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## Making Small Claims Courts Work in Montana: Recommendations for Legislative and Judicial Action

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# MAKING SMALL CLAIMS COURTS WORK IN MONTANA: RECOMMENDATIONS FOR LEGISLATIVE AND JUDICIAL ACTION

Archibald S. Alexander\*

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## I. INTRODUCTION

In a previous article this author reported on the results of a statistical study of the Montana small claims court.<sup>1</sup> This article makes certain recommendations for legislative and judicial action to improve the functioning of that court, based on the statistical study, the experience of other states, and the conclusions of other commentators.

The statistical study indicated that in many respects the Montana small claims court worked well in 1978, 1979, and 1980. Thanks primarily to limitations on certain plaintiffs, the court did

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1. Alexander, *Small Claims Courts in Montana: A Statistical Study*, 44 MONT. L. REV. 227 (1983). The Montana small claims court is a "division" of "justices' courts," existing tribunals of limited jurisdiction manned by "justices of the peace" (who are not required to have legal training and who have a politically entrenched independence). There must be at least one justice's court in each county, and each such court must have a small claims division. The monetary jurisdictional limit is \$1500. Significant classes of parties are excluded. 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. See MONT. CODE ANN. §§ 3-10-1002, -1004, -1005 (1983); MONT. CONST. art. VII, § 5.

not operate primarily as a "collection agency" for large businesses<sup>2</sup> and handled litigation with appropriate dispatch.<sup>3</sup> The study also uncovered some potential or actual problems of a serious nature. The incidence of use by businesses and individuals in the most rural counties suggested that the courts in those areas might well be operating as collection agencies.<sup>4</sup> Certain trends in use of the courts in more populous counties also suggest that such courts served increasingly as collection agencies.<sup>5</sup> The number of small claims filings per capita in Montana, despite increases from 1978 to 1980, indicates very low usage compared to other states.<sup>6</sup> There is no central record-keeping for small claims,<sup>7</sup> and justices of the peace in a significant number of counties are flatly refusing to operate a small claims division, in violation of Montana statutes.<sup>8</sup>

## II. MOST PROVISIONS OF THE MONTANA STATUTES SHOULD BE PRESERVED

Although this article recommends changes in the small claims court system, the basic concept of the Montana statutes is sound and many provisions should remain substantially unchanged. These provisions include the requirements that there be at least one small claims court in every county,<sup>9</sup> that the justice or his clerk provide assistance to the claimant in bringing suit, that hearings or trials be scheduled within ten to forty days of issuance of initial process,<sup>10</sup> that the hearing and disposition of claims be informal,<sup>11</sup> and that juries be prohibited.<sup>12</sup> Two other provisions—the practical exclusion of attorneys and establishment of the small claims court in the justice's court—are more controversial and call for fuller comment.

### A. *The Practical Exclusion of Attorneys*

Attorneys are permitted to represent parties in the Montana small claims court, but only if both sides are represented.<sup>13</sup> The

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2. Alexander, *supra* note 1, at 233-42.

3. *Id.* at 245-47.

4. *Id.* at 235, 236, 242 n.44.

5. *Id.* at 235, 237, 242 n.44.

6. *Id.* at 245.

7. *Id.* at 248 n.59, 249 n.60.

8. *Id.* at 247-49.

9. MONT. CODE ANN. §§ 3-10-101, -1002 (1983).

10. MONT. CODE ANN. § 25-35-203 (1983).

11. MONT. CODE ANN. § 25-35-301 (1983).

12. North Central Services, Inc. v. Hafdahl, \_\_\_ Mont. \_\_\_, 625 P.2d 56, 58 (1981).

13. MONT. CODE ANN. § 25-35-105(2) (1983).

practical effect of the law is that, in all but a handful of cases, neither side is represented. Because representation is rare, and because the problems resulting from use of attorneys in small claims courts are minimized when both sides are represented, the law should remain unchanged<sup>14</sup>—except that when a party is an attorney, the other side should be permitted to be represented.<sup>15</sup>

Results of studies in states that allow attorneys indicate that attorneys have a definite impact on both process and outcome in small claims courts, and that in general the party who is represented fares better.<sup>16</sup> This appears to be particularly true where the plaintiff is represented and the defendant is not.<sup>17</sup> Plaintiffs who are represented also appear to recover more often than those who are not.<sup>18</sup> Their success may well be attributable primarily to the higher default rates that their attorneys seem to be able to procure.<sup>19</sup> Because wealthier parties and businesses are more frequently represented,<sup>20</sup> it is plain that permitting attorneys would severely worsen the use of justices' courts as collection agencies, commonly known as the collection agency syndrome.<sup>21</sup> Use of attorneys would increase inequalities between business and individ-

14. This system was apparently first recommended by a Commissioner of the Federal Trade Commission. Special Project, *Judicial Reform at the Lowest Level: A Model Statute for Small Claims Courts*, 28 VAND. L. REV. 711, 772 n.321 (1975).

15. Wolfe & Weller, *Technical Assistance Report for the Small Claims Court, Yellowstone County, Montana* 7 (1976) (available from the author of this article).

16. Downing, Peters & Sankin, *The Toledo Small Claims Court: Part I*, 6 U. Tol. L. REV. 397, 405-07 (1976); Muir, *The Hawaii Small Claims Court: An Empirical Study*, 12 HAWAII B.J. 19, 26 (1976); Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & Soc'y 339, 349-50 (1976); but see Steadman & Rosenstein, "Small Claims" Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study, 121 U. PA. L. REV. 1309, 1333 (1973).

