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Small Claims Courts in Montana: A Statistical Study

Archibald S. Alexander

Professor, School of Business, Montana State University

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SMALL CLAIMS COURTS IN MONTANA: A STATISTICAL STUDY

Archibald S. Alexander*

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I. INTRODUCTION

Several circumstances make this an opportune time to examine the effectiveness of Montana's small claims courts.¹ These courts have been hearing cases since July, 1977. Hence there is available a substantial quantity of information which covers an extended period of time. Montana's small claims courts were an important innovation in the state's judicial system. In the six years since they were created there has not been a systematic study of their effectiveness. Without such a study, there is no reliable way to find out whether they are accomplishing the purposes for which they were created—providing a cheap and effective forum for small

* Associate Professor of Business Law, School of Business, Montana State University, Bozeman, Montana. A.B., Princeton University, 1955; LL.B., Harvard Law School, 1960.

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Much credit for this study belongs to Doris and Johnathan Ferguson, and John Bridges, former students in the Department of Marketing and Management at Montana State University, to Kenneth O. Cogger, Professor of Business at the University of Kansas, and to Kenneth Gaver, Associate Professor of Management (Quantitative Methods) at Montana State University.

1. All references to the Montana small claims court, unless otherwise indicated in the text, are to the one established in the "justice's court," MONT. CODE ANN. § 3-10-1002 (1981), since the one authorized in the district court, MONT. CODE ANN. § 3-12-102 (1981), was never activated by the counties.

claims and thereby assisting low-income litigants. However, the decision in *North Central Services, Inc. v. Hafdahl*,² which in March, 1981, invalidated the small claims court on the grounds that it denied the rights to counsel and jury trial, renewed public interest in the small claims court, and the Montana Legislature, through its prompt action to revive the court, demonstrated its own continuing commitment to an effective small claims system.³ Finally, the prospect of cutbacks in, or elimination of, federal legal aid programs could independently lead to increased attention and resort to small claims courts.

This study provides what appears to be unique information on several aspects of small claims courts. First, it provides a statewide picture of small claims courts based on accepted statistical methods. Such a picture could be particularly useful to legislators, judges, and administrators at the state level, where efforts at reform must originate. Second, by stratifying the sample used, this study provides a scientific basis for comparing rural and urban small claims courts in Montana. Third, by collecting information pertaining to a period in excess of three years, this study not only makes it possible to discern trends; it also provides multiple data points over an extended time which can be used to cross-check the accuracy of the picture at any given point in time. Fourth, this appears to be the only statistical study of the type of small claims court which was the product of reform proposals of the 1960's and 1970's. Thus, it may provide the first scientific evidence on the effectiveness of those reforms.

II. BACKGROUND

The essential function of small claims courts is to provide a forum in which the expenses of litigation are commensurate with small claims⁴ (today, under about \$1,000). If one accepts the common presumption that small claims are the most numerous civil

2. ___ Mont. ___, 625 P.2d 56 (1981).

3. The legislature responded to the declaration of unconstitutionality by re-enacting a modified version of the small claims court statute less than two months after the *Hafdahl* decision.

4. INST. OF JUDICIAL ADMIN., SMALL CLAIMS COURTS IN THE UNITED STATES 1 (1955 & Supp. 1959) [hereinafter cited as SMALL CLAIMS REPORT]; Domanskis, *Small Claims Courts: An Overview and Recommendation*, 9 J.L. REFORM 590 (1976); Hollingsworth, Feldman & Clark, *The Ohio Small Claims Court: An Empirical Study*, 42 U. CIN. L. REV. 469 (1973); King, *Small Claims Practice in the United States*, 52 ST. JOHN'S L. REV. 42 (1977); Kosmin, *The Small Claims Court Dilemma*, 13 Hous. L. REV. 934 (1976); Markwardt, *The Nature and Operation of the New York Small Claims Court*, 38 ALB. L. REV. 196 (1974); Roodhouse, *Small Claims Court*, 51 CAL. ST. B.J. 126, 127 (1976); Note, *The Small Claims Court in the State of Washington*, 10 GONZ. L. REV. 683 (1975).

claims,⁵ and that the "average citizen" is more likely to be a party in small claims litigation, the failure to provide such a forum would seriously harm the reality and the perception of justice.⁶ Though more than one remedy for the evil exists—others include arbitration or the administrative process⁷—small claims court legislation attempts to cut the costs of dispute resolution by establishing a judicial tribunal with markedly simplified and expeditious procedures. Although the material on legislative history in Montana is too sparse to permit reliable inferences about legislative purpose, the structure of the Montana statute, and the timing of its enactment after two decades of intensive evaluation of small claims courts, make it seem likely that the Montana Legislature had this essential function primarily in mind.

Since the creation of the first small claims court in the United States,⁸ many persons have also assigned other functions to small claims courts, such as helping low-income litigants overcome their alienation toward the judicial system, providing redress for consumers, and establishing a model for judicial speed and economy.⁹ Whatever the function assigned to small claims courts, commentators have tended to look at low-income litigants as plaintiffs and not as defendants, a perspective which, as we shall see, neglected an important dimension in evaluating the effectiveness of such

5. Axworthy, *Controlling the Abuse of Small Claims Courts*, 22 MCGILL L.J. 480, 485 (1976); cf. NAT'L. CENTER FOR STATE COURTS, NAT'L. COURT STATISTICS PROJECT, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1976, 78 (1980) [hereinafter cited as CASELOAD STATISTICS].

6. Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 315 (1913); Scott, *Small Causes and Poor Litigants*, 9 A.B.A. J. 457 (1923).

7. NAT'L INST. FOR CONSUMER JUSTICE REPORT, REDRESS OF CONSUMER GRIEVANCES, 5-11 (1972) [hereinafter cited as NICJ REPORT]; Eovaldi & Gestrin, *Justice for Consumers: The Mechanism of Redress*, 66 NW. U.L. REV. 281, 298-319 (1971); Kosmin, *supra* note 4, at 978; Sarat, *Alternatives in Dispute Processing: Litigation in A Small Claim Court*, LAW & SOC'Y, 339, 352 (1976).

8. Kansas created one of the first small claims courts in 1912. King, *supra* note 4, at 43; Weller, Ruhnka & Martin, *Success in Small Claims: Is a Lawyer Necessary*, 61 JUDICATURE 178, 179 (1977).

