ELLEN SUE KATZ, AZ Bar. No. 012214
WILLIAM E. MORRIS INSTITUTE FOR JUSTICE
202 E. McDowell Rd., Suite 257
Phoenix, AZ 85004
(602) 252-3432
eskatz@qwestoffice.net

IN THE SUPREME COURT

STATE OF ARIZONA

COMMENTS TO AMENDED RULE PETITION FOR CIVIL RULES OF PROCEDURE FOR LIMITED JURISDICTION COURT	Supreme Court No. R-12-0006

Pursuant to Rule 28 of the Rules of the Supreme Court, the William E. Morris Institute for Justice submits these comments to Amended Rule Petition for Civil Rules of Procedure For Limited Jurisdiction Courts ("Justice Court Civil Rules") submitted to the Arizona Supreme Court.

Statement of Interest

The William E. Morris Institute for Justice ("Institute") is a non-profit program established to advocate, litigate and lobby on behalf of the interests of low-income Arizonans. We work closely with the federally funded legal services programs and community groups. One substantive area the Institute historically has worked on is housing. Recently, the Institute has worked on issues concerning debt collection cases. The Institute monitors judicial practices and policies to ensure access to justice and the courts. The proposed Justice Court Civil Rules are an intersection of these issues.

During the last six months, the Institute working in general with the Legal Services Committee of the State Bar, commented on the proposed rules. In general, the following comments were submitted to the Rules Committee of the State Bar and were made available to the drafting committee.

Background to Comments

A large percentage of civil lawsuits filed in justice court are consumer debt

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

It is an emergent trend that many of the consumer debt collection cases are now filed by debt buyers who have purchased the debt after it has gone into default. Most credit card debt is written off by the original creditor and "sold" to debt buyers, companies who buy debt and sue to collect. In fact, some of these debts are sold numerous times before a lawsuit is filed. Debt buyers purchase these debts for 2-3 pennies on the dollar. Because of this low cost, debt buyers receive little, if any, evidentiary documentation of the debt. Often, debt buyers receive nothing more than a spreadsheet summarizing the hundreds or thousands of accounts they have purchased from a creditor or another debt buyer, and thus may have no fair mechanism to establish the debt by a preponderance of the evidence at trial.

As a result of the debt buyer's lack of evidence, debt buyers may sue the wrong consumer (for example, the named defendant may have the same name as the true debtor) or even a consumer who has paid the amount in full. Some consumers are sued twice for the same debt by different buyers.[1] Moreover, it is not unusual for a debt buyer to sue a consumer beyond the statute of limitations for the alleged debt. As a debt is sold from debt buyer to debt buyer, the likelihood of a mistake is increased as it is possible the alleged debt will be sold to two different debt buyers or the debt buyers will transfer even less documentation at the time of sale.

The standard collection complaint filed by debt buyers in Arizona justice court is a form pleading that does not: (1) identify the original creditor, (2) attached the contract from which the consumer's alleged liability arises, (3) attach proof of ownership of debt, (4) state the date of default, or (5) break down the amount claimed as currently owed by principal due at the time of default, interest, fees, and other charges. Moreover, prior to

---

[1] *See Chase Bank, USA, N.A. v. Cardello*, 896 N.Y.S.2d 856 (N.Y. Ct. 2010).

judgment, debt buyers often file employee affidavits averring as to the information contained in the debt buyer's own files, rather than in the business records of the original creditor. These affidavits are analogous to the robo-signers in the mortgage foreclosure context, where the employee often has not reviewed the creditor's records (because the debt buyer does not have them), and has instead reviewed only the spreadsheets described above. Debt buyers shy away from large-value cases, which would require them to file in superior court. Instead, debt buyers prefer to sue in justice courts.[2]

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

It is difficult for consumers to obtain representation in these cases because: (1) they cannot afford any attorney, or (2) they cannot find an attorney who will take their case. Absent a counterclaim, attorneys rarely take these cases on contingency because it is unlikely that they will recover their attorneys' fees if they successfully defend the case.[3] Typically, these cases have a high default rate.