17. Driscoll, *De Minimis Curat Lex—Small Claims Court in New York City*, 2 FORDHAM URBAN L.J. 479, 492 (1974); Sarat, *supra* note 16, at 350; Spurrier, *Use of Counsel in Oklahoma Small Claims Courts: Judicial Perceptions, Empirical Data, and Recommended Reforms*, 15 TULSA L.J. 70, 74 (1979); Stauber, *Small Claims in Florida: An Empirical Study*, 54 FLA. B.J. 130, 136 (1980).

18. Spurrier, *supra* note 17, at 77.

19. Driscoll, *supra* note 17, at 493; Eovaldi & Meyers, *The Pro-Se Small Claims Court in Chicago: Justice for the Little Guy*, 72 NW. U.L. REV. 947, 983-88 (1978); Steadman & Rosenstein, *supra* note 16, at 1333.

20. Axworthy, *A Small Claims Court for Nova Scotia—Role of the Lawyer and the Judge*, 4 DALHOUSIE L.J. 311, 319 (1977); Hollingsworth, Feldman & Clark, *The Ohio Small Claims Court: An Empirical Study*, 42 U. CIN. L. REV. 469, 514, table 15 (1973); Kosmin, *The Small Claims Court Dilemma*, 13 HOUS. L. REV. 934, 957-58 (1976); Muir, *supra* note 16, at 25; Weller, Ruhnka & Martin, *Success in Small Claims: Is a Lawyer Necessary?*, 61 JUDICATURE 176, 179 (1977); Special Project, *supra* note 14, at 771.

21. NATIONAL INSTITUTE FOR CONSUMER JUSTICE REPORT, REDRESS OF CONSUMER GRIEVANCES 23 (1972) [hereinafter cited as NICJ REPORT]; Hollingsworth, Feldman & Clark, *supra* note 20, at 500; Kosmin, *supra* note 20, at 958; Special Project, *supra* note 14, at 771, 774.

ual litigants, in part because of the intimidation that unrepresented individual defendants feel when they confront a represented business entity.<sup>22</sup>

The problem may be mitigated by providing legal assistance to low-income litigants, but there are reasons to doubt the practicality of such a solution.<sup>23</sup> It has also been persuasively argued that the presence of attorneys in small claims courts is essentially inconsistent with the functions and purposes of such a court. Attorneys may cause increased costs and delays, and tend to push the proceedings toward excessive technicality and complexity.<sup>24</sup> Perhaps a better way to ensure the raising of defenses and the clarification of issues in a small claims court is to improve the ability and inclination of judges to perform this function. In any event, though many small claims courts allow attorneys, commentators are virtually unanimous in recommending their exclusion.<sup>25</sup>

### B. *Justices of the Peace as Small Claims Judges*

Section 3-10-1002 of the Montana Code Annotated establishes Montana's only operating small claims court in the justice's court. The original small claims court legislation established one in the district court if implemented by the county,<sup>26</sup> but no court ever did so. Other states have created separate tribunals with no responsibilities beyond small claims, or assigned small claims functions to a variety of trial courts of general or limited jurisdiction.<sup>27</sup> The alternative chosen depends to a considerable extent upon the particular judicial organization in a given state.

There is a consensus among commentators that small claims court functions should be assigned to state trial courts of general jurisdiction.<sup>28</sup> The reasons given by these commentators are either

22. See, e.g., Spurrier, *supra* note 17, at 75-76.

23. Moulton, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657, 1680 (1969).

24. See, e.g., CHAMBER OF COMMERCE OF THE UNITED STATES, MODEL CONSUMER JUSTICE ACT: A PROPOSED MODEL SMALL CLAIMS COURT ACT FOR STATE LEGISLATURES § 7.1 and comment, at 29 (1976) [hereinafter cited as CH. COM. REPORT]; Axworthy, *supra*, note 20, at 318.

25. E.g., CH. COM. REPORT, *supra* note 24, § 7.1; NICJ REPORT, *supra* note 21, at 23; Axworthy, *supra* note 106, at 320; Joseph & Friedman, *Consumer Redress Through the Small Claims Court: A Proposed Model Consumer Justice Act*, 18 B.C. INDUS. & COM. L. REV. 839, 867 (1977).

26. MONT. CODE ANN. § 3-12-103(1) (1983).

27. Joseph & Friedman, *supra* note 25, appendix.

28. E.g., CH. COM. REPORT, *supra* note 24, at 6; NICJ REPORT, *supra* note 21, at 16; INST. OF JUDICIAL ADMIN., SMALL CLAIMS COURTS IN THE UNITED STATES 9-10 (1955 & Supp. 1959) [hereinafter cited as SMALL CLAIMS REPORT]; Joseph & Friedman, *supra* note 25, at 844.

inapplicable to Montana or can be met by other changes recommended herein. Moreover, there are—at least in Montana—considerations that favor leaving small claims to justices of the peace. If upon further experience and study it should appear that there are deficiencies truly attributable to the justice of the peace system, which cannot be otherwise corrected and which outweigh the favorable considerations, reassignment of small claims jurisdiction may well be advisable.