9. See CHAMBER OF COMMERCE OF THE UNITED STATES, MODEL CONSUMER JUSTICE ACT: A PROPOSED MODEL SMALL CLAIMS COURT ACT FOR STATE LEGISLATURES K 1.1, Comment, at 5 (1976) (hereinafter cited as CH. COM. REPORT); NICJ Report, *supra* note 7, at 14; SMALL CLAIMS REPORT, *supra* note 4, at 10, 11; Axworthy, *supra* note 4, at 482; Domanskis, *supra* note 4, at 196, 590; Driscoll, *De Minimis Curat Lex—Small Claims Courts in New York City*, 2 FORDHAM URB. L. REV. 479, 481 (1974); Eovaldi & Gestrin, *supra* note 7, at 281; Joseph & Friedman, *Consumer Redress Through the Small Claims Court: A Proposed Model Consumer Justice Act*, 18 B. C. INDUS. & COM. L. REV. 839, 840 (1977); Markwardt, *supra* note 4, at 206-10; Moulton, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969); Yngveson & Hennessey, *Small Claims, Complex Disputes: A Review of The Small Claims Literature*, LAW & SOC'Y 219, 226, 258 (1975).

courts.

After small claims courts had been operating for several decades, some observers began to see that they were not performing all assigned functions. The most prevalent criticism, which became widespread by the late 1960's was that far from serving as courts for low-income plaintiffs, small claims courts were being used primarily as collection agencies by business entities, and even in some cases by governments, casting low-income litigants in the role of defendants, not plaintiffs.¹⁰ Low-income plaintiffs appeared to be placed at a disadvantage by procedural complexities and heavy collection calendars and to be intimidated by the dominance of corporate plaintiffs. A serious additional problem was what seemed in some states to be a high rate of defaults by defendants, which raised questions about adequacy of service and intimidation of low-income defendants.¹¹ A major focus of this study is to determine whether and to what extent Montana's small claims courts have avoided this set of problems, which may be referred to as the "collection agency pitfall" or "syndrome."

Small claims courts throughout the United States present a bewildering variety,¹² and Montana's system, though not unusual, differs from those of other states in many ways. Like most states the Montana small claims court procedure statutes provide for simplified and expeditious pleadings and hearings.¹³ Montana also eliminates juries and, in most cases, attorneys.¹⁴

The Montana Legislature decided to establish the small claims court as a "division" of "justices' courts,"¹⁵ existing tribunals of limited jurisdiction which are manned by "Justices of the Peace" who are not required to have legal training and who have a politically entrenched independence.¹⁶ There must be at least one justice court in each county, and each such court must have a small

10. *E.g.*, NICJ REPORT, *supra* note 7, at 14; Axworthy, *supra* note 5, at 482; Eovaldi & Meyers, *The Pro Se Small Claims Court in Chicago: Justice For The Little Guy*, 72 Nw. U.L. REV. 947, 950-51 (1978); Moulton, *supra* note 9, at 1659-69; Yngvesson & Hennessey, *supra* note 9, at 228-29.

11. *E.g.*, Downing, Peters & Sankin, *The Toledo Small Claims Court: Part I*, 6 U. Tol. L. REV. 397, 404 (1975); Moulton, *supra* note 9, at 1664; Yngvesson & Hennessey, *supra* note 9, at 243-46.

12. Joseph & Friedman, *supra* note 9, App.

13. MONT. CODE ANN. §§ 25-35-501 through -807 (1981).

14. *See* MONT. CODE ANN. §§ 25-35-505, -701, -702 (1981); *see also* North Central Services v. Hafdahl, ___ Mont. ___, 625 P.2d 56, 58 (1981) (constitutional rights to counsel and trial by jury may be denied in the small claims procedure so long as these rights are protected on appeal to the state district court).

15. MONT. CODE ANN. § 3-10-1002 (1981).

16. *See* MONT. CONST. art. VII, § 5.

claims division.¹⁷ During the period from July, 1977 until March, 1981, the period for which we collected quantitative information, the monetary jurisdictional limit was \$750. On May 1, 1981, a new limit of \$1500 took effect.¹⁸

The Montana Legislature also excluded significant classes of parties. Neither the state nor any state agency may be plaintiff or defendant. Only a party to the transaction with defendant may sue in the small claims court, and no party may file an assigned claim. No party may file more than three claims in any calendar year. Otherwise, all persons or entities may use the court.¹⁹

III. RESEARCH DESIGN

The basic principle which shaped the design of this study was that a truly statewide picture of small claims courts would be most useful to state officials who are the only ones who may reform such courts and who necessarily have a statewide perspective. Other studies did not attempt to portray an entire state system, or did so on the basis of a selection of courts which were not a scientific sample.²⁰ In such studies, reformers at the state level might well find defects which were not part of a statewide condition, or miss faults not present in the courts selected. Equally important, the degree to which certain conditions existed at the state level would be unknown.

This study is mainly limited to what court dockets reveal.²¹ Such information appears to provide the basis for drawing a number of significant conclusions. While accumulating the quantitative docket-based information which is the center of this study, we also acquired a great deal of informal or impressionistic information of considerable importance. Informal information was obtained from justices of the peace, litigants, lawyers, and state officials as well as from our own experience in using the courts. Informal impressions appeared to confirm conclusions based on the quantitative data, but we distinguish clearly between conclusions based on formal

17. MONT. CODE ANN. § 3-10-1002 (1981).

18. See MONT. CODE ANN. § 3-10-1004 (1981).

19. MONT. CODE ANN. § 3-10-1005 (1981).

20. E.g., Comenetz, *Report on The Kansas Small Claims Procedure*, J. KAN. B. A. 75, 76 (1975); Hollingsworth, Feldman & Clark, *supra* note 4, at 477; Moulton, *supra* note 9, at 1959-60.

21. The Montana statute requires that every justice of the peace maintain a record called a "docket" which must contain information specified in the statute such as the title of the action, the date that "the order of the court/notice to defendant" was signed and the date of the trial as stated in the order, the date the parties appeared or the date on which default was entered, and the judgment of the court. MONT. CODE ANN. § 3-10-1005 (1981).

data and conclusions based on informal impressions.

We had an initial choice between census (i.e., examination of all records in all counties) and sample. We decided to limit the number of counties to be visited to the smallest number consistent with a high degree of reliability of result. Thus, this study is more a sample than a census. Counties were divided into "strata," each of which would be substantially more homogeneous in population and more urban or rural in character than Montana as a whole. Several Montana counties have "large" cities in which a substantial majority of the county population resides.²² These counties form a distinct group, with populations of 25,000 and above, starting with Yellowstone (Billings) at 108,035, and going down to Silver Bow (Butte) at 38,092. We designated this group "Stratum 7" to reflect the number of counties included.

