the parties involved. Although the informal proceedings of small claims courts blur

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126 In Chicago, 29 percent of the debtors in default said that they had not been served. In New York City, the figure was 46 percent. D. CAPLOVITZ, supra note 65, at 194. The actual percentage of defendants not receiving notice is probably lower than that found by Caplovitz since he obtained his data directly from the defendants without checking with court records to determine whether the notice had been received and signed by the defendant. Nevertheless, the percentage of defendants claiming not to have received notice probably is a good indication that a substantial number of defendants do not actually receive notice.


128 See, e.g., CAL. CIV. PRO. CODE § 117c (Deering Supp. 1976); N.Y. UNIFORM DIST. CT. ACT § 1803 (1963); WASH. REV. CODE ANN. § 12.40.40 (1974). The defendant's own signature should be required to validate service. If delivery and signature by someone at the defendant's residence would be enough for valid service, the defendant would often fail to receive personal notice. Hearings on S. 2928, supra note 4, at 86 (statement of Marianne Freeman, Consumer Action Director, Washington, D.C., Urban League).


131 Massachusetts and the District of Columbia are the only jurisdictions having statutes allowing waiver of fees. Massachusetts small claims court rules may be written to provide for elimination of all fees and costs. MASS. GEN. LAWS ANN. ch. 218, § 22 (1974). The District of Columbia Code provides that the judge may waive prepayment or payment upon the plaintiff's sworn statement or evidence of the inability to pay costs. D.C. CODE ANN. § 16-3903 (1973). The board of directors of the National Institute of Consumer Justice also recommends that the court have discretion to waive fees.

132 Steadman & Rosenstein, supra note 46, at 1331.

133 NICJ STAFF STUDIES, supra note 4, at 248.

134 Small Claims in Indiana, supra note 42, at 532.
the distinction between traditional adjudication and arbitration, the trial retains some measure of formality that distinguishes it from arbitration. While further data are needed to determine the effectiveness of arbitration and conciliation in small claims proceedings, small claims courts should experiment with these methods of settling controversies.

Conciliation, a binding procedure whereby a decision is reached only upon the mutual consent of the parties, has been used as a voluntary pre-trial procedure. While such a proceeding may expedite resolution of cases, criticism has been directed at those systems where the judge acts as conciliator and hears the trial if the parties cannot be reconciled. If the judge has failed to settle the dispute through conciliation, he may be prejudiced against one of the parties when the case is brought to trial. To avoid prejudice, no judge should act as conciliator and adjudicator in the same case. Potential problems could be avoided by appointing lawyers to serve as mediators.

Arbitration, a process whereby a binding decision is made by a third party outside of the courtroom, should be made available not as a pre-trial procedure but as an alternative to the trial. Arbitration by volunteer lawyers has been successfully used in New York City small claims courts. There, parties are informed when they appear for trial that they may have their dispute arbitrated with less formality but that they thereby waive the right to appeal.

While the use of conciliation and arbitration in small claims courts has been limited, these mechanisms may effectively supplement trial procedures for parties for whom a mutually satisfactory agreement can be worked out. For those disputants who cannot be reconciled, trial before