Two proposals for model small claims court acts assert that trial courts of general jurisdiction would have greater legitimacy and authority than a specialized small claims court.<sup>29</sup> It could be, however, that such a forum would be more intimidating to individual litigants for that very reason—and thus exacerbate the collection agency syndrome. In any event, the justice's court in Montana is an established court, and there is no basis to believe it has less legitimacy than any other state court. Commentators favoring use of trial courts of general jurisdiction also believe that it would raise standards of procedure and administration.<sup>30</sup> Our study does suggest that failure to adhere to minimal standards is a problem in Montana, but this problem can be remedied by other changes. It was beyond the scope of our study to investigate whether non-attorney judges were less knowledgeable about the law applicable to small claims than attorneys. Informal observations<sup>31</sup> did indicate that some non-attorney judges ran their courts better than the few attorney judges whom we could identify.

Several considerations favor retention of the justice of the peace small claims court in Montana. Small claims courts are specialized tribunals, and demand special qualities of a judge. There is a notion that small claims courts should dispense "homespun justice"—what is often referred to as "substantial justice"<sup>32</sup> and might even be called "rough and ready justice." It would be unsound to push this notion to the point of establishing a separate body of substantive law. There is, however, a certain predisposition on the part of the small claims court judge to be impatient with legal technicalities and especially sensitive to the need to provide a

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29. CH. COM. REPORT, *supra* note 24, at 6; NICJ REPORT, *supra* note 21, at 16.

30. SMALL CLAIMS REPORT, *supra* note 28, at 9-10.

31. The phrase "informal observations," and the equivalent, is used throughout this article to refer to information received that was not a part of the quantitative data analyzed by statistical methods, as described in the original study. See Alexander, *supra* note 1, at 231-33, 242 n.44. Sources of informal observations included conversations with justices of the peace and with attorneys and parties who had appeared in the small claims court.

32. Markwardt, *The Nature and Operation of the New York Small Claims Court*, 38 ALB. L. REV. 196, 207 (1974).

judicial remedy when the ordinary person has suffered a wrong.<sup>33</sup> Equally important is the notion that small claims court judges, unlike most trial court judges, cannot be effective if they remain aloof; they need to take an active role in assisting the litigants and in searching for the truth.<sup>34</sup> Judges who (like Montana's justices of the peace) reside, are elected, and sit locally, and are usually not attorneys, are more likely to possess these special qualities.

There is no indication, on the basis of informal observation, that justices' courts cannot handle the small claims caseload. In many instances, assignment of small claims to the justice's court will reduce workload since it simply means that the same court will handle the same claim but with simpler procedures.<sup>35</sup> Continued reliance on justices of the peace would avoid the expense and complexity of creating an independent tribunal and might permit the small claims division to benefit from the experience of the justices in handling small claims on the "civil side."

### III. SUPERVISION AND EDUCATION OF SMALL CLAIMS COURT JUDGES

Our statistical study revealed serious discrepancies in the attitudes and compliance of the justices of the peace who, under the present system, adjudicate small claims in Montana. The preceding discussion, recommending continued use of justices' courts and the barring of attorneys, underlines the importance of improved performance by justices of the peace. A better educational program and more positive supervision by the Montana Supreme Court would go a long way to improve the functioning of the present system and, if carried out with other recommendations made herein, could remedy most of the discrepancies and failures to comply.

Under the Montana Constitution, the supreme court "has general supervisory control over all other courts,"<sup>36</sup> and under section 3-10-203 of the Montana Code Annotated it must present and supervise "a course of study" and "training sessions" for justices of the peace. These authorizations are very broad. Until the present time, however, the court has not, so far as our inquiries reveal, exercised any active supervision over the justices of the peace,

33. *Id.* at 207-11.

34. See Domanskis, *Small Claims Court: An Overview and Recommendation*, 9 J.L. REFORM 590 (1976); Eovaldi & Meyers, *supra* note 19, at 993.

35. The civil jurisdiction of the justice's court is generally limited to disputes involving property, sums of money, or damages not exceeding \$3500. MONT. CODE ANN. § 3-10-301 (1983). Thus the resolution of "small claims" is in any event within the justices' jurisdiction.

36. MONT. CONST. art. VII, § 2(2).

though the court apparently does respond to complaints brought to its attention. The supreme court has provided for the once-every-four-years orientation course and the twice-a-year training sessions, as required, but coverage of the small claims court in these courses appears not to have been adequate.<sup>37</sup> Only two hours out of about 150 since 1978 were devoted to small claims court subjects. There is no record of the specific material covered in these two hours. Undoubtedly many of the other subjects taught would be helpful to small claims judges, but much of the subject matter has no relevance to small claims. Criminal law and procedure are understandably dominant topics.

The need for supervision of small claims courts is widely recognized throughout the United States. According to one study,<sup>38</sup> only fourteen states do not make specific provision for supervision of small claims courts or procedures. Of these fourteen, half have integrated small claims courts that would receive supervision as part of the regular court system. Some small claims court model acts contain very specific requirements for supervision by a state-level body.<sup>39</sup> In a comment to its section requiring supervision by the state agency, the United States Chamber of Commerce report on small claims courts well expresses some of the reasons for this requirement:

An effective statewide system of small claims courts can best be achieved by coordination of the small claims court by a central state agency. . . . By monitoring the operations of the court once established, the agency would ascertain the success with which the courts were satisfying their mandate to provide inexpensive, fast, fair and effective justice; the agency, by a comparative analysis of the courts, could correct the deficiencies of one court by applying therein the successful practices of another. Finally, the agency would thereby develop a statewide network of small claims courts of equal quality, each benefiting from the experience of the other and all in unison providing swift and effective justice for small claims throughout the state.<sup>40</sup>

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37. In September 1980, Justices Eschler and Hernandez of the Yellowstone County justice's court gave a lecture that covered important points about small claims courts, but there is no written record of the subjects dealt with, and the lecture was apparently optional and attended by only a few of the state's justices of the peace. Course schedules, outlines, and agendas for the regular, required sessions are available at the office of the court administrator in Helena, Montana.