The remaining counties reflect considerable diversity—compare, for example, the two extremes, Ravalli (Hamilton) with a population of 22,493, and Petroleum with a population of 655. We therefore divided the remainder into two further strata. Essentially because the remainder forms clusters at populations of 1,000 to 7,000 and 10,000 to 13,000, we divided them into "Stratum 14," with 14 counties in which the population lies between 10,000 and 24,999, and "Stratum 35," with 35 counties in which the population lies between 655 and 9,999. Since the number of counties which would compose a reliable sample of Stratum 7 would be close to the total number, we took a census of Stratum 7. We concluded that census of this Stratum, which represents about 56% of the total state population, would make the overall state picture more reliable. Six counties in Stratum 14 and ten in Stratum 35 were selected for sampling using a simple random scheme without replacement.²³

We examined, for the counties selected, all records for all cases filed from mid-1977, when the first small claims cases were commenced in Montana, to mid-March, 1981. The numbers for these filings are shown in Column 1 of Table A below. We then eliminated this data from both 1977 and 1981, because in each of those years the small claims court operated for only part of a year. It seemed likely that this data would reflect seasonal biases and confusion caused by start-up or by anticipation of the *Haf Dahl* decision. It is unlikely that inclusion of the 1977 and 1981 figures would affect any overall conclusions significantly, because the

22. Federal Census, 1970 and 1980.

23. DEMING, *SAMPLE DESIGN IN BUSINESS RESEARCH* 89 (1960).

numbers from those years are relatively very low. The numbers for the 1978, 1979, and 1980 filings are shown in Column 2 of Table A below.

TABLE A

	<u>Column 1</u>	<u>Column 2</u>
	Total Filings Examined	Total Examined For 1978-80
State	6,757	6,104
Stratum 7	6,226	5,569
Stratum 14	336	339
Stratum 35	165	160

It is worth noting that, although we selected six counties in Stratum 14 and ten in Stratum 35, we obtained information from only four counties in Stratum 14 and eight in Stratum 35, since in each of these Strata, two of the randomly selected counties lacked small claims courts in any form. This tends to magnify the difference in the number of cases between Stratum 7 and the other two strata.²⁴

IV. ANALYSIS AND CONCLUSIONS

A. *Montana's Small Claims Courts Have Avoided the "Collection Agency Pitfall"*

Many commentators, in attempting to assess the degree to which small claims courts suffer from the collection agency syndrome, have compared use rates by businesses and individuals, identities of defendants (whether businesses or individuals), and default rates of business and individual plaintiffs. Many of these commentators are referred to in the text and footnotes which follow. Use of such statistics for this purpose is based in part on the common sense judgment that high business use and low individual use, and high default rates in favor of businesses with low rates for individuals, constitute direct evidence of business domination, a key aspect of the collection agency syndrome. In what follows we report on this kind of information which we have collected for

24. Standard errors were calculated in accordance with DEMING, *SAMPLE DESIGN IN BUSINESS RESEARCH* (1960). They provide a way to measure the extent to which the reported figures, taken from the court-dockets in sampled counties, accurately reflect a statewide condition. The standard error figures have been taken account of in deciding upon the degree of certainty with which to state the conclusions drawn in this study.

Montana's small claims courts²⁵ and discuss its bearing on whether Montana has fallen into the collection agency pitfall. We have also added a refinement by correlating both plaintiff and defendant figures with the categories of individuals and businesses. In assessing the collection agency problems, it is important to know not only whether business plaintiffs outnumber individual plaintiffs but also whether defendants in those suits are individuals or businesses.

1. *Use Rates by Individual and Business Plaintiffs*

It is clear that individuals are a substantial majority of small claims court plaintiffs for the state overall (69%), for the "urban" counties (Stratum 7, 75%), and for medium-sized counties (Stratum 14, 65%), though the opposite is true in small counties (Stratum 35), where such plaintiffs are only 19%. This finding is inconsistent with a conclusion that these courts primarily serve businesses rather than individuals.

These figures contrast with those available from many other states, where business plaintiffs heavily predominate.²⁶ These states, unlike Montana, usually lack effective limitations on types of litigants and on number of claims per litigant. Various Califor-

25. Tables expressing the information collected in this study and showing standard errors for each figure are available at the Department of Management and Marketing at Montana State University.

The validity of the collection agency analysis depends in part upon accurate application of a significant distinction between businesses and individuals. At this point it is essential to explain the basis for that distinction. The main source of information was the case name in the justice's dockets or similar records. Thus, whenever there appeared a word or structure of words in a party name that conclusively indicated a business or profession, that party was counted as a business. The most obvious examples are "Corporation," "Incorporated," "Company," "Partnership," "doing business as," or their abbreviations. The same would apply, though none of the above words were used, if any word which is normally a common, not a proper, noun was used, such as the titles, "Kern Bicycle Shop" or "Acme Hardware." The same is true of any name consisting of a grouping of last names, as in a partnership, "Smith, Jones, Rapelje, and French." It is therefore plain that the category "business," as used herein, included all businesses, not only corporations but also partnerships and sole proprietorships, small businesses as well as big. If concern about business use of small claims courts centers on abuse by the more powerful businesses, our figures overstate the number of businesses. On the other hand, it is possible that because of errors by parties or clerks, some businesses were recorded as individuals, though the significance of this error would be diminished by the likelihood that most such omissions would involve small sole proprietorships. Given the limitations of this study which have already been discussed, there was no other way to identify parties, nor was there any systematic means for distinguishing between different types of businesses and professions. Because of the careful way in which we obtained and cross-checked this information, we believe that it reflects very closely the true identities of the parties.

26. *E.g.*, Kosmin, *supra* note 4, at 950; Yngvesson & Hennessey, *supra* note 9, at 236-38.

nia studies, for example, have shown individual plaintiff rates of 10%, 13%, 16%, 24%, 34.7%, and 51.5% in that state.²⁷ A study of one urban and one rural small claims court in Ohio showed percentages of 26.3% (urban) and 11% (rural).²⁸ Results would obviously differ where, as in Chicago and New York City, business plaintiffs are expressly excluded from using the courts.²⁹ Moreover, not all studies are consistent. A Hawaii study of a court which does not exclude any type of litigant reported that individuals were 81% of the plaintiffs.³⁰

The Montana trend in plaintiff use for the three years, 1978 to 1980, provides a less favorable picture. There is a trend toward greater relative use by business plaintiffs. In the critical category of suits by businesses against individuals, there is a marked and steady increase at the state level and in all Strata, though Stratum 35 shows a big drop in 1979. Perhaps this increase would be less cause for concern were there an equal or greater increase in suits by individuals against businesses, but, in fact, the percentage of such suits dropped slightly at the state level, held substantially even in Strata 7 and 35, and dropped precipitously in Stratum 14. The other two categories of cases, suits by businesses against businesses and by individuals against individuals, do not relate as critically to the issue whether Montana's small claims courts avoid the collection agency pitfall. To the extent they do so relate, the figures confirm the negative trend-picture, especially in the case of suits involving individuals, where there is a distinct trend toward decreased use.