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135 NICJ STAFF STUDIES, supra note 4, at 114.
136 The District of Columbia small claims statute provides that with the consent of the parties, settlement may be reached through the methods of conciliation and arbitration. D.C. CODE ANN. § 11-1322 (1973). In Minnesota, the small claims court is titled a conciliation court where the judge is urged to use his best endeavors to have the parties settle their controversy by mutual agreement. MINN. STAT. ANN. § 491.03(2) (1971). In Ohio, a court may, by rule, establish a voluntary conciliation procedure. OHIO REV. CODE ANN. § 1925.02 (1973). In the Virgin Islands, the judge is urged to conciliate the parties prior to trial. V.I. CODE ANN. tit. 5, App. IV, Rule 64 (1968).
137 NICJ STAFF STUDIES, supra note 4, at 160.
138 Adams, supra note 24, at 598. The conciliator inevitably becomes coercive in trying to settle a claim. If unsuccessful, the conciliator is liable to resent the party who has turned down his settlement suggestion. NICJ STAFF STUDIES, supra note 4, at 160.
139 NICJ STAFF STUDIES, supra note 4, at 161; REDRESS OF CONSUMER GRIEVANCES, supra note 15, at 21.
140 See the discussion of arbitration in New York City in NICJ STAFF STUDIES, supra note 4, App. H (Small Claims Procedure in New York City: The Arbitration Model), at 687-90. Arbitrators in the New York City small claims court are lawyers selected by the administrative judge from a list of names submitted by the New York State and New York City bar associations. The arbitrators sit about once per month and are not compensated for their services. There are more than enough applicants to fill the positions.
141 Id. at 693.
a judge rather than negotiated settlement will be necessary.

6. Removal—Many states allow removal of cases from the small claims court by the defendant if a counterclaim is asserted which exceeds the jurisdictional limit, or if the defendant seeks a jury trial. Defendants often use the removal option to stifle the prosecution of cases by plaintiffs who cannot afford to pursue the more expensive and inconvenient civil court trials. This problem can be effectively solved by limiting removal to cases in which the defendant shows, or the court on its own motion finds, that good reasons for removal, such as complex points of law or multiple parties, are present.

Any infirmities which disallowing removal would present with respect to compulsory counterclaims could be solved by permitting counterclaims only within the jurisdictional limits, reserving the defendant's right to bring a counterclaim above the limit in the regular civil court. In cases not involving counterclaims, constitutional problems could be sidestepped by allowing the defendant a jury trial on appeal in a trial de novo if dissatisfied with the small claims court decision.

F. Trial Procedures

1. Conduct of the Hearing—Small claims court advocates stress the need for informality and freedom from technicalities to ensure efficient and understandable proceedings. Many small claims statutes provide that the formal rules of evidence do not apply. Such provisions are

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142 See, e.g., CAL. CIV. PRO. CODE § 117t (Deering 1972); N.Y. UNIFORM DIST. CT. ACT § 1805(b) (1963); OHIO REV. CODE ANN. § 1925.10 (1973).
144 NICJ STAFF STUDIES, supra note 4, at 121.
145 Cf. ALASKA STAT. § 22.15.040 (1975); REDRESS OF CONSUMER GRIEVANCES, supra note 15, at 17.
146 Cf. KAN. STAT. ANN. § 61-2706 (Supp. 1974); NICJ STAFF STUDIES, supra note 4, at 99.
147 See notes 98-101 and accompanying text supra. MASS. GEN. LAWS ANN. ch. 218, § 23 (Supp. 1975) provides:
Every case begun under the procedure shall be determined initially in district court. No such cause may be removed for trial in the superior court.
The court may in its discretion transfer the cause. MASS. GEN. LAWS ANN. ch. 218, § 25 (1974). See also NICJ STAFF STUDIES, supra note 4, at 122.
148 NICJ STAFF STUDIES, supra note 4, at 123; Adams, supra note 24, at 615.
149 See, e.g., HAWAII REV. STAT. § 633-32 (Supp. 1974); MICH. COMP. LAWS ANN. § 600.8411 (Supp. 1975); N.Y. UNIFORM DIST. CT. ACT § 1804 (Supp. 1975) (with additional exceptions of communication with decedents and lunatics). An evidentiary exception is generally made for privileged communications. In states where the small claims court act says nothing about modification of the rules of evidence, courts have held that the rules of evidence apply in small claims court. See, e.g., Smith v. Champaign-Urbana City Lines, Inc., 116 Ill. App. 2d 289, 252 N.E.2d 381 (1969). This approach does not comport with the idea of a forum designed to be accessible to individual litigants and should not be followed.
necessary if litigants are to be able to present their cases effectively pro se. While evidentiary rules serve a legitimate function in more formal proceedings heard by juries, these technicalities need not be rigorously observed in a case heard by a judge whose function is to examine the parties and receive material evidence.

