



COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT

REPORT OF THE SMALL CLAIMS WORKING GROUP

AUGUST 1, 2007

ADMINISTRATIVE OFFICE OF THE DISTRICT COURT

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I. Introduction

In his essay on “The Administration of Justice in the Modern City,” 26 Harv. L. Rev. 302, 315 (1912-1913), Dean Roscoe Pound articulated the concept of a small claims or “people’s court.” It would “provide for disposing quickly, inexpensively, and justly of the litigation of the poor, for the collection of debts in a shifting population, and for the great volume of small controversies which a busy, crowded population, diversified in race and language necessarily engenders.” The goal was to avoid the intricacies of the extensive rules of civil procedure and to provide a simpler, more streamlined process for the initiation, pursuit and defense of small-dollar claims. While the use of lawyers was not prohibited, the small claims procedure was intended to permit individuals to pursue or defend their claims easily in a meaningful way without needing to retain counsel.

In April, 2006, Chief Justice Lynda M. Connolly of the Massachusetts District Court established an interdepartmental Working Group of clerk-magistrates and court staff attorneys to examine current small claims practices. With the approval of Chief Justice for Administration and Management Robert A. Mulligan, the Working Group included representatives from the District, Boston Municipal and Housing Court Departments, the three Trial Court departments with jurisdiction over small claims matters. The Working Group was later expanded to include representatives of consumer groups, collection attorneys, the Massachusetts Bar Association, and the Legislature.

The goal of the Working Group was to conduct a review of small claims practice in Massachusetts including the small claims statute, the Uniform Small Claims Rules and the Trial Court’s Small Claims Standards, and to examine whether any changes should be made in the small claims process.

The Working Group recognized that a significant portion of small claims cases involve the collection of commercial debts from defendants who are not represented by counsel. One option would have been to address the concerns that were identified in this area by importing procedural requirements and protections from regular civil litigation or excluding certain categories of cases or types of litigants from the small claims process altogether. The Working

Group avoided this approach, believing it would make small claims more complex, more specialized and more expensive – the very attributes that the small claims process was created to avoid. The Working Group recognized that simplicity is essential to the success of small claims procedure, which serves ordinary citizens well – not only as plaintiffs, but also as defendants – precisely by avoiding many of the more complicated, costly and sometimes arcane procedures of the regular civil docket.

Instead, the Working Group grappled at length with the details of small claims practice in order to dissect specific issues which have been identified as problematic and to propose specific remedies for each of those problems. Its goal was to clarify and improve a process by which a vast number of disputes have been resolved in a just, expeditious, and inexpensive manner. In making these recommendations, the Working Group seeks to improve but not to complicate the small claims process for resolving disputes in the spirit of Dean Pound's vision of a true people's court.

II. Executive Summary

Notice Issues. One of the chief concerns of the Working Group was the assertion that some defendants never receive notice of the small claims action pending against them, nor do they receive notice of the trial date, so that they may appear and present a defense or contest the amount of the claim. When a defendant fails to appear at trial, the court usually enters a default judgment, orders the defendant to pay the amount claimed, and schedules a payment review hearing. Unless the defendant pays the full amount of the judgment, asks for time to pay, asserts a current inability to pay, or seeks to vacate the default judgment, he or she will be subject to further debt collection proceedings, which may include the issuance of a Capias (civil arrest warrant) for failure to appear at the payment review hearing, or the issuance of a writ of Execution, permitting the seizure and sale of the defendant's property to satisfy the judgment.

The question of how best to insure that defendants actually receive the mailed *Statement of Small Claim and Notice of Trial* in the first instance is a difficult one. The current rule requires that the plaintiff provide the court with an address for the defendant, and that the court send the defendant a copy of the Statement of Small Claim by first class mail. The Working Group was aware that formerly both first class mail and certified mail were required, but that the Legislature eliminated the certified mail requirement as a cost-saving measure. (Certified mail continues to be used for out-of-state defendants.)

After much discussion, the Working Group concluded that a reinstatement of the certified mail requirement would do little or nothing to solve the problem of inaccurate or out-of-date addresses. Neither would service by a constable at the defendant's last and usual place of abode be effective, if the address provided to the constable were similarly incorrect. Recognizing that in-hand service would be both costly and extremely difficult to achieve, the Working Group focused its efforts on developing a system that would (1) be effective, (2) place the burden of

obtaining a current address on the plaintiff, (3) avoid additional costs of service, which are eventually passed on to the defendant, (4) provide a system that would enable a defendant to vacate easily any judgment that was a result of improper notice, and (5) continue to provide a streamlined, simple and expeditious process consistent with the goals of the small claims court.