2. Comparison of Defendant Identities

These tell a different story from the plaintiff use figures but one which, on balance, is not inconsistent with the conclusion that Montana has avoided the collection agency pitfall. The key point in these figures is that a clear majority of all cases filed—58%—involve suits in which both sides are individuals. Thus, while such litigants are defendants in 83% of total filings, this figure does not reflect a high percentage of business plaintiffs suing individual defendants. Such suits are only 25% of total

27. Moulton, *supra* note 9, at 1660; Roodhouse, *supra* note 4, at 129; Yngvesson & Hennessey, *supra* note 9, at 237.

28. Hollingsworth, Feldman & Clark, *supra* note 4, at 478-9, Table 1 at 509.

29. See Eovaldi & Meyers, *supra* note 10, at 962; Markwardt, *supra* note 4, at 203.

30. King, *Measuring the Scales: An Empirical Look at the Hawaii Small Claims Court*, 12 HAWAII ST. B.J. 3, 7 (1976); Muir, *The Hawaii Small Claims Court: An Empirical Study*, 12 HAWAII ST. B.J. 19, 24 (1976).

filings which, once again, is quite inconsistent with the collection agency syndrome. These figures are substantially the same for all Strata except for Stratum 35, where business suits against individuals represent 76% of all filings. When read together with high business plaintiff use figures in Stratum 35, these figures certainly raise the collection agency specter, since it suggests that businesses are using the courts quite freely but that individuals are reluctant to do so.

Even if the defendant figures on the whole suggest avoidance of the collection agency pitfall, there may be some cause for concern about the low percentage of individual suits against businesses—11% of total filings. This concern could be based on the fact that there is no plausible reason other than the collection agency syndrome to explain why suits by individuals against businesses are so much less frequent than suits by individuals against individuals (58%) and suits by businesses against individuals (26%). This could also reflect in part the essentially negative tack that Montana has taken to avoid the collection agency pitfall: limiting use by businesses but not encouraging use by individuals. Further evaluation of these figures by comparison to other states is difficult, partly because of the emphasis in other studies on plaintiff use figures, and partly because of the failure to break down defendant figures into “business” and “individual” categories. Defendant figures are available in one Hawaii and two California studies. The California figures for individual defendants in all filings were 93.3% for “rural” counties (population 7,275 to 52,207), 85.7% (Oakland-Piedmont), and 74% (Palo Alto),³¹ and are somewhat comparable to Montana. In light of the heavy use of the California small claims court by business plaintiffs one may conclude, however, that unlike Montana the majority of cases in which individuals were defendants involved suits by businesses. The Hawaii study, once again, presents a different picture, but without explanation. Only 44% of defendants were non-business private litigants.³² In Hawaii, where even without a statutory provision limiting business participation there is a low rate of business use (19%), defendant figures reflect less use by individuals than do plaintiff use figures. This suggests that caution is in order before any negative conclusions about Montana’s small claims courts be drawn from its defendant figures.

For the period from 1978 to 1980 in Montana, there is no clear

31. Roodhouse, *supra* note 4, at 129.

32. King, *supra* note 30, at 8.

trend indicating either an increase or decrease in the proportion of business to individual defendants. For each of these years, for the state as a whole, business defendants remained at about 16-17% and individual defendants at about 83-84%. When looked at by Stratum, however, the slight decline in percentage of individual defendants in Stratum 7 masks an apparently rising trend in Stratum 14. As was the case with plaintiff use figures, there is distinct cause for concern in the trends in the sub-categories of businesses against individuals and individuals against businesses. At the state level and in Strata 7 and 14, there was a trend toward an increase in the percentage of suits by businesses against individuals, and except for Strata 7 and 35 there were decreases in the percentages of individuals' suits against businesses. If these developments were to continue, it could become increasingly difficult to conclude that Montana had avoided the collection agency pitfall.³³

3. *Comparative Default Rates of Businesses and Individuals*

Default rates may also shed some light on the collection agency issue.³⁴ As reflected in the authorities cited below, there is a general presumption that "high" default rates, in courts where there is a high percentage of business plaintiffs and high plaintiff success rates, are one indication that businesses enjoy an undue advantage over individual, usually low-income, defendants. Such defendants, even though served with process, may be unable or unwilling to respond because of a lack of skill or knowledge or because they are intimidated by courts and business litigants.³⁵ A re-

33. We have compiled figures and tables showing comparative success rates of individual and business plaintiffs, but these figures appear to be more inconclusive on the collection agency question than the other data referred to in the text. First, as in most states, success rates in Montana are high for any plaintiff (businesses at 93% and individuals at 80%). Second, the better rate for businesses can be explained by factors other than ones which relate to the collection agency syndrome, as is explained in part in the following discussion on defaults. Third, the success rates do not take account of degree of success. Fourth, adequate comparative data is lacking from other states. See NICJ REPORT, *supra* note 6, at 23; Axworthy, *Small Claims Court for Nova Scotia—Role of the Lawyer and the Judge*, 4 DALHOUSIE L.J. 311, 319 (1977); Downing, Peters & Sankin, *supra* note 11, at 403-04; Driscoll, *supra* note 9, at 493; Eovaldi & Meyers, *supra* note 9, at 977, 983-88; Hollingsworth, Feldman & Clark, *supra* note 4, at 481-85, 498, 500, 514 Table 15; King, *supra* note 30, at 11; Moulton, *supra* note 9, at 1660-62; Muir, *supra* note 30, at 25; "Small Claims" Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study, 121 U. Pa. L. Rev. 1309, 1329 (1973); Weller, Ruhnka & Martin, *supra* note 8, at 181-82; Yngvesson & Hennessey, *supra* note 9, at 243, 248-50, 253-54; Note, 28 VAND. L. REV. 771, 774 (1975).

34. Several commentators refer to default rates in that context. See, e.g., Hollingsworth, Feldman & Clark, *supra* note 4, at 481-82; Kosmin, *supra* note 4, at 967-68; Yngvesson & Hennessey, *supra* note 9, at 246.

35. See Moulton, *supra* note 9, at 1663-65.

lated concern is that default rates may to some extent indicate a failure to give defendants actual notice of the proceedings, which could occur for a variety of reasons associated with inadequate procedures or a defendant's "culture of poverty." Any significant rate of defaults could be some cause for concern on the theory that fully contested matters are "healthier" and more fair, but this does not take account of obligors who may find it relatively easy to wait and see with regard to obligations which they realize they are legally required to meet.³⁶ In any event, default rates provide the same opportunity as success rates to assess the small claims court independently of statutory limitations on business plaintiffs.³⁷

In general, Montana's figures show a relatively low default rate overall and a higher default rate for business plaintiffs than for individual plaintiffs. Whether the defendant is a business or an individual seems to have little effect on the default rate. The default rate for the whole state for the full period is 25%. In looking at the same information by stratum, perhaps the most noteworthy phenomenon is that the "urban" Stratum 7 shows a lower rate than the other two Strata (though the standard errors for Strata 14 and 35 preclude any firm conclusions). With minor variations, the general pattern statewide is a default rate in favor of business plaintiffs a little more than twice as high as the default rate in favor of individual plaintiffs:

<u>Plaintiffs</u>	Business	43%
	Individual	19%

36. Such obligors may not respond to a mere request for payment but will also refuse to defend a lawsuit since this shifts the balance of relative ease. In such cases default judgments are appropriate.