38. Joseph & Friedman, *supra* note 25, appendix.

39. *E.g.*, CH. COM. REPORT, *supra* note 24, at 7; Joseph & Friedman, *supra* note 25, at 845-46.

40. CH. COM. REPORT, *supra* note 24, at 7.



Proposed model acts and many states also provide for additional supervision and control of small claims courts by an administrative judge or the equivalent, within an established court, which is usually a trial court of general jurisdiction.<sup>41</sup> Some account must also be taken of the fact that another of the usual methods for supervision of lower courts—appeals—is seldom available as a practical matter in small claims courts, since the amounts at issue are so small that they rarely justify the expense of an appeal.

Adequate supervision in Montana can be achieved under the existing constitutional and statutory provisions. If the supreme court, through the court administrator, were to exercise its power under these provisions more fully and more effectively, additional supervision through an administrative judge at the trial level might not be necessary. To be effective, the supervision would have to include the following elements: (1) acquisition of information of sufficient quality upon which to base evaluations and decisions, and (2) prompt action in response to any deficiencies that come to light.

The supreme court lacks at present systematic knowledge about what is going on in the small claims courts, yet such knowledge can be acquired quite easily through fuller use of existing mechanisms. It is startling to realize that there is now no central repository of information on small claims courts, and that the only way to learn about them is to visit each of the fifty-six county seats in Montana.<sup>42</sup> Justices of the peace must first be required to improve their recordkeeping. They could then forward to the court administrator the information they are now required to record in their small claims dockets. The court administrator has authority to require this,<sup>43</sup> and could prepare from that information a report similar to those he now prepares on the district courts and the supreme court. Docket information can be used in various ways, as our statistical study showed,<sup>44</sup> to permit significant conclusions about small claims courts. As the supreme court learns more about the small claims court, the court administrator might well develop

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41. *Id.* at 6; NICJ REPORT, *supra* note 21, at 20-21; Joseph & Friedman, *supra* note 25, at 844-45.

42. The justices of the peace do file with the court administrator a report on the total number of cases handled each month and the money generated by those cases, but this information is incomplete and does not distinguish between civil and small claims. Also, about 11% of filings involve incomplete records. See Alexander, *supra* note 1, at 249 n.60.

43. MONT. CODE ANN. §§ 3-1-701, -702 (1983).

44. Alexander, *supra* note 1, at 227-49.

a questionnaire to elicit additional information.<sup>45</sup>

The supreme court, with the assistance of the court administrator, must also be prepared to propose remedial legislation, adopt appropriate rules, take disciplinary measures against recalcitrant judges and, as indicated earlier, devise a comprehensive and rigorous educational program in small claims theory and procedures. The number of hours devoted to the subject should be greatly increased, and the subject should be covered at least once a year.

It would be helpful to have judges experienced in handling small claims proceedings conduct mock trials so that justices of the peace can see how to solve the many practical problems that may arise in administering such courts. Mock civil and criminal trials have been included in the past. It would be extremely useful to conduct a civil and a small claims mock trial back-to-back, followed by a session in which the techniques of conducting each trial are compared and contrasted. If recommendations made below with regard to settlement, mediation, and arbitration are followed, substantial time should also be devoted to training the justices of the peace in the use of these techniques. Since in much of the contact between the small claims court and the litigants the court is represented solely by the clerk,<sup>46</sup> it is important to require attendance of the clerks at most of these sessions.

#### IV. PUBLICIZING THE SMALL CLAIMS COURT

Studies in several other states show that the public is generally unaware of small claims courts and their advantages.<sup>47</sup> No such study has been conducted in Montana. Our statistical study did show a per capita usage of the small claims court markedly lower than in other states,<sup>48</sup> and it is not implausible to suspect that one factor in the low Montana usage is general public ignorance of the existence and advantages of the court.<sup>49</sup> The relatively low usage also suggests that there may well be cases which should be, but are not, coming before the court.<sup>50</sup>

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45. The court administrator believes, as of May 1984, that such a system could be handled within his existing budget if about \$10,000 were available to set it up.

46. See MONT. CODE ANN. § 25-35-201(2) (1983); Eovaldi & Meyers, *supra* note 19, at 971.

47. *E.g.*, NICJ REPORT, *supra* note 21, at 24; Downing, Peters & Sankin, *supra* note 16, at 131-34; Eovaldi & Gestrin, *Justice for Consumers: The Mechanism of Redress*, 66 Nw. U.L. REV. 281, 284 n.16, 298 n.98, 321 (1971).

48. Alexander, *supra* note 1, at 245.

49. Domanskis, *supra* note 34, at 601.

50. See Special Project, *supra* note 14, at 764.

There has never been a systematic attempt to publicize small claims courts in Montana. News media have covered various events in the development of the small claims courts, such as the creation of the court by the legislature in 1977 and the enactment of revival legislation in 1981. This sort of publicity is too intermittent and not sufficiently specific about the characteristics and advantages of the court. The attorney general has prepared a pamphlet that in essence tells what to do once a claimant decides to use the small claims court. The pamphlet is supposedly available in the justice's court, but at that location would not reach persons who are trying to decide what to do. There apparently was an effort to distribute this pamphlet and other materials to county extension agents, but it is not clear how widely the information was distributed.