The Working Group's proposals to address the problem of notice are found in several of its recommendations. They include a recommendation that plaintiffs in commercial debt matters be required to verify a defendant's current address in certain specific ways before they may obtain a default judgment (Recommendation 1), as well as a proposed change to the existing rules that would require that a judgment be vacated at any time the court finds that the defendant did not receive notice of the claim (Recommendations 4, 11 and 12).

Recognizing that not all defaults result from lack of notice, the Working Group also recommends that defendants be provided with more information about the claim, thereby encouraging defendants to appear in court (Recommendation 2).

Fair treatment of unrepresented defendants. The Working Group recognized the tension that can arise from a perceived imbalance between the parties when one is represented by an attorney and the other is not. The small claims procedure neither encourages nor discourages the use of lawyers. Court clerks are duty-bound to provide intelligible procedural information to all of the parties, yet they have an ethical obligation neither to advocate for one party nor to provide legal advice. The Working Group's careful consideration of these competing themes resulted in several recommendations. These include mandatory use of a standard payment agreement form (Recommendation 3), and encouraging magistrates to maintain control of small claims sessions so as to promote understanding by, and ensure equal treatment of, all parties (Recommendations 7, 9 and 10).

Entry and removal of default judgments. In an effort to ensure fairness in the entry and collection of judgments, the Working Group has made recommendations to improve consistency in the entry of default judgments (Recommendation 8) and in granting relief from judgment (Recommendation 13).

Reporting satisfaction of judgments. The Working Group recommends that for the first time in Massachusetts all civil plaintiffs be required to file a notice of satisfaction with the court once a judgment is paid in full (Recommendation 6).

Property seizures. The Working Group suggests changes in the timing and circumstances under which a writ of Execution may issue in a small claims case (Recommendation 5), and some increase in the value of automobiles that are statutorily exempt from seizure (Recommendation 14).

III. Members of the Working Group

The members of the Working Group included:

- Honorable Gregory R. Baler, Justice of the District Court
- James A. Bisceglia, Esq., Clerk-Magistrate, Worcester Housing Court
- Thomas G. Brophy, Esq., Chief of Staff, Office of Senator Robert S. Creedon, Jr., Senate Chair, Joint Committee on the Judiciary
- Lori A. Ciancuilli, Esq., Co-Chair, Subcommittee on Small Claims, Massachusetts Academy of Trial Attorneys
- Christopher J. Connolly, Esq., Administrative Attorney, Administrative Office of the Boston Municipal Court Department
- James F. Comerford, Esq., Law Clerk, Quincy District Court
- Timothy Cummings, Chief Legislative Aide, Office of Representative Charles A. Murphy, House Vice-Chair, Joint Committee on the Judiciary
- Pamela M. Dashiell, Esq., Director of Planning and Policy, Administrative Office of the Trial Court, Co-chair
- Charles M. Delbaum, Esq., Staff Attorney, National Consumer Law Center
- Martin W. Healy, Esq., General Counsel, Massachusetts Bar Association
- Robert J. Hobbs, Esq., Deputy Director, National Consumer Law Center
- Kathleen Joyce, Esq., Chief Legal Counsel, Office of Representative Eugene L. O'Flaherty, House Chair, Joint Committee on the Judiciary
- Sharon Lalli, Office of Senator Robert S. Creedon, Jr., Senate Chair, Joint Committee on the Judiciary
- Nance Lyons, Esq., Co-chair, Subcommittee on Small Claims, Massachusetts Academy of Trial Attorneys
- William A. McEvoy, Jr., First Assistant Clerk-Magistrate, Newton District Court
- Lawrence E. O'Brien, Jr., Esq., Ganick, O'Brien and Sarin
- Adam J. Olshan, Esq., Law Office of Howard Lee Schiff, P.C.
- Ellen S. Shapiro, Esq., Assistant General Counsel, Administrative Office of the District Court, Co-Chair
- James B. Sheerin, Esq., First Assistant Clerk-Magistrate, New Bedford District Court
- David W. White, Esq., Breakstone, White & Gluck, PC, President-Elect, Massachusetts Bar Association