2. Substantive Law—Statutes and court rules uniformly require that small claims judges follow state substantive law in reaching their decisions. As a practical matter, the short, speedy, and informal small claims court trial, conducted without the benefit of counsel to sharpen the legal issues, has necessarily resulted in a system where judges take a common sense approach without strict adherence to the substantive law. Two safeguards exist to protect litigants from potential abuses arising from this process: cases involving complicated questions of substantive law may be removed to a plenary court and a de novo trial on appeal is available after the informal small claims trial.

3. Continuances—Continuances, while occasionally necessary to allow a party to prepare adequately for litigation, are sometimes used to defeat a bona fide claim or defense. A defendant may seek a continuance to force the plaintiff to drop his claim; a plaintiff may seek a continuance in the hope that the defendant will fail to appear a second time and will

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150 NICJ Staff Studies, supra note 4, at 132.
151 In the trial of a nonjury case, it is virtually impossible for a judge to commit reversible error by receiving incompetent evidence, whether objected to or not. Builders Steel Co. v. Commissioner, 179 F.2d 377, 379 (8th Cir. 1950). Similarly, a small claims judge, acting without a jury, can decide cases without following the technicalities of the rules of evidence.
152 See, e.g., Mich. Comp. Laws Ann. § 600.8411 (Supp. 1975); N.Y. Uniform Dist. Ct. Act § 1804 (Supp. 1975). Most small claims court statutes make no reference to substantive law being followed since it is assumed that as a court of law small claims courts are bound to do so. Those statutes which refer explicitly to substantive law state that substantial justice should be done according to the rules of substantive law.
153 In Bierman v. City of New York, 60 Misc. 2d 497, 302 N.Y.S.2d 696 (Civ. Ct. 1969), a small claims judge held the City of New York and Consolidated Edison liable to an elderly woman whose basement was damaged by a ruptured water main in front of her house. His statement of the case illustrates the common sense approach of a small claims judge:
   The rule of substantive law says that Mrs. Bierman may not recover because she cannot prove negligence on the part of the city or of Consolidated Edison. Is this substantial justice? Only a very backward lawyer would think so. Why would a lady little able to bear the loss nevertheless bear it? Because the metropolis and the great utility were not at fault, we are told. Yet the concept of fault is beside the point. 60 Misc. 2d at 498, 302 N.Y.S.2d at 697. The judge found that there was no negligence and held the defendants liable on a strict liability theory. The appellate term of the supreme court, in Bierman v. Consolidated Edison Co., 66 Misc. 2d 237, 320 N.Y.S.2d 331 (App. T. 1970), reversed the holding of strict liability and dismissed the suit against the Consolidated Edison Company. The court affirmed the judgment on a finding of negligence on the part of New York City, but reprimanded the small claims judge, stating that stability and certainty in the law require adherence to substantive law.
154 See note 145 and accompanying text supra.
155 See notes 176-78 and accompanying text infra.
156 NICJ Staff Studies, supra note 4, at 145.
be adjudged in default. Continuances also affect the speedy rendering of justice. They should be granted only for good reason, as when a litigant has come to court without important evidence or witnesses.

4. Default Judgments—While sellers must have ready access to efficient legal processes for debt collection in a society where credit transactions are widely used, default judgments do not always occur simply because the debtor has no defense to the claim against him. In one study of debtors against whom default judgments had been entered, 35 percent of the debtors surveyed gave reasons for their default which were a result of the creditor's actions. Confronted with what they felt to be fraudulent conduct in the transaction from which the debt arose, consumers refused to pay amounts they thought were not justly due. Many small claims court cases arise in this manner; a high default rate results because the debtor fails to receive notice or because he does not know how to respond. In either case, the consumer is subjected to judgment without a hearing. Most states grant default automatically if a defendant fails to appear and the court determines that proper notice has been given.