A more systematic effort to inform the public would be highly desirable. At several points in our statistical study we noted that Montana chose to avoid the collection agency pitfall by essentially negative means—primarily by placing limitations on use of the courts by certain parties.<sup>51</sup> It may be doubted whether such means will ensure in the long run effective avoidance of the pitfall. Our statistics show possible trends toward increased business and decreased individual use and success rates, and the most rural counties show some characteristics of a collection agency (primarily because of low individual use) despite the limitations on business use.<sup>52</sup> An adequate publicity campaign would make it possible to ease restrictions on business use without raising the collection agency specter. Studies in other states have shown that publicity does have the effect of increasing use of the small claims courts.<sup>53</sup>

Publicity of the small claims court must be continuous and calculated to reach the widest audience. Since funds available for such a campaign would undoubtedly be limited, initiative and imagination will be required. It may be possible to conduct an effective publicity campaign at an out-of-pocket cost of only hundreds of dollars. News media can possibly be persuaded to devote part of their pro bono advertising to small claims courts.<sup>54</sup> Information

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51. Alexander, *supra* note 1, at 231, 243 n.44.

52. *Id.* at 235-37, 242 n.44.

53. *E.g.*, Graham & Snortum, *Small Claims Court—Where the Little Man Has His Day*, 60 JUDICATURE 260, 267 (1977); Muir, *supra* note 16, at 31; Yngvesson & Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219, 262 (1975).

54. This could be effective if the court administrator's office were to undertake production of advertising copy. Students at the business school at Montana State University have already prepared small claims court copy (available from the author) for newspapers, radio, and television.

about small claims courts can also be included with notices of motor vehicle license or registration renewals. County extension agents should be encouraged to use their newspaper columns and radio time to put out the information, and to report to the court administrator what they have done.

The court administrator needs to explore the possibility of using other private and public organizations and agencies to disseminate information on the court, such as welfare agencies, public utilities, and large corporations. The publicity should stress that the court is especially designed to handle small claims in a rapid and informal way not threatening to the claimant, that costs are less than in other courts, and that attorneys are prohibited unless both parties want them. The author recommends, however, that a publicity campaign not be undertaken until some of the other recommendations have been implemented. Otherwise, there is danger that statements made would prove untrue in many instances, thus harming the credibility of the effort.

#### V. NIGHT AND WEEKEND SESSIONS

If the small claims court is to become a forum especially well suited to handle the ordinary person's small claims, some account needs to be taken of the fact that most such claimants hold jobs in which they have little discretion as to when they work. If such claimants take time out during the day, on Monday through Friday, for a voluntary court appearance, they may face sanctions like loss of employment or pay. The additional costs to litigants that weekday daytime appearance may cause are especially intolerable in connection with small claims.<sup>55</sup> Studies have shown that restricting small claims court sessions to the usual daytime court hours deters use by individual plaintiffs.<sup>56</sup> All authorities who consider the timing of sessions recommend that small claims courts hold either night or weekend sessions, or both.<sup>57</sup> Such sessions, not now required in Montana, could be another positive way to help the small claims court avoid the collection agency pitfall. There should be a statutory requirement of either a night or a weekend session at least once a week. The statute should leave the working out of further details to the supreme court, through the court administra-

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55. Domanskis, *supra* note 34, at 602.

56. *See, e.g.*, CH. COM. REPORT, *supra* note 24, at 9; Comenetz, *Report on the Kansas Small Claims Procedure*, J. KAN. B.A. 75, 112-13 (1975); Domanskis, *supra* note 34, at 601-02.

57. *E.g.*, CH. COM. REPORT, *supra* note 24, at 9; NICJ REPORT, *supra* note 21, at 15, 18; Comenetz, *supra* note 56, at 112-13.

tor, in consultation with the justices of the peace, so as to meet the needs of individual counties in a flexible manner.<sup>58</sup>

## VI. ASSISTANCE IN COLLECTING JUDGMENTS

Almost all that has been said so far relates to what happens in Montana small claims courts up to the point at which a judgment is obtained. A judgment is not, however, the same thing as payment of the judgment debt by the defendant, and payment is probably the more significant event to the ordinary small claimant. Though many defendants may voluntarily pay within a reasonable time, many others do not, and in that event the small claims judgment creditor in Montana has no choice but to resort, without assistance, to the ordinary collection procedures. These procedures are costly, complex, time-consuming, difficult to understand, and may not result in payment. In order to collect payment the small claims judgment creditor may ironically have to confront all the characteristics associated with the collection agency syndrome that have been carefully removed from the process leading up to judgment. Thus failure to deal with the problem of collection may well have the effect of defeating the purpose of small claims court legislation.

In Montana there is no special provision for collection of small claims judgments. Collection procedures applicable to justices' courts apply in the small claims division.<sup>59</sup> These procedures, in turn, parallel those in most trial courts of general jurisdiction.<sup>60</sup> They include devices such as writs of execution, garnishment, attachment, and depositions of judgment debtors to discover assets available for execution.<sup>61</sup> The procedures are quite properly designed to protect judgment debtors from possible abuses in the seizure and sale of their property. A recalcitrant judgment debtor, however, has an almost endless repertory of obstacles that he can place in the path of the judgment creditor—which is particularly incongruous in the case of small claims.