The initial interdepartmental working group convened by Chief Justice Connolly with the approval of the Chief Justice for Administration and Management, Honorable Robert A. Mulligan, consisted of a representative from each of the Trial Court Departments with jurisdiction over small claims matters. The members were:

- James A. Bisceglia, Esq., Clerk-Magistrate, Worcester Housing Court
- Christopher J. Connolly, Esq., Administrative Attorney, Boston Municipal Court
- William A. McEvoy, Jr., First Assistant Clerk-Magistrate, Newton District Court

- Ellen S. Shapiro, Esq., Assistant General Counsel, Administrative Office of the District Court

This working group was later expanded to include representatives of consumer groups, collection attorneys, the Massachusetts Bar and the Legislature as detailed above. The enlarged Working Group convened on October 11, 2006, with Chief Justice Connolly and at that time created three subcommittees, each with the assigned the task of focusing on separate areas of concern as follows:

SUBCOMMITTEE ON NOTICE ISSUES

- Charles M. Delbaum, Esq., Staff Attorney, National Consumer Law Center
- Lawrence O'Brien, Jr., Esq., Ganick, O'Brien and Sarin
- Adam J. Olshan, Esq., Law Office of Howard Lee Schiff, P.C.
- Ellen S. Shapiro, Esq., Assistant General Counsel, AODC
- James B. Sheerin, Esq., First Assistant Clerk-Magistrate, New Bedford District Court
- David W. White, Esq., President-Elect, Massachusetts Bar Association, Breakstone, White and Gluck, PC

SUBCOMMITTEE ON POST-JUDGMENT ISSUES

- James A. Bisceglia, Esq., Clerk-Magistrate, Worcester Housing Court
- Honorable Gregory R. Baler, Justice of the District Court
- James F. Comerford, Esq., Law Clerk, Quincy District Court
- Martin W. Healey, Esq., General Counsel, Massachusetts Bar Association
- William A. McEvoy, Jr., First Assistant Clerk-Magistrate, Newton District Court
- Ellen S. Shapiro, Esq., Assistant General Counsel, AODC

SUBCOMMITTEE ON BEST PRACTICES AND CONSISTENCY ISSUES

- Christopher J. Connolly, Esq., Administrative Attorney, Boston Municipal Court
- Pamela M. Dashiell, Esq., Director of Planning and Policy, AOTC
- Robert J. Hobbs, Esq., Deputy Director, National Consumer Law Center
- Nance Lyons, Esq., Co-chair, Subcommittee on Small Claims, Massachusetts Academy of Trial Attorneys
- Ellen S. Shapiro, Esq., Assistant General Counsel, AODC.

Over the course of the following seven months the Working Group held five plenary meetings to receive reports from the subcommittees and to work on developing recommendations. Additionally, members of the Working Group met with representatives of a student program at Northeastern University School of Law (known as Law Office 12) who, under the supervision of Greater Boston Legal Services, were involved in a study of small claims practices. The Working Group welcomed the input of the law students, whose mission included proposing solutions to problems they observed in the courtroom and updating a consumer handbook for elderly pro se debtors.

IV. Recommendations for Changes in the Small Claims Rules

Procedures in all small claims actions conducted in the District Court, Boston Municipal Court and Housing Court Departments of the Trial Court are governed by Trial Court Rule III, the Uniform Small Claims Rules. Revisions or amendments to the Uniform Small Claims Rules must be proposed by the Chief Justice for Administration and Management and approved by the Supreme Judicial Court.

1. Verify the defendant's address before issuing a default judgment.

Problem:

Some defendants are not receiving the mailed *Statement of Small Claim and Notice of Trial* form. If the court does not have a correct address for the defendant, this can result in a default judgment being entered, and the defendant's property being seized, without the defendant ever having received notice. This problem may occur more often in assigned debt cases since such cases may be older than others, with a greater likelihood that debtors have moved since the debt was incurred.

Working Group's recommendation:

Uniform Small Claims Rules 2 and 7 should be amended so that plaintiffs who are pursuing a claim or debt incurred in the course of the plaintiff's trade or commerce may obtain a default judgment only if they have verified the defendant's address.

At the time of filing a Statement of Small Claim, any plaintiff pursuing a claim or debt incurred in the course of the plaintiff's trade or commerce, as defined in G. L. c. 93A, § 1 (the Consumer Protection Act), should be required to file an additional statement, signed under the pains and penalties of perjury, that the defendant's address, as provided to the court by the plaintiff in the Statement of Small Claim, has been verified by ***one*** of the following:

- Municipal record verification (e.g., from street list or tax records) within the past 12 months, or
- RMV verification within the past 12 months, or
- Receipt of correspondence from the defendant within the past 12 months with that return address, or
- Other verification from the defendant within the past 12 months that such address is current.