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157 Steinberg, The Small Claims Court: A Consumer's Forgotten Forum, 63 Nat'l Civic R. 289 (1974). The author observed the Washington, D.C. small claims court and learned the following:

One lawyer admitted, "You ask for a continuance when you have a weak case and the defendant shows up. He won't be able to afford to take another day off from work, and you'll win a default judgment next time."

Id. at 290.

158 Steadman & Rosenstein, supra note 46, at 1328.

159 If possible, the judge should hold the trial without the evidence or testimony, but in some cases such evidence will be essential, necessitating a continuance. NICJ Staff Studies, supra note 4, at 146; Tex. Rev. Civ. Stat. Ann. art. 2460a(8) (1971); Wis. Stat. Ann. § 299.27(2) (Supp. 1975).


161 The Persecution and Intimidation of the Low-Income Litigant, supra note 4, at 1664.

162 D. Caplovitz, supra note 65, at 91. The book is based on responses to detailed interviews with 1,331 default-debtors sampled from court records in Chicago, Detroit, New York City, and Philadelphia.

163 The debtor was almost always able and willing to pay but was withholding payments. Id. at 125. See also Eovaldi & Gestrin, supra note 5, at 283.

164 See note 126 and accompanying text supra.

165 Eovaldi & Gestrin, supra note 5, at 284. The debtor's inaction is often due to a lack of knowledge as to any source of help with consumer difficulties. D. Caplovitz, The Poor Pay More 175 (1963).

166 It has been suggested that injustice is done by allowing a default judgment to be entered when a defendant fails to appear if: (1) the defendant was never served; (2) nonpayment is due to a misunderstanding over the contract; (3) the defendant has a valid defense; (4) the defendant wanted to pay, but needed more time on an installment payment schedule; (5) the defendant failed to show up in court for other reasons, such as personal problems; or (6) the defendant is ignorant of the consequences of default. NICJ Staff Studies, supra note 4, at 140.

In many jurisdictions the clerk is authorized to enter the judgment after proof of service, so that a defendant may be found in default although the judge has never heard his case.\textsuperscript{168}

Small claims court rules should not grant substantive rights in consumer credit transactions by way of procedural "tinkering,"\textsuperscript{169} but they can and should provide procedural safeguards to insure that litigants' substantive rights are protected and a defendant is not adjudged in default without a chance to assert those rights. To this end, several states have enacted statutory safeguards against automatic default judgments that require the plaintiff to present some evidence to prove the validity of the claim before the entry of judgment.\textsuperscript{170} At this time, the judge should inquire into whether the plaintiff has contacted the defendant and attempted to settle by informal means.\textsuperscript{171} If the plaintiff has not done this, default should not be granted. In New York City, arbitrators determine whether a defendant should be adjudged in default.\textsuperscript{172} In the event that a defendant fails to receive notice of a small claims court hearing or does not understand the nature of the proceedings being brought against him, a further procedural safeguard would be to allow a party held in default to reopen the judgment against him.\textsuperscript{173} Enactment of safeguards such as these would permit the creditor to obtain a default judgment upon a proper showing of a legitimate claim and also protect the debtor from the overreaching creditor.

G. Post-Trial Procedures

1. Appeals—Although appeals are rarely taken from small claims court decisions,\textsuperscript{174} the right should be made available to both parties.\textsuperscript{175} Partic-
ularly in the small claims court, when trial normally is before a judge without a jury and without attorneys, due process requires that an appeal be available to the defendant.176 The right to a trial de novo on appeal in a civil court would preserve the informality of a small claims court while preserving the parties' rights to be represented by counsel and heard by a jury.