Since no record of satisfaction of judgments in the small claims court is required in Montana, our statistical study provided no evidence of collection difficulties in the small claims court. There is every reason to suspect, however, for the reasons given above, that a small claims collection problem does exist in Mon-

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58. CH. COM. REPORT, *supra* note 24, at 9; NICJ REPORT, *supra* note 21, at 15, 18; Domanskis, *supra* note 34, at 602.

59. MONT. CODE ANN. § 25-35-807 (1983).

60. *Id.* §§ 25-31-1101 to -1105.

61. See generally *id.* §§ 25-13-101 to 25-15-202.

tana. Several justices of the peace did complain to us informally about the problem. The problem appears to be universal in small claims systems throughout the United States; there is no reason to believe that Montana would be exempt from the collection difficulties experienced by virtually every other state.

In some states, studies indicate that as many as 20% to 50% of successful plaintiffs may never collect anything, with much higher percentages if those collecting only partially are added.<sup>62</sup> Many other studies acknowledge the existence of the problem without referring to quantitative data.<sup>63</sup> Other commentators have noted that individual small claims judgment creditors are ignorant of collection procedures.<sup>64</sup> In the best available statistical study of this issue, the author further demonstrates not only a high level of uncollectibility, but also that businesses and represented parties do much better than individuals and unrepresented parties in collecting judgments.<sup>65</sup> It is worth emphasizing again that this pattern would strongly reinforce the collection agency syndrome.

The problem should not be corrected at the expense of procedures that protect the judgment debtor. A better solution would include two elements. The first would be to advise the small claims plaintiff that judgment did not necessarily mean payment and to explain the procedures that may have to be followed to ensure collection. The best vehicle to achieve this would be to expand the explanation on collection in the attorney general's pamphlet.<sup>66</sup> The second element would be to provide the small claims judgment creditor with effective assistance in coping with the collection process. For reasons given earlier, attorneys, who perform this function in wealthier litigation, are not the answer in the small claims court. The best solution would probably be for the small claims court to provide the necessary assistance (although it would be unwise to assign a role to the court that it could not carry out with the resources at its command).

Some of the recommended modes of assistance by the court

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62. *E.g.*, Downing, Peters & Sankin, *supra* note 16, at 406-07; Kosmin, *supra* note 20, at 971-72; Stauber, *supra* note 17, at 136-37; Steadman & Rosenstein, *supra* note 16, at 1335; Yngvesson & Hennessey, *supra* note 53, at 254.

63. *E.g.*, CENTER FOR AUTO SAFETY, LITTLE INJUSTICES: SMALL CLAIMS COURT AND THE AMERICAN CONSUMER 12, 24, 25 (1972) [hereinafter cited as LITTLE INJUSTICES]; Driscoll, *supra* note 17, at 501-03; King, *Measuring the Scales: An Empirical Look at the Hawaii Small Claims Court*, 12 HAWAII B.J. 3, 7 (1976); King, *Small Claims Practice in the United States*, 52 ST. JOHN'S L. REV. 42, 64 (1977).

64. NICJ REPORT, *supra* note 21, at 22-23; Domanskis, *supra* note 34, at 613-14; Eovaldi & Meyers, *supra* note 19, at 990-91.

65. Hollingsworth, Feldman & Clark, *supra* note 20, at 483-85, 490-91, table 29.

66. *See* Kosmin, *supra* note 20, at 973.

can be implemented without a significant increase in the burdens on the justices of the peace. (A few justices already provide assistance on occasion.) These modes include the following.<sup>67</sup> At the end of the trial, when judgment is entered, the judge may invite the defendant to make payment immediately. If the defendant does not do so, he should take the stand and explain under oath how he or the entity he represents intends to make payment. The judge should question the defendant specifically at this point, and in effect conduct discovery as to the nature, value, and location of defendant's assets and any prior claims on them. The court may then enter a supplementary order providing for a specific date and method of payment, specifying an installment plan, if necessary, and explaining that failure to comply may lead to contempt proceedings and an increase in the amount that the defendant will have to pay. It would also be advisable for the judge at this time to enjoin the defendant from conveying any assets that could be used to satisfy the judgment, subject to the defendant's need to carry on his business in a reasonable manner. The court administrator could prepare the form of such an order, which could be incorporated in the small claims court statute as are other small claims forms.

Other modes of court assistance recommended by some commentators include assistance by court clerks in preparing the papers required in the collection process,<sup>68</sup> and having the court administer a "collection apparatus designed to collect any judgment it renders."<sup>69</sup> The latter recommendation comes with specific statutory language to implement it.<sup>70</sup> These more comprehensive methods of providing for collection should be carefully considered and implemented in some form after consultation with justices of the peace. Because they would require a significant commitment of time and energy, the legislature may have to allocate additional funds to handle the increased load. Without such a commitment, however, the problems that the small claims court was intended to solve may recur indirectly, through difficulties in the collection process.

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67. Domanskis, *supra* note 34, at 613; Greene, *Small Claims Courts—An Old Challenge in a New Dress*, 39 KY BENCH & B. 16, 44 (1975); CH. COM REPORT, *supra* note 24, at 39; Joseph & Friedman, *supra* note 25, at 873-75.