As an alternative, the plaintiff may verify the defendant's address by certifying under the pains and penalties of perjury any *two* of the following:

- The plaintiff has verified the defendant's address by mailing a letter to the defendant by first class mail that has not been returned by the postal service. The letter must have been mailed within the past 6 months, and at least 4 weeks prior to the filing of the small claim.
- The plaintiff has verified the defendant's address from an online database, other than white pages or other unpaid general telephone directories, within the past 6 months.
- The plaintiff has verified the defendant's address by obtaining independent verification from an additional source described by the plaintiff.

The sufficiency of the plaintiff's efforts to verify the defendant's current address will become relevant only if the defendant fails to appear for trial. Prior to entering a default judgment, the court must review the verification of address provided by the plaintiff and make a determination whether the plaintiff has fulfilled his or her obligation under the rule.

2. Require plaintiffs to include in their Statement of Small Claim specific basic information regarding any commercial debt.

Problem:

When a commercial debt has been assigned by the original creditor to another entity whose name is unfamiliar to the defendant, the defendant may not recognize and be able to resolve or dispute the claim or the amount of the claim.

Commercial debt is sometimes assigned to entities whose names may be unfamiliar to the defendants involved. Even where defendants have received notice of the small claim, they may not appear or be able to defend because they do not recognize the name of the plaintiff or otherwise recognize the description of the debt as their own, or because they do not have enough information about the claim to challenge the amount or to raise affirmative defenses.

Working Group's recommendation:

Amend Uniform Small Claims Rule 2 so that plaintiffs who are pursuing a claim or debt incurred in the course of a creditor's trade or commerce must include certain minimal information about the claim or debt in the statement of claim.

Any plaintiff pursuing a claim or debt incurred in the course of a creditor's trade or commerce, as defined in G. L. c. 93A, § 1, should be required to include all of the following

information in the statement of claim:

- Name of original creditor (if different from plaintiff's)
- Name of current creditor (if different from plaintiff's)
- Original account number (if an account number was established)
- Amount of current balance
- Amount of last payment or last charge (identifying which one)
- One of the following:
 - Date of last payment, *or*
 - Date of last charge, *or*
 - Date of default on payment
- Breakdown of amount claimed:
 - Principal amount
 - Interest amount
 - Attorney's fees
 - Other collection costs by contract

The sufficiency of the information provided by plaintiff in the Statement of Small Claim will become relevant only if the defendant fails to appear for trial. Prior to issuing a default judgment, the court must review the statement and make a determination whether the plaintiff has fulfilled his or her obligation under the rule and, as to the breakdown of damages, whether an assessment of damages will be necessary. If at all possible, such an assessment of damages should occur on the scheduled trial date.

If the plaintiff has not included such information in the Statement of Small Claim as required and the defendant does not appear, no default judgment should issue and the small claim should be dismissed without prejudice.

Minority position:

Amend Uniform Small Claims Rule 2 to require that creditors, in cases involving assigned commercial debt, attach a copy of the contract and proof of the assignment to the Statement of Small Claim, and require further that such creditors present a prima facie case of the underlying debt.

3. Exclude exempt income from any court-sanctioned payment plans.

Problem:

Small claims litigants are not always aware that under state and Federal law, income derived from public assistance or public benefits, as well as a certain percentage of wages, are exempt from court payment orders. **When courts issue payment orders based on agreements by the parties, they may unknowingly be ordering payments that will be derived from exempted income.**

Working Group's recommendation:

Amend Uniform Small Claims Rule 7 to mandate use of the standard *Judgment and Post-Judgment Payment Agreement* form (which includes the list of statutory exemptions) to insure that the court does not order or otherwise endorse any private payment agreement that may rely on exempted sources of income. If the defendant is present in court, the court should review the proposed agreement form with the defendant.

General Laws c. 224, § 16 (made applicable to small claims by G.L. c. 218, § 22) prohibits the court from ordering a defendant to make any payment from exempt income. Further, it is recommended that the court should not otherwise endorse any voluntary payment agreement that relies on exempted sources of income (e.g., by accepting it for filing, or continuing a matter during its term).