Some state statutes provide that the defendant has the right to appeal from an adverse judgment, while the plaintiff waives the right to appeal by submitting his claim to the small claims forum instead of the civil court with concurrent jurisdiction.177 To encourage individual litigants to utilize the small claims courts and to protect them from possible injustices resulting from informal procedures, plaintiffs as well as defendants should have the right to appeal.178 While the right to appeal must be protected for constitutional reasons,179 an appeal may force the adverse party to abandon his claim.180 Non-meritorious appeals would be discouraged, and the interest in finality would be properly balanced against the right to appeal if the prevailing party on appeal were allowed to recover costs and attorney's fees only when the civil court judgment differs significantly from the small claims court judgment.181

2. Enforcement of Judgments—Successful small claims court plaintiffs complain of difficulty in collecting their judgments.182 This problem has been found to result from the plaintiff's lack of knowledge of how to go about collecting on a judgment and from the failure of the court to inform the successful litigant of court procedures available for collecting on a judgment.183 In addition, there is no inexpensive or efficient way to collect from a determined opponent. However, procedural changes can do much to resolve the problem of collecting on judgments. It has been suggested that the judge should question the defendant about payment after judgment is rendered.184 Some statutes provide that if the judge finds the losing party unable to pay the judgment in full, provision may be made for payment by installments.185 Clerks and paraprofessionals may help victorious plain-

176 See notes 98-101 and accompanying text supra.
177 See, e.g., UTAH CODE ANN. § 78-6-10 (1953); WASH. REV. CODE ANN. § 12.40.120 (1962).
178 NICJ STAFF STUDIES, supra note 4, at 176. Providing an appeal right for both parties is contrary to the recommendation of the board of directors of the National Institute of Consumer Justice that only the defendant have the right to appeal. REDRESS OF CONSUMER GRIEVANCES, supra note 15, at 22.
179 See notes 98-101 and accompanying text supra.
180 The same problem is raised by the removal option. See note 144 and accompanying text supra.
181 Small Claims in Indiana, supra note 42, at 534.
182 Steadman & Rosenstein, supra note 46, at 1335-36; Ohio Small Claims, supra note 52, at 483.
183 NICJ STAFF STUDIES, supra note 4, at 185.
184 Id. at 186. A party is most amenable to collection when in court.
tiffs by assisting in informal collection efforts such as calling the losing party and informing plaintiffs of the availability of execution if the judgment remains unsatisfied.186

III. CONCLUSION

Because small claims are regarded as relatively unimportant, neither states nor local governments have provided sufficient resources for the effective operation of small claims courts. Remedying the problems of small claims courts will require allocating funds and other resources.187 This is especially so in light of the need for continued experimentation and for development of specialized small claims tribunals to meet the varying legal needs of urban, suburban, and rural communities.188

Small claims courts should be established or reformed to incorporate the changes suggested in this note. The Appendix contains the text of a Model Small Claims Court Act which includes most of these recommendations. However, some of the suggested changes do not lend themselves to statutory form and should be provided for by local court rule. For example, not every judicial district will have sufficient litigation in the small claims court to provide for evening and Saturday sessions. Thus, a statute legislating that every judicial district must hold evening and Saturday sessions would be inappropriate. Most of the suggested changes do lend themselves to incorporation in the statutory form and have been included in the appended Model Small Claims Court Act.

Section 1 of the Model Small Claims Court Act provides for the establishment of small claims courts throughout a state court system with judges of the civil court serving in the small claims division. Screening of judges for service in the small claims division should be done informally or by local court rule. Section 2 provides for subject matter jurisdiction ex-
tending to all civil actions, excluding injunctions, brought by any individual or organization beneath the jurisdictional limit within the parameters specified to be determined at the option of a particular jurisdiction. Section 3 provides the plaintiff the option of bringing suit in the small claims division or in the concurrent civil court. Section 4 is designed to protect defendants from being sued in an inconvenient forum, a problem especially important to defendants sued on contracts resulting from door-to-door and mail-order practices.

Sections 5 and 6 provide for informal pleadings, service of process, and counterclaims. Section 7 provides that a speedy trial will be available in small claims courts by providing for a hearing within thirty days, unless the defendant has not been served at least five days prior to the appearance date. Section 8 provides for fees to be charged only for filing and service of process. Although fees are not specified, they should be kept to a minimum. This section also provides that payment of fees may be waived upon evidence of the plaintiff's inability to pay.