---

[2] *See, e.g.*, Lauren Goldberg, Dealing in Debt: The High-Stakes World of Debt-Collection After FDCPA, 79 S.CAL, L. REV. 711, 729, 743-44 (2006), available at http://lawweb.usc.edu/why/students/orgs/lawreview/L.GoldbergDealinginDebt.dvm ("The minimal procedural formalities … and less onerous pleading requirements of small claims courts offer collection lawyers a swift sword of judgment against debtors and give lawyers leeway to file cases that would not survive in general civil court.")

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

Rather than a true adversary system, the debt buyer litigation model is characterized by a sophisticated business represented by a skilled lawyer suing an unsophisticated, unrepresented consumer. Judgments are often wrongly entered against unrepresented consumers, despite lack of sufficient proof as to liability, standing, or damages.[4] As a result of receiving tens of thousands of complaints regarding debt collection practices, in 2010, the Federal Trade Commission ("FTC") conducted an "extensive analysis," of the problem nationwide and concluded that:

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

The Institute believes this Court can start to address the debt collection abuses of debt buyers in the proposed Justice Court Civil Rules.

I. Requested Changes to Proposed Rules Pertaining to Debt Collection Cases

The Institute identified two main substantive concerns: (1) the need for specified pleading and document requirements in debt collection cases; (2) the need for specified default standards in debt collections cases. Each is explained below:

A. Specified Pleading/Document Requirements in Debt Collection Cases

1. Rule 110(b) (pleading requirements)

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

---

[4] *See, e.g.*, DEBT DECEPTION: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers (May 2010) Neighborhood Economic Development Advocacy Project, available at http://www.nedap.org/ pressroom/documents/DEBT_ DECEPTION_FINAL_WEB.pdf.; PAST DUE: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now (January 2011), East Bay Community Law Center and Consumer Union of the United States, available at www.consumersunion.org.

[5] Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration, Federal Trade Commission (July 2010), p. i., available at http:/www.ftc. gov/os/2010/07/debtcollectonreport.pdf.

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

a. The name of the original creditor and the current assignee in the caption if the debt is assigned; and

b. In the complaint, the identity of the original owner of the debt, a redacted original account number, the date of the last payment, the date of default, the amount owed to the original creditor at the time of default, the statute of limitations for the debt with the governing state law, the name of the current owner of the debt, information on the full chain of the assignment of the debt from the original creditor to the current plaintiff, and a breakdown of the amount claimed to be currently owed broken down by principal, interest, fees and other specified charges.

The trend throughout the country is to provide this type of protection for consumers. Those states include Delaware, Massachusetts, Virginia, Michigan, Connecticut, California, Florida, North Carolina, and New Mexico. The above proposal is adapted from the recommendations in the Federal Trade Commission Report, Repairing a Broken System on page 17.

Similar safeguards were provided in the Rules of Procedure for Eviction Actions ("Eviction Rules") effective January 1, 2009, adopted by the Arizona Supreme Court. For example, a landlord must attach as an exhibit to the complaint the notice to vacate that was served on the tenant. Rule 5(b)(7) of the Eviction Rules. There also are specific and heightened pleading requirements with respect to the complaint. Rules 5(b), (c) and (d). The attorney filing a complaint must "verify that the attorney believes the assertions in the complaint to be true on the basis of a reasonably diligent inquiry." Rule 5(b)(8). The complaint must state the specific reason for the eviction Rule 5(b)(7) and if for reasons other than nonpayment, the complaint must "state the reason for the termination of the tenancy with specific facts, including the date, place and circumstances of the

reason for termination, so the tenant has an opportunity to prepare a defense." Rule 5(d)(2). The complaint must provide that a proper notice to vacate was served, the date the notice to vacate was served and the manner of the service. Rule 5(b)(7).

Similar specified pleading requirements in debt collection cases are warranted and will provide guidance to the parties and the justices. These requirements will reduce mistakes made in debt collection litigation, mistakes that occur primarily because of the presence of the debt buying industry. Erroneous judgments in the debt collection context lead to erroneous garnishments, which unjustly take away hard earned wages from low-income workers, the very persons often unable to obtain legal representation. Thus, it is appropriate to provide similar safeguards in the debt collection context.

2. Rule 110(6) (document requirements)

The Institute proposes adding the following paragraph 6 to Rule 110:

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

a. A copy of the original contract or other documentary evidence of the original debt, showing proof of the original debt and the terms of the debt; and

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

These requirements are similar to the Administrative Directive of the Chief Judge of the Court of Common Pleas for the State of Delaware, No. 2011-1.