The small claims rules and standards should require that if a ***Judgment and Post-Judgment Payment Agreement form*** is proffered when the parties are before the court, the court should review the agreement and then inquire of the defendant to ascertain whether he or she: (1) is aware that income derived from certain sources is exempt, (2) has an actual ability to pay, and (3) understands the consequences of not complying with the court's payment order.

Since payment agreements are sometimes submitted without the defendant appearing before the court, the small claims rules should be revised to require parties to use the District Court's *Judgment and Post-Judgment Payment Agreement* form and to prohibit the use of alternative payment agreement forms.

4. Eliminate the one-year limit on relief from judgment where the defendant did not receive notice of the small claim.

Problem:

Uniform Small Claims Rule 8, which governs relief from judgment, has a one-year limitation even where relief is sought "for want of actual notice." However, where notice is faulty, the defendant may not become aware of the claim or the outstanding judgment until more

than a year has passed.

Working Group's recommendation:

Revise Uniform Small Claims Rule 8 to require that the court vacate a default judgment whenever the court finds that the defendant did not receive notice of the claim, regardless of when such a motion is made. This would be consistent with the due process requirements embodied in Mass. R. Civ. P. 60(b)(4) that a judgment that is voidable for lack of notice may be challenged at any time. The one-year limitation would remain for other grounds of relief from judgment.

Minority position:

It is important to have some finality in litigation. An open-ended ability to assert a failure of notice is unfair to plaintiffs who, with the passage of time, may no longer have documentary evidence necessary to prove a case. Rather than mandating that want of notice must always result in the judgment being vacated, the court should retain discretion to consider the merits of the underlying defense, as it does when a motion to vacate is brought on other grounds.

- 5. Do not issue a writ of Execution until after the payment review hearing, except in special circumstances. Add an explanation on court forms that after the payment review hearing the plaintiff may obtain a writ of Execution to seize and sell the defendant's non-exempt property even if payments are being made.**

Problem:

Defendants may feel misled by the court when the plaintiff obtains a writ of Execution, pursuant to Uniform Small Claims Rule 7(i), and seizes the defendant's property during the apparent "grace period" of 30 days provided by Uniform Small Claims Rule 7(g) prior to the payment review hearing, or while the defendant is making payments as required, or after the court has determined that the defendant is presently unable to pay the judgment.

When a judgment is entered for the plaintiff, the usual practice is to order the defendant either to make full payment within 30 days or to attend a payment review hearing on a specified date thereafter. However the plaintiff may request and obtain a writ of Execution at any time 15 days or more after judgment and then levy on the defendant's property prior to the expiration of the 30-day period or prior to the payment review hearing.

In addition, defendants may not realize that the plaintiff has the right to obtain a writ of Execution to seize their property even if they are making payments in compliance with a court

order or a voluntary payment plan, or even if the court has determined at a payment review that the defendant presently lacks the ability to make any payments on the judgment.

Working Group's recommendation:

Amend Uniform Small Claims Rule 7(i) so that **writs of Execution in small claims shall not issue until after the payment review hearing, or if none is scheduled, until 30 days after entry of judgment**, unless the court orders earlier issuance (subject to G.L. c. 235, § 16) upon a showing of compelling reason, such as an impending transfer of assets.

Add additional instructions to the court's *Notice of Judgment* and the *Judgment and Post-Judgment Payment Agreement* forms explaining: (1) that after the payment review hearing (or if none is scheduled, after 30 days after judgment) the plaintiff has the right to request and obtain a writ of Execution to seize and sell the defendant's non-exempt property to satisfy the judgment, (2) that thereafter, even if the defendant enters into an agreement to make payments on a periodic basis, or is determined to be currently unable to make payments, the plaintiff may obtain a writ of Execution which will permit the seizure and sale of the defendant's non-exempt property, unless the plaintiff agrees to forego this while payments are being made; and (3) that some items are exempt from seizure.

Minority position:

In addition to the above measures, the plaintiff should be required to serve the defendant by means of constable service with a copy of the written request for a writ of Execution that the plaintiff files with the court, along with an explanation that the writ of Execution will permit the plaintiff to seize the defendant's assets (including an automobile, if not exempt), and including a specific list of items exempt from seizure. The notice should also indicate that if the defendant has grounds for opposing issuance of the writ of Execution, the defendant should file such a motion in opposition within two weeks. The plaintiff should also be required to notify the court if the notice to the defendant is undelivered, and the writ of Execution then should not issue.