To keep the proceedings informal and inexpensive, section 9 provides that there shall be no trial by jury in the small claims court and section 10 provides that no attorney shall take part in the small claims proceedings. Since the model act excludes attorneys, clerks and legal para-professionals should be available to assist individual litigants. Section 11 provides for such assistance. To prevent abuse of the small claims courts, section 12 provides for mass filing limitations and exclusion of those who abuse small claims procedures.

Since many small claims can be resolved by informal mediation, section 13 provides for arbitration and conciliation proceedings. Section 14 limits the removal option to claims involving complex points of law and claims involving multiple parties. To prevent delays, section 15 limits the granting of continuances to a showing of good cause. Section 16 provides that proceedings should be free from the technicalities of procedural rules, but decisions should be reached in accordance with rules of substantive law.

Section 17 provides procedural safeguards in the granting of default judgments by requiring a plaintiff to present evidence to prove a claim before a default judgment is entered and to allow default judgments to be

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190 See notes 34-54 and accompanying text supra.
191 See notes 55-56 and accompanying text supra.
192 See notes 117-23 and accompanying text supra.
193 See notes 124-29, 146 and accompanying texts supra.
194 See notes 130-31 and accompanying text supra.
195 See notes 106-07 and accompanying text supra.
196 See notes 89-101 and accompanying text supra.
197 See notes 102-05 and accompanying text supra.
198 See notes 71-76 and accompanying text supra.
199 See notes 132-41 and accompanying text supra.
200 See notes 142-47 and accompanying text supra.
201 See notes 156-59 and accompanying text supra.
202 See notes 148-55 and accompanying text supra.
reopened for good cause within sixty days. \[203\] Section 18 provides that judgments may be paid in installments and that the court may authorize execution upon failure of a litigant to pay. \[204\] Section 19 provides that the costs of the action will be awarded to the prevailing party. Appeals from the small claims judgment may be taken according to section 20 to the civil court with concurrent jurisdiction. \[205\] These features should be statutorily adopted to provide for effective small claims courts in every jurisdiction.

Funds allocated to the improvement of small claims courts would be well spent. Unfair and deceptive practices in the marketplace should decline substantially if consumers are given realistic grievance machinery to protect their interests, \[206\] and small claims courts can provide an effective mechanism for the redress of consumer grievances and other small claims. Properly designed and funded, these courts can provide a forum for speedy, fair, inexpensive, and convenient dispute resolution.

APPENDIX

MODEL SMALL CLAIMS COURT ACT

Section 1 Small claims division; judges

A small claims division is established in each [district] \[207\] as a division of the [district court]. Judges of the [district court] are the judges of the small claims division.

Section 2 Jurisdiction

The jurisdiction of the small claims court shall extend to all civil actions, other than actions for injunctive relief, brought by any person [, association, corporation, or other legal entity] \[208\] where the amount involved, exclusive of costs, does not exceed [$500-$1,000]. \[209\]

Section 3 Jurisdiction of the [district court]

The small claims division shall exercise concurrent jurisdiction with the [district court].

Section 4 Venue

Actions shall be brought in the judicial [district] where the action arises or where the defendant lives, is regularly employed, or has an office for the transaction of business. Actions brought in other [districts] may be heard in the [district] in which the action is brought only if the defendant
appears and waives venue. The court, on its own motion, or on motion of either party, may transfer the cause to a more convenient [district].

Section 5  *Pleadings; service of process*

a. No formal pleadings shall be necessary. A claimant must prepare a complaint which adequately informs the defendant of the nature of the claim.

b. Service of the complaint upon the defendant shall be by registered or certified mail with return receipt requested from the addressee. If return receipt shows that there has not been effective service, the court may direct that service on the defendant be completed by personal service.