68. NICJ REPORT, *supra* note 21, at 23; Downing, Peters & Sankin, *supra* note 16, at 407.

69. CH. COM. REPORT, *supra* note 24, at 30; Joseph & Friedman, *supra* note 25, at 873.

70. CH. COM. REPORT, *supra* note 24, at 30; Joseph & Friedman, *supra* note 25, at 873-75.

## VII. VENUE AND TERRITORIAL JURISDICTION

The small claims court jurisdiction statute,<sup>71</sup> which limits the court's jurisdiction to "actions . . . when . . . the defendant can be served within the county where the action is commenced," appears to pose a serious problem for small claims litigation in Montana. Some justices of the peace construe the language to mean that a small claims court may not entertain suits against companies that do not have an office within the county where the court sits. (In most cases, a company can be "served within the county" only if it has a local office.) It makes no difference to these justices that such companies may have other significant contacts within the county. Some of these justices do recognize that companies without local offices may be sued in the Lewis and Clark County small claims court—based on the assumption that substituted service on a state official in Helena may be authorized.<sup>72</sup>

This construction seems a little simplistic when viewed from the perspective of *International Shoe Co. v. Washington*<sup>73</sup> and its progeny. It is also inconsistent with the current small claims court venue provision, which permits suit against "a nonresident of the state, in any county of the state."<sup>74</sup> Most important, the construction works against the purpose of the small claims court statute and would contribute to the collection agency syndrome. It would mean that entities without local offices (though only to the extent of three claims a year) could use the small claims court to collect on claims but in most cases would be immune from suit in that court. If suit could be brought against such corporations, but only in Lewis and Clark County, the added travel expenses would provide exactly the kind of deterrent for most persons with small claims that the statute was designed to avoid. In all likelihood, moreover, the out-of-state corporation would not find travel to Helena as inconvenient as would individual litigants throughout Montana. Finally, the construction of the jurisdiction statute may discriminate against local individuals and businesses who can more readily be served somewhere within one or more Montana counties other than Lewis and Clark.

The problem is compounded by the other venue provisions, which require in general that Montana residents may only be sued in counties in which they may be personally served.<sup>75</sup> Once again,

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71. MONT. CODE ANN. § 25-35-502 (1983).

72. See, e.g., MONT. CODE ANN. §§ 33-1-601, -602 (1983).

73. 326 U.S. 310 (1945).

74. MONT. CODE ANN. § 25-31-201(2) (1983) (emphasis added).

75. *Id.* §§ 25-31-201(1), (4), 25-35-504.



our informal inquiries identified several judges who construe this language to mean, in the case of a business entity, that one of its agents must be present in the county in which the case is to be tried. Thus, even where the defendant is a Montana resident, and may have done business (in the due process sense) in the county where the individual small claimant resides, the latter may still be forced to sue in a county far from where he resides or works.

If the rationale for these provisions is to protect individual defendants from being haled into court at distant locations, it would be understandable, though there is no legislative history which shows what the rationale was. It is inappropriate, however, to view this issue solely from a defendant's perspective. Small claims courts are designed to reduce the cost deterrent in litigation over small claims; therefore the plaintiff's perspective should be emphasized. The threat of abuse of wider venue provisions by businesses against individuals is minimized in Montana by the limits on the number of claims per year that any party may bring.

A conceivable solution to the problem might be to require businesses to sue individuals wherever the latter reside, and to permit individuals to sue businesses wherever the individuals choose—or some variation on this.<sup>76</sup> Aside from questions of fairness, which this solution may pose, it might not make sense to place sole proprietorships and small businesses in the same category with other businesses, and it would also be difficult in many cases to distinguish between individuals and businesses based on party names. Another solution would be to develop special venue rules applicable solely to the small claims court, but perhaps the best solution would be to apply the same venue rules to the small claims court that are now applicable to the district court. The latter solution is preferred by model acts and by commentators.<sup>77</sup> It would be easier for judges and practitioners to understand and apply venue rules with which they are already familiar.

In the Montana district court, plaintiffs may sue in the county where a contract was to be performed, or where a tort was committed.<sup>78</sup> The law also permits change of venue to another county if the convenience of witnesses and the ends of justice would thereby be promoted.<sup>79</sup> This approach not only removes the feature of an exclusively defendant-oriented venue, but also would probably re-

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76. See NICJ REPORT, *supra* note 21, at 17 (only within same judicial district).

77. *E.g.*, CH. COM. REPORT, *supra* note 24, at 10-11; NICJ REPORT, *supra*, note 21, at 17; Joseph & Friedman, *supra* note 25, at 854-55.

78. MONT. CODE ANN. §§ 25-2-101, -102 (1983).

79. *Id.* § 25-2-201.

sult in having most cases tried where the plaintiff works or resides. Since the defendant either agreed to perform a contract or committed a tort there, he is probably able to defend at that location. The provision permitting change of venue would give the small claims court the opportunity to consider the amount of the claim in relation to travel expenses and the relative abilities of individual and business litigants to travel to a distant court. Under the improved system of supervision proposed herein, small claims court judges could be expected to exercise this power competently and with an eye to furthering the purpose of the small claims court legislation.<sup>80</sup>

### VIII. LIMITATIONS ON BUSINESS USE OF THE SMALL CLAIMS COURT

Montana has avoided the collection agency pitfall in part because of three limitations on those who may bring suit in the small claims court.<sup>81</sup> These limitations are that the plaintiff must have been a party to the transaction sued on, that no assigned claims may be brought, and that no party may file more than three claims per year.<sup>82</sup> Since businesses are far more likely than individuals to have multiple claims in any one year, these limitations operate essentially as a limitation on business use of the court.