Some Working Group members favoring the minority position also believe that in-hand constable service should be required.

6. Require plaintiffs to notify the court when a judgment is satisfied.

Problem:

Often **plaintiffs do not inform the court when a judgment has been satisfied in full**, or they do not withdraw a writ of Execution that has been filed with the Registry of Deeds. It later becomes very difficult for a defendant to resolve these issues, both with credit reporting services and with the Registry of Deeds.

Working Group's recommendation:

Amend Uniform Small Claims Rule 9 (and perhaps propose a similar statutory amendment) to **require plaintiffs to file a Notice of Satisfaction of Judgment with the court within 60 days of full satisfaction of a judgment.** For consistency, a similar requirement should be added to the Massachusetts Rules of Civil Procedure so that it applies equally to all civil cases.

7. Require covering attorneys to file limited appearances.

Problem:

Attorneys who cover court sessions for plaintiffs' attorneys of record frequently do not file an appearance, as they do not intend to continue their representation after the session. As a result, there is no record of who appeared for the plaintiff during a particular proceeding and no accountability.

Working Group's recommendation:

Amend Uniform Small Claims Rule 7 to **require that covering attorneys in small claims sessions file a limited appearance for a given proceeding in a given case or cases.** The Rule should require that the appearance be in writing, indicating that the attorney is appearing as a substitute for counsel of record solely for that day's proceedings. The appearance should then be filed with the case papers, and the limited appearance should be entered on the docket.

Minority position:

The practice of permitting attorneys who have no connection to the particular case and know nothing about it to cover for plaintiffs' attorneys should be discontinued altogether.

8. Clarify when review by a magistrate is required prior to entering a default judgment.

Problem:

There is no consistent practice of reviewing a small claim before a default judgment enters when a defendant fails to appear.

Small Claims Standard 6:02 and its commentary suggest that prior to entering a default judgment, it may be advisable for the court to "briefly review the claim, and if necessary, to conduct a hearing in cases where the damages are uncertain or the claim itself appears to be

totally without merit or beyond the jurisdiction of the court.” In some courts most default judgments are entered automatically. In other courts, notice problems and concerns about commercial debts have resulted in the plaintiff being required to demonstrate a prima facie case, even though the commentary to the Standard indicates that this is unnecessary. Some courts require that documentary evidence be attached to the Statement of Small Claim in commercial debt cases, while others discard such attachments.

Working Group’s recommendation:

Amend Uniform Small Claims Rule 7 to clarify when a magistrate’s review will be required prior to the entry of a default judgment. The Rule should cover six situations when a magistrate must review a small claim before a default judgment is entered:

- Jurisdiction. When the court’s jurisdiction is questionable (e.g., a claim under the Massachusetts Tort Claims Act), then the matter must be reviewed by a magistrate for further examination.
- Liability. By defaulting, a defendant does not necessarily admit liability for the claim; he or she does admit the facts alleged in the Statement of Small Claim. If the facts alleged do not appear to constitute a recognized claim on which relief may be granted, then the matter must be assessed by a magistrate. Similarly, if the facts alleged, taken as true, do not include an essential element of the claim (e.g., an averment that the plaintiff sent a statutorily-required demand letter), then a magistrate must determine if such essential elements are present by eliciting additional facts before a default judgment may enter.
- Uncertain damages. A magistrate must conduct an assessment of damages whenever the Statement of Small Claim requests damages that are not a sum certain.
- Discretionary awards. A small claim must be reviewed by a magistrate whenever an exercise of discretion is required in awarding multiple damages (e.g., G.L. c. 93A consumer protection claims), statutory damages (e.g., for bad checks and shoplifting claims), or discretionary attorney fees or court costs.
- Review for reasonableness. Some items that are not considered discretionary must still be reviewed by a magistrate for reasonableness (e.g., contractual attorney fees or collection costs). Claims where the amount seems inflated should also be referred to a magistrate for review. In such cases, the magistrate’s function is not to substitute his or her own discretion for the parties’ agreement, but to avoid court enforcement of a clearly unjust result.
- Inconclusive military affidavit. If the plaintiff is unable to file a military affidavit stating that the defaulting defendant is not in military service “and showing necessary facts to support the affidavit,” the matter must be reviewed by a

magistrate who may exercise the discretion provided by Federal law: (1) If the defendant is in the military, the court must appoint an attorney for the defendant, and under certain circumstances stay the entry of any default judgment. (2) If the affidavit does not establish that the defendant is *not* in the military, the court may require a bond or make other orders to protect the defendant's rights.