Section 6  *Other formal pleadings; counterclaims*

a. The defendant need not file an answer.

b. If the defendant has a claim against the plaintiff, a counterclaim or demand for setoff may be asserted. Whenever a defendant asserts a claim beyond the scope of the small claims division's jurisdiction, the defendant may reserve the right to pursue the claim in a court of competent jurisdiction or to demand judgment on the claim not exceeding the jurisdictional amount waiving the right to bring an action in a court of competent jurisdiction for the amount in excess thereof.

Section 7  *Time for appearance; order for plaintiff to appear*

The date for the appearance of the defendant shall not be more than 30 days or less than 10 days from the date of filing. If the complaint is not served upon the defendant at least 5 days prior to the appearance date, the clerk shall set a new date for the appearance of the defendant which shall be not more than 30 days or less than 10 days from the date of the issuance of the new notice and the clerk shall inform both parties thereof. When the date for appearance is fixed, the plaintiff shall be informed of said date and ordered to appear.

Section 8  *Fees*

Fees shall be levied for filing and service of process. [The fees charged will be the same as those in the district court.]\(^{210}\) The judge may waive prepayment or payment of fees upon the plaintiff's sworn statement or evidence of the inability to pay fees.

Section 9  *No trial by jury*

There shall be no trial by jury in the small claims division. Trial by jury may be had on appeal.

Section 10  *No attorney to take part*

No attorney at law or other person than the plaintiff and defendant shall take any part in the prosecution or defense of litigation in the small claims division. Either party may present witnesses at any small claims proceeding.

Section 11  *Staff assistance to individuals*

The court staff shall assist individual litigants in the use of the small

\(^{210}\) This is an optional section.
claims division including but not limited to helping in the preparation of
claims and providing any other necessary information.

Section 12  \textit{Limitations on the right to resort to the small claims procedure}

a. Not more than 6 claims may be filed in the small claims division by
a single person [, firm or corporation] within any 30 day period.

b. If the court believes that the procedures of the small claims division
are sought to be utilized by a claimant for purposes of oppression or
harassment, including but not limited to a claimant having previously
resorted to the procedure for claims based on fraudulent or unfair trade
practices, seeking to circumvent court rules, or filing a colorless claim,
after affording the claimant an opportunity for a hearing, the court may
enter an order prohibiting the claimant from using the small claims
procedure.

Section 13  \textit{Arbitration and conciliation}

The small claims division may establish procedures for arbitration and
conciliation to be used at the consent of the parties. A judge or an attorney
appointed by the court may act as an arbitrator or conciliation referee
provided that a judge who has acted as a conciliation referee may not
serve as judge in any further proceedings in the same case.

Section 14  \textit{Removal}

The court may transfer the action to the [district court] upon the motion
of either party or that of the court if the court determines that complex
points of law are involved or that the claim involves multiple parties.

Section 15  \textit{Continuance}

A continuance shall not be granted except for good cause or with the
consent of both parties.

Section 16  \textit{Informal procedures}

The proceedings under this Act shall be informal. The court shall not be
bound by the statutory provisions or rules of practice, procedure, plead-
ings or evidence [except for the provisions relating to privileged communica-
tions].\textsuperscript{211} The court shall decide claims to achieve substantial justice ac-

\textsuperscript{211} This is an optional section.
ment to the clerk or the plaintiff either in a lump sum or in installments. The judgment authorizing payment of installments may be modified at any time for good cause.

b. Where the defendant has not paid according to the terms of the judgment, the court may authorize execution as it is available in the [district court]. Failure to pay a judgment is not the basis for a contempt citation.

Section 19  Costs

The costs for filing and sending notice shall be awarded to the prevailing party. No other costs shall be allowed either party except by special order of the court.

Section 20  Appeals

Either party may appeal an adverse judgment to the [district court]. The same fee as is charged on an original filing in the [district court] shall be paid by the appellant. On appeal the action shall be tried the same as an original action in the [district court]. If the judgment against the appellant is not substantially reduced or reversed, the court, in addition to other costs, shall require the appellant to pay reasonable attorney's fees to the appellee.

—Alexander Domanskis