Some considerations, however, militate against limitations on use of the courts. First, when viewed from a larger perspective, such limitations apparently have an effect contrary to their intended purpose. Businesses that may not collect in a small claims court will in all likelihood attempt collection through a court in which the individual defendant will be at greater disadvantage than in even a "collection agency" small claims court, or through extra-judicial coercion and harassment.<sup>83</sup> Second, there is a social interest in permitting all businesses to collect on legitimate claims at the lowest cost—for one thing, this could result in lower costs to the consumer.<sup>84</sup> Third, limitation on use, particularly Montana's limitation to three claims per party per year, may be too broad a remedy, since it may inhibit collection by sole proprietorships and other small businesses whose appearance before the small claims

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80. This solution could be achieved simply by deleting § 25-35-502 and substituting "district court" for "justice's court" in § 25-35-504.

81. Alexander, *supra* note 1, at 227.

82. MONT. CODE ANN. § 25-35-505(4), (5), (6) (1983).

83. Greene, *supra* note 67, at 44; Hollingsworth, Feldman & Clark, *supra* note 20, at 504; Joseph & Friedman, *supra* note 25, at 855.

84. CH. COM. REPORT, *supra* note 24, at 13; NICJ REPORT, *supra* note 21, at 15-16.

court would not contribute to the collection agency syndrome.<sup>85</sup> Fourth, it may be argued that businesses have a "right" to use the court to the full extent of their need to do so.<sup>86</sup>

Limitations on those who may bring suit in the small claims court should be abandoned if, without such limitations, the court could avoid the collection agency pitfall. If such limitations were the only way to avoid the pitfall, they should be retained to the extent necessary to achieve that result. Since the impact of such a change could not be ascertained in advance, Montana should move toward removing the limitations slowly and experimentally. In light of what has been done in other jurisdictions, and recommended by other commentators,<sup>87</sup> the limitation to three claims per party per year seems unnecessarily restrictive. It should be relaxed to permit three claims per month, so that most small businesses could take care of their small claims.<sup>88</sup> The results should be monitored through the reporting system recommended above, and legislation should permit the supreme court, through the court administrator, to extend the limit gradually but safely.<sup>89</sup>

Another suggestion made by several commentators, which could be tried in Montana simultaneously with relaxed restrictions, is to set aside certain hours or days (except nights and weekends) for collections of debts by businesses.<sup>90</sup> This would to some extent insulate individual claimants from the collection agency perception, but probably would not be a panacea, since perceptions of defendants in business collections suits are not insulated and may spread beyond those parties.<sup>91</sup> None of these recommendations for relaxing the limits on business use should be undertaken until the preceding recommendations are implemented, especially those relating to improved supervision and education of small claims personnel.<sup>92</sup>

85. Eovaldi & Meyers, *supra* note 19, at 693.

86. See Axworthy, *supra* note 20, at 482-83; Domanskis, *supra* note 34, at 599.

87. See Hollingsworth, Feldman & Clark, *supra* note 20, at 504 (six per 30-day limit); Kosmin, *supra* note 20, at 952.

88. Kosmin, *supra* note 20, at 952.

89. CH. COM. REPORT, *supra* note 24, at 13; Joseph & Friedman, *supra* note 25, at 856.

90. *Id.*

91. See NICJ REPORT, *supra* note 21, at 15-16.

92. See Joseph & Friedman, *supra* note 25, at 856.

The foregoing text deals with what might be called major policy issues. Implementation of several more "technical" improvements would, in this author's opinion, also greatly enhance the functioning of the small claims court. These include the following:

(1) The small claims court statutes should authorize plaintiffs to serve the complaint and order, and defendants to serve counterclaims, by certified mail, return receipt requested, in addition to the presently authorized method of personal service in MONT. CODE ANN. §§ 25-35-604, -606 (1983). Service by certified mail would reduce the cost of service

## IX. CONCLUSION

Prohibitive cost in resolving small disputes through the judicial system, which only an effective small claims court can mitigate, seriously undermines the effectiveness of that system. Incurring such a cost—or being forced to resort to less desirable alternatives—may be merely inefficient and annoying to wealthier litigants. To “ordinary” individuals, however, whose experience of the judicial process is more likely to be limited to small claims, and whose ability to resort to alternatives is more constrained by economic factors, the lack of satisfactory alternatives may result in severe injustice. Accordingly, significant efforts by the Montana Supreme Court and Legislature to make more real, by implementation of the recommendations contained in this article and by further study, the ideal of justice embodied in current small claims court legislation, could make an important contribution to the social fabric of Montana.

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and make it less intimidating to defendants.

(2) The constitutional defects discerned in *North Central Services, Inc. v. Hafdahl*, \_\_\_ Mont. \_\_\_, 625 P.2d 56 (1981), should be corrected by trial de novo rather than by transfer or removal to justice’s court (where representation is permitted). See § 25-35-605. Informal inquiries indicate that parties have abused removal since § 25-35-605 took effect in 1981. The problem is that removal to justice’s court often forces the plaintiff either to hire an attorney or drop the case. See, e.g., *Wolfe & Weller*, *supra* note 15, at 2-3. Trial de novo saves the right to representation. And a plaintiff who prevails in small claims court has an incentive not to drop a case against an appealing defendant. Losing defendants may also be unlikely to appeal small claims court verdicts.

(3) The filing and appearance fees of § 25-35-608 should be eliminated, since they may discourage plaintiffs from prosecuting and defendants from contesting claims involving small amounts.

(4) The power of the small claims court should be extended to allow justices to order repairs, rescission, and reformation.

(5) The legislature should consider adopting §§ 5 and 6 of the CH. COM. REPORT, *supra* note 24, to provide special mechanisms within the small claims court for settlement, mediation, and arbitration.