37. Two points should be kept in mind in examining the Montana default rate figures. First, the figures reflect only defaults by defendants (and by plaintiffs defending against counterclaims). This is consistent with the usual use of the word "default," which does not include "defaults" by plaintiffs ("defaults" by plaintiffs are usually referred to as "dismissals"). Plaintiff dismissals are far less numerous than defaults, and since plaintiffs at least had what it took to start the litigation, dismissals may not tell anything about the collection agency issue.

Second, in compiling default rate figures it is possible to compare the number of defaults to the number of claims filed, judgments rendered, or suits won by plaintiffs. We compiled figures for all three, but report the results only of the comparison to suits won by plaintiffs, since the key issue is whether there are "too many" judgments against individual defendants obtained by default. We found that the only effect of the other comparisons was to increase the denominator without altering significantly the relationships among strata or parties. The only problem with this approach occurs when data from other states use a different denominator, and in that event we adjusted the Montana denominators to make the figures more comparable.

The ratio is similar in Stratum 7. Stratum 14 appears to show slightly higher rates overall than Stratum 7. In Stratum 35, the figures show a default rate in favor of businesses almost three times the default rate in favor of individuals, but large standard errors for this computation reduce its significance.

There may be some cause for concern, as explained below, in the default rate trends for the three-year period. For the whole state the first two years are practically even, but in 1980 there is a distinct jump:

Statewide Default Rate

<u>1978</u>	<u>1979</u>	<u>1980</u>
24%	22%	30%

There is not a similar jump, however, in the comparative default rates in favor of businesses and individuals, since the former remain, through the three years, a little over twice the latter. There is a decrease from 1978 to 1980 in the degree to which business default rates against businesses exceed business default rates against individuals, while the same comparison in suits by individuals indicates little trend. The state figures conceal some of the variations in the Strata. The following patterns over the three years emerge, comparing default rates by identity of plaintiffs and defendants:

	<u>1978</u>			<u>1979</u>			<u>1980</u>		
	Stratum			Stratum			Stratum		
	<u>7</u>	<u>14</u>	<u>35</u>	<u>7</u>	<u>14</u>	<u>35</u>	<u>7</u>	<u>14</u>	<u>35</u>
BvB	57%	100%	0%	41%	60%	0%	58%	33%	0%
BvI	38%	83%	20%	35%	57%	28%	45%	54%	48%
IvB	22%	43%	0%	14%	0%	0%	19%	33%	0%
IvI*	17%	34%	0%	17%	17%	11%	22%	24%	20%

*"B" stands for business and "I" for individual

Stratum 7 reveals a more or less flat trend in defaults against businesses and a rising trend in defaults against individuals. Stratum 14 reveals a falling default rate in every category, and Stratum 35 shows no defaults against businesses and a rising default rate against individuals. Standard errors, however, considerably blur the picture in Strata 14 and 35.

The first step in analyzing Montana's default rates is to compare them to small claims default rates in other states. The Stratum 7 (Montana urban) figures of 42% and 18% in favor of business and individual plaintiffs respectively can be compared to 90% in Hamilton County (Cincinnati) as derived from the tables and

footnotes in the Hollingsworth study.³⁸ For “rural” Clermont County in Ohio (population 95,887)³⁹ the following comparisons may be made to Stratum 14:

	<u>Clermont</u>	<u>Stratum 14</u>
B Plaintiffs	70%	57%
I Plaintiffs	57%	24%

These comparisons reveal similarity in higher default rates in favor of businesses than in favor of individuals. Ohio is different than Montana in that it has a much higher overall default rate, closer business and individual default rates in Clermont than in Stratum 14, and in having higher urban than rural rates.

Other default rates outside Montana which are less comparable than the Hollingsworth figures are also substantially higher than Montana's, and they also reflect higher rates in favor of businesses than in favor of individuals.⁴⁰ Montana's lower default rates for all plaintiffs reflect in part much lower default rates for business plaintiffs. This suggests that businesses suing in Montana's small claims courts may not have that degree of undue advantage over individual defendants which they may have in other states. In this sense, Montana's default rates may be read as an indication that Montana has avoided to a significant degree—and not simply by exclusionary means—the collection agency pitfall of many other small claims courts.

It is still necessary, however, to understand the reasons for the comparative advantage which business plaintiffs enjoy over individual plaintiffs with respect to default rates.⁴¹ The fact that this

38. See Hollingsworth, Feldman & Clark, *supra* note 4, at 481-82, Table 12 at 513.

39. *Id.*

40. Figures from a Toledo, Ohio, study show default rates of 85% for business plaintiffs and 34% for individual plaintiffs, and a Honolulu study reported 59% for business plaintiffs and 20% for individual and tenant plaintiffs, both of which are comparable to Stratum 7 figures of 42% and 18%. A Philadelphia study showed a “less than 30%” default rate for “consumer plaintiffs.” A California study of four courts in towns ranging in population from 7,275 to 52,207 in predominantly agricultural areas reported a figure of 73.5% for all plaintiffs, which might be compared to the Stratum 14 rate of 34%. This study did not report default rates by plaintiff identity. Yngvesson and Hennessey refer to several reports from which they deduce the following: in all but two of fourteen courts in six states for all plaintiffs, the default rate was 47%, which may be compared to Montana's 25%. They also refer to figures which indicate that in Washington, D.C., “most” small claims defaults were against consumer debtors, and to figures of 83% for corporate plaintiffs, as compared to 60% for all plaintiffs. Downing, Peters & Sankin, *supra* note 11, at 404; King, *supra* note 30, at 11; Moulton, *supra* note 9, at 1660; Steadman & Rosenstein, *supra* note 33, at 1329; Yngvesson & Hennessey, *supra* note 9, at 243 n.18.

41. Two points which relate to higher business plaintiff default rates are worth noting. First, such rates must be evaluated in light of the fact that in Montana individual plaintiff

advantage appears to be widespread among the states, and to exist without regard to the great variations in court structures and procedures, might suggest that it can best be explained by reference to factors other than the collection agency syndrome. In Honolulu, for example, where there appear to be court structures and procedures favorable to individual plaintiffs, as reflected in high relative individual use without statutory provisions excluding businesses, business plaintiff default rates are not only "high" (59%), but are almost three times as high as individual plaintiff rates (20%). This study does provide information from which it is possible to infer that factors other than the collection agency syndrome may explain that advantage. Correlation of default rates with plaintiff and defendant identity shows, in general, that the differences between business plaintiff default rates against individuals and against businesses, and between individual default rates against individuals and against businesses, are far less than the differences between business and individual plaintiff default rates. Statewide, for example, for the three-year period as a whole, the business against business default rate was 50%, compared to a business against individual default rate of only 41%. These figures suggest that business plaintiffs have higher default rates because they are businesses, not because they are suing individuals. The reasons for the "advantage" which businesses may enjoy in obtaining defaults against individuals may be the same as those which explain the "advantage" businesses enjoy against businesses.