The above requirements will go a long way to ensuring that the thousands of debt collection judgments that are granted each year to debt buyers are for sums actually owed by the person being sued to the entity bringing the lawsuit. These are modest reforms.

B. Specified Default Standard in Debt Collection Cases

1. Rule 140

The Institute proposes the following be added to Rule 140 which concerns default judgments as a new subsection (h):

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

The Institute believes this guidance is needed. It is similar to the requirements in the Eviction Rules. Eviction Rule 13 requires the justice in every action, except where there is a stipulated judgment, to determine (1) whether service was proper; (2) whether a proper termination notice with an opportunity to cure was provided (and if not, to dismiss the case); (3) if the facts as alleged show the plaintiff is entitled to possession of the property; and (4) if there was a partial payment whether the landlord obtained a waiver (if the landlord did not, the case is to dismissed).

The reasons that these specified rules were needed in eviction cases equally apply to debt collection cases: represented debt buyers and unrepresented defendants; thousands of cases filed each year; most cases heard by default; and the need to be sure justice is being served. For all these reasons, the Institute requests that the Supreme Court adopt the Institute's proposal, or in the alternative, send these rules back to the drafting committee with specific instructions to incorporate the Institute's requests.

Finally, in the state legislative session that just ended, House Bill 2664 was signed into law. This law allows a debt buyer to prove up the amount of the debt by submitting the last billing statement or by "electronic data." A.R.S. § 44-7804. (Available at www.azleg.gov/legtext/50leg/2r/laws/0318.pdf.) The Institute expects that there will be legal challenges to this bill. This law does not affect the Institute's proposals.

II. Universal Concerns

The Institute reviewed the amended rules package with an eye toward how these rules would impact unrepresented litigants who are the majority of litigants in justice court. The Institute is concerned that the rules are not drafted in a way that could assist unrepresented litigants. We have the following concerns:

A. Readability and Understanding of the Rules

The charge to the drafting committee was to craft rules that would "simplify" the court processes and make the rules more "comprehensible to everyone." The Institute's initial observation is that the rules are written at a tenth grade reading level. An effort should be made to reduce the readability level. We think some of this can be accomplished by looking at word choice and using different words. As examples, the word "give" could replace the word "provide" or the word "ends" could replace the word "concludes." In other places, the number of words in a sentence should be reduced as some sentences have 50 plus words. Some of the sentences could be broken up by using numbers to separate out the different clauses. We understand that as lawyers we often think a certain word must be used and we are comfortable using it.

Unfortunately, the drafting committee refused to undertake this task unless someone edited the rules for them. The Court should require this undertaking.

B. Time Periods

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

The Court should modify all time periods so none is less than 10 days.

C. The Order and Numbering of the Rules

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

The drafting committee did not follow the numbering system used in the Arizona or federal Rules of Civil Procedure. At the end of the rules, there is a table that contains a cross reference to the Arizona Civil Rules of Procedure that may have slight or significant differences on the subject matter of the Justice Court rules. In the Appendix to the proposed rules there is chart with a note by the committee on page 3 showing which rules generally apply depending on whether there is no answer filed, there is a settlement or there is a litigation process ending in a judgment.

The Institute remains concerned that the system used by the drafting committee does not simplify the process or make the rules more comprehensible to everyone. The Institute requests that the Court review the numbering system in the rules with simplification and comprehensibility in mind, especially for unrepresented litigants and send these rules back to the committee to simplify the numbering system.

III. Objections to the Summons/Subpoena

The proposed rules also contain some draft pleadings. The draft civil summons

(page 51 of the Appendix to Amended Rule Petition) raises several objections. First, the summons incorrectly states the defendant must file a written answer. The justice court statute allows for oral pleadings unless otherwise provided by law. A.R.S. § 22-215. In A.R.S. § 22-216, there is a list of allegations that must be in writing. The summons should be changed to reflect that a written answer is not required in all cases. This issue was addressed when the Rules of Procedure for Eviction Actions were drafted. The "Residential Eviction Information Sheet" advises the tenant that s/he is "encouraged" to file a written answer.