When a magistrate must conduct such a review or assessment, normally it should be done on the day of trial.

Since a defaulting defendant is deemed to have admitted the facts set forth in the Statement of Small Claim, the Rule should indicate that a magistrate may not require the plaintiff to offer evidence of a prima facie case, except as to any element of the claim that has not been set forth in the Statement. For instance, if the facts alleged indicate the existence of a contract and its breach, the defendant's default should be taken as an admission of those facts without requiring the plaintiff to prove the existence of the contract.

The role of the magistrate should not be enlarged to include raising potential defenses or otherwise protecting the defendant from a claim of which he or she has received fair notice and against which he or she has presumptively chosen not to defend. In an adversarial proceeding, the magistrate is ethically obliged to maintain his or her neutrality and should not be placed in the position of advocating for either party, but may intervene to avoid a miscarriage of justice in the circumstances described above. The Working Group believes that its recommendations to strengthen notice provisions and to clarify when an assessment of damages is required should relieve any perceived need for the magistrate to overstep his or her role in order to protect an absent defendant.

9. When the defendant appears for trial but trial does not occur because the plaintiff is not ready, the small claim should be dismissed without prejudice. Reviving the claim may be conditioned on reasonable court costs to the defendant.

Problem:

Sometimes **defendants appear ready for trial, but plaintiffs or their counsel seek to continue the case, as they are without the necessary information to proceed with trial. The defendant objects to returning to court on another day.**

Working Group's recommendation:

Uniform Small Claims Rule 7 should be amended to provide that **if the defendant appears on the scheduled trial date but the trial does not go forward because the plaintiff is not prepared to proceed to trial, the case is to be dismissed without prejudice**, subject to the current provisions of Rule 3(b) for a continuance based on prejudice, or of Rule 7(b) for a

continuance based on unfair surprise. The court may condition refiling of the claim, or allowance of any motion to vacate judgment, upon the **payment of reasonable court costs** to compensate the defendant for any additional costs or losses incurred as a result of appearing in court.

The court should not permit a continuance unless, as currently provided for in the Uniform Small Claims Rules, there is either:

- an agreement by both parties, or
- a finding that the defendant's failure to submit a written answer (or counterclaim) in a timely manner has prejudiced the plaintiff, or
- a showing of good cause or exceptional circumstance.

For these purposes, the defendant's appearance and his or her denial that he owes the debt claimed, does not constitute prejudice to the plaintiff or good cause for a continuance.

Minority positions:

1. An answer should be required prior to trial. Then the plaintiff would come to court ready for trial and this would not be a problem.
2. Unless the defendant agrees to a continuance, the trial should go forward. If the plaintiff fails to present a case, judgment should be entered for the defendant.

V. Recommendations for Changes in the Small Claims Standards

The Small Claims Standards were originally issued by the Chief Justice for Administration and Management in November 2001 to assist in the implementation of the Trial Court's Uniform Small Claims Rules. These Standards were based largely upon the District Court Department's earlier STANDARDS OF JUDICIAL PRACTICE: SMALL CLAIMS (1984). Revisions or amendments to the Small Claims Standards must be adopted by the Chief Justice for Administration and Management.

The Uniform Small Claims Rules and the Trial Court's Small Claims Standards already address many of the issues considered by the Working Group. The Working Group recommends that some of the Standards be amended or clarified to provide additional direction to the courts. We also recommend that additional review and emphasis on several of the Standards be part of continuing education sessions for magistrates, in order to insure that the Standards are applied consistently throughout the small claims sessions.

10. Controlling the courtroom.

Problem:

Unrepresented defendants sometimes perceive that they are at a disadvantage because the opposing party is a frequent litigant and therefore familiar with local court practices and personnel.

Working Group's recommendation:

Small Claims Standard 6.08 should be amended to provide that at the beginning of each small claims session the magistrate shall identify the participating parties and explain their respective roles and how the session will proceed. The magistrate must maintain control of the courtroom and avoid any appearance that any party or attorney has an unfair advantage.

The magistrate should emphasize that the court's role is to resolve all claims that are not resolved by agreement. The magistrate must ensure that unrepresented parties understand that the court is ready to hear their cases, and that they are not required to reach a prehearing resolution with counsel or the covering attorney for the other party.