The foregoing suggests that differences between business and individual *plaintiffs* may help to explain higher business plaintiff default rates. This is contrary to the collection agency analysis which assumes that what is wrong is that business plaintiffs dominate and intimidate individual defendants.⁴² It is true that, if ser-

use is much greater than business plaintiff use. Thus, while business default rates are higher, individuals are nevertheless obtaining more defaults than businesses. This tends to diminish the significance of the higher business rates, quite apart from any other factors mentioned.

Second, while business plaintiff default rates are more than twice as high as individuals' (statewide, 43% compared to 19%), business plaintiff success rates were only about 12% more than individuals' (statewide, 92% compared to 80%). It would appear, therefore, that the default rate differential could more than account for the success rate differential, though it would not necessarily follow that the former provides a complete explanation of the latter. This comparison may tend to confirm, however, that the two factors discussed above, which may explain higher business default rates, may also help to explain higher business success rates.

42. See, e.g., NICJ REPORT, *supra* note 7, at 14; Axworthy, *supra* note 5, at 482; Downing, Peters & Sankin, *supra* note 11, at 404; Eovaldi & Meyers, *supra* note 10, at 950-51; Moulton, *supra* note 9, at 1664, 1659-69; Yngvesson & Hennessey, *supra* note 9, at 228-29, 243-46.

vice is effected, default is the defendant's choice, yet in the absence of more plausible explanations, it would appear that the choice is being influenced by differences between business and individual plaintiffs and different practices which they might follow. An explanation that would account for the response by both individual and business defendants would not likely be intimidation, or relative forensic skill levels. There is little reason to believe that businesses intimidate other businesses or that business plaintiffs are more skillful than business defendants. A better explanation would be one which applies to both business and individual plaintiffs. Two of the explanations offered by other commentators could help provide an explanation of the default rate differential.⁴³ First, business plaintiffs may screen their claims more carefully than do individuals—if only because they are likely to have a greater volume and hence more experience. A second related explanation is that, if business claims are more likely to be based on contract than tort, such claims arguably provide less opportunity for resistance and thus more readily discourage continued litigation.⁴⁴

43. There are plausible explanations which do not support the hypothesis that the small claims court is operating like a collection agency. One is that business claims are by their nature simpler and more susceptible of proof, since they are more likely to be debt or simple contract actions, especially when the defendant is an individual. Hollingsworth, Feldman & Clark, *supra* note 4, at 481, Table 9. Claims by individuals, of which a good percentage are likely to be automobile accident cases and require proof of negligence, are more complex and less certain of proof. *Id.* Another plausible explanation is that businesses, being more experienced in litigation, are better able to recognize the doubtful claims and choose not to bring them to court. A further possible explanation is that those operating a business have greater forensic skill than individuals. Hollingsworth, Feldman & Clark, *supra* note 4, at 498; Moulton, *supra* note 9, at 1662; Yngvesson & Hennessey, *supra* note 9, at 247-48. To some degree this disparity will remain in any formal process: that is, no matter how simple the procedures and no matter what role played by the judge, the litigant with superior forensic skills will still have an advantage. There are other plausible explanations which do not support the collection agency syndrome. Yngvesson & Hennessey, *supra* note 9, at 253-54.

44. The foregoing analysis of the formal information pertaining to the collection agency issue strongly points to the conclusion that, in general, Montana has avoided the pitfall. This is a significant conclusion, but several important qualifications must be added. Among them are the following four.

First, Stratum 35, which includes the most rural counties, contained patterns which were usually at odds with those discernible in Strata 7 and 14 and the state as a whole. Individual plaintiffs in Stratum 7 were only 18% compared to the statewide 68%. Business suits against individuals were 77% in Stratum 35 compared to 27% statewide. Default rates for business in Stratum 35 were about three times those for individuals, whereas at the state level they were a little more than twice as great. It is difficult to escape the conclusion that the small claims courts in Stratum 35, unlike those in Strata 7 and 14, are "operating as collection agencies." Statewide figures thus appear to conceal the realities in Stratum 35.

Second, in all strata and at the state level, there are many trends over the 1978-80 period which suggest that Montana's small claims courts are becoming more like collection agencies. Plaintiff use figures show trends toward greater business use, especially in suits by

B. Use of the Small Claims Court Increased From 1978 to 1980

Projecting the samples for Strata 14 and 35, the small claims filings for 1978, 1979, and 1980, for each Stratum and the state, were:

	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>3-Year Total</u>
Stratum 35	63	246	260	569
Stratum 14	132	371	288	791
Stratum 7	1,729	2,046	1,794	5,569
State	1,924	2,663	2,342	6,929

individuals against businesses where there is a trend toward fewer such suits. Default rate trends also show an overall pattern of increase in business plaintiff rates. Stratum 35 demonstrates that, even under a statute like Montana's, small claims courts may begin to resemble collection agencies, and the trends for the state and Strata 7 and 14 indicate that, if trends are not checked, they might also end up in the same place.

Third, informal information did not as strongly confirm the favorable conclusion. We observed a variety of courtroom settings, some so informal so as to raise no question of intimidation, others much more formal. Among the justices with whom we talked, there were several who expressed a variety of attitudes hostile to the small claims court which could well be translated into an at least apparent hostility toward individual small claimants, and one justice stated explicitly that he saw his function as providing exclusively a facility through which businesses could simply and expeditiously collect their debts. There were also significant examples of other justices who fully understood the proper role of the small claims court and showed the desire and ability to carry it out. In several courts, we happened upon instances in which there were violations of the small claims court statute which could well contribute to the collection agency syndrome, such as permitting attorneys where only one side was represented, or allowing more than three claims by one party in a calendar year. Several justices themselves pointed out what they felt to be serious problems in the collection of judgments. Since at present the collection process can be complex and difficult, more affluent parties who can afford attorneys are likely to fare better in satisfying their judgments, and attorneys are not prohibited at this stage.

Fourth, certain provisions of Montana's statute probably played a significant role in producing some of the figures upon which the favorable conclusion is based. This is especially true in the case of comparative use rates by individual and business plaintiffs. The key provisions were: (a) the exclusion of assigned claims (this operates directly to exclude entities in the business of collecting debts); (b) the limitation to three claims a year for any one party (a severe limitation on do-it-yourself collection by large corporations); (c) the practical exclusion of lawyers (the presence of lawyers favors litigants with dollars to spend and large caseloads); and to a lesser extent (d) simplified and informal procedures. These provisions were undoubtedly enacted for this very reason, yet especially in the cases of (a) and (b) above, the methods selected are essentially negative. Provisions (a) and (b) do not implement a concept that the collection agency syndrome is to be avoided by methods which would encourage in a positive manner use by individual litigants, methods such as education of the public and of judicial personnel.