Second, the summons informs the defendant s/he is "required to pay a filing fee" when the answer is filed. There is no mention on the summons of waivers and deferrals of fees and costs. A.R.S. §12-302. The summons should affirmatively state that the litigant can request a fee waiver and deferral. The Institute is very concerned that the combination of incorrect or inadequate information about the need to file an answer and pay a filing fee will discourage many low-income persons from defending the case, even when they have a valid defense. These persons may read the summons and think that because they cannot file a written answer and cannot afford a filing fee, they cannot defend.

The Institute is aware that the "Notice to Defendant" (page 52 of the Appendix to the Amended Rule Petition) in paragraph 5 informs persons that:

> You must pay a filing fee to the court when you file your answer. If you cannot afford to pay a filing fee, you may apply to the court for a fee waiver or deferral, but you must still file your answer on time.

It is not adequate to rely on the notice when the summons has incorrect and inadequate information.

Third, the summons and subpoena forms (pages 53-56 of the Appendix to the Amended Rule Petition) also contain the following requirement: "Request for reasonable accommodation for persons with disabilities must be made to the court by parties at least 3 working days in advance of a scheduled court proceeding." The Institute believes this

statement violates the Americans with Disabilities Act ("ADA"). 42 U.S.C. § 12131 *et seq*. Courts have an obligation to provide reasonable accommodations to parties and witnesses under the ADA. The Institute knows of no authority that allows the courts to impose a 3 working day requirement on requests for reasonable accommodations. Counting weekends and holidays, under this statement, some reasonable accommodation requests must be made 5-6 days prior to the court date. A litigant may not receive the court papers 3 working days prior to the court date. A person reading the notice may assume that if they miss the time period stated, they cannot make a reasonable accommodation request. This requirement will have a chilling effect on and may interfere with a person's right to make a reasonable accommodation request. *See* 28 C.F.R. § 35.134(b); 28 C.F.R. §35.149.

Courts cannot make a reasonable accommodation request more difficult than need be. The statement makes it seem that if an accommodation is not made at least 3 working days in advance it either cannot be made at all or if it is made, it will be denied. Both of these options would violate the ADA. The Institute knows of no authority that would allow a court to deny a reasonable accommodation request because it was not made at least 3 working days in advance. Most accommodations can be made at or right before the time of the court proceeding.

This ADA issue also was addressed when the Rules of Procedure for Eviction Actions were drafted. Rule 5(a)(4) states that the summons shall advise the person that "Requests for reasonable accommodations for persons with disabilities should be made to the court as soon as possible." This same statement should be used for the general summons and subpoena forms in the Amended Rule Petition.

Finally, the summons informs the recipient that s/he can go to TurboCourt to get the answer form and file the answer electronically. It is the Institute's understanding that persons have to pay to download forms and there is no fee waiver or deferral on TurboCourt yet. Thus, there are more fees than just the filing fees. The Institute strongly encourages the Arizona Supreme Court working with the Administrative Office of the

Court to expeditiously resolve the lack of a fee waiver and deferral process on TurboCourt. TurboCourt has been operational for over one year. The fee waiver and deferral process should have been part of the initial planning. It was not. At this point, this matter must be made a priority and resolved immediately.

IV. The Notices are a Good Idea and Their Usage should be Expanded

The Institute supports the idea of the notice to the defendant as required by Rule 112(d) and the notice language required in discovery requests. These will be helpful and informative to unrepresented litigants. The Institute suggests other notices be considered such as for a pretrial conference, motion for summary judgment and at trial. If these rules are sent back to the drafting committee, the Institute requests that the Court suggest that the committee develop additional notices.

CONCLUSION

The William E. Morris Institute for Justice requests that the Amended Rule Petition for Civil Rules of Procedure for Limited Jurisdiction Courts not be adopted until the above matters are adequately addressed to promote public laws and policies that enhance the profession and support the administration of justice.

Respectfully submitted this 29th day of May 2012.

WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

By /s/Ellen Sue Katz

Ellen Sue Katz
William E. Morris Institute for Justice
202 E. McDowell Road, Suite 257
Phoenix, Arizona 85004

Original electronically filed with the
Clerk of the Supreme Court of Arizona
this 29th day of May 2012

By: /s/ Ellen Sue Katz