The court should take steps to make clear that parties and their attorneys who may seek to discuss their cases with opposing parties before the session begins are not court personnel. Such measures should include the following:

- If possible, a court employee should be on hand even before the small claims session begins, to ensure that it is clear that court personnel are in control of the

courtroom.

- Parties and their counsel should not be given access to court facilities or equipment in a way that gives the impression that they have a preferred status in the court.
- The magistrate should inform all participants that neither party may depart, even if they have reached an agreement for a resolution or a continuance, until they have been excused by the magistrate.
- When a continuance is requested, the magistrate should make sure that both parties are aware that they need not agree to a continuance and that the decision rests with the magistrate.

11. When the defendant's notice of the small claim is undelivered.

Problem:

Sometimes **the *Statement of Small Claim and Notice of Trial* is returned to the court as undelivered**, after it has been mailed to the defendant at an address provided by the plaintiff.

Working Group's recommendation:

Amend Small Claims Standard 4:04 to provide that the plaintiff should be given 120 days to provide the court with the defendant's current address.

When the notice to the defendant is returned to the court unserved, the court should immediately notify the plaintiff and give the plaintiff 120 days to provide a new address for the defendant. If the plaintiff fails to do so by that date, the case should be dismissed without prejudice. If the notice has been returned and a new address obtained soon enough, it may be possible to keep the same scheduled trial date when notifying the defendant at the new address. On or before the date of trial, the court should check the docket sheet or file to confirm that the notice to the defendant has not been returned unserved.

If the notice is returned after a default judgment has entered, the court should vacate the judgment and notify the plaintiff.

If the notice is returned after a default judgment has entered and a writ of Execution has issued, the court should vacate the judgment, recall the writ of Execution, and notify the plaintiff.

The court should schedule hearings so that there is time to receive returned letters (although not beyond the applicable time standards).

12. When the defendant's notice of the judgment is undelivered.

Problem:

The court's notice of the judgment and payment review that was sent to the defendant is returned as undeliverable. As a result, the defendant does not appear at the payment review hearing.

Working Group's recommendation:

In this situation, the court may not issue a Capias, as the defendant has not received notice of the judgment and payment order and the requirement to appear at the payment review.

Small Claims Standard 9:01 should be amended to provide that the plaintiff should be asked to provide a current address for the defendant or, if the address is believed to be correct, to arrange for an alternative form of service. The court should revoke any writ of Execution that has been issued, or deny issuance if requested. The judgment should be vacated if it appears that the original address to which the *Statement of Small Claim and Notice of Trial* was sent was not valid at that time.

13. Granting relief from judgment.

Problem:

A defaulted defendant who seeks relief from judgment for a reason other than lack of notice is not presently required to demonstrate a meritorious defense or counterclaim.

Working Group's recommendation:

As noted in Recommendation 4 above, the Working Group recommends that Uniform Small Claims Rule 8 be amended to eliminate the one-year limitation on motions for relief from judgment based on lack of notice. Recommendation 13 concerns when relief from judgment under Rule 8 should be granted for other reasons.

Small Claims Standard 7:06 should be amended to provide that, in order to prevail on a motion for relief from judgment that is not based on lack of notice, defendants should be required to show excusable neglect for failing to appear *and also* a meritorious defense or counterclaim.

It is not permissible to grant such relief from judgment *ex parte*. A court granting such relief from judgment should consider whether an award of costs to the plaintiff is appropriate.

VI. Recommendation for Statutory Change

14. Increase the automobile exclusion.

Problem:

Currently, **a judgment creditor may seize and sell a judgment debtor's automobile if its value exceeds \$700**, even if it is necessary for personal transportation or to secure or maintain employment.

Working Group's recommendation:

The Working Group is aware that legislation has been proposed to increase the exempted amount for an automobile. **The Working Group supports an increase in the amount of the exemption for automobiles** but was not in agreement as to an appropriate amount.

VII. Conclusion

In proposing these changes to the Uniform Small Claims Rules, Standards and statute, the Working Group acknowledges the tremendous challenges facing the District, Boston Municipal and Housing Courts in dealing with more than 129,000 small claims filed each year. The members of the Working Group commend the diligence and hard work of the magistrates and other court personnel who work in these sessions daily.

The Working Group hopes that its recommendations will further improve the operations of the small claims courts as they strive to deliver fair and impartial justice, while safeguarding individual rights and upholding the rule of law in each of these oftentimes challenging disputes.