Finally, any conclusion to the effect that Montana's small claims courts avoid the collection agency pitfall must inevitably be a comparative one. It was difficult to find comparable statistics from other states. There were differences in structure or procedure that one could not prove to be irrelevant to comparison. On the other hand, no statistics were available from states like Nebraska which do have systems in some respects more similar to Montana's. Even inapplicable comparisons, however, do not speak conclusively to the issue whether Montana's system can or should be better than it is.

These figures show rising trends from 1978 to 1980 in all three Strata and at the state level. There is a 28% increase from 1978 to 1980 at the state level.

Some perspective on small claims court filing trends may be obtained by a cautious comparison to the Montana district courts, the state trial courts of general jurisdiction. Error due to jurisdictional differences between these courts may be minimized by limiting comparison of the small claims court to that category of district court filings which corresponds most closely to the types of cases handled by the small claims court. This "General Civil" category eliminates many of the types of cases not heard in the small claims court: criminal, domestic relations, juvenile, probate, insanity, and adoption. For 1978, 1979, and 1980, statewide, general civil district court filings were 11,958, 13,138, and 14,155 respectively.⁴⁵ These reflect an 18% increase from 1978 to 1980.

It will also be helpful to compare the rates of increases in filings to the rate of population increase for the same period. The filing increase rates reflect increases over a two-year period from 1978 to 1980. The rates of increase in filings in the district court and the small claims court, 18% and 28% respectively, far exceed the rate of population increase which could reasonably be estimated at 2.2% for the same period,⁴⁶ and hence cannot be explained by population growth alone. At least some of the small claims court increase may be attributed to factors which it may share with the district court, factors such as a general tendency to look increasingly to the judicial process to resolve disputes.⁴⁷ At the same time, the fact that the small claims court rate of increase substantially exceeds the district court rate invites a deeper inquiry. The simplest explanation is that 1978 was the first full calendar year of small claims court operation, and perhaps potential plaintiffs had not heard of it yet or had refrained from resorting to an unfamiliar forum. It is far from clear, however, how more poten-

45. MONTANA SUPREME COURT ANNUAL REPORT 30 (1978), at 1 (1979), at 1 (1980).

46. Federal census figures are not available for this period, but a reasonable estimate of the growth in the population of Montana for that period can be made, since there are federal census figures for the following:

April 1, 1970	694,409
July 1, 1975	746,244
April 1, 1980	786,690

These figures show a 13.3% increase in population from 1970 to 1980, and an approximately 5.4% increase from 1975 to 1980. Whether one assumes a linear or positive exponential growth for the two-year period, a reasonable estimate would be about a 2.2% rate of increase for the two-year period from 1978 to 1980.

47. Cf. CASELOAD STATISTICS, *supra* note 5, at vii.

tial plaintiffs could have heard of the court in 1979 and 1980, since there has never been any effort to advise the general public of the availability of the small claims court.

Comparison to filings per 100,000 population in other states which have "similar" small claims courts provides, in any event, an independent indication that there may be substantial numbers of claimants who could use the Montana court but do not. Because of differences between small claims courts in different states—which relate directly to the basis for this comparison but whose impact cannot be quantified—such as differences in jurisdictional amount, in identity of permitted plaintiffs, in types of suits that may be brought, in permitted numbers of claims per year, to name a few—the usefulness of such a comparison is limited. No small claims court statute is identical to Montana's. The following compares filings per 100,000 in Montana for the year 1980 to filings in other states for which figures are available through the National Center of State Courts for the year 1976:

Montana	297.6
California	2,019.5
Idaho	1,218.5
Michigan	501.0
Nebraska	1,498.9
New Jersey	506.0
North Dakota	226.4
Ohio	793.6
Oklahoma	2,303.1
Mean	1,048.1 ⁴⁸

If 1980 figures were available from other states, they would probably be higher than the 1976 figures listed here, and Montana's rates would be still lower in comparison to other states. Montana's 1980 figures are well below the mean of the other states based on 1976 figures. Despite the North Dakota figure it is not plausible, in light of the figures from Idaho, Nebraska, and Oklahoma, to explain Montana's very low figure by supposing that demand for small claims courts is especially low in rural or agricultural or low-income or mountain regions.

C. *The Montana Small Claims Court is an Expeditious Forum*

In assessing whether the Montana small claims court is an expeditious forum we looked at the number of days from filing to the

48. *Id.* at 81.

last trial date for all cases in which court records showed a final disposition. Informal observation of the small claims court revealed that judgment is usually entered on the last trial date, and thus the figures shown probably reflect quite closely the number of days from filing to judgment as well. Over 50% of the small claims were tried within three weeks of filing. Ninety percent were tried within seven weeks. The average number of days from filing to trial was 28 for the state as a whole, 29 for Stratum 7, 22 for Stratum 14, and 21 for Stratum 35.

Compared to Montana's district courts, which dispose of cases more rapidly than comparable courts in most other states, the small claims court still seems remarkably expeditious. Average times of disposition for the district court in 1978, 1979, and 1980, were 151, 209, and 208 days respectively⁴⁹—compared to an average of 28 days for the whole three-year period in the small claims court. Montana's small claims courts are even more expeditious than other states' small claims courts for which roughly comparable information is available. Montana's 59% within 21 days and 91% within 49 may be compared to Hamilton County's (Ohio) 59% within 22 to 28 days and 93% within 64 or more,⁵⁰ and to Florida's nearly 50% within 60 days and 86% within 180.⁵¹ In the Chicago court the mean time from filing to judgment was three months,⁵² which is far longer than Montana's 28 days. It appears that Honolulu does about the same, in that 73% of cases reached judgment within 30 days of filing, compared to Stratum 7's 71.9% within 28 days, but Honolulu does less well with 90% of its cases within 60 days as compared to Stratum 7's 91% within 49.⁵³

It appears that, with regard to rapidity of disposition, justices of the peace who hear small claims cases are performing as intended. The time of disposition figures also imply that justices are in many cases complying with the timing provision in section 25-35-203 of the Montana Code Annotated.⁵⁴ This provision requires that a trial date be set not "more than 40 nor less than 10 days" from the date of the notice-order which is issued when a suit is filed. The fact that 88% of the cases for which there is a disposition are tried within 42 days of filing indicates substantial compliance with the initial 10-40 day limit. Section 25-35-203 also pro-

49. MONTANA SUPREME COURT ANNUAL REPORTS 30 (1978), at 1 (1979), at 1 (1980).

50. Hollingsworth, Feldman & Clark, *supra* note 4, Table 5.

51. Stauber, *Small Claims in Florida: An Empirical Study*, 54 FLA. B. J. 130, 135 (1980).

52. Eovaldi & Meyers, *supra* note 10, at 977.

53. Muir, *supra* note 30, at 24-25.

54. MONT. CODE ANN. § 25-35-203 (1981).

vides that "repeated orders may be issued at any time within one year after the commencement of the action." Only two counties, both in Stratum 7, had cases which had trial dates set after the one-year period, and the total number of such cases in that Stratum was 14 out of 5,569, or .25%, probably a matter that should be corrected but not one of major concern. Somewhat more significant is the number of cases in which trials were scheduled sooner than the allowed time of ten days. There were 172 such cases statewide out of a total of 6,222—or about 2.8%. Only four of the 19 counties examined did not participate in this apparent violation, and all Strata were affected. This could certainly result in unfairness to the defendant who might well be deprived of adequate time to prepare a defense. There is also a possibility that setting an extremely short trial date might deter defendants from presenting a defense and might thus lead to a default which would not otherwise have occurred.

The rapid dispositions achieved in the Montana small claims court could be attributed in part to characteristics of that court conferred by statute, such as the elimination of attorneys, jury trials, responsive pleadings, discovery, and other trappings of the usual judicial process. Thus, one would, of course, expect to see more rapid dispositions in small claims courts than in trial courts of general jurisdictions. It is also easier to achieve rapid dispositions with uncrowded calendars, and this may explain why Montana does better than Ohio, Florida, and Hawaii, as is suggested when one compares times of disposition in Strata 14 and 35 to Stratum 7, or Clermont County, Ohio, to Hamilton County, Ohio. None of this, however, diminishes the commendable record of expeditious disposition through the combination of statutory provisions which require prompt action and effective compliance by judges.

D. *Several Justices of the Peace Refuse to Operate a Small Claims Division—A Statutory Violation*

Montana Code Annotated section 3-10-1002⁵⁵ provides that:

There is established within the jurisdiction of *each* justice's court in this state a small claims division to be known as the "small claims court."

There has been no judicial interpretation of this language, but none is necessary since, on the question of whether there shall be a

55. MONT. CODE ANN. § 3-10-1002 (1981) (emphasis added).

small claims division in each justice's court, the language is clear and mandatory. In contrast, the legislature used permissive language when providing for small claims courts within the jurisdiction of the state's district courts. These small claims courts, unlike the small claims division in the justice courts, may be created by the individual boards of county commissioners.⁵⁶ Comparison of the statutory language of these enactments indicates that the legislature intended to make the establishment of a small claims division within the justice court mandatory, and legislative history, though hardly ample, supports this conclusion.

After enactment of the permissive "District Court Small Claims," legislation in 1975,⁵⁷ not a single county implemented it. Thus, when Representative Holmes of Billings appeared on February 22, 1977, before the House Judiciary Committee as the lead witness on the justice court small claims legislation,⁵⁸ she began by stating: "Last session we passed legislation to establish small claims court, but it has not been used at all." Apparently the mandatory language of section 3-10-1002 was the legislature's response to this problem.

Our research indicated that there could be as many as 12 counties in Montana without small claims courts,⁵⁹ despite the clear and mandatory language of the statute. From informal inquiries it appears that the failure to maintain a small claims court was not due to ignorance of the law. It was due instead to the "philosophy" of some justices of the peace who did not believe in the small claims court, or who believed that they could deliver a service as well-tailored to small claims on the regular "civil side" of justice court. Often criticisms expressed by justices about the small claims system were valid, yet they cannot excuse outright refusal to comply with section 3-10-1002. The fact that about 20% of the counties appear to be guilty of this violation means that the problem cannot be dismissed as minor or merely a vagary. Refusal to

56. MONT. CODE ANN. § 3-12-102 (1981) provides:

There *may* be created within the jurisdiction of the district court of *any* county of the state of Montana a separate court known as the "small claims court." (emphasis added).

MONT. CODE ANN. § 3-12-103(1) (1981) provides in pertinent part:

A small claims court *may* be created by a resolution passed by the board of county commissioners. . . . (emphasis added).

57. See MONT. CODE ANN. §§ 3-12-101 through -203 (1981).

58. H.R. 800, 45th Leg., 175 Mont. Laws ch. 572.

59. Since there is no central source of such information in Montana, to obtain a census of noncomplying counties would have required going to every county in Montana, which we were unable to do. Therefore, we rely on a sampling method for an estimate of the number involved.

maintain a small claims court also raises grave questions as to whether the refusing justices are violating their oath of office, as well as the judicial canons of ethics, which can serve as a guide for judicial conduct in Montana, even if not adopted here. Violation of law by the very officer whose chief duty is to apply and uphold it is unlikely to encourage public confidence in justice.⁶⁰

V. SUMMARY

Montana's Small Claims Courts, to the extent that Justices of the Peace decided to operate them, appear to have functioned adequately in 1978, 1979, and 1980. It is especially significant that Montana appears to have avoided substantially the collection agency pitfall which drew the attention of many commentators on small claims courts in other states—though it did so primarily by negative means. This is not to say, however, that certain improvements may not be advisable. Some trends suggest, moreover, the possibility that there may be progressive erosion in some favorable conditions. A troubling problem uncovered by this study, that a significant number of Justices of the Peace have decided that they will not operate a small claims court, appears to call for action by the Montana Supreme Court, under its constitutionally granted supervisory power over the entire judicial system.

60. More informally, the investigation revealed a similar but less significant discrepancy which relates to justice courts as well as small claims courts. In a few cases, there were violations of MONT. CODE ANN. §§ 3-10-101(2) and 1002, in that either there was no justice's court in the county seat, or if a second justice's court had been established in a location other than a county seat, there was no small claims court in one of the two locations.

We made no systematic effort to catalog instances of failure to comply with the small claims court statute, yet in the course of seeking other information we were able to compile formal data in some such cases. Foremost in this category was failure to record in the justice's docket all of the items of information required by MONT. CODE ANN. § 3-10-1005 (1981). The only formal data available is that out of a total of 6,757 filings 714, or about 11%, were incomplete in one or more respects. Moreover, this discrepancy occurred in a majority of courts examined. In addition, we noted informally that in several instances the required information was maintained in a form, such as loose sheafs of paper, which could not by any stretch of the imagination be considered the "docket" required by statute. Failure to maintain adequate information in a proper form would certainly impede effective supervision were any to be undertaken. In a different category, we noted formally that in four of the counties in Stratum 7, justices had permitted suits in which the amount claimed exceeded the jurisdictional limit of \$750 (a violation of MONT. CODE ANN. § 3-10-1004 (1981)).

